IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAS MINING CORPORATION, GERMAN LARREA MOTA-VELASCO, GENARO LARREA MOTA-VELASCO, OSCAR GONZALEZ ROCHA, EMILIO CARRILLO GAMBOA, JAIME FERNANDO COLLAZO GONZALEZ, XAVIER GARCIA DE QUEVEDO TOPETE, ARMANDO ORTEGA GOMEZ AND JUAN REBELLEDO, Defendants Below / Appellants, v. MICHAEL THERIAULT, as Trustee for the Theriault Trust, Plaintiff Below / Appellee.	Case No. 29, 2012 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.	Case No. 30, 2012 On Appeal from the Court of Chancery Consol. C.A. No. 961-CS

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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 **CONFIDENTIAL - FILED UNDER SEAL**

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	Consol. C.A. No. 961-VCL **CONFIDENTIAL – FILED UNDER SEAL**

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE OR IN THE ALTERNATIVE REOPEN AND COMPEL DISCOVERY AND VACATE ORDER DISMISSING SPECIAL COMMITTEE DEFENDANTS

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March 17, 2011

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PRELIMINARY STATEMENT

The Post-Cut-Off Production is highly prejudicial to Plaintiff and should be stricken from the record. The record was clear at close of the December 21, 2010 hearing -- no formal meetings of the Special Committee occurred after July 20, 2004. The Court expressly asked, "**Where are the minutes**?"[1] Counsel for AMC Defendants did not say he did not know or that he thought they had been produced. He said, "**the minutes of all formal meetings, as I understand, have been produced**."[2] The Special Committee Defendants did not protest. How could they? Throughout discovery the Special Committee Defendants had represented to Plaintiff and the Court that no other documents existed.[3] Basic and important evidence concerning the proper functioning of the Special Committee was lacking in an entire fairness case. That was the record. Plaintiff developed and presented that argument in defeating AMC Defendants' cross-motion for summary judgment, and is now prepared to go to trial.

The Defendants chose to ignore Plaintiff's attack on the Special Committee's process. Defendants were fully aware of the missing minutes.[4] Defendants acknowledge that from the very first deposition Plaintiff conducted, Plaintiff laid-out a complete set of the minutes that had

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[1] In re Southern Peru Copper Corp. S'holder Litig., Consol. C.A. No. 961-VCS, Tr. On Argument and Ruling on Cross Motions for Summary Judgment (Del. Ch. Dec. 21, 2010) ("Summ. J. Tr.") at 80:5 (emphasis added).

[2] Id. at 6-8 (emphasis added).

[3] In re Southern Peru Copper Corp. S'holder Deriv. Litig., Consol. C.A. No. 961-VCS, Tr. Of Telephonic Oral Argument on Plaintiffs' Motion to Set Deposition Locations and Ruling of the Court (Del. Ch. July 1, 2009) ("Discovery R. Tr.") at 16:10-13.

[4] See Affidavit of Adrienne K. Eason Wheatley in Support of the Special Committee Defendants' Opposition to Plaintiff's Motion to Strike or in the Alternative Reopen and Compel Discovery and Vacate Order Dismissing Special Committee Defendants (referred to herein as "Wheatley Aff. ¶__") at ¶¶14-15 ("we undertook to locate all Special Committee meeting minutes on several occasions, but did not find anything other than what had already been produced or logged").

been produced.[5] Yet, prior to the close of discovery, which had been extended repeatedly, the AMC Defendants did not "***ask*** counsel for the Special Committee to undertake [an] additional search";[6] and, a Latham & Watkins LLP ("Latham") partner did not ***personally*** undertake a search for the missing minutes.[7] Defendants did not even bother to respond to Plaintiff's briefing on the issue -- a waiver on the argument as a matter of law.[8]

It was only after the summary judgment hearing when the AMC Defendants failed to shift the entire fairness burden that they realized the absence of minutes might undermine their defense that they belatedly decided to commission another search for the minutes. Defendants only purpose in making this inexcusably late production is to improve their record at trial in shifting the fairness burden to Plaintiff. This belated attempt to improve their trial record is deeply prejudicial to theories, strategies, choices, and arguments Plaintiff has developed and pursued successfully throughout the years-long discovery period that was agreed to among the parties and ordered by the Court. This is nothing less than shameless litigation by surprise -- to Plaintiff and the Court -- and it should not be tolerated. The Post-Cut-Off Production should be stricken.

If the Post-Cut-Off Production is not stricken, discovery should be reopened. All parties agree on this point, but there is a dispute as to the scope of the additional discovery that should

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[5] Special Committee Defendants' Opposition to Plaintiff's Motion to Strike or in the Alternative Reopen and Compel Discovery and Vacate Order Dismissing Special Committee Defendants (referred to herein as "Sp. Comm. Br.") at 8.

[6] Sp. Comm. Br. at 2 (explaining how the Special Committee Defendants recent search for the Post-Cut-Off Production came about) (emphasis added).

[7] Apparently, Ms. Wheatley's personal attention was not available until the AMC Defendants requested Latham conduct another search. See Wheatley Aff. at ¶¶16-18 (emphasis added).

[8] See Emerald P'rs v. Berlin, 2003 WL 21003437, *43 (Del. Ch.) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), aff'd, 840 A.2d 641 (Del. 2003) (Table); see also In re IBP, Inc. S'holders Litig., 789 A.2d 14, 62 (Del. Ch. 2001).

be permitted. All parties agree that the re-deposition of the Special Committee Defendants is warranted. However, defendants seek to limit the depositions to questions about the belatedly produced minutes. Without explanation or citation, the AMC Defendants say any discovery beyond questions about the minutes would be burdensome.[9] Thus, all defendants want to do is allow the Special Committee Defendants to confirm the minutes without Plaintiff having a full opportunity to reexamine them. Allowing Plaintiff to "take discovery regarding the Minutes"[10] will not place Plaintiff in the same position as if the minutes were available at the time of the original depositions. A "second deposition regarding the Minutes"[11] will simply allow the Special Committee Defendants to claim belatedly that everything happened just as the minutes say.

Plaintiff also seeks discovery of Latham as to both the creation and production of the documents contained in the Post-Cut-Off Production. In a footnote, the AMC Defendants claim that this is also unnecessary and would be unduly burdensome, but the AMC Defendants do not explain why. The Special Committee Defendants concede discovery of Latham is warranted, but seek to preempt the issue by offering Ms. Wheatley's affidavit to explain the Post-Cut-Off Production. The affidavit alone warrants Ms. Wheatley's deposition; Ms. Wheatley was far removed from the creation and search for the documents contained in the Post-Cut-Off Production and has little personal knowledge of the effort the Special Committee Defendants undertook to comply with their discovery obligations. Further depositions of other Latham representatives are warranted to answer the numerous questions about Latham's discovery

[9] AMC Defendants' Answering Brief in Opposition to Plaintiff's Motion to Strike or in the Alternative Reopen and Compel Discovery and Vacate Order Dismissing Special Committee Defendants (referred to herein as "AMC Br.") at 5, n.5.

[10] AMC Br. at 5.

[11] AMC Br. at 5, n.3.

practices that Ms. Wheatley has either failed to answer or raised in her affidavit. If the Court allows the Post-Cut-Off Production into the record, the additional discovery of Latham sought by Plaintiff will be necessary and should be permitted so that a complete record of Latham's discovery efforts is before the Court.

The Special Committee Defendants should also be compelled to produce documents withheld on grounds of privilege. The Special Committee Defendants concede that the minutes now produced were in files that Alicia Clifford of Latham sent to storage, that the files were previously searched and dozens of non-duplicative documents, including executed meeting minutes and consents, were not produced.[12] The Special Committee Defendants have not produced or identified the person who reviewed the files. They merely speculate that the documents "mistakenly appeared to be duplicates of previously produced or logged documents." Documents cannot have a mistaken appearance. How do executed minutes mistakenly appear to be unexecuted minutes? And how was it determined that minutes were privileged just because they were unsigned? And what about Ms. Clifford's notes -- what did they mistakenly appear to be?

The Special Committee Defendants' concessions that Ms. Clifford's files had been searched and that the documents were not produced or recorded on the privilege logs waives any privilege claim as to all the documents in those files, including Ms. Clifford's notes and unsigned minutes. The Special Committee Defendants do not explain why unsigned minutes, including the purported "duplicates" that were not on any log, were privileged. Moreover the failure to log the duplicates when Ms. Clifford's files were searched and those documents were reviewed waived the privilege.

[12] Sp. Comm. Br. at 9-10.

There is also a clear record that the Special Committee Defendants have disclosed certain attorney communications that are favorable to them while withholding others. Either by the Special Committee Defendants' untimely claim of privilege, their use of privilege as a sword and a shield, or both, the privilege is waived and the withheld documents and redactions made in connection with the Post-Cut-Off Production and relating to the minutes of the meetings of the Special Committee should be produced.

ARGUMENT

I. PLAINTIFF'S MOTION TO STRIKE SHOULD BE GRANTED[13]

The Post-Cut-Off Production is highly prejudicial to Plaintiff and is a shameless attempt by Defendants to materially improve **the record they created** to boost their chance of shifting the fairness burden to Plaintiff at trial. The new evidence is offered as "cumulative" but will be used in attempt to fill a gaping hole in Defendants' case that the Special Committee functioned properly. To get the new evidence in, the AMC Defendants seek mercy from the Court, pleading that they should not be punished for the sins of their brothers.[14] The AMC Defendants open their brief with a "blame the victim" argument, pointing fingers in all directions but their own claiming they will be unfairly prejudiced if Plaintiff's motion is granted.[15] This is non-sense. The absence of the minutes of meetings during the critical time leading-up to the approval of the Minera Transaction creates a favorable record for Plaintiff. This fact influenced how Plaintiff litigated this action, including, the theories, strategies and arguments pursued. The AMC Defendants did nothing to avoid or improve this record and should not now be allowed to shift the ground beneath Plaintiff's feet. Admitting these documents would be highly prejudicial to Plaintiff.

It is the AMC Defendants' initial burden to prove the entire fairness of the Minera Transaction. They moved for summary judgment to shift this burden based upon the representation that no formal meetings took place after July 2004. The AMC Defendants had every opportunity to obtain the missing meeting minutes before their motion for summary

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[13] The Special Committee Defendants do not oppose Plaintiff's motion to strike the Post-Cut-Off Production. Sp. Comm. Br. at 2.

[14] AMC Br. at 6.

[15] AMC Br. at 1; see also Sp. Comm. Br. at 4-7.

judgment was denied, but did not. That was their tactical choice. They should not be permitted to revisit their litigation strategy and attempt to improve their position heading into trial because they lament their decisions.

That the AMC Defendants had every opportunity to obtain the Post-Cut-Off Production is reinforced by their relationship to Southern. AMC is Southern's controlling stockholder. German Larrea was Chairman of Southern's Board of Directors and its CEO until the date the Board of Directors approved the Minera Transaction. From the date the Board of Directors approved the Minera Transaction, Oscar Gonzalez has been Southern's CEO. Armando Ortega was Southern's ***General Counsel and Secretary -- the Southern Officer that signed the Proxy***.[16] These defendants had access to Southern's corporate records, including the Special Committee's meeting minutes. That these defendants managed to draft, review and approve the Proxy disseminated to Southern's stockholders without having possession of the meeting minutes contained in the Post-Cut-Off Production strains credibility.

Defendants' argument that the minutes and other documents should be admissible because they are not that significant is without support. Defendants have not provided record cites to support their assertion that "[m]ost, if not all, of the information in the Minutes can be found in other places in the record."[17] To the contrary, the Post Cut-Off Production introduces minutes for at least two meetings that appear nowhere else in the record.[18] Defendants should not now be permitted to supplement their vague testimony with counsel-drafted, after-the-fact

[16] PX 86 at 68.

[17] AMC Br. at 5, n.3.

[18] See SP COMM 019602-03 and SP COMM 019607-09.

versions of the meeting minutes.[19] Nor should they be permitted to rely on the minutes to disprove what they represented to Plaintiff and the Court – that no formal meetings took place after July 2004.

The opportunity to re-depose the Special Committee Defendants is not the panacea the AMC Defendants claim it to be. The depositions do nothing to cure the Special Committee Defendants' utter disregard for their obligation under the Rules of this Court to engage in discovery in good faith and to search for and produce these documents earlier. To reward this conduct with do-over depositions is a "terrible idea" and does little to "make clear the type of consequences that can flow from failing to comply with well-established obligations."[20]

Moreover, do-over depositions of the Special Committee would be highly prejudicial to Plaintiff. They are another step that "if nothing else . . . takes time."[21] Depositions will take time to prepare, time to travel, time to examine the witness, time to review the transcripts, "every step takes time."[22] The earliest the Court will hear this motion is the afternoon of April 20. Pre-trial opening briefs are due May 12. Thus, Plaintiff's are taxed with the burden of discovery during the very time when they would otherwise be preparing for trial.

Even with the opportunity to re-depose the Special Committee Defendants, Plaintiff has lost the opportunity to take other discovery it may had taken had the Post-Cut-Off Production been timely. This includes examining Goldman on the advice it gave regarding risk of work

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[19] According to the Special Committee Defendants' January 23, 2011 privilege log, the only drafts of meeting minutes for the months of September and October 2004 were created on November 9, 2004, nearly two months after the first September Special Committee meeting. This calls into question the accuracy of the minutes in the first place, and further demonstrates why they should not be admitted.

[20] Klig v. Deloitte LLP, 2010 WL 3489735, *7 (Del. Ch.).

[21] Id. at *6.

[22] Id.

stoppages at Minera Mexico just three days before the Special Committee approved the Minera Transaction.[23] Work stoppage was a huge risk for Minera Mexico. It has a long history of labor strikes, and just recently resolved a two-year work stoppage at its largest copper mine. It also includes examining Goldman on the "alternative ways to reach agreement with Grupo," including the significance of Grupo's concession to pay fourth quarter dividends, which the Proxy fails to mention.[24] Bleeding Southern of cash dividends -- most of which gathered in the hands of Grupo and Cerro -- goes to the very heart of the "relative valuation" approach the Special Committee embraced.[25]

Also, Plaintiff would have likely examined Phelps Dodge on what the Special Committee Defendants said during and after their September 14, 2004 teleconference concerning Phelps Dodge's August 27, 2004 letter.[26] According to Palomino, "[t]here was no discussion during the call. [Phelps Dodge] just expressed concerns and we listened."[27] However, the minutes specifically state that the parties discussed the Phelps Dodge letter, and redact details of the Special Committee's internal discussions about the call.[28] These are just a few instances of how this inexcusably late production would have altered the course of this litigation, and how even with the opportunity to re-depose the Special Committee Defendants, Plaintiff is deeply prejudiced. The rules of discovery are in place to police such prejudicial conduct, and to simply

[23] SP COMM 019606.

[24] SP COMM 019601.

[25] Summ. J. Tr. 34:14-35:5.

[26] SP COMM 019589-90.

[27] Palomino 27:20-21.

[28] SP COMM 019590.

award Plaintiff a round of consolation prize do-over depositions works to eviscerate those rules.[29]

Finally, the Special Committee's claim that it has "not taken procedural sides in this case" since the summary judgment determination[30] is incorrect. They have asserted that the minutes confirm the directors' testimony and the assertions contained therein are already on the record. They preordain additional depositions as "substantially redundant, given the weight of the existing evidence."[31] They claim the minutes "support its clients' *bona fides*" and "make it more plain that the Special Committee diligently performed its responsibilities." [32] Indeed, the Special Committee Defendants spend much of their brief attacking plaintiff and plaintiff's counsel.[33] So the Special Committee Defendants claim that it is neutral is belied by its own conduct and positions. The Special Committee Defendants' obvious agenda is to do whatever it can to justify its conduct and assist the remaining defendants. The Special Committee Defendants' conduct is still very much in question, and their repeated assertions that the Post-Cut-Off Production confirms "that the Special Committee acted appropriately, and that each Special Committee member testified truthfully at deposition"[34] demonstrates that the documents are being used "as evidence"[35] - which is the only reason the AMC Defendants caused them to be produced. This belated and unfair attempt to improve on their chance of shifting the fairness burden must be rejected.

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[29] Digiacobbe v. Sestak, 1998 WL 684149, *8 (Del. Ch.)

[30] Sp. Comm. Br. at 1.

[31] Id. at 2. See also id. at 11.

[32] Id. at 2, 4. See also id. at 11.

[33] Id. at 4-7.

[34] Id. at 11.

[35] Id. at 14.

II. IF THE POST-CUT-OFF PRODUCTION IS ADMITTED, DISCOVERY FROM THE SPECIAL COMMITTEE DEFENDANTS AND THEIR COUNSEL SHOULD BE PERMITTED

All parties agree that if the Post-Cut-Off Production is admitted, additional discovery is appropriate, including, at least the re-deposition of the Special Committee Defendants.[36] The dispute concerns the scope of this discovery.[37] Both the Special Committee Defendants and the AMC Defendants weakly suggest that discovery regarding the minutes is sufficient.[38] This only allows the Special Committee Defendants to claim belatedly that everything happened just like the attorney-drafted minutes say.

For these do-over depositions to be at all meaningful, Plaintiff should have the full opportunity to reexamine the Special Committee Defendants. A full examination is particularly appropriate here because, contrary to what the AMD Defendants claim, the Post-Cut-Off Production does not merely confirm facts already in the record.[39] The Post-Cut-Off Production contain minutes for at least two meetings which appear nowhere else in the record.[40] The October 12, 2004 meeting is not mentioned in the Proxy and along with the October 18, 2004[41] meeting minutes contradict the Proxy as to the timing of certain events leading up to the approval

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[36] There is some dispute over the location of these depositions. The AMC Defendants have represented that Handelsman will be made available in Chicago and that each of the other Special Committee Defendants will be made available in Mexico City. Plaintiff's counsel has already traveled to Chicago, Mexico City (twice) and Lima, Peru to depose these individuals and believe, under the circumstances, the Special Committee Defendants should be burdened with travel.

[37] An additional dispute relates to the location of any future depositions. Plaintiff respectfully submits that, for the reasons discussed herein and in its opening brief, all future depositions should take place in Wilmington, DE and at Defendants' expense.

[38] AMC Br. at 5; Sp. Comm. Br. at 2.

[39] AMC Br. at 5, n.3.

[40] SP COMM 019601 and SP COMM 019607.

[41] SP COMM 019604.

of the Minera Transaction. This includes how Grupo communicated an error in its calculation of ownership of Minera Mexico to the Special Committee and how the Special Committee determined to increase the number of shares to be issued to Grupo as a result of that error by 200,000 (a market value of approximately $9.28 million).[42]

The October 12, 2004 minutes further indicate that the Special Committee pushed Grupo to commit to additional cash dividends, a method used by the Special Committee to increase Southern's debt and influence the exchange ratio of their "relative valuation" in Grupo's favor.[43] To meaningfully examine the Special Committee Defendants on this subject, the scope of the examination must include documents other than the minutes that explain the special transaction dividend also negotiated by the Special Committee Defendants.

The January 14, 2005 meeting minutes contradict Palomino's testimony as to whether the Special Committee met after October 21, 2004.[44] The record contains contradictory testimony from the Special Committee Defendants and Goldman as to whether the Special Committee Defendants made an informed determination on the consequence of Southern's increased stock price on the fairness of the transaction.[45] The October 1, 2004 minutes[46] discuss that the Special Committee determined that they would meet with Larrea in early October to discuss key open

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[42] Compare PX 86 at 26 to SP COMM 019605.

[43] See SPCOMM019601; Palomino 113:6-15 (discussing that reducing Minera's debt and increasing Southern's dividends "evened out the differences in valuation that still existed between what we were proposing and what Grupo Mexico was proposing. … It's just basic finance.").

[44] Palomino 105:17-20 ("I don't believe [we] met formally as a Special Committee [after October 21, 2004]."). Apparently Palomino, like AMC Defendants' counsel, believes that the Special Committee preferred to avoid formal meetings.

[45] Compare Handelsman 104 (Special Committee received second fairness opinion from Goldman Sachs prior to closing) and Sanchez 128 (no second fairness opinion was issued).

[46] SPCOMM019598-99.

items. The Special Committee did meet with Larrea on October 5 and agreed to numerous critical provisions without the presence of their advisors, including the number of shares to be issued and that Cerro would support the transaction.[47] These and other examples illustrate how the questions raised by the Post-Cut-Off Production are intertwined with complex issues that require full exploration of the subject matter. Plaintiff should be granted that opportunity.

Plaintiff should also be permitted to conduct discovery beyond the do-over depositions, particularly, discovery of Latham,[48] the AMC Defendants simply say without explanation this "would be unduly burdensome."[49] The Special Committee Defendants separately argue it is "over the top." At the same time, however, the Special Committee Defendants offer the affidavit from Ms. Wheatley concerning the very subject matter into which Plaintiff seeks discovery -- Latham's document retention, review, and production practices, and information concerning the documents themselves. Plaintiffs are entitled to discovery including cross-examination with respect to the missing minutes' sudden appearance, and should not be required to accept a self-serving affidavit by a lawyer with highly limited personal knowledge.

Plaintiff should be permitted to depose Ms. Wheatley for two additional reasons. First, her testimony is open to question. Ms. Wheatley claims that "In July 2008, a discovery schedule was entered, though discovery did not actually resume again until May 2009, almost a year later."[50] The Special Committee Defendants may not have resumed discovery again until May 2009, but the rest of the parties did, including the AMC Defendants. Why the Special Committee Defendants waited until Plaintiff threatened and filed a motion to compel to produce

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[47] See PX 86 at 25.

[48] For the reasons set forth herein, Plaintiff should also be permitted to take additional discovery of Goldman Sachs and Phelps Dodge.

[49] AMC Br. at 5 n.5

[50] Wheatley Aff. ¶11.

documents has never been explained. Plaintiff has already presented this Court with its account of who delayed whom during the period of July 2008 through May 2009 and is not inclined to rehash the dispute.[51] What the Special Committee Defendants cannot avoid, however, is the representation by Delaware counsel for the Special Committee Defendants in September 2008 in response to Plaintiff's counsel's inquiry as to when the Special Committee Defendants expected to produce documents:

> The Special Committee will be producing documents. Since the scheduling order has been entered, we have resumed our document collection and review efforts. Because the process involves international document collection, however, it will likely be several weeks before it has been completed. Please let me know if you have any further questions.[52]

Ms. Wheatley is copied on the correspondence. Apparently it escaped her memory. Plaintiff should have the opportunity to refresh it and test the veracity of the rest of her testimony.

Second, Ms. Wheatley's affidavit contains no foundation establishing her personal knowledge of the facts set forth in her affidavit. Who from "Latham" engaged in discovery efforts? What were these efforts? Who reviewed and redacted documents for privileged material? Who, if anyone, undertook to locate all Special Committee minutes on several occasions after privilege logs were produced and Plaintiff requested production of missing minutes? What files were searched?[53] Many of the newly-produced minutes are signed by Mr.

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[51] See Plaintiffs' Reply to Defendants' Opposition to Motion to Set Deposition Locations (Trans. ID 25841309) attached hereto as Exhibit A.

[52] See Ex. 6 to Affidavit of Marcus E. Montejo in Support of Plaintiffs' Reply to Defendants' Opposition to Motion to Set Deposition Locations (Trans. ID 25841309) attached hereto as Exhibit B.

[53] The Special Committee Defendants argue that "plaintiff's counsel concedes that files from relevant custodians were searched." Sp. Comm. Br. at 7, citing Br. at 15-16. Plaintiff does not concede anything about the files that Latham did or did not search. First, Plaintiff asserts that, given Mr. Sorkin's relevance to the transaction, "it is inconceivable that Mr. Sorkin's files, including his electronic files, were not searched." Br. at 15. Ms. Wheatley's affidavit makes no mention of searching Mr. Sorkin's files, and asserts that all minutes signed by Mr. Sorkin were

Nathan or Mr. Sorkin.[54] Ms. Wheatley does not even indicate whether Messrs. Nathan or Sorkin's files were searched. Plaintiff is entitled to seek discovery of answers of these and other substantial questions raised by Ms. Wheatley's affidavit should the Court admit the Post-Cut-Off Production. For the reasons set forth in Plaintiff's Opening Brief, it should be entitled to depose Ms. Clifford. And, Plaintiff should also be permitted to take discovery of a Latham representative (or representatives) most familiar with the Special Committee Defendants' document review and production practices. This limited discovery is necessary to provide the Court with a complete record on which it can determine how much weight this belated production (and accompanying testimony) should be afforded if the Post-Cut-Off Production is going to be allowed.

III. THE SPECIAL COMMITTEE DEFENDANTS SHOULD BE COMPELLED TO PRODUCE DOCUMENTS WITHHELD BASED ON PRIVILEGE

The Special Committee Defendants have waived privilege in connection with the Post-Cut-Off Production and documents relating to the minutes of the meetings of the Special Committee and should be compelled to produce documents withheld on this basis. Contrary to the Special Committee Defendants' mischaracterization, Plaintiff does not argue this waiver of privilege is result of a "mere … supplemental production." Plaintiff argues that the Special Committee Defendants' failure to comply with the Rules of this Court, failure to conduct a timely search of their own counsel's files, failure to abide by the stipulated and ordered

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pulled from Ms. Clifford's files. Whether Mr. Sorkin's files were in fact searched remains a mystery. Second, for the same reason, Plaintiff asserts that it is inconceivable that Ms. Clifford's files were not searched. The Wheatley Affidavit demonstrates that Ms. Clifford's files were not searched with any discipline, as the difference between (e.g.) signed and unsigned documents readily escaped those charged with reviewing Ms. Clifford's files. Third, Ms. Clifford and Mr. Sorkin are not the only relevant custodians. Numerous Latham attorneys from multiple offices worked on the transaction. Plaintiff has no way of knowing the full extent of the "relevant custodians" or whether their files were searched.

[54] See SP COMM 019541-82.

schedules of this litigation, and failure to timely assert attorney-client privilege waives the privilege. Also contrary to the Special Committee Defendants' mischaracterization of privilege law, such a waiver does not require ***knowing*** and ***intentional*** conduct.[55]

Waiver only requires a failure to properly assert attorney-client privilege.[56] This includes the failure to produce complete and detailed privilege logs by the deadlines imposed by this Court's Scheduling Orders. As the Court held in M & G Polymers, the "failure to furnish a complete and detailed log of its privilege claims by the deadlines imposed in the Trial Scheduling Order [that] constitute[s] a waiver of privilege as to all documents not listed."[57] Indeed, the Special Committee Defendants' very argument that state-of-mind was relevant to waiver of attorney-client privilege was rejected in M & G Polymers. There, the Court explicitly held that "[w]hether the failure to produce the log was an inadvertent oversight, as Carestream contends, or a deliberate act of concealment, the law does not distinguish these two situations in determining whether there has been a waiver of privilege."[58]

Fingold and Klig do not help the Special Committee Defendants. Neither of those cases turned on state-of-mind. Attorney-client privilege was waived in Fingold because defendants' failed to timely assert it.[59] Instead, defendants claimed certain documents were subject to work-product immunity.[60] When challenged, defendants changed their tune and claimed in their answering brief to a motion to compel that the documents were confidential attorney-client

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[55] Sp. Comm. Br. at 12.

[56] See Klig, 2010 WL 3489735 at *3 (explaining that privilege law in Delaware is so clear "[a] summer associate can find it in approximately and hour.")

[57] M & G Polymers USA, LLC v. Carestream Health, Inc., 2010 WL 1611042, *51 (Del. Super.), aff'd, 9 A.3d 475 (Del. 2010)(Table).

[58] Id. at *58.

[59] Fingold v. Computer Entry Sys. Corp., 1990 WL 11633, *1 (Del. Ch.).

[60] Id.

communications.[61] The Court held "[t]hat argument came too late."[62] Fingold therefore is just one of many examples of how a belated claim of privilege is a waiver of privilege. Klig repeats this basic tenet of Delaware privilege law.[63] Moreover, Klig underscores that this Court will not tolerate anything less than a party's good faith effort to comply with its discovery obligations.[64] As discussed in detail above, the Special Committee Defendants fall far short of this. Consequently, production of the documents withheld from the Post-Cut-Off Production based on a belated claim of privilege should be compelled.

The Special Committee Defendants attempt to avoid waiver of attorney-client privilege by suggesting Plaintiff "misapprehends the nature of the supplemental production." This is a change in their tune reminiscent of Fingold. Ms. Wheatley was clear in her January 23, 2011 letter that what had been located included documents that had been "logged as privileged drafts." This explanation of the late production is fabricated (as explained below, none of the documents produced in the Post-Cut-Off Production had been previously identified as even existing, let alone being privileged) but that was the position the Special Committee Defendants took. Now on challenge, the Special Committee Defendants claim that the "supplemental production included final, non-privileged versions of documents that had previously been (and remain) logged in draft form."[65] This explanation is just as fabricated as the first.

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[61] Id.

[62] Id.

[63] See Klig, 2010 WL 3489735 at *3 and *8 (quoting from the "leading treatise on practice in the Court of Chancery" and explaining that privilege law in Delaware is so clear "[a] summer associate can find it in approximately and hour.")

[64] Id. at *5.

[65] Sp. Comm. Br. at 12-13.

The Special Committee Defendants' August 12, 2009 privilege log lists drafts of undated minutes, which drafts were purportedly created on August 5, 2004, August 25, 2004, September 10, 2004, and September 12, 2004. The Post-Cut-Off Production does not include minutes of meetings dated August 5, 2004, August 25, 2004, September 10, 2004, or September 12, 2004.[66] Rather, it includes minutes of ten meetings dated on or after September 14, 2004. The Special Committee Defendants never identified the documents contained in the Post-Cut-Off Production.[67] The Special Committee Defendants two explanations as to why and how certain "final, non-privileged" yet unsigned versions of meeting minutes were not found and produced earlier are contradictory, make no sense, are unsupported by the record and hardly inspire confidence that the Special Committee Defendants have made a good faith effort to meet their discovery obligations.[68] In short, the Special Committee Defendants have done nothing to avoid waiver of privilege.

Plaintiff's decision not to challenge privilege assertions as to the draft minutes and related documents was greatly influenced by the absence of final minutes for many meetings including the critical "informal" meetings in the fall of 2004. Given the Special Committee Defendants' belated production of minutes and other documents and belated assertion of privilege as to documents not previously produced, Plaintiff's decision to now challenge privilege assertions as to draft minutes and other documents are not "untimely."[69]

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[66] The Proxy makes no mention of Special Committee meetings held on September 10 or 12, 2004. See PX 86 at 23.

[67] The Special Committee Defendants' September 1, 2009 redaction and privilege logs only include entries for redactions made to meeting minutes dated on or before June 23, 2004.

[68] The Special Committee Defendants effort to paint this dispute as a "discovery spat" that could be resolved with a meet and confer wholly ignores the context and timing of the Post-Cut-Off Production.

[69] Sp. Comm. Br. at 14.

Moreover, the Special Committee Defendants now redact information from the Post-Cut-Off Production that was previously disclosed. In the newly produced signed February 13, 2004 meeting minutes, information regarding the Special Committee's interview of Latham is redacted.[70] That information was previously disclosed.[71] What changed? How is that information now privileged? In the same minutes, the Special Committee Defendants now disclose information that was previously redacted.[72] Not surprising, the new disclosure reveals that Ruiz "noted" that he did not "have any present or prior relationship with Grupo."[73] Why was this information privileged previously? Why is any of the information on these minutes privileged? The only attorneys present -- Latham -- were there for a beauty contest.[74] Latham was not retained until the February 26, 2004 meeting.[75] Yet there are dozens of privilege entries throughout the Special Committee Defendants' logs that pre-date Latham's retention.[76] The description of those entries includes advice to the Special Committee on its make-up, its duties under Delaware law, and correspondence with Phelps Dodge.

The Special Committee Defendants also argue there is no waiver because they are not using attorney-client privilege as a sword and a shield. They suggest all they are doing is "producing non-privileged discussions with lawyers, while simultaneously withholding privileged discussions with lawyers."[77] But Plaintiff is not challenging all communications with

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[70] SP COMM 019542.

[71] PX 7.

[72] Compare SP COMM 019542 and PX 7.

[73] SP COMM 019542.

[74] Id.

[75] SP COMM 019550.

[76] See e.g. Br. Ex. B at 10; Br. Ex. D at 1, 5, 6, 9, 15, 39, 40 and 45; Br. Ex. E at 51 and 118.

[77] Sp. Comm. Br. at 13.

in-house counsel as was the case in Amirsaleh.[78] Plaintiff is challenging the Special Committee Defendants' disclosure of communications with its legal advisors such as "legal issues raised by the Draft Merger Agreement," including "whether the transaction would be subject to a 'majority of a minority' or other super-majority vote" and "the corporate governance provisions contained in Grupo Mexico's revised term sheet."[79] These communications are disclosed while other communications with their legal advisors are redacted in the very same document. Similarly, as discussed above, previously redacted information that the Special Committee Defendants' believe is helpful has been disclosed in the Post-Cut-Off Production.[80] This picking and choosing is plainly designed to paint the Special Committee Defendants in the best possible light, and is the very type of disclosure that waives attorney-client privilege.

IV. DETERMINATION AS TO THE SPECIAL COMMITTEE DEFENDANTS' GOOD FAITH IS PREMATURE

Incredibly, the Special Committee Defendants argue there is no basis for Plaintiff's sword and shield argument because the Post-Cut-Off Production "is not being offered by the Special Committee as evidence."[81] Fine, let the Post-Cut-Off Production be stricken. But to suggest the Special Committee can use attorney-client privilege as a sword and shield to assist their friends at trial because it will not be the Special Committee Defendants that offer the Post-Cut-Off Production as evidence creates serious doubt that on a complete record the Special

[78] See Amirsaleh v. Bd. Of Trade of the City of N.Y., 2008 WL 241616, *2 (Del. Ch.) ("It is nonsensical to assume, as plaintiff does, however, that the existence of non-privileged communications with in-house counsel necessarily means *all* communications with in-house counsel are non-privileged.")

[79] SP COMM 019592.

[80] SP COMM 019542.

[81] Sp. Comm. Br. at 14.

Committee Defendants conduct will be exculpated under §102(b)(7). To this end, the Special Committee Defendants argument that their dismissal cannot be vacated is premature.

CONCLUSION

For all the foregoing reasons, plaintiff's motion to strike or in the alternative reopen and compel discovery and vacate order dismissing special committee defendants should be granted.

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Dated: March 17, 2011

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

- - -

Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, April 25, 2011
10:08 a.m.

- - -

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

- - -

ORAL ARGUMENT ON PLAINTIFFS' MOTION TO EXCLUDE

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
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THE COURT: Good morning, everyone.

Good morning, Mr. Brown.

MR. BROWN: Good morning, Your Honor.

Your Honor, this is the time set by the -- I don't know if you want to do any introductions or not.

Okay. This is the time set by the Court for the argument on our -- our -- plaintiffs' motion to exclude or strike certain late document production in the case.

Fact discovery in this case ended on March 1st, 2010. We then exchanged expert reports, took the depositions of the experts. Expert discovery concluded June 16th, 2010. Summary judgments were fully briefed, argued, and decided. Pretrial briefs are now due May 12th and trial starts June 20.

The state of the record with respect to the issue that's -- today following all that was that the special committee claimed to have met 24 times between February 2004 and October 2004, but minutes for only 14 of most meetings had been produced and they were all unsigned. There were no minutes after July -- for any meetings after July 20, 2004.

At the summary judgment argument

counsel for Grupo Mexico said that -- and we agree -- that essentially the state of the record, you know, the evidence in the record suggests there were no formal meetings of the special committee after July 20, 2004.

I think what -- as I understand it what happened, the -- I presume that the Grupo defendants realized after the summary judgment argument that they needed -- they didn't like the way that record was -- sat. And so they wanted to change it. They then asked counsel for the special committee to go back and search again and try to find the minutes or more minutes. And more minutes were produced.

Recently signed versions of 13 of the 14 previously produced unsigned minutes were produced, signed versions of two meetings that had not previously been produced were produced, and unsigned versions of nine meeting minutes that had not previously been produced were produced. There are still two -- I think that adds up to 25 out of the 27. There's still two meetings as to which there are no minutes. And they produced a supplemental privilege log with 59 new entries, mostly identified as attorney

notes, but some draft minutes and going through the redactions again.

Your Honor, our position is pretty simple; and it is that, you know, there's a schedule agreed to by the parties and entered by the Court. And, you know, that's it. We all get a chance to create our record within the time frame set. It's got to be an organized process. It can't be a moving target. It makes it very difficult to litigate these cases that way.

And -- and we did, you know, certainly identify from the first deposition, from the beginning of the document production this was a good fact for us. You know, we want to set up our argument that the special committee didn't -- one of the reasons the special committee didn't function properly was that there are no minutes and that we want to contend that there were no formal meetings after July 20.

And so in -- in asking questions, sometimes we didn't ask questions on issues because we wanted to let it -- we liked that and, you know, we didn't press motions to compel, you know, redactions in the minutes because we wanted to let it sit. We're okay with unsigned minutes for only some meetings.

And so that's how -- you know, part of our decision-making went forward on how to litigate the case.

The defendants say well, now we're suddenly -- we've suddenly mentioned it in the summary judgment briefing. There was no briefing really before that. I mean, they could tell from the first deposition when all the -- when all the draft minutes were marked and we're asking certain questions and not asking others that this -- they knew what the state of the record was.

Now, let me back up. I guess -- you know, honestly, I think that we -- things get missed, okay. And if someone came in, you know, a month after discovery deadline and said some attorney took a file and we had no idea and it was gone and now we found it, you know, okay. I mean, there's a plausible argument there. But to say we're doing a search after everything, after summary judgment and the facts are, as I understand them -- I'm sure I'll be corrected if I'm wrong; but they looked in the box or boxes they already looked in and these were there. And they say well, we were just -- these were misinterpreted, I guess, is how I understand it. That is, someone

thought it was something that was already produced or just misunderstood it. And that's why it wasn't produced. So these aren't documents that they didn't have. I mean, they had them. They were in the boxes that they searched. You know, they could have -- anyway, so that, to me, is a further argument for excluding this stuff. There's really no good reason for why it wasn't produced, in our view.

Now, the two groups of defendants, the special committee defendants and the Grupo defendants, have sort of different arguments or -- or different objectives. I'm assuming the special committee defendants said in their brief that they take no position with respect to most of this because they want to be -- they're out of the case or they want to be out of the case, although I think if you're out of the case you -- and you've gotten summary judgment on a record that was complete, you can't then supplement the record after you're out of the case.

But the Grupo defendants have only one very simple argument, which is, as I understand it, "We didn't do anything wrong. You know, this is a" -- "a problem created by other defendants. And so we" -- "we shouldn't be prejudiced by being barred from

relying on this evidence and since we're innocent."

The answer to that, I think, is very simple, which is, they had, you know, the opportunity to press for these documents, to say to the other defendants, you know, "Gee, this doesn't make any sense. We want to send our people to look at your files" or whatever or ask them to search again, you know, during the discovery period.

So it's not that they're innocent. I mean, they had the same chance to develop a record that everyone else had. And everyone was okay with the record, and everyone let it become final and move for summary judgment on it, and that's it.

So we think --

THE COURT: What ... Understanding that, you know, I'm not in any way excusing this -- I'm not really excusing much of the procession of this entire case, but I -- I don't -- I agree. I don't believe this is the sort of thing that should happen. Nonetheless, you know that our Supreme Court's jurisprudence prefers decisions on the merits. There doesn't seem to be any rational reason why the defendants would have failed to produce this information earlier in -- you know, for tactical

reasons. They just screwed up and they just blew it. And if -- if there can be a way of giving you the chance to address the evidence fairly before trial and before writing your pretrial brief, isn't that, frankly, what our Supreme Court instructs folks like me to be doing?

MR. BROWN: I -- yes, but it -- all -- the cases -- there's a spectrum of facts. And to me, this is sort of an extreme set of facts. We're certainly not saying, and I'm not saying, the defendants' lawyers deliberately did anything or -- or -- wrong or whatever. But it -- this is way late. I mean, this is after summary judgment they went back and suddenly wanted to look, after they were dismissed from the case. Now they want to supplement the record?

THE COURT: I -- I'm not -- as I said --

MR. BROWN: I mean, I think if you do it before --

THE COURT: But, I mean, I'm also in a case where I don't even know where your team began to walk towards prosecution of the lawsuit.

MR. BROWN: Well --

THE COURT: And, therefore, for me, I believe this is -- as I've told you-all before, there are some things that are stinky old and that's a good thing, like certain types of cheeses. This is stinky old in a way that ain't good in any way. And your side of this case is as responsible for that as anyone.

And it would be one thing if we were marching towards trial, everybody agreed at the beginning it was an 18-month schedule, everybody had to do their job, and there was a reason for trial, everybody lived up to the thing and at the last minute -- you know, what's the big interest of justice now in giving your client, who, as I recall, the search of your client's own records was not exactly what is expected? Why in the interests of justice am I going to declare that now my patience ought to be at an end?

Again, this is way old. This should never -- I don't -- this is the oldest case in my docket. I mean, I love getting a case and it immediately becomes the oldest case on my docket. That's what I got. And your side is probably more responsible for the slowness than anyone. And now what you want me to do is basically just preclude all

this evidence and say it's too late, where you would have claimed outrage, frankly, if there had been dismissal for failure to prosecute granted; right?

MR. BROWN: Let me explain -- let me try to defend myself somewhat, Your Honor. I'm not going to try to say it was perfect or anything. But the case was filed before the transaction closed. A document request asking for this stuff was filed immediately. The defendants --

THE COURT: I'm not -- I'm not saying that. What I'm saying is, you know, now all of a sudden, when people make a mistake, it should be, you know, pretty extreme punishment, which is let's keep out all the evidence. Let's not consider alternative things. If that had been applied against your team, we wouldn't even have this case, because the torpor with which you prosecuted it could have justified getting rid of it; right?

MR. BROWN: No.

THE COURT: No?

MR. BROWN: They were under the obligation under the rules to produce the documents.

THE COURT: You are mixing up --

MR. BROWN: And -- no.

THE COURT: You are mixing up something here. Weren't there substantial periods of time in which you did not do anything to advance the ball in this case?

MR. BROWN: No.

THE COURT: No?

MR. BROWN: We didn't do -- there were settlement discussions. You know, there were periods of time when there was no litigation. We hired an expert. We made a presentation to the defendants to try to settle the case, you know, gave them reports -- reports of our consultants. You know, there were efforts going on. There were -- they were always under the obligation to produce the documents. Yes, there were several months where we didn't keep saying, you know, "Where are the documents? Where are the documents? Where are the documents?" You know, it's -- it's their obligation to produce the documents. And we did file motions to compel at certain points to get them to produce documents.

So, I mean, it depends -- I'm -- when you say "substantial periods of time when there was no activity," I mean, you know, there was always something going on, some -- some settlement floating

around and people couldn't meet for the summer or whatever. So it's not like we did nothing. And as I say --

THE COURT: So when Vice Chancellor Lamb expressed frustration about the case and the lack of progress, he just had it wrong?

MR. BROWN: Well, all I -- I can't -- all I can say is, you know, we briefed the issue. He punished us for what he perceived to be the lack of -- not -- not pursuing it sufficiently. And so --

THE COURT: And the issue that was briefed was what? --motion to dismiss for failure to prosecute?

MR. BROWN: I don't recall. I thought it was location of depositions, but I could be wrong.

THE COURT: Location of depositions.

MR. BROWN: Well, that was one of the issues. And -- so, anyway, let me move, then, Your Honor, to the argument that if the evidence comes in, what happens. And, really, I think there's two issues: one, how much discovery do we need to do, if any. And that -- there's several issues in there. One is the scope of the depositions. And I think, based on my conversations with at least some defense

counsel, there's not going to be an issue with that. I mean, we're not going to waste time; but we just don't want to be -- have them appear at the deposition and say "Well, you can only" -- "Here's the minutes. You can only ask a question about some" -- you know, "what's in that exact document." You know, we're not going to take -- all these depositions were less than a day, to begin with. So, you know, it's a couple hours. You know, I just wanted to have the understanding that it's not sort of "You can ask questions about the face of the minutes and that's it." And I think we have that understanding, hopefully, and maybe they'll confirm that.

We did want to depose the Latham -- or the attorneys that did the search to try to make an argument about these documents, because they're produced late. And I assume there's -- they are what they purport to be; but I think we're entitled to take some depositions and ask the people about, you know, how did they show up at this late date. Again, I -- you know, I -- we're talking about a couple hours.

And -- so I -- that's not controversial. I think the big issue is the location of the depos. They want us to go back to Mexico City,

which -- and they say "Well, we'll pay for it." That's helpful, but, really, it takes three days, and it's really --

THE COURT: What you're saying is it's on them.

MR. BROWN: They should have to come to Wilmington for the depositions. It's easier for one guy to come than all these lawyers to go out. Yes, it doesn't cost us, our expenses are covered; but it's the, you know, being out for three days and -- and while you're trying to work on this case and other cases, it's a hassle. So if they want to put this stuff in, you know, we'll try to make these quick depositions. They ought to come to Wilmington for the depositions.

And so the -- that's it on the discovery, scope of discovery, I think.

The other issue is the extent to which there's any privilege waiver.

THE COURT: Yeah. That's where I am -- I have to say the briefing on this on your side, I'm not -- I'm not getting exactly what your argument is.

MR. BROWN: And so let me try to

clarify. I think -- as I understand the law and the cases that we've cited, if you don't identify privileged documents on your privilege log and then you try to produce them later and claim privilege, you know, after discovery closes, you can't do that. These aren't documents that they didn't know about. These are documents that were in the box that they searched. And they misinterpreted them. And so they don't get to now say it's privileged. I mean, they knew they had the document. They didn't identify it on the log. Whether it was because they misinterpreted or a junior paralegal just basically missed part of the file or whatever the reason is, you know, it's too late. You don't get to claim privilege after the fact. You can put this stuff in or if you get to put this stuff in, it comes in clean now. We -- we -- your assertion of privilege comes too late. I mean, that's our argument.

THE COURT: "Your privilege" -- "your assertion of privilege is 'too late.'" So it's -- your argument is basically just you can -- if you're going to put the evidence in, you can't claim privilege over it now.

MR. BROWN: Right, because there's a

...

THE COURT: That's the argument.

MR. BROWN: That's the argument, because the documents -- they have them. And if they didn't identify them on their privilege log for whatever reason, they're not privileged.

THE COURT: Okay.

MR. BROWN: So that's it, Your Honor, unless Your Honor has any other questions.

MR. STONE: Good morning, Your Honor.

Your Honor, when I was here arguing the summary judgment motions, I did make a mistake but not the misstatement that Mr. Brown says that I made. I did not say that there were no meetings. I -- I did say, mistakenly, that I believe all minutes for all substantive meetings had been produced. And I apologize for making that misstatement. But the fact that I was under that misimpression, I think, really shows that there really was no issue about this in all the five years of litigation. There was never a motion to compel. There was never mention in the depositions, "Hey, where are the minutes for these meetings?" And so it was a surprise to me that all of the -- all the minutes had not been produced.

And, you know, my ignorance is -- is not excused. I should know better than that, and I apologize for that. But I think it really does show the fact that there really was no issue made of this whatsoever until the last minute.

Now, Your Honor, when we got Mr. Brown's motion back in February, I called him up before we took the time to brief the motion and said "Look, I've got a practical solution. We'll make these witnesses available. And we'll make them available in Mexico City, and you can ask questions about" --

THE COURT: Why Mexico City?

MR. STONE: Well, because it's -- it really is for the convenience of our witnesses. It's very difficult --

THE COURT: I understand that. But you're --

MR. STONE: And we offered to --

THE COURT: Convenience of folks who have messed up, you know, sometimes in life you got to own it.

MR. STONE: I understand. And we -- our proposal, Your Honor, was to do everything that we

could to make it as -- to make as little inconvenience as we could for the plaintiffs by paying their expenses to come down. So that was our proposal. But I made that proposal back in February. I got no response, Your Honor.

Mid-March we got their reply brief. At that time Mr. Brown raises an issue about I was putting restrictions on the subject matter. When we saw that in the brief, we sent him an e-mail saying "We're not putting restrictions on anything that arises out of the minutes is fair game." That -- that's what we told them. We still got no -- no response on that. Instead, he wanted to proceed to a hearing today which, I think, is just kind of silly. And we're still willing to produce, obviously, the witnesses. And we do think there's time before -- before the trial. And the fact that we're now sitting here, really what is six or seven weeks away from trial, is his fault, not mine.

So I -- I do think that, you know, there's -- there's plenty of prejudice to go around here. And I -- I would respectfully request that -- that we still try to arrange these depositions in Mexico City. It's very difficult for my clients to

gather all of -- not my clients, but -- but all the directors up here for -- for continued depositions.

THE COURT: So, I mean, I'm sure it is. It's also means Mr. Brown and his team have to -- at the instance of your clients, have to go back and -- you're going to want them to travel. They're going to spend a week out of their life, which means they're not going to be able to handle other cases. They're also going to, you know, not be where they can get the most work done even on this case. And why should they bear that burden, when, you know --

MR. STONE: Right. And, again, Your Honor, my only argument here is that there's plenty of blame to go around. And the fact that this occurs this late in the game is not necessarily all of our making.

THE COURT: No. But what --

MR. STONE: And particularly my clients --

THE COURT: I think what Mr. Brown is willing to live with is this: He was willing to live with the state of the record that you all created; right? You're right. He could have moved to compel and said -- but then he goes "Frankly, if they say

there are no things, how formal could this meeting be, how reliable is their memory, I'll go with it." I don't think there's anything inconsistent in his position saying, "I'm going to let the record stay where it is." It's your clients or your clients' allies, essentially, in the litigation who would like the record to be supplemented and to be different than it was. And that obviously pits -- puts the plaintiffs in a very different position; right?

MR. STONE: Right. I guess another solution here, Your Honor, would be simply to -- to -- if -- if the fact of the minutes can be admitted; in other words, that there were minutes, we're -- we're fine with that. Substantively we don't think the minutes make any difference whatsoever. Everything that's in those minutes is in the proxy already. And our witnesses will come and testify about the substance of what occurred at those meetings without the aid of those minutes. I mean, that's another very simple solution here and we can avoid these depositions altogether.

So --

THE COURT: Go over that again.

MR. STONE: If -- if we can enter into

the record or have a stipulation that the minutes in fact exist, that there were minutes for all these special committee meetings for which they -- there -- there are minutes, the substance of those minutes, in effect, doesn't really matter to us because we think that the substance --

THE COURT: It doesn't matter to us, but it doesn't cure any of the harms to the plaintiffs, because the reality is that -- and this is why the offer, for example, to restrict the deposition testimony to simply the minutes or something like that -- part of what you do -- I mean, you're an excellent member of our -- our bar -- is, you read everybody's production and you come up with the questions that you're going to ask. And things that happen at one meeting might shape questioning about another area, because it's all of a piece.

And it's not -- and so the fact that you're going to stipulate to just having them in doesn't mean your witnesses aren't going to be saying things now at trial because their memory is also -- the other reason why people create minutes is, people forget things. And I'm assuming the witnesses here are going to reread the minutes; right?

MR. STONE: Right. My only point is they could just as well reread the proxy without reading the minutes and that would refresh your recollection.

THE COURT: They could, but now the minutes are going to be in evidence. If they get in trouble on the stand, then folks on this side of the room -- side of the room you're on are going to help rehabilitate them by using these minutes. Someone is shaking his head no. I don't know what that means. I mean, I -- and I prefer people not to do that, but I would be shocked if qualified counsel have admitted to help rehabilitate a witness for a failed memory would not actually use something. Maybe it is --

MR. STONE: Sure. If they're in evidence, absolutely, Your Honor. That's true.

THE COURT: Right. If we were -- and that's the thing. I'm dealing with the reality that Mr. Brown is perfectly content to say "This is all out," in which case we don't even have an issue.

So when I see -- hear people -- excellent counsel shaking their head no and the suggestion that they might actually use something that they have spent time getting into the record, that

surprises me, I think for a fairly obvious reason; right?

MR. STONE: The only point I was trying to make, Your Honor, was that the -- what's important to us, as a matter of record, is simply the existence of the minutes, because we think that the substance of those minutes is covered elsewhere in the record. And we think that -- for that reason, we think that these depositions, in effect, are duplicative because they've already had an opportunity to -- to question the witnesses on everything that's in the proxy, which is covered by these very minutes that -- that have now been late produced.

THE COURT: Okay.

MR. STONE: Okay?

THE COURT: Thank you.

MR. STONE: That's all I have, Your Honor.

THE COURT: Anything further?

MR. BRANDT: Your Honor, James Brandt of Latham & Watkins.

The Court made the comment earlier that sometimes you just have to own your mistakes. And I'm just standing up to do that. This was our

mistake. It was not a mistake of the clients. Mr. Brown is correct that the box that was at issue was in fact reviewed. There is not a good explanation for why the documents at issue were not found. We looked for and through that particular box several times. We -- there was a stark exchange at the argument on the topic of whether minutes existed, of whether minutes existed. We were asked several things after the hearing, and one of them was to go back and look again.

We sent one of, at that point, our partners through the records to look page by page and see what could be found. Upon finding documents we had not produced, we didn't -- we thought they absolutely had an obligation at that time to produce them, and we did. We found a small set of additional privileged documents, which we put on the log. It was the first time we recognized that there were documents that were privileged and responsive that had not been logged, and we logged them.

But I really just came up to emphasize that it's not a mistake of the clients. It's a mistake of the law firm. We made a mistake, and we did our best to remedy it as soon as we recognized it.

So I came to apologize. And that's what I found.

THE COURT: Thank you.

MR. BROWN: Your Honor, could we -- I just have two things. There weren't minutes for two meetings that were not identified in the proxy statement. So I think when Mr. Stone says tells why on the record, that may not be correct.

Is it possible -- we did want to discuss his proposal. If -- that we have just -- this will be solved by a stipulation that there are minutes for meetings dated blah, blah, blah.

THE COURT: And that there will be no other use?

MR. BROWN: Yeah. If that's -- if that's -- we would just -- if we could talk to defense counsel and talk amongst ourselves for a few minutes to see if we can accept that deal.

THE COURT: Sure. Why don't we do that. We were having audiovisual difficulties, anyway, probably due to, you know, the lack of aesthetics of the trial judge. And so why don't you talk among yourselves. Let me know when you need me back and we'll go from there.

MR. BROWN: Thank you, Your Honor.

(A short recess was taken from 10:39 a.m. until 10:50 a.m.)

MR. BROWN: Apologize that we had to go through all this to get to this point, but we've reached an agreement to withdraw the motion and enter into a stipulation along the lines that Mr. Stone proposed, stating that there are minutes but they won't be admitted into evidence.

THE COURT: I'm always happy to get a resolution, even when it saves me only a bench opinion.

(Laughter)

MR. STONE: To be clear, Your Honor, the -- the stipulation will -- will say that there was a meeting on this date and that there were minutes produced, either signed or unsigned.

THE COURT: Okay. But there will be no other use of the documents.

MR. STONE: That's correct, Your Honor.

THE COURT: That's your understanding, Mr. Brown?

MR. BROWN: Yes, Your Honor.

THE COURT: Well, good. Thank you. Thank you, all. It looks like a lovely spring day before the rains come, and I hope you get to enjoy some of it, even on the Club Car on the Acela. Have a miniature. See you.

MR. STONE: Thank you, Your Honor.

(Court adjourned at 10:52 a.m.)

- - -

CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 28 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 13th day of June 2011.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAS MINING CORPORATION, GERMAN LARREA MOTA-VELASCO, GENARO LARREA MOTA-VELASCO, OSCAR GONZALEZ ROCHA, EMILIO CARRILLO GAMBOA, JAIME FERNANDO COLLAZO GONZALEZ, XAVIER GARCIA DE QUEVEDO TOPETE, ARMANDO ORTEGA GOMEZ AND JUAN REBELLEDO, Defendants Below / Appellants, v. MICHAEL THERIAULT, as Trustee for the Theriault Trust, Plaintiff Below / Appellee.	Case No. 29, 2012 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.	Case No. 30, 2012 On Appeal from the Court of Chancery Consol. C.A. No. 961-CS

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION.	Consol. C.A. No. 961-VCS **CONFIDENTIAL** **FILED UNDER SEAL**

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION.	Consol. C.A. No. 961-VCS **CONFIDENTIAL** **FILED UNDER SEAL**

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GLOSSARY OF TERMS

AMC Defendants or Defendants	Americas Mining Corporation, 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
ASC	Americas Sales Company, Inc.
Beaulne Report	Expert Report of Daniel Beaulne, dated March 16, 2010 (Montejo Aff. Ex. 4)
Confidential Coen Aff.	Second Affidavit of Kevin M. Coen filed under Seal in support of the AMC Defendants' Motion for Summary Judgment, dated August 10, 2010
Grupo Mexico	Grupo Mexico, S.A. de C.V.
Individual Defendants	Germán Larrea Mota-Velasco, Genaro Larrea Mota-Velasco, Oscar Gonzalez Rocha, Emilio Carrillo Gamboa, Xavier Garcia de Quevedo Topete, Armando Ortega Gómez, and Juan Rebolledo Gout
Lemon Bay Complaint or Complaint	Complaint in *Lemon Bay v. Americas Mining Corp., et al.*, C.A. No. 961-VCS, filed December 30, 2004 (Public Coen Aff. Ex. A)
Minera	Minera México, S.A. de C.V.
Montejo Aff.	Affidavit of Marcus E. Montejo in support of Plaintiff's Summary Judgment Brief, dated June 30, 2010
Pl. S.J. Br. or Plaintiff's Summary Judgment Brief	Plaintiff's Opening Brief in Support of Their [sic] Motion for Partial Summary Judgment, dated June 30, 2010 (D.E. 145)
Pl. Ans. Br. or Plaintiff's Answering Brief	Plaintiff's Reply Brief in Support of its Motion for Partial Summary Judgment and Answering Brief in Opposition to Defendants' Cross Motions For Summary Judgment, dated September 24, 2010 (D.E. 200)
Public Coen Aff.	Affidavit of Kevin M. Coen in support of the AMC Defendants' Motion for

	Summary Judgment, dated August 10, 2010
PX [ ]	Plaintiff's Compendium of Exhibits filed in support of Plaintiff's Summary Judgment Brief
Schwartz Report	Expert Report of Eduardo S. Schwartz, dated April 21, 2010 (Montejo Aff. Ex. 7)
Sousa Complaint	Complaint in *Sousa v. Southern Peru Copper Corp., et a*l, C.A. No. 978-N, filed January 7, 2005 (Public Coen Aff. Ex. B)
SPCC	Southern Peru Copper Corporation
Special Committee	Special Committee of Disinterested Directors of SPCC
Special Committee Defendants	Carlos Ruiz Sacristan, Harold S. Handelsman, Gilberto Perezalonso Cifuentes, and Luiz Miguel Palomino Bonilla
Theriault	Michael Theriault
Theriault Complaint	Complaint in *Therault* [sic] *v. Luis Miguel Palomino Bonilla*, *et al*., CA. No. 969-N, filed January 5, 2005 (Public Coen Aff. Ex. C)

PRELIMINARY STATEMENT[1]

The only issue to be tried in this case is whether the AMC Defendants breached their fiduciary duties when they approved a merger between SPCC and Minera (the "Merger") that was negotiated over an eight month period, recommended by a special committee of independent and disinterested directors, and overwhelmingly approved by the holders of SPCC's outstanding stock. Plaintiff has abandoned most of the claims in his complaint and now alleges only that SPCC overpaid for Minera. In support of his claim, Plaintiff argues that the Special Committee's financial advisor, Goldman Sachs, should have used a different methodology to assess the fairness of the Merger that, according to Plaintiff, would have resulted in SPCC paying less for Minera. Although much of Plaintiff's evidence will likely relate to the details of valuation analyses and be familiar to this Court from appraisal actions, this is not an appraisal action. Rather, the issue is whether Plaintiff can demonstrate that the Special Committee was led astray by Goldman Sach's use of a widely recognized and accepted valuation methodology to support its conclusion that the Merger was fair, from a financial perspective, to SPCC's stockholders.

The evidence will show that far from being led astray, the Special Committee worked closely with its multiple financial, mining, and legal advisors over an eight month period to assess the fairness of the Merger, ensure that it was in the best interests of SPCC and its stockholders, and get the best deal possible for SPCC and its minority stockholders. This process involved extensive due diligence (including numerous trips to Mexico and Peru) and multiple valuation analyses based on the important assumptions derived from the information the Special Committee and its advisors gathered and numerous meetings. The Special Committee

[1] Capitalized terms used in this brief are included in the Glossary of Terms.

and Grupo Mexico also negotiated extensively the terms of the Merger, resulting in significant benefits for SPCC and its stockholders. In the end, Goldman Sachs advised the Special Committee that the appropriate method to determine the fairness of the consideration in the Merger was a relative valuation of the two companies. This method allowed the Special Committee to compare the two similarly situated companies using the same set of assumptions. Based on a relative valuation of the two companies, the Special Committee concluded that the negotiated terms of the Merger were fair from a financial point of view and recommended to SPCC's board of directors that it approve the Merger. Based on the Special Committee's recommendation, the SPCC Board approved the Merger.

As the AMC Defendants will show at trial, Plaintiff's argument that the Merger price was unfair because SPCC was not valued based on its market capitalization is not supported by Delaware law or appropriate given the facts of this case. In fact, Plaintiff's argument is belied by his own express admission that SPCC's stock price did not reflect the inherent value of the company and his expert's admission that he did not know what SPCC's stock price represented (nor did he try to find out). Plaintiff cannot show that the AMC Defendants breached any fiduciary duty in approving the Merger.

Accordingly, Defendants respectfully request that the Court enter judgment in favor of the AMC Defendants and dismiss this case with prejudice.

NATURE AND STAGE OF THE PROCEEDINGS

This litigation arises out of a stock-for-stock merger between SPCC and Minera that was announced on October 21, 2004.[2] Two months after the then-proposed Merger was

[2] After the Merger was completed, SPCC changed its name to Southern Copper

Footnote continued...

announced, the first of three complaints (the Lemon Bay Complaint) was filed in this Court alleging breaches of fiduciary duty in connection with the Merger and asserting, among other things, that the Merger should be preliminarily and permanently enjoined. The Sousa Complaint and the Theriault Complaint were filed in early January 2005. The Sousa Complaint — and only the Sousa Complaint — alleged that there was not enough information available for shareholders to make an informed vote on the Merger. By order dated January 24, 2005, the cases were consolidated and coordinated and the Lemon Bay Complaint became the operative complaint (the "Complaint").

In connection with the proposed Merger, SPCC's board formed a special committee of independent directors to negotiate the Merger on behalf of the Company's minority stockholders. After eight months of investigating, analyzing and negotiating the transaction for the benefit of SPCC and its minority stockholders, the Special Committee recommended the approval of the Merger to SPCC's board of directors, which unanimously approved the Merger. In February 2005, SPCC issued a lengthy proxy statement explaining the proposed Merger and setting forth the date of the shareholder meeting to vote on the proposed Merger.[3] On March 28, 2005, SPCC's shareholders — including Sousa, one of the original plaintiffs — voted to approve the Merger.[4]

After discovery closed, Plaintiff filed a motion for partial summary judgment. The AMC Defendants also cross-moved to shift the burden of proof to Plaintiff under the entire

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Corporation. Because the company was known as SPCC at all times relevant to this case, this brief refers to the company as SPCC.

[3] *See* Public Coen Aff. Ex. D.

[4] *See* Public Coen Aff. Exs. E & H.

fairness standard. The Special Committee Defendants also cross-moved for summary judgment to dismiss the claims against the Special Committee members under SPCC's exculpatory provision adopted pursuant to Section 102(b)(7) of the Delaware General Corporation Law. At the December 21, 2010 hearing on the parties' summary judgment motions, the Court denied Plaintiff's and the AMC Defendants' motions for summary judgment. The Court granted the Special Committee Defendants' motion and dismissed the Special Committee Defendants from the action.

The trial in this case is scheduled to commence on June 20, 2011 and to last for five trial days. This is the pretrial brief of the AMC Defendants.

STATEMENT OF FACTS

A. The Parties

1. Plaintiff

Although the complaints were originally filed by three separate plaintiffs, none of the original plaintiffs remains in this action. Lemon Bay fled shortly after the AMC Defendants served document requests to which it or its counsel did not want to respond; plaintiffs James Sousa and Robert Theriault died. The only reason this case continues is because Michael Theriault was substituted in place of his late father on December 10, 2008 (seven months after he died). The Theriault Trust held stock in SPCC from at least April 2003 through July 2010, and during that time bought and sold various quantities of SPCC stock, including buying SPCC stock the ***day after*** the Merger was announced, again just a few weeks before the Theriault Complaint

was filed and at least once during the course of discovery.[5] The Theriault Trust alleges that it continues to be a shareholder of SPCC.

Theriault has no personal knowledge about anything relevant to the case and did not know when he was deposed whether he even agreed with the allegations in the complaint.[6] In addition, Plaintiff has had essentially no involvement in prosecuting this case, abdicating full control of this lawsuit to his counsel.

2. **Defendants**

SPCC. Nominal Defendant SPCC is a Delaware corporation. Prior to the Merger, SPCC was an integrated copper producer that operates mining, smelting, and refining facilities in Peru. Today, SPCC is one of the largest integrated copper producers in the world with mining, smelting and refining facilities located in Peru and Mexico.[7] As a result of the Merger and subsequent stock acquisitions, SPCC owns approximately 99.95% of Minera.

AMC. AMC is a Delaware corporation and a wholly owned subsidiary of Grupo Mexico.

ASC. ASC is a Delaware corporation and wholly owned subsidiary of AMC.

Individual Defendants. Defendants Germán Larrea Mota-Velasco, Genaro Larrea Mota-Velasco, Oscar Gonzalez Rocha, Emilio Carrillo Gamboa, Xavier Garcia de Quevedo Topete, Armando Ortega Gómez, and Juan Rebolledo Gout were the members of SPCC's board

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[5] *See* Confidential Coen Aff. Ex. 14.

[6] Theriault testified at his deposition, which took place 15 months after he substituted in place of his father, that he was still forming opinions and reconciling whether he agrees with this lawsuit or whether his father "wasn't inadvertently fighting this battle for the bad guys." Theriault Tr. 102:9-105:17 (Confidential Coen Aff. Ex. 1).

[7] *See* SPCC Annual Report (2010) at 66 (attached hereto as Exhibit 1).

of directors at the time of the Merger who did not serve on the Special Committee. The Individual Defendants were also directors and/or employees of Grupo Mexico at the time of the Merger.

B. The Merger[8]

In September 2003, Grupo Mexico engaged UBS Investment Bank to provide advice with respect to a strategic transaction involving Minera and SPCC.[9] After some initial discussions, Grupo Mexico formally approached the board of SPCC on February 3, 2004 regarding a potential combination of Minera and SPCC.[10] Pursuant to the proposal, SPCC would acquire Grupo Mexico's interest in Minera in exchange for newly-issued SPCC common stock.[11]

C. The Special Committee

Immediately after Grupo Mexico proposed the Merger, SPCC's board of directors appointed a Special Committee of independent and disinterested directors to negotiate the Merger and to make a recommendation to SPCC's board of directors.[12] SPCC's board of directors announced the proposed Merger and the formation of the Special Committee on February 4, 2004.[13]

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8 The AMC Defendants respectfully refer the Court to SPCC's Proxy Statement, dated February 25, 2005 (the "Proxy") for a detailed account of the Merger. *See* Public Coen Aff. Ex. D at 16-19. The Proxy's factual recitations are undisputed on the record before the Court.

9 *See* Proxy at 16 (Public Coen Aff. Ex. D).

10 *See id.* at 16 (Public Coen Aff. Ex. D); *see also* PX 107.

11 *See* PX 107.

12 Proxy at 16 (Public Coen Aff. Ex. D); *see also* PX 78.

13 Proxy at 16 (Public Coen Aff. Ex. D).

1. **Composition**

The Special Committee was comprised of independent directors Carlos Ruiz Sacristan, Gilberto Perezalonso Cifuentes, Harold S. Handelsman, and Miguel Palomino Bonilla.[14] The members of the Special Committee were independent and disinterested, highly qualified and fully understood their duties as members of the Special Committee.

- Mr. Ruiz. Mr. Ruiz, who chaired the Special Committee, was elected to SPCC's board of directors to fill a vacancy and was then appointed to the Special Committee.[15] Mr. Ruiz was a Mexican government official for 25 years before co-founding an investment bank, where he advises on M&A and financing transactions.[16] Mr. Ruiz had no affiliation with any of the other SPCC directors or any Grupo Mexico affiliates before joining the SPCC board.

- Dr. Palomino. Dr. Palomino was elected to SPCC's board of directors to fill a vacancy[17] and was recommended for SPCC's board by certain Peruvian pension funds that were among SPCC's minority shareholders.[18] Dr. Palomino has a Ph.D in finance from the Wharton School at the University of Pennsylvania and has worked as an economist, financial advisor, and analyst for various banks and financial institutions.[19] Dr. Palomino served as Chief Executive Officer and the Senior Country and Equity Analyst of Merrill Lynch, Peru, where he covered all companies in Peru, Venezuela, and

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14 Pedro-Pablo Kuczynski was initially a member of the Special Committee but later resigned from the SPCC board in order to accept the post of Minister of Economy and Finance of the Republic of Peru. *See* Proxy at 16-17 (Public Coen Aff. Ex. D). Like the other members of the Special Committee, Mr. Kuczynski had no affiliation with Grupo Mexico or any of its affiliates other than SPCC, and Plaintiff does not allege otherwise.

15 *See* Proxy at 16 (Public Coen Aff. Ex. D). Because Mr. Ruiz was nominated to the SPCC board by AMC, the board specifically investigated and confirmed his independence before he joined the Special Committee. *See* Confidential Coen Aff. Ex. 16 at AMC 00024180.

16 *See* Public Coen Aff. Ex. R; Ruiz Tr. 20:22-21:22 (Confidential Coen Aff. Ex. 4).

17 *See* Proxy at 17-18 (Public Coen Aff. Ex. D). Mr. Palomino also satisfied the independence requirements of the New York Stock Exchange. *See* Confidential Coen Aff. Ex. 25.

18 *See* Palomino Tr. 17:8-15; 21:6-14 (Confidential Coen Aff. Ex. 2).

19 *See* Public Coen Aff. Ex. S.

Colombia, including SPCC.[20] Mr. Palomino had no affiliation with any of the other SPCC directors or any Grupo Mexico affiliates prior to joining the SPCC board.

- Mr. Handelsman. Mr. Handelsman became a director of SPCC in August 2002 as a designee of Cerro Trading Company, which is associated with The Pritzker Organization, LLC (one of the "Founding Stockholders"). Mr. Handelsman graduated from Columbia Law School and worked at Wachtell, Lipton, Rosen & Katz before joining the Pritzker family interests as General Counsel of the Hyatt Group of Companies.[21] Mr. Handelsman had no affiliation with any of the other SPCC directors or any Grupo Mexico affiliates prior to joining the SPCC board.

- Mr. Perezalonso. Mr. Perezalonso became a director of SPCC in 2002 and was elected by holders of the Common Stock in April 2004. Mr. Perezalonso has a law degree and an MBA and spent most of his career working at Grupo Cifra, S.A de C.V. and Grupo Televisa, S.A.B.[22] Mr. Perezalonso had no affiliation with any of the other SPCC directors or any Grupo Mexico affiliates prior to joining the SPCC board.

2. **Advisors**

The SPCC Board empowered the Special Committee to retain legal and financial advisors.[23] After considering numerous law firms, the Special Committee engaged Latham & Watkins LLP ("Latham") as its United States legal advisor and Mijares, Angoitia, Cortes y Fuentes SC ("Mijares") as its Mexican counsel.[24] Similarly, after considering numerous

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20 *See* Palomino Tr. 10:4-19 (Confidential Coen Aff. Ex. 2). He was thus independently familiar with SPCC before minority shareholders recommended that he be appointed to the SPCC board to represent their interests.

21 *See* Handelsman Tr. 6:21-8:7 (Confidential Coen Aff. Ex. 3).

22 *See* Public Coen Aff. Ex. T.

23 *See* PX 78.

24 Proxy at 16, 18 (Public Coen Aff. Ex. D); *see also* PX 9, PX 15, PX 17.

investment banks, the Special Committee engaged Goldman Sachs as its financial advisor and, later, Anderson & Schwab ("A&S") as its mining consultant.[25]

3. Negotiation Of The Terms Of The Merger

Over the eight months that the Special Committee negotiated the terms of the Merger, the Special Committee focused on ensuring that the proposed Merger was in the best interests of SPCC and its minority stockholders. The Special Committee's advisors assisted it in obtaining and analyzing relevant information to negotiate the Merger. This process included, among other things, the establishment of a data room, multiple trips to Mexico and Peru (including to SPCC's and Minera's mines and corporate headquarters) to gather information, and more than two dozen Special Committee meetings. The Special Committee and its advisors conducted various analyses using different methodologies to assess the economic terms of the Merger before ultimately determining that the best way to analyze and value the Merger was to compare SPCC and Minera on a relative basis, using the same assumptions (modified in company specific ways as appropriate) for both companies.

Throughout that process, the Special Committee successfully negotiated significant concessions for SPCC and its minority shareholders such as (i) reducing the number of shares to be exchanged as consideration for Minera, (ii) improving Minera's capital structure by capping the amount of debt SPCC would assume; (iii) providing for the payment of a $100 million special dividend to shareholders before the Merger, (iv) securing indemnification of SPCC for pre-Merger claims against Minera, (v) securing important governance changes for SPCC after the Merger, (vi) enhancing public float and liquidity for post-closing trading, and

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[25] Proxy at 16 (Public Coen Aff. Ex. D).

(vii) negotiating a provision that required a significant minority holder to vote its shares consistent with the Special Committee's recommendation. The Proxy, the contents of which are undisputed, as well as the testimony of the Special Committee members, details the Special Committee's careful review and negotiation of the proposed Merger.[26]

4. **Recommendation and Approval**

On October 21, 2004, the Special Committee met with its advisors. At this meeting, the Special Committee's legal and financial advisors reviewed the process the Special Committee had conducted over the previous eight months. Goldman Sachs provided a presentation of its analysis and methodology and opined that the Merger was fair from a financial point of view. After considering the presentations of its counsel and financial advisors, the Special Committee met in executive session without any representatives of the Committee's advisors present.[27]

At the same time, Mr. Handelsman informed the Special Committee that he would abstain from voting on whether to recommend to SPCC's board of directors that it approve the Merger to alleviate any appearance of a conflict of interest as a result of his negotiation on behalf of Cerro for registration rights, an issue Goldman Sachs raised for the first time at an October 21, 2004 meeting.[28] Although Mr. Handelsman and other members of the Special Committee disagreed with Goldman Sachs' suggestion that Mr. Handelsman's negotiation of registration

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26 *See* Proxy at 16-39 (Public Coen Aff. Ex. D). At the summary judgment hearing the Court held that it would not allow Plaintiff to pursue disclosure claims. Summ. J. Hr'g Tr. at 118 (Dec. 21, 2010) ("I'm not opening up the door for Mr. Brown to invent other disclosure claims.") (attached hereto as Exhibit 2).

27 *See* Proxy at 27.

28 *See id.*

rights had the potential to create an appearance of a conflict, Mr. Handelsman abstained from the Special Committee's vote.[29]

The members of the Special Committee (other than Mr. Handelsman) voted to recommend the Merger to SPCC's board of directors based on their determination that it was in the best interests of SPCC stockholders.[30] In voting to recommend the Merger to SPCC's board of directors, the Special Committee considered and relied upon the following factors, among others:[31]

- The current and historical trading prices of SPCC common stock.
- All current SPCC stockholders would receive a transaction dividend in the aggregate amount of $100 million in proportion to their pre-Merger share ownership.
- Grupo Mexico and its affiliates would not be able to approve the Merger unilaterally because it required approval of 2/3 of the outstanding common stockholders.
- Cerro agreed to vote in accordance with the Special Committee's recommendation and not to vote in favor of the Merger in the event the Special Committee withdrew its recommendation of the Merger.
- AMC agreed to indemnify SPCC for certain losses it might suffer post-closing.
- Potential opportunities for the combined company to realize synergies resulting from the Merger estimated at approximately $400 million.
- The expectation that the Merger would be accretive to SPCC earnings on a per share basis.
- The fairness opinion rendered by Goldman Sachs.

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29 *See, e.g.*, Handelsman Tr. 161:6-21; 162:13-163:3 (Confidential Coen Aff. Ex. 3); Palomino Tr. 35:9-37:3; 103:15-24 (Confidential Coen Aff. Ex. 2).

30 Proxy at 27 (Public Coen Aff. Ex. D).

31 *Id.* at 28-29.

Upon the recommendation of the Special Committee and the board of directors' review of the terms of the Merger as well as presentations from Goldman Sachs and Latham, the SPCC board resolved to recommend that SPCC stockholders approve the Merger.[32]

D. **Shareholder Approval**

On February 25, 2005, SPCC sent the Proxy to SPCC's shareholders soliciting their vote to approve the Merger at a special meeting of stockholders to be held on March 28, 2005. The Proxy set forth in detail the eight month process the Special Committee, with the assistance of its advisors, undertook to negotiate the Merger. The Proxy also set forth the various factors the Special Committee considered in determining that the Merger was in the best interests of SPCC and its stockholders and the basis for its recommendation that stockholders vote for the Merger.

At the March 28, 2005 special shareholder meeting, the holders of more than 90% of the outstanding capital stock of SPCC voted to approve the Merger. Among those who voted for the Merger was Sousa, who had filed one of the three complaints challenging the Merger.[33]

E. **The Parties' Experts**

1. **Plaintiff's Expert Report**

Plaintiff submitted an expert report from Daniel Beaulne, an employee of Duff & Phelps, LLC. Beaulne is not a specialist in commodity or mining issues, nor is he an expert in market efficiency.[34]

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[32] *See id.*

[33] *See* Public Coen Aff. Exs. H & E.

[34] *See* Beaulne Tr. 123:5-23; 103:13-108:8 (Confidential Coen Aff. Ex. 6). And although Beaulne claimed to have relevant mining experience, he was unable or unwilling to

Footnote continued...

Beaulne was engaged to "determine the fair value of Minera Mexico," *not* opine as to the fairness of the Merger.[35] In determining the "fair value" of Minera, Beaulne took the market price of SPCC stock on the merger date (adjusted to reflect the special dividend), performed a DCF valuation of Minera using cash flow projections he took directly from the work done by the Special Committee without change (adjusted to reflect AMC's ownership of 99.15% of Minera), and divided the second number by the first.[36] He concluded that SPCC should have paid 41.2 million shares as consideration for Minera as opposed to the 67.2 million shares that SPCC actually paid.[37]

2. **Defendants' Expert Report**

Defendants submitted the expert report of Prof. Eduardo S. Schwartz. Prof. Schwartz is the California Chair in Real Estate and Land Economics and Professor of Finance at the Anderson School of Management of the University of California, Los Angeles. He is an internationally recognized expert on commodity pricing and valuation, is one of the co-developers of the real options method of asset (including mine) valuation taught in one of the texts this Court has cited with approval, has taught the company with the largest copper reserves

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discuss any of it during his deposition, making it impossible to test that claim. *See id*. at 199:6-201:21; 201:24-203:20. Beaulne also has offered no opinion regarding the Special Committee's process or the independence of its members. *See id*. at 64:6-24.

35 *See* Confidential Coen Aff. Ex. 15 at 1-2.

36 *See* Beaulne Report at 44 (Montejo Aff. Ex. 4). Beaulne accepted the cash flow forecasts derived by the Special Committee and its professionals in their entirety; he does not offer a single criticism of the cash flow forecasts the Special Committee and its professionals derived for either SPCC or Minera.

37 *Id*. at 43.

in the world (Codelco) how to apply that methodology to value copper mines,[38] teaches valuation, and has actual experience working in the mining industry.[39]

Prof. Schwartz reviewed the work of the Special Committee and concluded that it had used the precise methodology he would have used had he been given the task of determining the number of shares to be paid in the Merger in the first instance.[40] Because Minera and SPCC were so similar, Prof. Schwartz determined that the Merger could best be understood and evaluated by comparing the values of the companies' mine assets on the basis of the same sets of assumptions. Prof. Schwartz tested his conclusion that the Merger was fair for robustness and determined that the conclusion was robust to all reasonable variations in the primary variables that affect the value of copper mining companies.[41]

Prof. Schwartz set forth a continuum of valuation results ranging from those based on the $0.90/pound long-term copper price used by the Special Committee to the $1.30/pound long-term copper price that (i) was implied by the market capitalization of SPCC on October 21, 2004 and (ii) he considered a more reasonable assumption at the time.[42] In his report, separate results for SPCC and Minera are provided within that range, although the results

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38 *See* Schwartz Tr. 86:11-88:4 (Confidential Coen Aff. Ex. 7).

39 *See* Schwartz Report ¶ 1 & Ex. A (Montejo Aff. Ex. 7); R. Brealey, S. Myers & F. Allen, PRINCIPLES OF CORPORATE FINANCE at 632 n.14 & 639 (New York McGraw-Hill, 9th ed. 2007); Schwartz Tr. 86:11-88:4; 92:16-24; 101:18-22 (Confidential Coen Aff. Ex. 7).

40 *See* Schwartz Report ¶¶ 9(i) & 12-20 (Montejo Aff. Ex. 7); Schwartz Tr. 98:20-99:6; 115:23-116:11 (Confidential Coen Aff. Ex. 7).

41 *See* Schwartz Report ¶¶ 27-35 (Montejo Aff. Ex. 7).

42 *See id.* at ¶ 43 & Ex. 2; Schwartz Tr. 33:3-34:10 (Confidential Coen Aff. Ex. 7). Plaintiff does not challenge Prof. Schwartz's expertise relating to commodity pricing. Prof. Schwartz is a leading expert on the behavior of commodity prices. *See* Schwartz Report ¶ 2 & Ex. A; Schwartz Tr. 84:13-87:4.

are primarily presented as the exchange ratio that would result from using each long-term copper price. At $0.90/pound the equity value of Minera was approximately $1.7 billion, whereas at $1.30/pound it was approximately $3.7 billion.[43] The key point in both scenarios is that SPCC paid a fair price for Minera no matter what long-term price is selected for copper within the range that would have been reasonable to use at the time.

3. The Differences Between The Parties' Expert Reports

There is one key distinction between the parties' expert reports — the methodology. Although both Beaulne and Prof. Schwartz calculated equity values for Minera using the DCF methodology, Prof. Schwartz calculated equity values for SPCC using the same sets of assumptions (adjusted as necessary to reflect certain differences between the companies, such as country risk premia), whereas Beaulne simply accepted the market price of SPCC as definitive with respect to SPCC's value without conducting any additional inquiry or analysis. In particular, Beaulne made no effort to peer behind SPCC's market price, and he disclaimed any ability to do so or to be able to determine what that price implied or what information it impounded.[44]

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[43] *See* Schwartz Report Ex. 2 (Montejo Aff. Ex. 7). Critically, Beaulne claims he did no analysis of what the value of Minera would have been using a long-term copper price other than $0.90/pound, *see* Beaulne Tr. 96:12-22 (Confidential Coen Aff. Ex. 6), and so he cannot offer any opinion on that issue.

[44] *See* Beaulne Tr. 109:17-23; 116:6-8 (Confidential Coen Aff. Ex. 6).

ARGUMENT

I. THE MERGER WAS ENTIRELY FAIR

A. Legal Standard

Entire fairness looks at the process leading to the consummation of a transaction and the price.[45] Fair dealing involves "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."[46] Fair price involves questions of "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."[47] In transactions subject to entire fairness review,[48] the burden of proof shifts to the plaintiff if the defendants are able to demonstrate that the transaction was approved by "an independent committee of directors or an informed majority of the minority shareholders."[49] Importantly, the entire fairness analysis does not require perfection on the part of the board of directors.[50]

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45 *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

46 *Emerald Partners v. Berlin*, 787 A.2d 85, 97 (Del. 2001).

47 *Weinberger,* 457 A.2d at 711.

48 *See Kahn v. Lynch Commc'ns Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994), *aff'd* 669 A.2d 79 (Del. 1995).

49 *See id.*; *see also* Pl. S.J. Br. at 36; *In re Tele-Commuc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *8 (Del. Ch. Jan. 10, 2006); *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 534 (Del. Ch. Aug. 15, 2003); *accord In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *13 (Del. Ch. May 6, 2010) ("To shift [the entire fairness] burden to the Appraisal Objectors, Defendants must demonstrate that the Special Committee 'was truly independent, fully informed, and had the freedom to negotiate at arm's length.'").

50 *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (1995) ("A finding of perfection is not a *sine qua non* in an entire fairness analysis.") (emphasis added).

As set forth below, and as the Defendants will demonstrate at trial, the Special Committee appropriately negotiated the Merger and the Merger was then approved by the holders of a majority of SPCC's minority shares including Plaintiff Sousa. Given that Plaintiff cannot establish a material disclosure claim and given the existence of a well functioning Special Committee, Plaintiff, for each of these independent reasons, has the burden of proving that the Merger was not fair. Plaintiff has not and cannot satisfy that burden.

B. The Process Was Fair

To determine whether the process surrounding a transaction is fair, Delaware Courts traditionally look at four factors: (1) the board's composition and independence; (2) the extent to which the board was accurately informed about the transaction; (3) the timing, structure and negotiation of the transaction; and (4) how board approval was obtained.[51] All of these factors weigh in favor of shifting the entire fairness burden to Plaintiff and a determination that the Merger was a product of a fair process.

1. The Merger Was The Product Of A Thorough And Effective Special Committee Process

It is undisputed that none of the Special Committee members had any affiliation with Grupo Mexico or any of its affiliates other than SPCC and had no financial interest in the Merger.[52] Indeed, Plaintiff conceded this fact at the summary judgment stage.

There is also no dispute that the members of the Special Committee were highly qualified and had extensive transactional experience. Mr. Ruiz co-founded an investment bank

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[51] *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995).

[52] To establish a lack of independence, a plaintiff must demonstrate that directors were dominated or otherwise controlled by an individual or entity interested in the transaction. *See Orman v. Cullman*, 794 A.2d 5, 24 (Del. Ch. 2002).

and advises on M&A and financing transactions. Mr. Palomino worked as an economist, financial advisor, and analyst for various banks and financial institutions (including Merrill Lynch). Mr. Perezalonso has spent most of his career on issues relating to finance and strategy, managing multi-billion dollar companies such as Grupo Cifra, S.A. de C.V., Grupo Televisa, AeroMexico Airlines and Corporation Geo S.A. de C.V. Similarly, Mr. Handelsman practiced as an M&A attorney before joining the Pritzker family interests. The Special Committee was well-positioned to evaluate the proposed Merger.

There is also no dispute that the Special Committee members understood their authority and duty to reject any offer that was not fair to SPCC and its minority stockholders. Indeed, Plaintiff concedes that the Special Committee threatened to walk away from the negotiation to induce Grupo Mexico to improve the terms of the transaction.[53] Mr. Palomino explained "[t]he Special Committee was not going to continue discussions or recommend [the proposed Merger if it] didn't get improvements on the conditions … that were existing at that point."[54] The Special Committee's ability and willingness to "just say no" demonstrated that the Special Committee functioned properly.[55]

In addition, the Special Committee retained independent, highly skilled, and reputable legal, financial and mining advisors to assist the Special Committee in fulfilling its

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53 Pl. Ans. Br. at 32.

54 *See* Palomino Tr. at 94:23-95:3 (Confidential Coen Aff. Ex. 2).

55 *See Gesoff v. IIC Industries Inc.*, 902 A.2d 1130, 1146 (Del. Ch. 2006) (observing that a special committee's mandate "should include the power to fully evaluate the transaction at issue, and, ideally, include what this court has called the 'critical power' to say 'no' to the transaction"); *Muoio & Co. LLC v. Hallmark Entertainment Invs. Co.*, 2011 WL 863007, *12 (Del. Ch. Mar. 9, 2011) (finding that the Special Committee interpreted its mandate broadly to include the power to consider the transaction, negotiate its terms and recommend or reject the transaction).

duties. The Special Committee retained Latham as its U.S. legal counsel and Mijares as its Mexican legal counsel. The Special Committee also retained Goldman Sachs as its financial advisor and A&S as its mining advisor. At the Special Committee's direction, these advisors spent months analyzing both SPCC and Minera as well as the proposed Merger, discussing their findings and opinions with the Special Committee, and helping the Special Committee negotiate the proposed Merger. The Special Committee relied upon the advice of its advisors to fulfill its duties.[56]

2. The Special Committee Negotiated At Arm's Length For The Benefit Of SPCC's Minority Stockholders

The Special Committee's extensive negotiations with Grupo Mexico are further evidence that the Merger was the product of a fair process. The Special Committee evaluated and negotiated the Merger over an eight month period in an effort to ensure that the Merger was in the best interests of SPCC and its stockholders. Over this eight month period, the Special Committee negotiated key terms of the Merger that directly benefitted SPCC stockholders:

- The Special Committee was able to negotiate a 23% reduction in Minera's net debt. That was a direct benefit to SPCC because it reduced the debt SPCC assumed — part of the cost of the Merger — by $300 million.
- The Special Committee negotiated a transaction dividend to SPCC stockholders of $100 million prior to the closing of the Merger (in addition to SPCC's regular quarterly dividend).
- The Special Committee secured indemnification by AMC for certain pre-closing environmental matters and conditions of Minera.[57]
- The Special Committee negotiated significant corporate governance protections designed to protect minority shareholders post-Merger.

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[56] Nor was the Special Committee denied any information or rushed during the negotiations process.

[57] *See* Proxy at 24-25 (Public Coen Aff. Ex. D).

- The Special Committee negotiated away from a proposed floating exchange ratio to a fixed ratio and negotiated down (by approximately 7%) the number of shares to be exchanged for Minera.[58]
- The Special Committee negotiated a super-majority voting requirement of 66-2/3 percent, followed by securing a commitment from Cerro to vote its 14.2% interest in accordance with the recommendation of the Special Committee. This ensured that Grupo Mexico could not unilaterally approve the Merger.

The Special Committee also used lower long-term copper price forecasts than it could have used to value Minera. That strategic decision saved SPCC from paying millions more SPCC shares for Minera.[59]

3. **The Merger Was Approved By The Holders Of The Minority Shares**

Further evidence that the Special Committee process was effective and produced a result that was fair to SPCC's minority shareholders is the fact that the overwhelming majority of SPCC's stockholders voted to approve the Merger. In fact, over 90% of the outstanding capital stock of the Company voted to approve the Merger, including one of the original plaintiffs.[60] If the Class A Common Shareholders (AMC, Cerro, and Phelps Dodge) are taken out of the equation, approximately 99% of the outstanding common stockholders who voted, voted in favor of the Merger.[61]

4. **Plaintiff's Challenges To The Special Committee Process Are Without Merit**

Plaintiff has abandoned many of his claims challenging the Special Committee members' independence, instead now arguing that the Special Committee failed to negotiate the

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58 *See, e.g.*, Handelsman Tr. 107:16-108:7 (Confidential Coen Aff. Ex. 3).

59 *See* Schwartz Report ¶¶ 44-45 (Montejo Aff. Ex. 7).

60 *See* Public Coen Aff. Exs. E & H at 2.

61 *See* SPCC Quarterly Report (March 31, 2005) at 25 (attached hereto as Exhibit 3).

registration rights agreements with Cerro and Phelps Dodge and that the Special Committee's advisors were inadequate because they were influenced by Grupo Mexico.[62] Plaintiff also argues that the stockholders were not informed. There is no legal or factual basis to support any of Plaintiff's contentions.

a. The Special Committee Negotiated A Key Provision Of The Registration Rights Agreements

Plaintiff's argument that the Special Committee failed to negotiate the registration rights agreements with Cerro and Phelps Dodge is without merit. It was the Special Committee that specifically sought agreement from Grupo Mexico to grant registration rights to Cerro and Phelps Dodge because the Special Committee believed, as did its financial advisors and market analysts,[63] that creating additional liquidity and public float would be "advantageous to the public stockholders as a whole."[64] Grupo Mexico had to that point been hesitant to negotiate registration rights with either stockholder. Once Grupo Mexico agreed to negotiate registration rights with both Cerro and Phelps Dodge, the Special Committee negotiated the key provision of the Merger Agreement that precluded Grupo Mexico from unilaterally approving the Merger.

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62 Pl. Ans. Br. at 22, 26-36.

63 *See, e.g.*, Confidential Coen Aff. Ex. 20 at SP COMM 3023 (listing "increased trading liquidity" as a "key consideration" and "sale of stock by principal stockholders" as a potential solution); Confidential Coen Aff. Ex. 29 at SP COMM 005902 (noting decreased public float as transaction risk); Ruiz Tr. 181:24-182:14 (Confidential Coen Aff. Ex. 4).

64 PX 85. The Special Committee sought registration rights not because Cerro or Phelps Dodge needed 1933 Act registration to dispose of their shares, but because use of a registration process would permit Cerro and Phelps Dodge to dispose of their interests in an orderly and organized fashion that would enhance liquidity in SPCC stock without disruption in the capital markets and an adverse impact on SPCC's stock price. *See* Handelsman Tr. 14:4-15:9 (Confidential Coen Aff. Ex. 3) (explaining that there weren't any contractual restrictions on Cerro's ability to sell its stock).

Specifically, when a draft of the registration rights agreement with Cerro was presented to the Special Committee on October 18, 2004, the Special Committee objected to Grupo Mexico's attempt to condition the registration rights on Cerro's agreement to vote in favor of the Merger.[65] The Special Committee ensured that the agreement was re-drafted to provide that Cerro would vote only in accordance with the Special Committee's recommendation.[66] This provision, coupled with the super-majority approval provision, meant that Grupo Mexico could not unilaterally approve the Merger. In addition, the agreement provided that if the Special Committee withdrew its recommendation approving the Merger, Cerro would not vote in favor of the Merger.[67]

b. **The Special Committee's Advisors Were Qualified And Independent**

Plaintiff does not dispute that the Special Committee retained experienced and competent U.S. and Mexican legal advisors, financial advisors, and mining consultants and relied on their advice. Instead, Plaintiff argues that the Special Committee's choice of advisors was inadequate because it was influenced by Grupo Mexico or (in the case of Latham), had ties to the Pritzker interests.[68] Plaintiff does *not* argue that the actual work by any of the Special Committee's advisors was influenced in any way by Grupo Mexico or any of the AMC Defendants. The only thing Plaintiff asserts is that the Special Committee's choice of some of its

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65 Proxy at 21, 23 & 26 (Public Coen Aff. Ex. D).

66 *Id*. at 10 & 26; *compare* Confidential Coen Aff. Ex. 30 at SP COMM 006746 (containing language that Cerro would vote to approve the transaction) with PX 62 (amending language to provide that Cerro would vote in accordance with the recommendation of the Special Committee).

67 PX 62. The registration rights agreement for Phelps Dodge contained a similar provision but was not executed until after the Special Committee voted to approve the Merger.

68 Pl. Ans. Br. at 33.

advisors was somehow improper. As set forth below, and as the evidence will demonstrate at trial, these arguments are without merit.

(i) The Retention of Goldman Sachs Was Not Influenced By Grupo Mexico

Relying solely on an email from May 2003 (nine months before the Merger was even proposed to the SPCC Board) that mentions Goldman Sachs as a "possible banker," Plaintiff argued, for the first time in his summary judgment brief, that Goldman Sachs was an inadequate advisor because its retention was preordained.[69] This argument is nonsensical and legally unsupportable. When the Special Committee was established in February 2004, it considered five investment banks before selecting Goldman Sachs as financial advisor.[70] Mr. Handelsman explained that the Special Committee picked "bulge bracket investment banks" and interviewed them.[71]

Each of the financial institutions prepared presentation materials that the Special Committee considered.[72] After consideration, the Special Committee ruled out Lehman Brothers and Credit Suisse First Boston because the committee believe they did not have sufficient Latin American or mining experience; Merrill Lynch was ruled out because of its fee proposal; and

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69 *Id.* at 33-34.

70 *See* Confidential Coen Aff. Exs. 17, 18, 19, 20; *see also* Ruiz Tr. 27:25-30:5 (Confidential Coen Aff. Ex. 4); Perezalonso Tr. 27:20-28:1 (Confidential Coen Aff. Ex. 9); Handelsman Tr. 46:4-47:9 (Confidential Coen Aff. Ex. 3).

71 Handelsman Tr. 44:9-15 ("Q. Who proposed that Goldman Sachs be interviewed as a possible financial advisor to the committee? A. I think it was a consensus. We sat down and thought about who were the bulge bracket investment banks and picked a number of them to interview and then interviewed them.") (Confidential Coen Aff. Ex. 3); *see also* Perezalonso Tr. 24:5-14 ("Q. Do you recall who recommended Goldman Sachs to the Special Committee? A. I don't think anyone recommended Goldman.") (Confidential Coen Aff. Ex. 9).

72 *See* Confidential Coen Aff. Exs. 17-20.

JPMorgan Chase was ruled out because it was determined that it had a conflict of interest.[73] There is no evidence whatsoever that Grupo Mexico had any influence over the Special Committee's selection of Goldman Sachs or rejection of other candidates. Moreover, there is no evidence that the results of the Special Committee's process would have been any different with different advisors. For example, at least two of the advisors the Special Committee considered advocated using a relative valuation methodology similar to what Goldman Sachs used.[74]

(ii) The Choice of Anderson & Schwab Was Not Influenced By Grupo Mexico

Plaintiff's argument, raised for the first time in his summary judgment brief, that A&S's engagement was somehow inappropriate because A&S's engagement letter was executed by SPCC's president instead of a member of the Special Committee is also without merit.[75] Plaintiff does not and cannot point to a single piece of evidence that A&S's advice was somehow influenced by SPCC signing the engagement letter. The Special Committee and Goldman Sachs decided to retain A&S and that decision was in no way influenced by SPCC's president or Grupo Mexico.[76] And the record makes clear that A&S was fully independent and challenged management's estimates relating to Minera at all times.[77]

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73 *See* Handelsman Tr. 65:4-12 (Confidential Coen Aff. Ex. 3); Perezalonso Tr. 23:8-17 (Confidential Coen Aff. Ex. 9).

74 *See* Confidential Coen Aff. Ex. 19 at SP COMM 003197; Confidential Coen Aff. Ex. 20 at SP COMM 003022; 3027-28.

75 Pl. Ans. Br. at 33.

76 *See, e.g.,* Ruiz Tr. 27:18-24 (Confidential Coen Aff. Ex. 4). Moreover, the Special Committee considered more than one mining consultant before engaging A&S. *See* Confidential Coen Aff. Exs. 22 & 28.

77 *See, e.g.*, PX 44 at SP COMM 003338; 003374.

(iii) Latham & Watkins Was Not Conflicted

Similarly, Plaintiff's contention that the "Special Committee's selection of Latham as its legal counsel was [ ] dubious" because of its relationship with the Pritzker interests is baseless.[78] There is no evidence that Latham's prior dealings with the Pritzkers impeded Latham's ability to provide sound legal advice to the Special Committee or deprived the Special Committee of knowledgeable or independent counsel. Moreover, the fact that Mr. Handelsman (an experienced M&A attorney) recommended Latham and two other well known and reputable law firms for the Special Committee to consider does not create a conflict of interest.

(iv) SPCC's Stockholders Were Informed

Plaintiff does not dispute that the holders of a majority of SPCC's minority shares voted in favor of the Merger, nor can he. Instead, Plaintiff argues that the Proxy was materially misleading because it purportedly failed to disclose the value of Minera, SPCC or the implied value of SPCC common stock that was used as consideration in the Merger.[79] This argument fails for two reasons. *First,* Plaintiff's failure to timely allege disclosure claims precludes any such arguments now.[80] *Second*, Plaintiff conceded in his summary judgment briefing that what he claims should have been disclosed to shareholders was in fact disclosed.[81]

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78 Pl. Ans. Br. at 35.

79 *See* Pl. Ans. Br. at 24.

80 Summ. J. Hr'g Tr. at 118 (Dec. 21, 2010) ("I'm not opening up the door for Mr. Brown to invent other disclosure claims") (Exhibit 2 hereto); *see also In re Transkaryotic Therapies, Inc*., 954 A.2d 346, 356-63 (Del. Ch. 2008).

81 Plaintiff conceded that "a reasonable stockholder" would be "capable of deriving" the equity values of Minera and SPCC based on the information provided in the Proxy statement. *See* Pl. Ans. Br. at 24.

C. Plaintiff Cannot Establish That SPCC Paid An Unfair Price

Plaintiff's inability to show that the Special Committee's process of evaluating and recommending the Merger was unfair undercuts his claim that the price was unfair. In short, because the Merger was negotiated at arm's length, Plaintiff will not be able to prove that the financial terms of the Merger were unfair to SPCC's minority stockholders.[82] The Special Committee followed a well-established process in which it retained highly qualified financial, mining, and legal advisors and relied on those advisors as permitted by Section 141(e) of the Delaware General Corporation Law in determining whether the Merger was in the best interest of SPCC and its minority stockholders and whether to recommend the Merger to SPCC's board of directors.[83]

Plaintiff's argument that the Merger consideration was unfair started as an attack on the Special Committee's choice of methodology (*i.e.*, a relative valuation) to assess the fairness of the proposed Merger. Plaintiff argued that Minera's value should have been compared to SPCC's market capitalization. But at the summary judgment hearing, Plaintiff's argument morphed into an argument that, irrespective of the methodology the Special Committee ultimately used, the Defendants breached their fiduciary duties by failing to conduct a stand-

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[82] *See Hallmark*, 2011 WL 863007 *16 ("A strong record of fair dealing can influence the fair price inquiry, reinforcing the unitary nature of the entire fairness test.'") (citing *Reis v. Hazelett Strip-Casting Corp.,* 2011 WL 303207, at *17 (Del. Ch. Jan 21, 2011)); *id.* ("[T]he Special Committee's process, its demonstrated independence and arm's length negotiations, the advice it received from its financial advisors, and the result it achieved all lend support to the conclusions that the [transaction] was entirely fair.").

[83] *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1175 (Del. 1995) (recognizing that lower court properly considered a board's reliance on experienced advisors as evidence of a fair process); *see also The Walt Disney Co. Deriv. Litig.*, 907 A.2d 693 (Del. Ch. 2005).

alone valuation of Minera. Neither argument is supported by Delaware law or the facts of this case. The evidence will show that the Special Committee closely examined SPCC and Minera, focusing on what drove their values, and properly considered the Merger before recommending it to SPCC's board of directors.

1. Delaware Law And The Facts Of The Case Support The Determination That The Merger Price Was Fair

Under Delaware law, value can be determined "by any techniques or methods which are generally considered acceptable in the financial community."[84] In determining fair price "[a]ll relevant economic factors of the proposed merger, such as asset value, market value, earnings, future prospects, and any other elements that affect the inherent or intrinsic value of a company's stock" should be considered.[85] Consistent with these principles, the Special Committee and its financial, mining and legal advisors spent eight months evaluating and analyzing the fairness of the evolving terms of the proposed Merger.

During the course of its evaluation of the Merger, Goldman Sachs presented the Special Committee with various valuation analyses based on the information it gathered from the extensive due diligence it conducted in conjunction with A&S. In fact, one of the first analyses Goldman Sachs conducted was a stand-alone discounted cash flow analysis for Minera using Minera's management projections, adjusted projections based on A&S's due diligence of Minera, and a range of sensitivities for long-term copper prices, discount rates and ore milled.[86] The results of this preliminary analysis suggested that Minera's value might be lower than the

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84 *Weinberger v. UOP*, 457 A.2d 701, 712-13 (Del. 1983).

85 *Gesoff v. IIC Indus. Inc.,* 902 A.2d 1130, 1152 n.127 (Del. Ch. 2006) (quoting *Rosenblatt v. Getty Oil*, 493 A.2d 929 (Del. 1985)).

86 *See* PX 44.

value Grupo Mexico ascribed to it. As a result of this analysis, the Special Committee engaged in extensive negotiations with Grupo Mexico concerning the terms of the Merger (for which it achieved significant concessions)[87] and the Special Committee's advisors engaged in extensive discussions with UBS concerning Minera's valuation. The Special Committee's advisors also continued their due diligence and refined their analyses by probing and challenging the management representations regarding both companies' assets[88] and running analyses using different assumptions and methodologies.[89] The effect of this preliminary analysis of Minera is fully disclosed in the Proxy:

> Following discussion [of Goldman Sachs' June 11, 2004 Presentation], the members of the special committee agreed that representatives of the special committee should meet with Mr. Larrea and inform him that the special committee had received a preliminary report from its advisors and that there were substantial differences between the views of the special committee and Grupo Mexico regarding Grupo Mexico's term sheet. The parties agreed to ask their respective financial advisors to meet and discuss the respective views of the special committee and Grupo Mexico with regard to the appropriate valuation of Minera Mexico. . . . Throughout June and July, representatives of Goldman Sachs spoke with representatives of UBS on numerous occasions to discuss the respective views of the special committee and Grupo Mexico with respect to valuation issues . . . Also during this period, from time to time Mr. Ruiz and other members of the special

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87 *See supra* pp. 19-20.

88 Indeed, A&S believed that management's representations relating to Minera's assets should be adjusted and proposed using varied assumptions which Goldman Sachs incorporated into its analyses and presentations to the Special Committee. *See, e.g.*, PX 44. Critically, Plaintiff does not challenge in any way the assumptions the Special Committee ultimately used and in fact adopted those assumptions.

89 The Special Committee also paid close attention to differences in its views regarding SPCC and what the markets seemed to be taking into consideration, at some points noting that analysts, for example, did not seem to be recognizing that SPCC's ore grades were expected to decrease over time, which the Special Committee recognized meant that the analysts' views regarding the value of SPCC were less accurate. *See, e.g.*, Palomino Tr. 128:15-129:21 (Confidential Coen Aff. Ex. 2).

> committee spoke with Mr. Larrea about the respective views of the special committee and Grupo Mexico with respect to the valuations of Minera Mexico and [SPCC].[90]

After months of discussions and analysis, Goldman Sachs and the Special Committee ultimately concluded that the most appropriate way to assess the fairness of the proposed Merger was to compare SPCC and Minera on a relative basis. The evidence will show that among the chief reasons the Special Committee used a relative valuation was that it allowed SPCC and Minera to be compared using the same set of assumptions. This approach provided a more consistent and reliable estimate of each company's value. For example, a relative valuation mitigated the inherent uncertainties involved in trying to value each company's reserves and predict long-term metal prices, such as copper. Plaintiff does not dispute that Minera's copper reserves were larger and longer-lived than SPCC's and that increases in the price of copper would have a greater impact on the value of Minera than SPCC. By using the same assumptions, if the price of copper, for example, fluctuated the relative value of the companies could still be reasonably estimated.

Plaintiff's own authority establishes that a relative valuation is a generally accepted methodology in the financial community and is recognized as appropriate by Delaware courts.[91] In addition, not only did Prof. Schwartz confirm that the methodology the Special

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[90] Proxy at 20-21 (Public Coen Aff. Ex. D).

[91] *See Associated Imports, Inc. v. ASG Industries, Inc*., 1984 WL 19833, at 15 (Del. Ch. June 20, 1984) *aff'd sub nom. Hubbard v. Associated Imports*, 497 A.2d 787 (Del. 1985) (noting that a relative valuation, among other methodologies, is generally accepted in the financial community); *see also* Jason A. Pedersen, THE WALL STREET PRIMER: THE PLAYERS, DEALS AND MECHANICS OF THE U.S. SECURITIES MARKET, 177 (2009) ("Along similar lines, fairness opinion books for stock-based transactions also include 'contribution' analyses. These compare the percentage of the stock the seller receives in the combined company to the financial contribution that the seller's business will make to

Footnote continued...

Committee used was appropriate and was in fact the precise methodology he would have used, but JPMorgan and Merrill Lynch, two of the other investment banks that the Special Committee interviewed and considered retaining, advocated performing a relative valuation similar to what Goldman Sachs and the Special Committee ultimately did.[92] JPMorgan Chase specifically noted that "methodologies need to be applied consistently across MM and SPCC."[93]

The evidence will show that the Special Committee could and did reasonably conclude that the equity value of Minera was close to or even greater than the equity value of SPCC.

2. The Special Committee Relied On Its Advisors As Permitted By Section 141(e) Of The Delaware General Corporation Law

The evidence also will show that the Special Committee worked closely with its advisors and placed considerable reliance on their advice concerning the fairness of the financial terms of the proposed Merger in determining whether to recommend the Merger to SPCC's board of directors. Delaware law is clear that a board's reliance on expert advice not only "evidence[s] good faith in the overall fairness of the process"[94] but can protect a board from challenges that it breached its duty of care.[95]

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the combined company's operations."); Kevin K. Boeh, Paul W. Beamish, MERGERS AND ACQUISITIONS: TEXT AND CASES 101-102 (Paul W. Beamish, 1st ed. 2007) (describing contribution analysis methodology).

92 Confidential Coen Aff. Ex. 20 at SP COMM 003022; 3027-28; Confidential Coen Aff. Ex. 19 at SP COMM 003197.

93 *See* Confidential Coen Aff. Ex. 20 at SP COMM 003027.

94 8 Del. C. § 141(e); *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1142 (Del. Ch. 1994), *aff'd* 663 A.2d 1156 (Del. Ch. 1995).

95 *See* 8 Del. C. § 141(e).

To overcome the protections of Section 141(e), a plaintiff must establish that the reliance was unreasonable. To do that a plaintiff must show that (i) the board did not rely on its advisors; (ii) such reliance was not in good faith; (iii) the board did not believe the advisors' advice was within their professional competence; (iv) the board's advisors were not selected with reasonable care; (v) the omitted information the board should have considered was so obvious and reasonably available that it was gross negligence for the board to fail to consider it; or (vi) the board's decision was so unconscionable as to constitute waste or fraud.[96] The record will show that the Special Committee was provided with expert advice from reputable advisors and relied on that advice in assessing the fairness of the Merger. Plaintiff does not dispute that the Special Committee's advisors were independent and qualified and there is no evidence that the Special Committee's advisors failed to provide the Special Committee with any information.

3. The Special Committee Did Conduct A "Stand-Alone" Valuation of Minera

Plaintiff argues, albeit only for the first time at the summary judgment hearing, that the Special Committee breached its duty of care by failing to conduct a "stand-alone" valuation of Minera. As demonstrated above, this is not true. One of the first analyses Goldman Sachs presented to the Special Committee was a stand-alone DCF analysis of Minera.[97] Plaintiff admits this fact.[98] Although the DCF analysis presented a range of values based on different

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96 *See Selectica, Inc. v. Versata Enterprises, Inc.*, 2011 WL 703062, at *17 (Del. Ch. Feb. 26, 2010).

97 *See* PX 44 at SP COMM 003375-76.

98 Pl. S.J. Br. at 14-16 ("In the June 11 Presentation, Goldman presents results from its preliminary discounted cash flow analysis for Minera. Goldman performs sensitivities for both long-term copper prices and discount rates. Goldman presents its results using Minera's management's projections, as well as those projections as adjusted by A&S.").

assumptions, Goldman Sachs' preliminary stand-alone valuation of Minera was generally lower than the value Grupo Mexico ascribed to Minera. Consequently, the Special Committee and its advisors engaged in extensive due diligence and analyses as well as negotiations with Grupo Mexico and UBS. This process led the Special Committee to determine that the most appropriate way of valuing these two mining companies in this proposed stock-for-stock merger was by comparing the companies on a relative basis.[99]

4. SPCC's Market Capitalization Is Not Determinative Of The Fairness Of The Merger Price

Because value can be determined "by any techniques or methods which are generally considered acceptable in the financial community,"[100] "[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."[101] Indeed, the Delaware Supreme Court, in *Smith v. Van Gorkom*, noted that it is inappropriate to rely on a company's market price when the board has reason to believe that the market consistently misvalues the company's stock.[102] Rather, directors can and should rely on "other competent and sound valuation information that reflects the value of the particular business."[103] This is

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99 Proxy at 20-21 (Public Coen Aff. Ex. D).

100 *Weinberger v. UOP*, 457 A.2d 701, 712-13 (Del. 1983).

101 *Paramount Commc'ns, Inc. v. Time Inc*., 571 A.2d 1140, 1150 n.12 (Del. 1990). Plaintiff's own expert conceded that "someone can have an opinion of value that is different than the publicly traded stock price." Beaulne Tr. 219:10-12 (Confidential Coen Aff. Ex. 6).

102 *See Smith v. Van Gorkom*, 488 A.2d 858, 875-76 (Del. 1985).

103 *See id*. at 876-77; *see also In re Emerging Commc'ns, Inc. S'holders Litig*., 2004 WL 1305745, at *23 (Del. Ch. June 4, 2004) ("the market price of shares is not always indicative of fair value") (citing *Cede & Co. v. Technicolor, Inc*., 684 A.2d 289 (Del. 1996)); *see also Gesoff v. IIC Indus. Inc*., 902 A.2d 1130, 1152 n.127 (Del. Ch. 2006)

Footnote continued…

exactly what the Special Committee and its advisors did. The Special Committee's decision to compare SPCC and Minera on a relative basis in assessing the fairness of the Merger was appropriate under the facts and controlling law.

Plaintiff's argument that a public company's value can only be measured by its market price cannot be squared with controlling Delaware law. Nor can Plaintiff's argument be squared with his own admission that SPCC's intrinsic value is not reflected in its stock price and that the Special Committee should not have relied on it. In the Complaint, Plaintiff alleges that "SPCC (and its special committee and board) made the *mistake* of relying solely on the market price of SPCC stock as of the signing of the merger agreement to determine the intrinsic value of SPCC. The intrinsic value of SPCC was much higher than that reflected in its market price."[104] The only mistake that was made was by Beaulne who, unlike the Special Committee, blindly relied on SPCC's market price. Beaulne did not conduct any analysis of the value of SPCC and admitted that neither he nor anyone else could possibly know the meaning of SPCC's stock price or the reasons that it traded at a particular level.[105]

(quoting *Rosenblatt v. Getty Oil*, 493 A.2d 929 (Del. 1985) ("'all relevant economic factors of the proposed merger, such as asset value, market value, earnings, future prospects, and any other elements that affect the inherent or intrinsic value of a company's stock.'). Similarly, this Court has noted that markets can and do overvalue stocks. *See Finkelstein v. Liberty Digital, Inc.*, 2005 WL 1074364, at *12 & n.20 (Del. Ch. Apr. 25, 2005). The undisputed fact that markets misvalue stocks is one reason Plaintiff's argument that a market price is the beginning and end of a valuation analysis is a non-starter.

104 Complaint ¶ 59 (emphasis added). That was an admission by Plaintiff. *See Merritt v. United Parcel Service*, 956 A.2d 1196, 1201 (Del. 2008) ("Voluntary and knowing concessions of facts made by a party during judicial proceedings (e.g., statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions, counsel's statements to the court) are termed 'judicial admissions'.")

105 Beaulne Tr. 109:17-23 ("no one can point to exactly what is impacting the price of a

Footnote continued...

Accepting Plaintiff's argument would mean that directors must compare a DCF valuation of a private company based on known assumptions to a valuation of a public company that is—in the view of Plaintiff's expert—a pure unknown. Plaintiff cites no authority for such a result, nor are the AMC Defendants aware of any support for it. The primary case Plaintiff relies upon, *Associated*, did not hold that use of relative valuation was inappropriate — in fact, the court stated that all of the methodologies proposed in that case (which included a relative valuation) were generally acceptable within the financial community.[106]

Here, the record leaves no doubt that the Special Committee could and did reasonably conclude that the equity value of Minera was close to or even greater than the equity value of SPCC.

a. **SPCC's Stock Price Was Not Hidden From The Special Committee**

Plaintiff also argues that the relative valuation hid SPCC's stock price from the Special Committee. Plaintiff argues that Goldman Sachs did not disclose to the Special

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stock because it's traded on the market. And no one knows exactly what people are doing when they're trading the stocks with all the factors that they're considering when they're making the trades of a stock") (Confidential Coen Aff. Ex. 6); *id.* at 116:6-8 ("I'm not sure what assumptions market participants are doing when they're buying and selling shares.").

[106] *Associated*, 1984 WL 19833, at *14 ("[M]ethodology, at least as an art form, is not a controlling factor. . . . 'proof of value includes any techniques or methods which are generally acceptable in the financial community and otherwise admissible in court. Each of the methodologies falls within that broad language."). As the decision makes clear, the Court rejected all the opinions offered at trial, and it primarily rejected the relative valuation opinion because the structure of the transaction did not match it. *See id.* at *14 n.8. There is no such issue here. And *Associated* concluded that using the market price was "*an* appropriate and fair standard of value," *id.* at *15 (emphasis added), not "*the* appropriate and fair standard of value." As noted above, later cases make clear that market price is not the exclusive standard of value.

Committee that its DCF value of SPCC was below SPCC's market capitalization or what the implied per share value of SPCC was in determining the number of shares to be exchanged in the proposed Merger. Plaintiff's argument is not only false, it misses the point of a relative valuation. The record will show that the Special Committee was well aware of SPCC's stock price during its evaluation of the Merger[107] and the fact that Goldman Sachs' DCF analysis of SPCC generated values that were below SPCC's observed market value under certain assumptions.[108] The Special Committee also understood, however, that SPCC's market price was not key to evaluating Minera and SPCC on a relative basis.[109] The purpose of the relative valuation was to ascertain the fundamental value of each company using the same set of assumptions. The per share market price of SPCC was not a direct input in this analysis.

The only relationship that matters in a relative valuation is the one between Minera and SPCC using the *same set of assumptions*. Comparing SPCC's value based on its market price to the value of Minera based on a DCF analysis is irrelevant. This is because the assumptions underlying Minera's valuation would not necessarily be the same as those used by the market in pricing SPCC stock. If Minera was publicly traded (which it was not), such a comparison could makes sense. But, when a DCF valuation of SPCC is calibrated to match

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107 The majority of Goldman Sachs' presentation expressly discussed SPCC's stock price. *See e.g.*, PX 44 at SP COMM 003354; 003382; PX 48 at SP COMM 006865; 006899; PX 46 at SP COMM 006966; PX 67 at SP COMM 003727.

108 *See, e.g.*, Palomino Tr. 189:14-193:20 (Confidential Coen Aff. Ex. 2); Ruiz Tr. 207:7-16 (Confidential Coen Aff. Ex. 4); Handelsman Tr. 143:11-15 (Confidential Coen Aff. Ex. 3).

109 *See, e.g.*, Palomino Tr. 189:14-193:20 (Confidential Coen Aff. Ex. 2).

SPCC's market capitalization, the results confirm that the Merger was more than fair for SPCC shareholders.[110]

5. The Market Thought The Merger Price Was Fair

The economic fairness of the Merger was confirmed by the market. The market reactions at various relevant times confirmed that (i) the market initially treated the proposed Merger like most stock-for-stock mergers when information about it began to enter the market but (ii) reacted positively when additional information became available. As this Court has noted, the stock price of an acquiring company generally drops when it announces that it intends to merge with another company.[111] Here, SPCC's stock price declined around the time the proposed Merger was first announced and when the Merger Agreement was announced just over eight months later.[112] But for the two days after the Proxy was released on February 25, 2005 — the first time SPCC and Minera's financials were presented together — SPCC's stock price increased.[113] There are only two possible interpretations of that: Either Plaintiff's focus on "the market" is wrong (in which case Plaintiff has offered no evidence that the Merger was unfair) or "the market" determined that the Merger was fair.

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110 *See* Schwartz Report ¶¶ 47-51.

111 *See Global GT LP v. Golden Telecom, Inc.*, 2010 WL 1663987 at *22 (Del. Ch. Apr. 23, 2010); *see also* Matthew Tagliani, THE PRACTICAL GUIDE TO WALL STREET, EQUITIES AND DERIVATIVES, 62, (John Miley and Sons 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 … ."). Beaulne is not knowledgeable about this issue and did not take such effects into consideration in his report. *See* Beaulne Tr. 121:11-122:4 (Confidential Coen Aff. Ex. 6).

112 *See* Exhibit 4 hereto.

113 *See id.*

6. Prof. Schwartz Confirmed The Merger Price Was Fair

Prof. Schwartz's analysis also confirms that the Merger price was fair. At trial, Prof. Schwartz will explain that the methodology the Special Committee used to assess the fairness of the Merger and determine the number of shares to be exchanged in the Merger was appropriate. Prof. Schwartz will explain that the most reliable way to compare the value of SPCC and Minera for purposes of the Merger was to conduct a relative valuation of SPCC and Minera's assets using the same assumptions and methodologies for both companies, like the Special Committee did. Given the difficulty of valuing each company's reserves due to the uncertainty of long-term copper prices, a relative valuation reduced the impact of these uncertainties in the inputs on the ultimate conclusion. Prof. Schwartz will show that, based on relative valuations of Minera and SPCC using a reasonable range of copper prices (*i.e.*, $.90/pound to $1.30/pound), including the copper price relied on by Beaulne, the results uniformly show that the Merger was fair to SPCC and its stockholders.

7. Beaulne's Opinions Are Unreliable

Beaulne's opinions are flawed and unreliable. As discussed above, comparing the equity value of Minera derived from a DCF valuation against the observed market value of SPCC is akin to comparing an apple to an orange. The values of SPCC and Minera that Beaulne generates are based on entirely different assumptions (indeed, according to Beaulne the market price of SPCC has no meaning at all). The incongruity of Beaulne's methodology is demonstrated by the fact that it assigns an astonishing low value to the assets that make up more than half of the reserves of the merged company.

a. Beaulne's DCF Assumptions Differ From Market Expectations

As Prof. Schwartz will explain at trial, at least one or more of the assumptions Beaulne used to value Minera are inconsistent with market expectations relating to SPCC. Had Beaulne applied consistent assumptions to a DCF valuation of SPCC he would have found that SPCC's implied value would be lower than its observed market price (*i.e.*, his methodology suffers from the same criticism he has of Goldman Sachs' analysis). To match SPCC's DCF value with its observed market price, Beaulne would have had to use (i) an unreasonably low discount rate or (ii) a long-term copper price of $1.25 per pound.[114] This suggests that SPCC's stock price was based on a long-term price of copper that was greater than the $.90 per pound assumption that was being used to value Minera. However, if a long-term copper price of $1.25 is used, SPCC would have paid 80.3 million shares for Minera rather than the 67.2 million it actually paid, thus confirming that the Merger was fair.[115]

b. Beaulne Ignores The Correlation Between The Value Of SPCC And Minera

The unreliability of Beaulne's analyses is also apparent with respect to the computation of the implied number of shares to be issued. As Prof. Schwartz will show at trial, under reasonable copper price inputs, the resulting range in the implied number of shares to be issued under Beaulne's methodology is far wider than that the resulting range using a relative valuation – *i.e.*, 36.8 to 80.4 million shares as compared to 67.6 to 80.6 million shares under Prof. Schwartz's methodology.[116]

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114 Schwartz Report ¶¶ 47-51 (Montejo Aff. Ex. 7).

115 *Id.* ¶ 50.

116 *Id.* ¶¶ 52-54.

c. Beaulne's "Market Approach" Is Based On Inadequate Comparables

In support of his opinion that Minera's fair market value was $1.9 billion, Beaulne conducted a "market approach" or multiples analysis. As Prof. Schwartz will show at trial, Beaulne's selection of comparable companies, among other things, undermines his analysis. All but one of the companies Beaulne selected are significantly related to Minera. Therefore, the multiples of these companies depend, in part, on the value of Minera – which Plaintiff disputes. In addition, Beaulne provides no justification for the companies he selected.[117]

II. PLAINTIFF IS AN INADEQUATE FIDUCIARY REPRESENTATIVE

Plaintiff's claims also fail because they cannot be squared with his utter lack of understanding or familiarity with the allegations asserted in the Complaint or his lack of interest in pursuing this case. Plaintiff has no personal knowledge about anything relevant to the case. He has no idea why his father bought or sold SPCC stock or why (former) Plaintiff Sousa voted for the Merger. More importantly, he does not even know whether he agrees with the allegations in the Complaint. Plaintiff has simply lent his name to this lawsuit and abdicated all control to his counsel.[118] Any contention that this case is being maintained for the benefit of SPCC shareholders is belied by Plaintiff's own inaction and lack of participation.

CONCLUSION

For the reasons set forth herein, the AMC Defendants respectfully request that the Court enter judgment in favor of the AMC Defendants and dismiss this case with prejudice.

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117 *Id.* ¶¶ 60-68.

118 Theriault Tr. 69:9-11; 92:23-93:12; 99:15-100:21; 102:16-23; 99:15-100:21; *see also* Pl. Ans. Br. 37-38 (arguing that Plaintiff is entitled to rely on his counsel). Plaintiff did not even know that he was represented by three law firms. *See* Theriault Tr. 21:1-5; 59:5-60:25.

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2011, I electronically filed and caused to be served by LexisNexis File and Serve a copy of the foregoing **AMC DEFENDANTS' PRETRIAL BRIEF** on the following counsel of record:

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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
	)	
	)	**CONFIDENTIAL - FILED UNDER SEAL**

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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 **CONFIDENTIAL - FILED UNDER SEAL**

PLAINTIFF'S PRE-TRIAL OPENING BRIEF

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Dated: May 12, 2011

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NATURE AND STATE OF THE PROCEEDINGS

This is a consolidated derivative action on behalf of Southern Copper Corporation ("Southern" or the "Company") and its minority public stockholders seeking a remedy for breaches of fiduciary duty in connection with Southern's acquisition of Minera Mexico, S.A. de C.V. ("Minera") from Americas Mining Corporation ("AMC"), a subsidiary of Grupo Mexico, S.A.B. de C.V. ("Grupo"). Pursuant to the terms of an Agreement and Plan of Merger dated October 21, 2004, Southern issued AMC 67.2 million shares of Southern common stock in exchange for AMC's 99.15% equity interest in Minera (the "Transaction"). The Transaction closed on April 1, 2005.

Three actions were filed challenging the Transaction,[1] and were consolidated for all purposes by order of the Court. The complaint filed in Civil Action No. 961-N was designated as the operative complaint (the "Complaint").[2] On March 14, 2005, the defendants answered the Complaint. Thereafter, the parties engaged in extensive fact and third-party discovery, which concluded on March 1, 2010. Plaintiff produced its expert report on March 16, 2010. Defendants produced their expert rebuttal report on April 23, 2010. Expert depositions concluded on June 16, 2010.

On June 30, 2010, plaintiff moved for partial summary judgment. On August 10, 2010, the AMC Defendants[3] cross-moved for summary judgment, or in the alternative, for a

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[1] The three actions are Lemon Bay, LLP v. Americas Mining Corporation, et al., Civil Action No. 961-N (December 30, 2004), Sousa v. Southern Peru Copper Corporation, et al., Civil Action No. 978-N (January 7, 2005), and Theriault Trust v. Luis Palomino Bonilla, et al., Civil Action No. 969-N (January 6, 2005).

[2] The Complaint is cited to herein as Compl. ¶___.

[3] The "AMC Defendants" are German Larrea Mota-Velasco ("German Larrea"), Genaro Larrea Mota-Velasco ("Genaro Larrea"), Oscar González Rocha ("Gonzalez"), Emilio Carrillo Gamboa ("Carrillo"), Jaime Fernando Collazo Gonzalez ("Collazo"), Xavier García de Quevedo Topete ("Xavier Garcia"), Armando Ortega Gómez ("Ortega"), and Juan Rebolledo Gout ("Rebolledo").

determination that plaintiff bears the burden of proof as to the entire fairness of the Transaction. The Special Committee Defendants[4] cross-moved for summary judgment on all claims on August 11, 2010.

Argument on the motions and cross-motions for partial and full summary judgment was held December 21, 2010. The Court denied plaintiff's motion and the AMC Defendants' motion, but granted the Special Committee Defendants' motion. The AMC Defendants are therefore the only remaining defendants and have the initial burden at trial to demonstrate the entire fairness of the Transaction. A five day trial is scheduled to begin June 20, 2011. This is plaintiff's opening pre-trial brief.

[4] The "Special Committee Defendants" are Carlos Ruiz Sacristan ("Ruiz"), Harold S. Handelsman ("Handelsman"), Gilberto Perezalonso Cifuentes ("Perezalonso"), and Luis Miguel Palomino Bonilla ("Palomino").

PRELIMINARY STATEMENT

This case turns on simple concepts. Grupo, Southern's controlling stockholder, was issued common stock of Southern, a publicly traded New York Stock Exchange company, that had an identifiable value in the real world of $3.1 billion on the date Southern's Board of Diretors (the "Board") approved the Transaction. However, there is no evidence that what Southern received in return from Grupo was worth anything close to $3.1 billion. Defendants instead contend that the Court must ignore the actual value of the stock that Southern paid its controlling shareholder and instead adopt a discounted cash flow ("DCF") valuation of Southern that values Southern's equity a fraction of its actual market price. Plaintiff submits that this position is preposterous.

Put simply, the benefit that Southern's controlling stockholder derived from this conflicted transaction was common stock with an actual market value of $3.1 billion. To pass the entire fairness test, there must be evidence to establish that what Southern received in return for issuing $3.1 billion of stock was worth at least $3.1 billion. There is no such evidence.

To the contrary, the record reveals that the Special Committee (as defined below) charged with protecting the best interest of the Company and its minority stockholders worked and reworked its analyses of and approach to the acquisition to rationalize a $3.1 billion valuation for Minera, rather than negotiate a fair price. Indeed, the Special Committee ultimately agreed to terms that caused Southern to pay $600 million more for Minera than Grupo had proposed. However, when presenting the Transaction in the Proxy (as defined below) to the shareholders and in road-show presentations to the market at large, none of the underlying valuations relied on by the Special Committee were disclosed. Instead, shareholders and the market were misled to believe Minera was being valued at a much lower multiple than what the Special Committee and its advisor actually used. Both in terms of price and process, the Transaction was wildly unfair.

Plaintiff's expert opines that Southern paid at least 24.7 million shares in excess of Minera's fair value. After two stock splits, Grupo (through AMC) today holds approximately 148.2 million Southern common shares derived from Southern's overpayment in the Transaction. Based on Southern's May 11, 2011 closing price of $34.89 per share, the market value of these shares is approximately $5.17 billion. As a remedy for defendants' wrongful conduct, plaintiff seeks to have these shares canceled or returned to the Company. In the alternative, plaintiff seeks damages in an amount equal to their market price. Plaintiff also seeks damages in the amount of approximately $1.5 billion for dividends paid on these shares. Plaintiff will demonstrate at trial that there is no evidence of fair price and no evidence of fair dealing, and accordingly, that judgment should be entered in its favor.

FACTUAL AND PROCEDURAL BACKGROUND[5]

I. THE PARTIES

A. Grupo, Southern, and Minera

Grupo is a Mexican holding company listed on the Mexican stock exchange.[6] The Larrea family controls a majority of the capital stock of Grupo, which is, and during the relevant period was, the controlling stockholder of both Southern and Minera.[7] At all relevant times German Larrea has served as the Chairman and CEO of Grupo.[8] German Larrea inherited his position from his father, Jorge Larrea, who founded Grupo in the 1960s,[9] and has served as the figurehead of his family company and fortune since 1994.[10] The Larrea fortune is currently estimated at $16 billion, making German Larrea the second richest man in Mexico.[11]

Southern is a Delaware corporation.[12] Until October 11, 2005, Southern was known as Southern Peru Copper Corporation. Southern's common stock currently trades on the New York Stock Exchange under the symbol "SCCO." Grupo currently owns 80.00% of Southern common

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[5] The following individuals were deposed in connection with this action: Harold Handelsman (September 2, 2009, Chicago, Illinois; cited to herein as "Handelsman"); Xavier Garcia de Quevedo (September 30, 2009, Mexico City, Mexico; cited to herein as "Garcia"); Armando Ortega Gomez (October 1, 2009, Mexico City, Mexico); Carlos Ruiz Sacristan (October 2, 2009, Mexico City, Mexico; cited to herein as "Ruiz"); Martin Sanchez (October 21, 2009, New York, New York; cited to herein as "Sanchez"); Thomas Parker (October 23, 2009, Kalispell, Montana; cited to herein as "Parker"); Oscar Gonzalez Rocha (November 4, 2009, Lima, Peru; cited to herein as "Gonzalez"); Miguel Palomino Bonilla (November 5, 2009, Lima, Peru; cited to herein as "Palomino"); German Larrea Mota-Velasco (February 24, 2010, Mexico City, Mexico; cited to herein as "Larrea"); and Gilberto Perezalonso Cifuentes (February 25, 2010, Mexico City, Mexico; cited to herein as "Perezalonso").

The transcripts of these depositions have been lodged with the Court. Documents from the record cited to herein are attached to the Transmittal Affidavit of Marcus E. Montejo ("Montejo Aff.").

[6] Larrea at 13:18-19.

[7] Montejo Aff. Ex. 1 at 63-66.

[8] Montejo Aff. Ex. 2 at 4; Larrea 12:2-3.

[9] Larrea 13:16-14:6.

[10] Id. at 14:19-21.

[11] Montejo Aff. Ex. 3.

[12] Montejo Aff. Ex. 1 at 1.

stock through AMC.[13] Prior to April 1, 2005, Grupo owned 54.17% of Southern's outstanding common stock, comprised of 43.3 million shares of Southern's class A common stock ("Class A Shares" or "Founders Shares"), which constituted approximately 65.78% of the outstanding Founders Shares and 63.08% of the aggregate Southern voting power.[14] The preferred rights of the Founders Shares included 5:1 super-voting rights and the ability to appoint directors to the Southern Board.[15]

Minera is a holding company organized under the laws of the United Mexican States.[16] Prior to the Transaction, Grupo owned approximately 99.15% of Minera.[17] As a result of the Transaction and subsequent stock acquisitions, Southern today owns approximately 99.95% of Minera.[18]

B. The Defendants and Related Parties

With the dismissal of the Special Committee Defendants at summary judgment, the remaining defendants are the AMC Defendants.[19] At the time the Transaction was approved, these defendants held 8 of 13 Board seats.[20]

Former Special Committee Defendant Ruiz was appointed to the Board by Grupo.[21] Messrs. Perezalonso and Palomino were nominated to the Board by Grupo, but voted to the

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[13] Montejo Aff. Ex. 4.

[14] Montejo Aff. Ex. 1 at 64.

[15] Montejo Aff. Ex. 5 at SPCOMM001562-98.

[16] Garcia 13:12-13; Montejo Aff. Ex. 1 at 1.

[17] Montejo Aff. Ex. 1 at 2.

[18] Montejo Aff. Ex. 6 at 5.

[19] Compl. ¶¶7-14.

[20] Id.

[21] Montejo Aff. Ex. 2 at 2.

Board by the Company's stockholders.[22] Handelsman was designated to the Board by Cerro Trading Company, Inc. ("Cerro"), which, along with Grupo and Phelps Dodge Corporation ("Phelps Dodge") was one of three holders of the Company's Founders Shares.[23] Handelsman had been employed by entities affiliated with the Chicago-based Pritzker family since 1978.[24] At the time Handelsman served on the Special Committee, the Pritzker family controlled Cerro.[25] Cerro sought to (and did) dispose of all of its Founders Shares through an underwritten offering supported by the Company in connection with the Transaction. Personally, Handelsman owned only 600 shares of Southern common stock.[26]

C. Cerro and Phelps Dodge

Cerro and Phelps Dodge had been shareholders of Southern since 1955. Prior to the close of the Transaction, Cerro and Phelps Dodge owned only Founders Shares. Cerro and its affiliates owned 11,378,088 Founders Shares, representing 14.2% of the Company's outstanding capital stock.[27] Phelps Dodge owned 11,173,796 Founders Shares, representing 13.95% of the Company's outstanding capital stock.[28] Both Cerro and Phelps Dodge sought throughout 2003 and 2004 to dispose of their Southern interests.[29] In exchange for voting in favor of the Transaction, Cerro and Phelps Dodge entered into registration rights agreements with Southern by which they sold their shares in an underwritten offering and reaped hundreds of millions of dollars in proceeds.

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[22] Id.

[23] Montejo Aff. Ex. 2 at 7.

[24] Handelsman 7:7-8.

[25] Id. at 8:17-25.

[26] Montejo Aff. Ex. 1 at 63.

[27] Id. at 64.

[28] Id.

[29] Montejo Aff. Exs. 7, 39, 40, 41 and 42.

II. BACKGROUND TO THE TRANSACTION

A. Grupo Coaxes Support for the Transaction

In May 2003, German Larrea met with representatives of Cerro to discuss Southern's acquisition of Minera.[30] Cerro understood that such a transaction would offer liquidity for its equity investment in Southern.[31] According to Handelsman, Cerro's minority position in Southern was "not common for the Pritzker interests" and "it would be their goal to try to liquify a valuable asset of that kind."[32] Indeed, Cerro's tax basis was only $1.32 per share.[33] Accordingly, liquidity at then-current trading prices would have been particularly lucrative for Cerro. German Larrea and Cerro discussed possible bankers for the Transaction and agreed they "felt comfortable" with Goldman Sachs & Co. ("Goldman") serving in this capacity.[34]

B. Grupo Prepares to Sell Minera to Southern

With Cerro's cooperation intact, Grupo prepared Minera for sale and planned for the best way to maximize Minera's value. Grupo restructured Minera's debt. Minera's then-present debt structure required Minera to make pre-payments if copper prices rose. By securing refinancing for its debt, Minera was able to reduce its debt cost and improve its free cash flow.[35] Grupo engaged two mining engineering firms, Winters, Dorsey & Company, LLC ("Winters") and Mintec Inc. ("Mintec"), to optimize Minera's life-of-mine plans and operations.[36] Grupo also engaged UBS Investment Bank ("UBS") to assist it in developing negotiating strategies to

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[30] Montejo Aff. Ex. 7.

[31] Id.

[32] Handelsman 18:25-19:7.

[33] Montejo Aff. Ex. 8.

[34] Id.

[35] Montejo Aff. Ex. 5 at SPCOMM001498.

[36] Id. at SPCOMM001497.

preempt likely "attacks" from Southern. Those strategies focused on, among other things, valuing Minera and Southern by "applying the same multiple to both companies."[37]

C. Grupo Proposes the Transaction to Southern

On February 3, 2004, German Larrea made a presentation to the Board proposing that Southern acquire Grupo's interest in Minera.[38] German Larrea's initial proposal valued Minera's equity at $3.050 billion and contemplated that Southern would acquire Minera from AMC (i.e., Grupo) in exchange for 72.3 million shares of Southern common stock valued at their market price.[39] That is, the number of shares to be issued by Southern was calculated by dividing Minera's proposed $3.050 billion equity value by Southern's January 29, 2004 share price of $42.20.[40] Grupo did not provide the basis for Minera's proposed equity value. As a result of the proposed Transaction, Minera would become a 98.84% (later revised to 99.15%) subsidiary of Southern.[41] Grupo's proposal also contemplated the conversion of all Founders Shares into common shares,[42] and Southern's continued listing on the NYSE.[43]

D. Southern Forms a Special Committee to Evaluate the Transaction

In response to German Larrea's February 3, 2004 proposal, the Board established a special committee of disinterested directors (the "Special Committee") on February 12, 2004 to evaluate the Transaction.[44] After an initial member of the Special Committee resigned and was

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[37] Montejo Aff. Ex. 9.

[38] Handelsman 21:24-25:8; Montejo Aff. Ex. 10.

[39] Id. Larrea's proposal assumed an enterprise value for Minera of $4.318 billion and net debt of $1.268 billion. Id.

[40] Montejo Aff. Ex. 10 at AMC0019912.

[41] Id.

[42] Id.; Montejo Aff. Ex. 11 at AMC0019894.

[43] Montejo Aff. Ex. 10 at AMC0019924.

[44] Handelsman at 22:15-21.

replaced, the Special Committee settled on its composition in March 2004.[45] During the shuffle, the Special Committee interviewed several investment bankers,[46] but consistent with what German Larrea and Cerro discussed months before, the Special Committee retained Goldman as its financial advisor.[47] The Special Committee also interviewed potential legal advisors, each recommended by Handelsman.[48] Latham & Watkins, LLP ("Latham"), however, who also represented the Pritzker interests and with whom Handelsman had the closest relationship,[49] began advising the Special Committee well before this beauty contest ended.[50]

E. The Special Committee Conducts Due Diligence

The Special Committee's advisors began conducting due diligence on Minera in April 2004.[51] As part of the Special Committee's diligence, Anderson & Schwab, Inc. ("A&S") was engaged to provide the Special Committee and Goldman with mining expertise. A&S tested the plans prepared by Winters and Mintec for reasonableness.[52] Upon A&S's critique of those plans, Mintec went back to work, and again revised and adjusted its analyses to produce an alternative life-of-mine plan ("Alternative 3") that on balance added approximately $166 million in

[45] Montejo Aff. Ex. 1 at 16-18.

[46] Montejo Aff. Ex. 13 at SPCOMM001484.

[47] Montejo Aff. Ex. 14.

[48] See, e.g., Montejo Aff. Ex. 15 (Latham being recommended by Handelsman); Handelsman 24:10-18; Perezalonso 29-30 (discussing that Handelsman recommended the Special Committee's legal counsel; no other Special Committee member recommended law firms to serve as the Special Committee's primary counsel).

[49] Handelsman 24:19-22; 30:11-12.

[50] Montejo Aff. Ex. 13.

[51] See Montejo Aff. Ex. 1 at 19 (Goldman and A&S meeting with Minera senior management); Montejo Aff. Ex. 16 (May 5, 2004 email from Charlie Smith to Thomas Parker advising "MM has grossly overstated the case for MM by inflating performance and extending reserves."); Montejo Aff. Ex. 17 at SPCOMM003438, 41 (discussing Minera due diligence items outstanding and April 16, 2004 Minera management presentation).

[52] Id. at SPCOMM003442.

projected EBITDA to Minera. In contrast, Southern's life-of-mine plans were only updated internally on an annual basis.[53] Outside consultants only certified Southern's plans.[54] No additional analyses were performed on Southern despite A&S advising the Special Committee that "[t]here is expansion potential" for Southern and its "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."[55]

F. Goldman Ignores Its Own Valuation Principles

Goldman testified that "[i]f you are buying a company, there is only one DCF value to do, which is the company that you are buying."[56] Goldman initially attempted for several months to calculate a stand-alone value of Minera, but was unable to value Minera at $3.1 billion. Goldman's final presentation to the Special Committee at the time it approved the Transaction does not contain a single valuation of Minera on a stand-alone basis. Instead, Goldman presented two alternative valuation methodologies to the Special Committee, each of which completely ignored Minera's actual value.

1. Goldman Cannot Support a $3.1 Billion Equity Value for Minera

Goldman's October 21, 2004 presentation did not contain a stand-alone valuation of Minera because Goldman was unable to conclude that the equity value of Minera on a stand-alone basis was anywhere close to the $3.1 billion value Grupo proposed. After substantial completion of its due diligence, Goldman presented its stand-alone equity value of Minera in its June 11, 2004 presentation to the Special Committee.[57] That presentation contains multiple

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[53] Gonzalez 29:16-30:4.

[54] Id.

[55] Montejo Aff. Ex. 18 at SPCOMM006957.

[56] Sanchez 41:14-16.

[57] Id.

analyses valuing Minera independently.[58] Goldman performed DCF analyses on multiple long-term copper price sensitivities with one based upon Minera management financial projections and the other based upon Minera management financial projections as adjusted by A&S.[59] Goldman also performed sensitivities based upon Minera management ore milled and SX-EW production and copper ore grade projections.[60] Goldman was only able to value Minera at $3 billion by using Minera management projections and Goldman's most aggressive assumptions. However, using the same projections as adjusted by A&S and the same aggressive assumptions yielded an equity value for Minera of only $2.414 billion.[61]

Goldman's other attempts to value the equity of Minera at $3.1 billion were even less successful. Goldman performed an "Illustrative Contribution Analysis" which applied Southern's market-based sales, EBITDA, and copper sales multiples to Minera.[62] This analysis yielded an equity value for Minera of between $1.1 billion and $1.7 billion.[63] Goldman performed an "Illustrative Look Through Analysis," which was a sum-of-the-parts analysis of Grupo's market capitalization.[64] After heavily discounting the value of all other Grupo assets besides its interest in Southern, this analysis yielded a maximum equity value for Minera of $1.311 billion.[65] Having attempted for months to value Minera on a stand-alone basis as an acquisition target, none of Goldman's analyses came close to $3.1 billion. Goldman's "Illustrative Get/Give Analysis" put the disparity of the economic value of the Transaction in

[58] Montejo Aff. Ex. 19.

[59] Id. at SPCOMM003375.

[60] Id. at SPCOMM003376.

[61] Id. at SPCOMM003375.

[62] Id. at SPCOMM003380.

[63] Id. at SPCOMM003380.

[64] Id. at SPCOMM003377.

[65] Id.

stark terms: Southern would "Give" Grupo $3.1 billion in stock and "Get" in exchange an asset that was worth no more than $1.7 billion.[66]

After another month of due diligence, Goldman revised its DCF valuation for Minera and presented it to the Special Committee in its July 8, 2004 presentation. This time, again using the Minera management projections and Goldman's most aggressive assumptions, Goldman was only able to derive a Minera equity value of $2.806 billion.[67] When adjusted by A&S and using the same aggressive assumptions, Minera's equity value was only $2.085 billion.[68] Unable to support Grupo's $3.1 billion valuation of Minera, after July 8, 2004, Goldman never again attempted to value Minera independently.[69]

2. Goldman Redefines the Transaction as a "Merger of Equals" and Shifts to a "Relative Valuation" and "Contribution Analysis"

Unable to support Grupo's valuation of Minera after more than four months of due diligence, Goldman stopped trying to value Minera as an acquisition target. Instead, Goldman adopted a "relative valuation" and a "contribution analysis." The "relative valuation" was nothing more than a comparison of the two companies' DCF valuations; the "contribution analysis" was nothing more than a comparison of the two companies' market-based equity values, as derived from Southern's 2004E EBITDA multiple. Goldman presented these analyses in terms of Southern shares to be issued, which concealed a significant disparity in value between the two methodologies. UBS noted that the Special Committee was conceptually defining the Transaction as "a merger of equals or corporate reorganization," rather than the

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[66] Id. at SPCOMM 003381.

[67] Montejo Aff. Ex. 20 at SPCOMM006886.

[68] Id.

[69] Montejo Aff. Ex. 21 (August 25, 2004 presentation), Montejo Aff. Ex. 22 (September 15, 2004 presentation), Montejo Aff. Ex. 23 (October 21, 2004 presentation).

acquisition proposed by Grupo (and described in the Proxy) and driving the "focus away from absolute valuations."[70]

Goldman's "Relative Discounted Cash Flow Analyses" were first presented to the Special Committee in a July 8, 2004 presentation.[71] The actual values of Southern and Minera calculated in the analyses are not disclosed, and the Special Committee members testified that these values were "irrelevant."[72] Instead, the analyses calculate a range of Southern shares to be issued of 28.9 million to 71.3 million.[73] Based on Southern's July 2, 2004 closing stock price of $40.90 per share, the analyses valued Minera's equity at anywhere between approximately $1.18 billion and $2.92 billion. This nearly two billion dollar range of value was presented to the Special Committee in more than 150 different hypothetical scenarios.[74] After the July 8, 2004 Special Committee meeting, the Special Committee proposed that Southern acquire Minera in exchange for 52 million Southern shares.[75] This proposal is not disclosed in the Proxy.[76] UBS characterized the proposal as valuing Minera at $3.3 billion based on Southern's July 8, 2004 closing stock price, $200 million more than Grupo's ask.[77] According to UBS, "Goldman Sachs indicated that the relative contribution of 2004E EBITDA provided a good summary of their

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[70] Montejo Aff. Ex. 24 at UBS-SCC00005563.

[71] Montejo Aff. Ex. 20 at SPCOMM006896-98.

[72] Palomino 191:25-192:4 ("What matters at this point is that, that they are comparable in relative terms. That is the only point that is relevant here. Other issues are irrelevant."), 192:5-21 (testifying that the value of Southern and Minera underlying the relative DCF analysis "is nonsense. It has nothing to do with this analysis."); Handelsman 174:8-23 ("I can't speak for other members of the committee, but my interest was understanding the relative value of the two companies. They could have been -- both been worth $10 or one of them could been worth $10 and the other one $5 and those edifications for the number of shares that are issued.").

[73] Montejo Aff. Ex. 20 at SPCOMM006896-98.

[74] Id.

[75] Montejo Aff. Ex. 25 at UBS-SCC00005597.

[76] Montejo Aff. Ex. 1 at 21.

[77] Montejo Aff. Ex. 25 at UBS-SCC00005597.

analysis[.]"[78] In line with the Special Committee's "merger of equals" approach, this proposal assigned approximately the same enterprise value to Minera and Southern and estimated that both companies would contribute approximately equally to EBITDA on a proforma basis.[79] In making this proposal, the Special Committee relied on Grupo's May 2004 investors' presentations.[80] Those presentations provided for a 2004B EBITDA of $633 million for Southern, and $624 million for Minera.[81]

G. The Special Committee Adopts 2005 EBITDA Multiples

What happened next is not recorded in Southern's corporate books. The Special Committee meeting minutes for the July 20, 2004 meeting state little more than "the members of the Committee concluded that they should advise Mr. Larrea that Grupo Mexico should submit a new proposal to the Committee that addressed the Committee's concerns relating to valuation and corporate governance principles,"[82] and defendants did not produce Special Committee meeting minutes for meetings purportedly held on August 5 and 25, 2004. According to the Proxy, sometime before August 5, 2004, Grupo proposed that it receive 80 million Southern shares for its interest in Minera[83] and on August 5 the Special Committee met to discuss the "substantial gap that remained between the exchange ratio for Minera Mexico proposed by Grupo Mexico and the special committee's views of an appropriate exchange ratio."[84] Ultimately, the "gap" was filled simply by the Special Committee acceding to Grupo's position. The Special Committee did this in part by shifting away from 2004 financial metrics.

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[78] Montejo Aff. Ex. 25 at UBS-SCC005599.

[79] Id.

[80] Id.

[81] Id.

[82] Montejo Aff. Ex. 26 at SPCOMM019351.

[83] Montejo Aff. Ex. 1 at 22.

[84] Id.

Goldman's focus on 2004 should have been favorable to Southern. Southern's 2004 EBITDA continued to improve throughout 2004. At the end of the first half of 2004, annualized 2004 EBITDA for Southern and Minera was $738 million and $624 million, respectively.[85] Grupo's internal September 2004 forecasts projected 2004E EBITDA for Southern of $733 million and Minera of $677 million.[86] According to Goldman's October 21, 2004 presentation to the Special Committee, Grupo's forecast had not changed for Southern, and Minera's projected 2004E EBITDA had improved by $10 million to $687 million.[87] However, Southern's annualized first three quarters EBITDA had surged to $801 million while Minera's sank to $643 million.[88] Southern's actual 2004 EBITDA was $1.0048 billion, nearly $300 million more than Grupo's projections.[89] Though Grupo woefully underprojected Southern's 2004 performance, its forecasted result for Minera's 2004 EBITDA was dead-on with actual results: $687 million vs. $681.3 million.[90] As Southern continued to beat projections for 2004, Grupo and UBS told Goldman to shift the focus of Goldman's Contribution Analysis to a 2005E EBITDA metric in order to capture Minera's rehabilitation plans and expansions that Winters and Mintec had been working on, and a royalties tax expected to be levied on Southern.[91]

The Special Committee agreed. In doing so, it simply accepted Grupo's 2005E EBITDA projection of $581 million for Southern at face value even though Grupo's 2004E EBITDA was proving to be so highly unreliable. The Special Committee accepted Grupo's projections despite

[85] Montejo Aff. Ex. 22 at 23.

[86] Id.

[87] Montejo Aff. Ex. 23 at 24.

[88] Id.

[89] Montejo Aff. Ex. 27.

[90] Id.

[91] Montejo Aff. Ex. 28 at UBS-SCC00005559; Montejo Aff. Ex. 29 at UBS-SCC00096058.

analysts' estimates that Southern's 2005 EBITDA would be $664 million[92] to $705 million,[93] and despite that A&S's recommendation that Southern's projections be revised to include additional expansion potential went unheeded. Southern outperformed Grupo's 2005E EBITDA projections by 135%.[94] Goldman's September 15, 2004 presentation illustrates the prejudicial effect of the Special Committee's decision to accept Grupo's shift to 2005E EBITDA. There, Goldman presented both 2004E EBITDA and 2005E EBITDA in its Contribution Analysis.[95] The range of shares to be issued under 2004E EBITDA was 44 to 54 million; [96] in contrast, the range of shares to be issued under 2005E EBITDA was 61 to 72 million.[97] Based on Southern's $46.10 share price, these 61 to 72 million shares represented a value of $2.812 to $3.319 billion, perfectly surrounding a $3.1 billion valuation of Minera.

The bottom line is that Grupo's terms never changed. Grupo demanded $3.1 billion in Southern stock, and that is exactly what it received. The Special Committee fully understood this. When asked whether Grupo was basically proposing the same numbers all along Handelsman testified, "Substantially so."[98] Thus, through the entire "negotiation," all Goldman and the Special Committee really did was find a way to rationalize accepting the value Grupo originally demanded.

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[92] Montejo Aff. Ex. 23 at SPCOMM003753.

[93] Montejo Aff. Ex. 44 at Exhibit 4.

[94] Montejo Aff. Ex. 27.

[95] Montejo Aff. Ex. 22 at SPCOMM006805.

[96] Id.

[97] Id.

[98] Handelsman 111:6-11.

H. Grupo Rejects a Price Collar

The Special Committee's counter-proposal to Grupo in July 2004 proposed that the Transaction be negotiated on a fixed-exchange ratio basis.[99] In connection with this fixed-exchange ratio,[100] Goldman and UBS negotiated that the Transaction include a double threshold collar.[101] According to Handelsman, the Special Committee had no reason to believe Southern's stock price would go down.[102] The primary purpose of the collar was to enable Southern to renegotiate or walk away from the Transaction if its stock price—and thus the value of the shares issued to Grupo—continued to climb. In light of Southern's surging stock price, Grupo's August 21, 2004 term sheet dropped the price collar term.[103] After the Company's stock price increased by more than 25% between August 21, 2004 and September 30, 2004 ($41.20 to $51.66), the Committee again sought a 20% price collar, deeming it to be an "essential" term.[104] Again, Grupo said "no."[105] In the end, the Special Committee dropped its demand for a collar without obtaining any additional financial benefit for Southern or its minority stockholders. Between October 21, 2004 and the time the Transaction closed, Southern stock continued to climb from $45.92 per share to $55.89 per share, netting Grupo an additional $600 million.

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[99] Montejo Aff. Ex. 25 at UBS-SCC00005597.

[100] Handelsman 107:18-21 (Goldman "suggested there be a fixed exchange ratio and there be a collar on each side of that fixed exchange ratio.").

[101] Montejo Aff. Ex. 29 at UBS-SCC00096058. The "double threshold collar" provided for a fixed number of shares to be issued within the first collar, a variable number of shares outside the first collar, and walk-away rights outside the second collar.

[102] Handelsman 100:24-101:1.

[103] Montejo Aff. Ex. 30.

[104] Montejo Aff. Ex. 31.

[105] Id.

I. The Special Committee "Negotiates" Governance Terms that Favor Grupo

On July 12, 2004, Goldman presented UBS with what the Special Committee has claimed to be "significant corporate governance protections designed to protect minority shareholders post-transaction":[106]

- NYSE Listing. The Special Committee proposed that Southern and Grupo would each agree to use their best efforts to maintain Southern's NYSE listing for at least five years.[107] However, this provision was actually first proposed by Grupo in its February proposal to the Board.[108]

- Related-Party Transaction Review. The Special Committee proposed that future related party transactions between Grupo and its affiliates and Southern would be approved by an independent committee of the Board.[109] Again, the concept of independent director review of related party transactions was first proposed by Grupo.[110] After proposing a $500,000 threshold for committee review, the Special Committee agreed to Grupo's demand that a committee of the Board only review related-party transactions in excess of $10 million in advance of their consummation.[111] The Company's public filings state that it did not engage in any such transactions in 2002, 2003 or 2004.[112]

- Independent Directors. The Special Committee proposed that minority stockholders would be represented proportionately on the Board by independent directors who meet the NYSE independence requirements and are nominated by a special nominating committee.[113] The Special Committee's proposal actually eliminated the minority stockholders' right to elect directors. Prior to the Transaction, minority stockholders were entitled to elect 2 of the Company's 15 directors.[114] As a result of the conversion of all Class A shares to common shares in the Transaction, all

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[106] Special Committee Defendants' Answering Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and Opening Brief in Support of the Special Committee Defendants' Motion for Summary Judgment ("SPCOMM MSJ Br.") at 39.

[107] Montejo Aff. Ex. 1 at 21.

[108] Montejo Aff. Ex. 10.

[109] Montejo Aff. Ex. 1 at 21.

[110] Montejo Aff. Ex. 32.

[111] Montejo Aff. Ex. 31 at SPCOMM010497.

[112] Montejo Aff. Ex. 37 at A61 ("the total amount paid by the Company to Grupo Mexico for such [related party transactions] in 2004, 2003 and 2002 was $7.0 million for each year.").

[113] Montejo Aff. Ex. 1 at 21.

[114] Montejo Aff. Ex. 2 at 4.

> Southern stockholders now vote on the election of all directors based on plurality voting.[115] Grupo controls enough stock to elect every single Southern director.

Grupo readily agreed to each of these corporate governance provisions. The provisions were either already proposed by Grupo, failed to provide any real protection to Southern's minority stockholders post-Transaction, or actually benefitted Grupo at the expense of the minority. None of the Special Committee's governance proposals were perceived as much of a change "from status quo."[116]

J. The Special Committee "Negotiates" Southern Dividend Payments to Reduce Southern's Value

In the last weeks of negotiations, the Special Committee proposed that Grupo pay a special dividend of $100 million in connection with the Transaction to "get more money for the shareholders."[117] The Special committee also negotiated for Southern to pay its ordinary third and fourth quarter dividends. The real reason for the dividends was, as Palomino testified, to "reduce a differential between . . . the Special Committee's valuation of Southern Peru and Minera Mexico, and what Grupo Mexico was asking."[118] As Goldman testified, Southern's dividends "increase[] the debt by the amount of the agreed dividend to be paid."[119] In other words, rather than negotiate Grupo down from 67 million shares, the Special Committee reduced Southern's equity value under the relative valuation analysis.

Grupo gave nothing up by agreeing to pay dividends. To the contrary, not only did Grupo receive 54% of the cash paid, but it also unfairly gained millions of additional Southern

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[115] Montejo Aff. Ex. 33 at 3-4.

[116] Montejo Aff. Ex. 29 at UBS-SCC00005563.

[117] Handelsman 112:16.

[118] Palomino 114:5-15.

[119] Sanchez 100:14-23 (discussing effect of special dividend on Southern net debt). Although Sanchez later testified that Southern's quarterly dividends were not considered debt (id. at 100:24-101:10), Goldman did in fact consider the quarterly dividends as debt. See, e.g., Montejo Aff. Ex. 1 at 35.

shares. This was because Goldman's relative valuation analysis deeply discounted the value of Southern to a mere fraction of its market capitalization. Goldman tacked on the special dividend to Southern's debt to further reduce Southern's equity value. As a result, instead of the special dividend being a 2.75% dividend on Southern's $3.7 billion market capitalization (as the market would perceive it), as it relates to the exchange ratio of the Transaction, it was approximately a 6% dividend on Goldman's DCF implied value of $1.6 billion for Southern.[120] Rather than Grupo receiving approximately 1.1 million additional shares as the case would have been if Southern had been valued at its market capitalization, Grupo received approximately 3 million additional shares as a result of the special dividend.[121] Goldman used Southern's regular third and fourth quarter dividends to further reduce Southern's relative DCF equity value and justify the issuance of additional shares to Grupo.[122] In total, the dividends increased by 8.1 million the number of Southern shares issued to Grupo above what the number of shares the dividend payments would have resulted in had Southern been valued at its market capitalization.[123]

K. The Special Committee Allows Grupo and Cerro to Lock Up Stockholder Approval of the Transaction

The Special Committee also proposed to condition the Transaction on a majority of the minority vote provision.[124] Grupo countered that a majority of the minority provision was unnecessary, and that a 2/3 vote condition would ensure that Grupo "could not unilaterally approve the Merger."[125] But as early as August 21, 2004, Grupo had advised the Special

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[120] Montejo Aff. Ex. 34.

[121] Id.

[122] Id.

[123] Id.

[124] Montejo Aff. Ex. 31 at SPCOMM010489-90.

[125] Id.

Committee that Southern would support a registered offering by Cerro and Phelps Dodge.[126] As a recipient of the August 21, 2004 term sheet, Handelsman, and thus Cerro, knew Cerro would receive registration rights so long as the Transaction was approved. By October 5, 2004, the key terms of the Transaction were set.[127] As Grupo and Cerro together owned more than 2/3 of the Company's outstanding stock, the Special Committee's agreement on October 8, 2004 to condition the Transaction on a 2/3 vote provision merely acknowledged that Cerro would be voting in favor of the Transaction in exchange for its long-sought registration rights.

III. THE TRANSACTION IS APPROVED

A. The Special Committee Approves the Transaction

The Proxy states that the Special Committee met on October 21, 2004 to approve the Transaction.[128] At that meeting, Goldman made its final presentation to the Special Committee (the "October 21 Presentation"). The October 21 Presentation states that Southern's equity value was $3.714 billion based on Southern's October 18, 2004 stock price of $46.41.[129] Minera's stated equity value is $3.148 billion and is determined by multiplying 67.2 million shares by Southern's $46.41 stock price.[130] Both Goldman's Relative DCF Analysis and Contribution Analysis are presented in terms of a hypothetical number of shares to be issued to Grupo. No target valuation for Minera is stated in the presentation.

Goldman's presentation of its Relative DCF Analysis does not disclose the fact that Minera is valued at $1.254 billion, only 40% of Implied Equity Value stated on page 2 of the

[126] Montejo Aff. Ex. 30 at SPCOMM010487.

[127] Montejo Aff. Ex. 1 at 25.

[128] Montejo Aff. Ex. 1 at 26.

[129] Montejo Aff. Ex. 23 at 2; Sanchez 48:23-49:15.

[130] Id.

presentation.[131] Nor does Goldman's presentation of its Relative DCF Analysis disclose the fact that Southern is valued at $1.601 billion, a per-share equity value of $20.20, only 44% of Southern's publicly traded stock price.[132] Goldman's Relative DCF Analysis presents 675 possible outcomes.[133] The range of numbers of Southern shares to be issued stretches from 47.2 to 87.8 million, representing a difference in market value of $1.884 billion.[134] This range of value is greater than Goldman's value of Minera. Handelsman had no understanding of how Goldman derived the number of shares to be issued.[135] Neither could Ruiz testify as to the values that underlie Goldman's Relative DCF Analysis.[136] When asked if he knew what values Goldman's Relative DCF Analysis revealed, Palomino testified:

> THE WITNESS: I don't need to know what these values these models revealed because value doesn't make any sense. . . . It has nothing to do with this analysis.
>
> This analysis is a relative valuation. The only thing that matters is that the two firms be compared on comparable and equal and reasonable assumptions, so that you can compare the relative value of the one versus the other under those assumptions, which is what we did.
>
> In fact, not only what we did. As you can see there is no one implied value or price, because as you can see, we have . . . approximately 700 and something valuations, implied valuations. So your question does not make any sense. There are over 700 implied valuations here.
>
> Q: So the Special Committee was presented with 700 different valuations?
>
> Ms. WHEATLEY: Object to the form of the question.

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[131] Montejo Aff. Ex. 44 at 49.

[132] Id. at 48.

[133] Montejo Aff. Ex. 23 at 21-23.

[134] Id.

[135] Handelsman 170:24-171:1, 173:1-18.

[136] Ruiz 199:4-204:10.

> THE WITNESS: The Special Committee was presented with a wide degree of potential values according to various assumptions…[137]

As intended, Goldman's analysis certainly took the "focus away from absolute valuations."[138]

The October 21 Presentation also contains an EBITDA Contribution Analysis, which calculates a range of 42 million to 56 million Southern shares to be issued based on annualized 2004E EBITDA, and a range of 53 million to 73 million Southern shares to be issued based on estimated 2005E EBITDA.[139] The number of shares to be issued under this analysis implies a range of equity values for Minera of $1.94 billion to $3.34 billion, $700 million to $1.1 billion more than Goldman's DCF value of Minera. Again, this range of value is greater than Goldman's valuation of Minera. The 2004E EBITDA analysis does not support the issuance of 67.2 million Southern shares. However, 67.2 million shares falls at approximately the midpoint of the range of shares calculated in the 2005E EBITDA analysis (although if projections unadjusted by A&S are excluded, 67.2 million shares fall at the very high-end of the range). As discussed above, it is notable that analysts projected a significantly higher 2005E EBITDA for Southern, and that Southern in fact outperformed its projected 2004E EBITDA by 37% and its 2005E EBITDA by 135%.[140]

According to the Proxy, Handelsman apparently abstained from voting on the Transaction as a member of the Special Committee to eliminate the appearance of conflict of interest created by his concurrent representation of Cerro and the Special Committee.[141] But Handelsman never removed himself from the negotiation of the Transaction. Rather, he guided

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[137] Palomino 192:9-193:4.

[138] Montejo Aff. Ex. 24 at UBS-SCC00005563; see also Handelsman 174:11-19 (discussing that he was not concerned with the absolute values of Southern and Minera).

[139] Montejo Aff. Ex. 23 at SPCOMM003753.

[140] Montejo Aff. Ex. 27.

[141] Montejo Aff. Ex. 1 at 26-27; Handelsman 161:7-14.

the Special Committee's retention of advisors and was directly involved in the Special Committee's evaluation of the Transaction at the same time he was negotiating Cerro's long-sought exit from the Company. Indeed, in the days leading up to the approval of the Transaction, Grupo and Handelsman were negotiating a letter agreement pursuant to which AMC would provide Cerro with registration rights for its Southern shares and, as promised at the October 5, 2004 meeting between the Special Committee and German Larrea, Cerro would vote in favor of the Transaction.[142]

B. Southern's Disclosure of the Transaction to the Market and its Stockholders

On February 25, 2005, Southern filed with the SEC its definitive proxy statement soliciting stockholder approval of the Transaction (the "Proxy").[143] As with the October 21 Presentation, the Proxy fails to disclose the values of Minera and Southern underlying Goldman's analyses.[144] Throughout the Proxy's description of Goldman's opinion, reference is repeatedly made to Southern's trading price. The Proxy states:

> Goldman Sachs also calculated an illustrative implied pre-tax saving enterprise value for Minera México by (1) multiplying our closing stock price of $46.41 as of October 18, 2004 by 67,207,640, the number of new shares of our Common Stock to be issued under the Agreement and Plan of Merger, (2) dividing the result by 99.1463%, the percentage of the outstanding shares of Minera México being acquired by us pursuant to the proposed merger, and (3) adding to the result of these calculations $1 billion, the maximum amount of the net debt of Minera México and the book value of the minority interests in Minera México that will be outstanding as of the closing of the merger under the terms of the Agreement and Plan of Merger.[145]

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[142] Montejo Aff. Ex. 35.

[143] Montejo Aff. Ex. 1.

[144] Montejo Aff. Ex. 1 at 30-39.

[145] Id. at 32.

This and other similar disclosures[146] gave the market and Southern's stockholders the impression that Goldman relied on Southern's market price in calculating the number of shares to be issued. This is not what Goldman did.

Instead, as discussed above, the exchange ratio was determined by performing a DCF analysis for both companies.[147] What the Proxy omits is that Goldman's DCF analysis yielded an equity value for Minera of $1.254 billion and an equity value of Southern of $1.510 billion.[148] In contrast, Southern's market capitalization as of October 18, 2004 was $3.714 billion, and the market-based formula above [(67,207,640 shares x $46.41) x 0.991463 = $3.092 billion] yields an equity value of $3.092 billion for Minera. Thus, the implied equity value for Minera the reader is capable of deriving from the Proxy disclosure is nearly $2 billion more than the implied equity value Goldman used to calculate the exchange ratio.

The Proxy also misleads the market with regard to Goldman's Contribution Analysis. On page 34, the Proxy provides a table of comparable companies and 2004E and 2005E EBITDA multiples for those companies.[149] Included as a comparable company is Southern.[150] Southern's

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[146] See, e.g., id. ("Goldman Sachs calculated an illustrative implied enterprise value for our company by multiplying our closing stock price of $46.41 as of October 18, 2004 by the number of fully diluted shares of our Common Stock outstanding based on the most recent information publicly disclosed by us and adding to the result a net cash amount of $15 million."); id. at 33 ("The equity market capitalization for our company and each of the selected companies used by Goldman Sachs was calculated by multiplying each company's closing stock price as of October 18, 2004 by the number of fully diluted shares of such company based on the most recent information publicly disclosed by such company."), id. at 36 ("Using the October 18, 2004 closing price of $46.41 per share of our Common Stock and the number of fully diluted outstanding shares of our Common Stock" Goldman calculated Southern's equity and enterprise value).

[147] See, id. at 35 ("Using the illustrative implied equity values for both companies as of December 31, 2004, Goldman Sachs calculated illustrative implied numbers of our Common Stock to be issued corresponding to the respective illustrative implied equity values of 99.1463% of the outstanding Minera México shares as of December 31, 2004.")

[148] Montejo Aff. Ex. 44 at 49.

[149] Montejo Aff. Ex. 1 at 34.

[150] Id.

2004E and 2005E EBITDA multiples are 4.8x and 5.5x, respectively.[151] Under the description of the Contribution Analysis, the Proxy states that Goldman determined the number of shares to be issued by "applying the illustrative implied EBITDA multiples of our company to corresponding EBITDA estimates for Minera."[152] The only EBITDA multiples for Southern disclosed in the Proxy are 4.8x and 5.5x for 2004 and 2005, respectively. Omitted from the Proxy is the fact that Goldman actually applied 2005E EBITDA multiples in the range of 6.3x to 6.5x.[153] These multiples were derived from management projections, not the market.[154] The Proxy leaves the market and Southern's stockholders with the impression that a much lower market multiple for Southern was applied to Minera.[155]

Moreover, in November 2004, Grupo made a road-show presentation to investors, bankers, bondholders, and pension funds throughout the United States and Europe.[156] Page 4 of that presentation describes the terms of the Transaction.[157] The presentation states that the enterprise value of Minera is $4.1 billion based on Southern's share price, which implies a 2005E EBITDA multiple of 5.6x.[158] This 2005E EBITDA multiple is less than the 6.3x to 6.5x range that Goldman applied in its Contribution Analysis,[159] but it is equal to Southern's 5.6x

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[151] Id.

[152] Id. at 36.

[153] Montejo Aff. Ex. 23 at SPCOMM003753.

[154] Compare id. to Montejo Aff. Ex. 1 at 37; see, also, Montejo Aff. Ex. 23 at SPCOMM003740.

[155] Southern filed its preliminary proxy on November 22, 2004. Disclosure of Goldman's financial analyses did not substantively change between November 2004 and February 2005. Thus, the misleading nature of the Proxy influenced the market as early as November 2004.

[156] Montejo Aff. Ex. 36 at SPCOMM006670.

[157] Id. at SPCOMM006674

[158] Id. Minera's enterprise value is calculated by multiplying the 67.2 million Southern shares to be issued in the Transaction by Southern's October 21, 2004 closing stock price and adding $1.060 billion of debt.

[159] Montejo Aff. Ex. 23 at SPCOMM003753.

Wall Street research 2005E EBITDA multiple[160] and approximates Southern's 5.5x 2005E EBITDA multiple as calculated in Goldman's analysis of comparable companies.[161] Thus, Grupo told the market that the 2005E EBITDA multiple implied by the Transaction was in line with Wall Street's expectations of Southern. Grupo was able to make sense of the lower multiple in the road-show presentation by using a higher projected copper production than A&S was willing to approve.[162] The road-show production projections are even higher than Minera management's own unadjusted projections.[163] Minera's actual 2005 copper production was 332.3Mt, directly in line with A&S's 329.1Mt projection, and significantly below Grupo's projections stated in the road-show presentation. Defendants knew that the market would not accept the 6.3x to 6.5x EBITDA multiples actually used by Goldman to value Minera. Rather than disclose how Goldman actually valued Minera, defendants intentionally misled the market in the Proxy and on their road-show to believe that a much lower multiple was used in the Transaction.

C. Southern Pays 20% More For Minera Than Agreed

The day after the Transaction was announced, the Company's stock price traded down 4.6%, from $45.92 to $43.72 per share. One week later, Southern's stock price traded down 8.2%, to $42.15 per share. On strong copper prices, and following Grupo's materially misleading road show presentations and the November 22, 2004 preliminary proxy statement, Southern's stock price recovered. By April 1, 2005, the date on which the Transaction closed,

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[160] Id.

[161] See id.; Montejo Aff. Ex. 1 at 34.

[162] Compare Montejo Aff. 36 at SPCOMM006674 ("Assumes copper production of 365.4Mt") with Montejo Aff. Ex. 20 at SPCOMM006884 (A&S revised Minera copper production of 338.5Mt as of June 2004) and Montejo Aff. Ex. 23 at SPCOMM003745 (A&S revised Minera copper production of 329.1Mt as of October 21, 2004).

[163] Montejo Aff. Ex. 23 at SPCOMM003745.

Southern's stock closed at $55.89 per share, an increase of approximately 21.7% over Southern's October 21, 2004 closing price. Had the Special Committee obtained the pricing collar it proposed, it would have had an opportunity to renegotiate the exchange ratio or terminate the Transaction. Instead, Southern issued $3.755 billion in stock to Grupo, approximately $600 million more than Grupo originally purposed. At his deposition, Handelsman testified that "Before the closing of the transaction the special committee asked Goldman Sachs whether or not it continued to consider the transaction to be fair and Goldman Sachs said yes."[164] Goldman representative Martin Sanchez testified that he did not remember any such second fairness opinion.[165]

IV. EPILOGUE

A. Cerro Sells All of Its Shares

On June 15, 2005, ten weeks after the Transaction closed, Cerro sold its entire interest in Southern (11,378,088 shares) in an underwritten offering at $40.635 per share.[166] Cerro profited by more than $447 million in the sale.[167]

B. Stock Splits and Dividends Since the Close of the Transaction

Since the close of the Transaction, Southern stock has undergone a 2-for-1 split and a 3-for-1 split. Thus, Grupo now holds six shares of Southern common stock for every one share issued in the Transaction. Also, since the close of the Transaction, each pre-split share of common stock issued in the Transaction has been paid $60.20 in dividends.[168]

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[164] Handelsman 104:9-13. See also id. at 105:8-12 (Goldman issued oral fairness opinion "contemporaneously with the closing").

[165] Sanchez 128:17-20.

[166] The low-high trading prices for one day prior were $43.08 – $44.10 per share.

[167] 11,378,088 shares x ($40.635/share –$1.32/share) = $447,329,529.70.

[168] Montejo Aff. Ex. 38.

ARGUMENT

I. DEFENDANTS ARE LIABLE FOR BREACH OF FIDUCIARY DUTY

The Transaction must be reviewed for entire fairness. "The test of entire fairness is an exacting one."[169] The two components of entire fairness are well known: fair price and fair dealing.[170] Fair price "relates to the economic and financial considerations" of the Transaction.[171] Fair dealing "embraces questions of when the [T]ransaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[172] In making a determination as to the entire fairness of a transaction, the Court does not focus on one component over the other, but examines all aspects of the issue as a whole.[173] Defendants have the initial burden to prove the Transaction was entirely fair.[174] This they cannot do.

II. THE EVIDENCE OF UNFAIR PRICE IS OVERWHELMING

In analyzing the economic fairness of a self-dealing transaction between a controlling stockholder and its controlled subsidiary, the Court must compare (i) the value of what was given by the controlled subsidiary, and (ii) the value of what the controlled subsidiary received in return.[175] Here, what the Company gave was shares of its common stock, the "currency" used in the Transaction. Based on the published trading price of Southern stock on the New York Stock Exchange, the 67.2 million shares issued to Grupo in the Transaction had a market value of

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[169] T. Rowe Price Recovery Fund, L.P. v. Rubin, 770 A.2d 536, 554 (Del. Ch. 2000).

[170] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

[171] Id.

[172] Id.

[173] Id.

[174] In re Southern Peru Copper Corp. S'holder Derivative Litig., Del. Ch., Cons. C.A. 961-VCS, Hr'g Tr., Dec. 21, 2010 at 119-121.

[175] Associated Imports, Inc. v. v. ASG Indus., Inc., 1984 WL 19833, *14-18 (Del. Ch.), aff'd sub nom., Hubbard v. Assoc. Imports, Inc., 497 A.2d 787 (Del. 1985).

approximately $3.1 billion on October 21, 2004, the date the defendants approved the Transaction. On April 1, 2005, the date the Transaction closed, the 67.2 million shares issued to Grupo in the Transaction had a market value of approximately $3.7 billion. What the Company received in return was 99.15% ownership of Minera. There is no expert testimony being offered in this case taking the position that Minera was worth anything close to $3.1 billion, let alone $3.7 billion. Rather, the expert reports establish that Minera was worth no more than $1.8 billion. Indeed, the record overwhelmingly demonstrates that the value of what Southern gave in the Transaction was far greater than the value of what it received in return.

A. The Company Gave Grupo At Least $3.1 Billion of Southern Common Stock

Grupo valued the 67.2 million shares of Southern common stock it received in the Transaction at market price.[176] In determining the entire fairness of this self-dealing transaction, the Court should do the same. When a controlling stockholder causes a company to enter into a self-dealing transaction relying on a market price to value the assets it is selling to the company, the controlling stockholder should not be allowed to avoid market price at trial in demonstrating the transaction was in fact entirely fair. Here, valuing the Southern shares at market price just as Grupo did is exactly what Delaware law requires.

This Court recognizes that "market consensus is an appropriate and fair standard of value for determining" the value of shares of a publicly traded company issued to a controlling stockholder to acquire a business from it.[177] Indeed, the issue here is exactly the issue presented in Associated Imports.[178] The "heart of the controversy is in the exchange ratios by which [a publicly traded controlled company] acquired [a wholly owned subsidiary of its controlling

[176] Montejo Aff. Ex. 10 at AMC0019912; Montejo Aff. Ex. 32 at SPCOMM007078; Montejo Aff. Ex. 1 at 22; see, also, Montejo Aff. Ex. 11 at AMC0019883; Montejo Aff. Ex. 36 at SPCOMM006674.

[177] Associated Imports, 1984 WL 19833 at *15.

[178] Id.

stockholder] and for which it issued [67.2 million] shares to [its controlling stockholder]."[179] Associated Imports valued the stock at market price.[180] This Court should do the same.

Market price is the benchmark of what the Company could have received from the sale of its stock in arm's-length negotiation with disinterested, independent third-parties.[181] Public markets for stock, particularly a stock that is widely traded on the New York Stock Exchange and followed by multiple analysts, offer a ready and reliable value that this Court should use in accessing fair market value.[182] In Union Illinois, the Court found the price the market would place on the stock was the proper measure of the value for shares sold to corporate fiduciaries:

> What has been 'taken' here is the difference between the assets transferred and the market value of these assets; it has been 'taken' not from an individual shareholder but from the company itself. For these reasons, it is clear to me that in order to determine the fair price here, the stock must be valued as the market would value it, which will ensure that the corporation will receive full value for the assets (the stock) which the directors caused to be sold to themselves.[183]

Accordingly, the value of the 67.2 million shares Southern paid to acquire Minera is no less than $3.1 billion.

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[179] Id. at *4.

[180] Id.

[181] Union Illinois v. Korte, 2001 WL 1526303, *7 n.14 (Del. Ch.) ("the amount which the company could have received from the sale of its stock, absent unfair dealing, is the fair market value.")

[182] See, In re Tri-Star Pictures, Inc. Litig., 634 A.2d 319 (Del. 1993) (recognizing damage to corporation from over-issuing stock to controlling stockholder to acquire assets is the market value of over-issued stock); Applebaum v. Avaya, Inc., 805 A.2d 209 (Del. Ch. 2002), aff'd, 812 A.2d 880 (Del. 2002) (deciding on summary judgment that average market price for common stock as quoted on the New York Stock Exchange in the ten days leading up to the transaction equaled fair value); Kahn v. Tremont Corp., 1996 WL 145452, *9 (Del. Ch.), rev'd on other grounds, 694 A.2d 422 (Del. 1997) ("Thus generally the market price of that stock presents a fair measure of the value of the stock at the time the contract to purchase and sell was agreed upon."); see also, In re Loral Space and Commcn's Inc., 2008 WL 4293781, *30 n.150 (Del. Ch.) ("one has to be extremely cautious about substituting an imprecise estimate for a market tested price").

[183] Union Illinois, 2001 WL 1526303, at *7. In Union Illinois, the corporation was privately held and the court applied a lack of marketability and minority discount. Id. Southern's market price already reflected the market and minority status of its publicly traded shares. In contrast, the shares issued to Grupo would increase its control block and if anything would have a value at least as great as the minority market price.

Defendants' assertion that the value of Southern's stock was substantially less than its publicly traded market price is unconvincing. The publicly traded Southern shares reflected "a prevailing minority trading price, which is presumed to be fair market value because [Southern] is widely traded on a liquid market."[184] In contrast, the non-public shares of Minera were not valued by taking into account factors such as lack of marketability.[185] A valuation methodology that suggests that the stock price of a publicly traded company in a liquid market substantially overstates the value of the Company is simply not credible.[186]

Defendants offer no alternative basis to value these shares. They cite no legal or financial authority for ignoring Southern's market price and substituting a relative valuation. They assert that the "market price of a company's stock is not the sole permissible method of valuing a company."[187] However, none of the cases cited by defendants hold that the market price of a company's stock should be disregarded. Moreover, none of the cases cited by defendants values stock that is used as acquisition currency. Rather, these cases consider the fair value target company stockholders are to receive as compensation for the relinquishment of their company stock in a merger.[188] Thus, they are inapplicable to the determination of the value of Southern's stock in this matter. Moreover, the cases cited by defendants hold that directors of Delaware

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[184] In re Staples, Inc. S'holders Litig., 792A.2d 934, 955 (Del. Ch. 2001).

[185] Id.

[186] In re Sunbelt Beverage Corp. S'holder Litig., 2010 WL 26539, at *8 (Del. Ch.).

[187] AMC Defendants' Answering Brief in Opposition to Plaintiff's Motion For Partial Summary Judgment and Opening Brief in Support of Their Cross-Motion for Summary Judgment, or, in the Alternative, for A Determination That Plaintiff Bears the Burden of Proof as to Entire Fairness (Transaction I.D. 32600252) at 21-25 (citing, inter alia, Finkelstein v. Liberty Digital, Inc., 2005 WL 1074364, at *12 & n.20 (Del. Ch.), In re Emerging Commc'ns, Inc. S'holders Litig., 2004 WL 1305745 (Del. Ch.), and Gesoff v. IIC Indus. Inc., 902 A.2d 1130, 1152 n.127 (Del. Ch. 2006)).

[188] See, e.g., Finkelstein, 2005 WL 1074364 (appraisal action); Emerging Commc'ns, 2004 WL 1305745 (appraisal action and assessment of damages to target company's stockholders in going private acquisition); Gesoff, 902 A.2d 1130 (appraisal action seeking damages on entire fairness claim).

companies have a duty to "enhance corporate profitability,"[189] not devalue company stock in a self-interested transaction with a controlling stockholder.

B. The Company Received Far Less in Return

Southern paid at least $3.1 billion in stock to Grupo, but in exchange received assets from Grupo worth far less than $3.1 billion. Plaintiff's expert valued Minera's equity at $1.854 billion.[190] To reach this conclusion, he performed a DCF analysis just as Goldman had. Just like Goldman, he also performed a comparable company analysis, except plaintiff's expert followed generally accepted business valuation models whereas Goldman did not. In determining his concluded equity value of Minera, plaintiff's expert took the median of the DCF valuation and the comparable company valuation implied enterprise values for Minera, added Minera's cash, and subtracted Minera's debt. Plaintiff's expert performed these valuations for both October 21, 2004, the date the Board approved the Transaction, and April 1, 2005, the date the Transaction closed. Plaintiff's expert concluded that Minera's implied equity value was $1.854 billion as of October 21, 2004 and $2.396 billion as of April 1, 2005.

1. Plaintiff's Expert's Concluded Value of Minera is Supported by Goldman's DCF Analysis

Plaintiff's expert's valuation is supported by Goldman's DCF analysis. Plaintiff's expert's DCF value for Minera is actually $531 million higher than Goldman's.[191] The difference is mostly attributable to plaintiff's expert's use of a lower discount rate of 6.5 percent rather than the 8.5 percent used by Goldman.[192] When plaintiff's expert's model is adjusted for

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[189] Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1990).

[190] Montejo Aff. Ex. 44 at 42.

[191] Id. at 47.

[192] Id.

the difference in the discount rate, plaintiff's expert's DCF model yields an enterprise value of $2.281 billion, which is approximately $27 million, or 1.2 percent, higher than Goldman's value.

2. Goldman's Contribution Analysis Deviates Substantially From Generally Accepted Business Valuation Models and Does Not Support a $3.1 Billion Value for Minera

Although Goldman's Contribution Analysis mimics what a comparable company valuation does in that it derives an implied value for Minera by applying a selected multiple to a financial metric, it deviates substantially from accepted business valuation models. A comparable company valuation model typically involves "(1) identifying comparable publicly traded companies; (2) deriving appropriate valuation multiples from the comparable companies; (3) adjusting those multiples to account for the differences from the company being valued and the comparables; and (4) applying those multiples to the revenues, earnings, or other values for the company being valued."[193] Notably, the more a selected multiple "deviates from the medians the more biased and subjective the analysis arguably becomes."[194]

Goldman went through the exercise of identifying comparable companies.[195] The comparable companies selected by Goldman are Antofagasta Holdings plc, Freeport-McMoRan Copper & Gold Inc., Phelps Dodge Corporation, and Grupo.[196] Goldman determined that both the median and mean 2005E EBITDA multiple for these companies was 4.8x.[197] But Goldman ignored this market multiple and selected a multiple derived from Southern's highly unreliable

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[193] Highfields Capital, Ltd. v. AXA Financial, Inc., 939 A.2d 34, 56 (Del. Ch. 2007). See, also, Damodaran on Valuation: Security Analysis for Investment and Corporate Finance, 2nd Ed., (John Wiley & Sons, Aug. 2006) at 233-34 (three steps to proper relative valuation are (i) finding comparable assets that are priced by the market, (ii) scaling the market prices to a common variable, and (iii) adjusting for differences across assets); Beaulne 100:5-10 (discussing belief that Dr. Damodaran's "relative valuation" means "guideline or comparable company analysis.").

[194] Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 855 A.2d 1059, 1078 n.31 (Del. Ch. 2003).

[195] Montejo Aff. Ex. 23 at SPCOMM003740.

[196] Id.

[197] Id.

management projections provided by Grupo.[198] As discussed above, Southern outperformed its management EBITDA projections for both 2004 and 2005 by a substantial margin. Nonetheless, using Southern's depressed EBITDA projections as provided by Grupo, Goldman derived 2005E EBITDA multiples of 6.3x to 6.5x to apply to Minera. Notably, in both the Proxy and the October 21 Presentation, Southern's listed market multiple is 5.5x 2005E EBITDA. Goldman therefore applied an EBITDA multiple to Minera that was not only significantly higher than Southern's market multiple, but approximately 32% higher than the mean and median established by Goldman's selected companies. "Delaware courts have found a comparable company metric to be unreliable where such a discrepancy is present."[199] Had Goldman conformed its analysis to generally accepted business valuation models and selected an unbiased multiple for 2005E EBITDA (4.8x), its result would have been slightly less than plaintiff's expert's comparable company analysis.[200]

Defendants knew that the multiples Goldman applied to Minera in rendering its fairness opinion were unsupportable. Not only is the 6.3x to 6.5x range omitted from the Proxy, but Southern's November 2004 road-show presentation states that Minera's estimated enterprise value of $4.1 billion is implied by a Minera "EV/EBITDA 2005E multiple of 5.6x."[201] Defendants are only able to support a $4.1 billion valuation of Minera at this substantially lower multiple by assuming a much higher level of copper production than Minera could realistically

[198] Montejo Aff. Ex. 23 at SPCOMM003753. Goldman's use of a single comparable company is also curious in light of defendants' own expert's opinion that "a single company cannot be used to estimate multiples for valuation purposes." Montejo Aff. Ex. 45 at ¶66.

[199] Highfields Capital, 939 A.2d at 56 (finding a 27% deviation from the comparable company median and a 33% deviation from the comparable company mean to evidence that the analysis is overly biased and subjective).

[200] Montejo Aff. Ex. 23 at SPCOMM003740 (median and mean 2005 EBITDA multiple for Goldman selected companies is 4.8x); compare Montejo Aff. Ex. 44 at Exhibit 4 (selected 2005 EBITDA multiple of 4.95x).

[201] Montejo Aff. Ex. 36 at SPCOMM006674.

achieve.[202] Thus, defendants knew that a market-based EBITDA multiple applied to independently-reviewed projections for Minera could not substantiate the $3.1 billion price Southern paid in the Transaction. Defendants intentionally misled the market in this regard.

Plaintiff's expert, meanwhile, performed a proper comparable companies analysis.[203] Plaintiff's expert derived four market-based multiples from substantially similar comparable companies as Goldman analyzed.[204] He then applied these market-based multiples to Minera's financial data and determined that Minera's enterprise and equity values as of October 21, 2004 were $2.832 billion and $1.878 billion, respectively.[205] These values are substantiated by Minera's DCF value as calculated by plaintiff's expert, defendants' expert and Goldman. [206]

3. Defendants' Expert's Opinion Is Academic Bunk

The defendants were evidently unable to find an expert to testify that Minera's equity value actually equaled $3.1 billion. Just like Goldman, defendants' expert instead uses a relative DCF valuation approach to "drive[] focus away from absolute valuations."[207] His report states:

> The only relationship that matters . . . is the one between Minera and SPCC's DCF valuations. Generating an equity value of SPCC that matched the market capitalization of SPCC was irrelevant for the purposes of the Goldman Sachs analysis and is also irrelevant for the purpose of my analysis.[208]

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[202] Id.

[203] See supra at n. 191 (discussing proper methodology for comparable companies analysis).

[204] See Montejo Aff. Ex. 44 at 38-41; compare Montejo Aff. Ex. 44 at 38-39 and Montejo Aff. Ex. 23 at SPCOMM003740.

[205] Montejo Aff. Ex. 44 at 38-42. As of April 1, 2005, these Minera's enterprise and equity values were $3.254 billion and $2.341 billion, respectively. Id.

[206] This Court may regard a "relative valuation" as "both reliable and highly probative of the going concern value of [the target company]" when it applies "normal valuation techniques" as would have been applied in any valuation assignment. Gray v. Cytokine Pharmasciences, Inc., 2002 WL 853549, *7 (Del. Ch.). At his deposition, Prof. Schwartz was not able to identify a single thing he would have done differently had he been valuing Minera on a "stand-alone" basis. Schwartz 107:2-113:13.

[207] Montejo Aff. Ex. 24 at UBS-SCC00005563.

[208] Montejo Aff. Ex. 45 at ¶40.

When asked at his deposition what he would say at trial if he was asked to opine on the value of Minera on a stand-alone basis he testified that he "was not asked to determine the stand alone value." When pressed, he said "I don't know what I would say."[209] Though in his report he repeatedly characterized the Transaction as a stock-for-stock exchange of shares,[210] he claimed he was not asked to give and had no opinion on the value of the 67.2 million shares of Southern stock Southern gave Grupo in the Transaction.[211] However, even he conceded that if he was valuing 67 million shares of a company traded on the New York Stock Exchange, one thing he would look at is the market price.[212] Nevertheless, his report claims "the market price of SPCC is irrelevant."[213]

Defendants' expert relies extensively on Dr. Aswath Damodaran's work, yet he cites nothing from Dr. Damodaran in support of his exclusive reliance upon discounted cash flows in a relative valuation analysis, nor can he.[214] "In relative valuation, we value an asset based on how similar assets are priced in the market."[215] This is not what defendants' expert did. Defendants' expert compares the results of two DCF models. In his valuation of Minera, defendants' expert ignores similar public companies; in his valuation of Southern, defendants' expert ignores the comparison to an identical asset – the publicly traded stock price of Southern. As Dr. Damodaran

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[209] Schwartz 114:21-118:8.

[210] Montejo Aff. Ex. 45 at ¶¶14, 16.

[211] Schwartz 9:14 – 13:22.

[212] Schwartz 14:5 – 14:21.

[213] Montejo Aff. Ex. 45 at ¶44.

[214] Indeed, "there is a significant philosophical difference between discounted cash flow and relative valuation. In discounted cash flow valuation, we are attempting to estimate the intrinsic value of an asset based on its capacity to generate cash flows in the future. In relative valuation we are making a judgment on how much an asset is worth by looking at what the market is paying for similar assets." Damodaran, at 234.

[215] Damodaran, at 233-34.

states, "we have the market's own estimate of the value of the company – the market price – adding to the mix. Valuations that stray too far from this number make analysts uncomfortable, since they may reflect large valuation errors (rather than market mistakes)."[216]

Defendants' expert's valuation implies an equity value (using the 90 cents per pound long-term copper price Southern Peru used internally) for Minera of $1.703 billion—actually lower than the equity value plaintiff's expert placed on Minera.[217] Defendants' expert claims that the difference between his implied value for Minera and the $3.1 billion market price of the shares issued to Grupo can be explained by increasing the long-term copper price to $1.25 per pound.[218] But the market consensus during the time was a long-term copper price of $0.90 per pound.[219] Goldman's review of Wall Street Research indicated projected long-term copper prices from five different analysts in a range of $0.85-1.00 per pound,[220] and Goldman relied on the median long-term copper price of $0.90 per pound in rendering its fairness opinion.[221] Thus, the Special Committee determined that $0.90 per pound was the most appropriate long-term copper price to use to value Minera.[222] Even Southern relied on a long-term copper price of $0.90 per pound for its internal planning.[223]

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[216] Damodaran, at 2.

[217] Montejo Aff. Ex. 45 at Ex. 1.

[218] Montejo Aff. Ex. 45 at ¶¶45 ("if long-term copper price is assumed to be approximately $1.30, the calculated equity value of SPCC would approximate SPCC's observed market capitalization."), 50.

[219] Beaulne 92:14-18.

[220] Montejo Aff. Ex. 23 at 28.

[221] Montejo Aff. Ex. 1 at 34 ("The Forecasts reflected per pound copper prices of $1.20 in 2005, $1.08 in 2006, $1.00 in 2007 and $.90 thereafter and per pound molybdenum prices of $5.50 in 2005 and $3.50 thereafter, based on average forecasts published by selected Wall Street research analysts.")

[222] See, Palomino 191:16-20 ("What we did is we used the copper price that was what we believed the right copper price or the best copper price to use for a long term forecast as would be necessary in this transaction.").

[223] See, Montejo Aff. Ex. 37 at A14 (For purposes of our long-term planning, management uses metals price assumptions of $0.90 per pound for copper and $4.50 per pound for molybdenum.); see also,

Regardless, defendants' expert "tests for robustness" by backing into his predetermined result and solving for a higher long-term copper price keeping all else equal.[224] He simply calculates "the implied number of shares" by assuming the level of copper prices necessary to support that mathematical calculation.[225] As he explains, the "[l]ong-term copper price of $1.252816/lb is derived by solving for the long-term copper price while holding SPCC's equity value (with real WACC of 6.74%) to be equal to its market capitalization."[226] His conclusion: Southern's stock price, as of October 21, 2004, was trading based on the long-term copper price of $1.25-1.30.[227]

Defendants' expert's "test for robustness" is contrary to Delaware law. The reliability of a particular valuation technique is tested with alternative valuation techniques.[228] Goldman incorporated multiple analyses into its valuation,[229] and plaintiff's expert incorporated multiple analyses into his valuation. Defendants' expert's failure to incorporate other valuation methods into his analysis makes his valuation far less credible.[230] Indeed, his analysis is predicated on

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ASARCO LLC v. Americas Mining Corp., 396 B.R. 278, 359-360 (S.D.Tex. 2008) ("the Court is more heavily persuaded by the evidence in favor of using 90 cents as a long-term price in March 2003, especially as that was the price used internally by SPCC and ASARCO").

[224] Montejo Aff. Ex. 45 at 2 (advocating use of "a higher copper price to reconcile" the difference between his valuation of Southern and "its market capitalization.").

[225] Id. at 16, 19-20.

[226] Id. at Exhibit 4.

[227] Montejo Aff. Ex. 45 at ¶¶43, 50 and Ex. 2.

[228] In re Hanover Direct, Inc., S'holders Litig., 2010 WL 3959399,*2 (Del. Ch.).

[229] Although Goldman performed multiple analyses, neither is robust because they do not independently reach results that fall within the same range. S. Muoio & Co. LLC v. Hallmark Enter. Inv. Co., 2011 WL 863007, *17 (Del. Ch.). Goldman hides this by presenting its results in terms of shares, however, its DCF for Minera yielded an implied equity value of approximately $1.2 billion while its contribution analysis (for A&S Case) yielded an implied equity value for Minera of $2.8 to $3.1 billion. In contrast, plaintiff's expert's analyses yields for Minera a very tight equity value range of $1.83 to $1.87 billion as of October 21, 2004 and $2.34 to $2.45 billion as of April 1, 2005.

[230] S. Muoio & Co., 2011 WL 863007, at *17.

ignoring entirely the most commonly used technique for valuing shares of stock of a public company: the market price based on actual trades of the stock that is published every day.[231] As discussed above, the Court can be confident that both of plaintiff's expert's analyses accurately value Minera, and can dismiss defendants' expert's "relative valuation" using sky-high long-term copper prices for what it is: academic bunk.[232]

III. THE TRANSACTION WAS THE PRODUCT OF UNFAIR DEALING

The "critical issue" when assessing fair dealing "is whether the Special Committee functioned as an effective proxy for arms-length bargaining, such that a fair outcome equivalent to a market-tested deal resulted."[233] Here, no such fair outcome occurred. The Transaction was initiated, structured, and timed to favor Grupo. To be sure, "[w]henever the Special Committee [and Goldman] had an opportunity to use leverage it had or create additional leverage, they found a way to avoid doing so."[234] The Transaction was not the product of fair dealing.

A. Grupo Timed, Initiated and Structured the Transaction for Its Benefit

Grupo controlled the timing of the Transaction and used it to its benefit. The timing of a self-interested transaction by a controlling stockholder constitutes a breach of fiduciary duty when the minority stockholders are financially injured by the timing and the controlling stockholder gains what the minority stockholders lost.[235] What the minority stockholders lost in the Transaction was dilution of their equity value as a result of the Transaction's unfair exchange

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[231] Montejo Aff. Ex. 45 at 15 (claiming the market value of Southern's stock is "irrelevant for the purpose of my analysis.").

[232] Hanover, 2010 WL 3959399 at *2 ("If a discounted cash flow analysis reveals a valuation similar to a comparable companies or comparable transactions analysis, I have more confidence that both analyses are accurately valuing a company.")

[233] Loral Space, 2008 WL 4293781, at *22.

[234] Loral Space, 2008 WL 4293781, at *25 (discussing failure of special committee to negotiate with controlling stockholder).

[235] Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 599 (Del. Ch. 1986).

ratio. Grupo gained proportionately to that loss in an over issuance of Southern shares. That exchange ratio was based on management projections for Minera and Southern. Minera's projections benefited from a years-long effort to analyze and optimize Minera's operations and life-of-mine plans. No similar effort was made on Southern's behalf even though the Special Committee was advised that a similar effort for Southern would "no doubt . . . add value at lower capital expenditures."[236]

The Transaction was initiated and structured for Grupo's benefit:

- Grupo proposed that it receive Southern shares valued at $3.1 billion and Grupo received exactly what it asked for; by the time the Transaction closed, these shares were worth $3.7 billion.
- By receiving stock instead of cash Grupo was increasing its own market capitalization. Grupo's stake in Southern was the largest component of its own market capitalization. Because Southern traded at a premium to Grupo, simply moving assets to Southern had a "positive effect on [Grupo's] share price."[237]
- The exchange ratio was largely influenced by a valuation of Minera that applied Southern's EBITDA multiple to Minera despite the fact that Southern traded at a premium to Grupo.
- Rather than applying Southern's market multiple, an alternative was derived from Grupo's projections, which Southern consistently outperformed by a substantial margin.
- When Southern outpaced its projections and Minera's performance in 2004, the focus of the Contribution Analysis shifted to Grupo's dismal 2005E EBITDA projections for Southern.
- Dividend payments were used to further depress Southern's DCF equity value and provided a disproportionate benefit to Grupo by substantially increasing the number of shares it would receive in the Transaction.
- The shares were set by a fixed-exchange-ratio with no collar.
- A majority-of-the-minority vote was traded for a two-thirds vote locked up by Grupo and Cerro.
- Cerro received registration rights and underwriting support that enabled it to finally exit its investment in Southern for approximately a $450 million profit.

[236] Montejo Aff. Ex. 18 at SPCOMM006957.

[237] Montejo Aff. Ex. 11 at AMC0019886.

- The Proxy omitted material information regarding the basis for Minera's $4.1 billion enterprise value.

Neither Southern nor the minority stockholders shared in the benefits Grupo obtained through the timing and structure of the Transaction.

B. The Special Committee Did Not Negotiate At Arm's-Length

Fair dealing requires a process that must come as close as possible to "arm's length bargaining" with the controlling stockholder.[238] In negotiating with Grupo, the Special Committee did not simulate arm's-length bargaining. Goldman testified that when you are buying a company, you need to value the company you are buying.[239] However, rather than value Minera to obtain the best deal possible for Southern and its minority stockholders, Goldman and the Special Committee worked and reworked their approach to the Transaction to meet and rationalize Grupo's demands. To do so, the Special Committee compared unstated DCF values of Southern and Minera, and applied Southern's artificially-inflated EBITDA multiples to Minera. This was not arm's-length negotiating.

The Transaction was an acquisition. The Special Committee actually set out to value Minera as if it was an acquisition target, as it knew it should. When the Special Committee was unable to value Minera's equity at $3.1 billion independently, it redefined the Transaction as a "merger of equals" and intentionally moved to a valuation approach that "drives focus away from absolute valuations."[240] As in Associated Imports, this Court should reject defendants' arguments that the Transaction was "an amalgamation of the two companies under some other

[238] Gesoff, 902 A.2d at 1145.

[239] Sanchez 41:14-16.

[240] Montejo Aff. Ex. 24 at UBS-SC00005563.

procedure."[241] Further, Grupo sought to be paid Southern shares valued at market price. Rather than utilize Southern's (rising) stock price to its advantage, the Special Committee derived the "relative valuation," taking the position that the value of Southern's stock as deal currency was irrelevant.[242] This was not arm's-length negotiating.

The Special Committee's Contribution Analysis also demonstrates a lack of arm's-length negotiating. When Southern's 2004E EBITDA (what the Special Committee relied on in presenting its "merger of equals" concept) significantly outpaced its projected performance, Goldman and the Special Committee turned to management's 2005 projections, which projected that Minera would outperform Southern. Southern ultimately outperformed management EBITDA projections for 2004 and 2005 by a substantial margin, merely 37% and 135%, respectively.[243] The difference in Southern's projected versus actual performance cannot be explained away by just increasing metal prices. Minera's performance in 2004 was 2% under its projected performance, and Minera outpaced its 2005 projections by only 45%.[244]

How defendants disclosed their valuation to the market illustrates how deeply the Special Committee betrayed Southern and the minority stockholders. Defendants disclosed to the market that Southern was simply applying its market-based multiple to Minera's EBITDA.[245] This was not so. Using Grupo's dismal 2005E EBITDA for Southern, Goldman and the Special Committee derived multiples of 6.3x to 6.5x EBITDA for Southern,[246] a full point higher than

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[241] Associated Imports, 1984 WL 19833, at *14 (rejecting relative valuation approach and valuing acquiror's stock at market value where acquiror "survived the [] transaction and was the same company in law as before the acquisition.").

[242] Ruiz 188:18-19; Palomino 67:15-19.

[243] Montejo Aff. Ex. 27.

[244] Montejo Aff. Ex. 27.

[245] Montejo Aff. Ex. 1 at 36-37.

[246] Montejo Aff. Ex. 23 at SPCOMM003753.

Southern's market multiple.[247] Southern therefore paid a huge premium to its own trading multiple to acquire Minera.

But presentation is everything. Goldman's October 21 presentation states the results of Goldman's analyses only in terms of Southern shares to be issued. Because the range of shares (under base assumptions) is similar, the October 21 presentation gives the impression that Goldman used multiple valuation techniques to triangulate a robust value for Minera. However, the underlying values for Minera were nearly $2 billion apart. This should have been a red flag that something was terribly wrong, yet the Special Committee was apparently content not looking behind the curtain.[248] This "head in the sand" attitude towards the Transaction does not come close to the hard-nosed bargaining expected in arm's-length negotiations. At the end of the day, Grupo obtained exactly what it proposed -- Southern shares valued at approximately $3.1 billion.[249] But that is not the end of the Special Committee's failures.

The Special Committee also gave up on two key protections for Southern. First, the Special Committee agreed to a fixed-exchange ratio without a price collar. This was a mistake of epic proportion. The Special Committee had no concern that Southern's stock price was going-down, so a floating-exchange ratio based on Southern's stock price only meant that Southern could end-up issuing a lesser number of shares to Grupo. The Special Committee nevertheless agreed to the collarless fixed-exchange ratio notwithstanding that it would likely result in Southern paying more in stock than what Grupo initially proposed. And that is exactly what happened. The 67.2 million Southern shares issued to Grupo were worth $600 million

[247] Id. at SPCOMM003740; see also Montejo Aff. Ex. 1 at 34.

[248] Handlesman 170:24-171:1 ("Q: How did they come up with a number of shares to be issued? A. I don't know.").

[249] Montejo Aff. Ex. 1 at 26-27; Montejo Aff. Ex. 23 at SPCOMM003727; Montejo Aff. Ex. 44 at 10.

more on April 1, 2005 than when the Special Committee approved the Transaction. Second, the Special Committee gave up a majority of the minority vote on the Transaction for a 2/3 super majority voting provision after Cerro had already assured its vote in favor of the Transaction. Rather than use Cerro's vote as leverage to extract more favorable terms from Grupo, the Special Committee allowed Grupo to lock-up stockholder approval of the Transaction with a side-agreement to give Cerro its long-sought registration rights.[250]

Indeed, every aspect of the Transaction ended in Grupo's favor. Even the "significant corporate governance protections designed to protect minority shareholders post-transaction" were a victory for Grupo—Grupo initially proposed Southern's continued New York Stock Exchange listing and the review of related party transactions, and the proportional Board representation resulted in Grupo electing every director on the Board. None of these provisions were "radical change from [Southern's] status quo."[251] As such, they were "cheap and easy to give."[252]

C. Stockholder Approval Was Not Obtained On Full Disclosure

The manner in which a transaction is disclosed to stockholders is an element of fair dealing.[253] As discussed in detail above, Southern's minority stockholders were misled by the omission of material information in the Proxy. The Proxy omitted information about how Goldman conducted its DCF valuations of Southern and Minera, and misled stockholders about

[250] Grupo gave up nothing in exchange for Cerro's vote. Grupo planned to grant Cerro and Phelps Dodge their registration rights since before the Transaction was proposed to the Southern Board. Montejo Aff. Ex. 9.

[251] Montejo Aff. Ex. 28 at UBS-SCC00005558.

[252] In re Emerson Radio S'holder Derivative Litig., 2011 WL 1135006, *5 (Del. Ch.).

[253] Weinberger, 457 A.2d at 711.

how Goldman conducted its Contribution Analysis. Consequently, the stockholder vote was not informed.[254]

IV. REMEDY AND DAMAGES

Plaintiff seeks an equitable remedy that cancels or requires defendants to return to Southern the shares Southern issued in excess of Minera's fair value. In the alternative, Plaintiff seeks rescissory damages in the amount of the present market value of the excess number of shares that Grupo holds as a result of Southern paying an unfair price in the Transaction. Plaintiff also seeks damages in an amount equal to the dividends paid on the canceled or returned shares.

This Court has broad remedial power to address breaches of the duty of loyalty.[255] The Court has the power to reform the Transaction "in a fitting and proportionate way" to address defendants' misconduct.[256] Here, defendants caused Southern to sell 67.2 million shares too cheaply thus, "the remedy would be either to cancel the shares . . . or to require the [defendants]

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[254] See Weinberger, 457 A.2d at 712; In re Emerging Commun's., 2004 WL 1305745, at *37-38 (stockholder vote uninformed where, among other things, financial projections and valuation information withheld from stockholders). Moreover, the stockholder vote cannot be said to ratify Defendants' conduct in connection with the Transaction. The doctrine of ratification is wholly inapplicable to the Transaction because (1) shareholder approval was required by statute to authorize the shares issued in the Transaction, and (2) the Proxy was materially misleading. Gantler v. Stephens, 965 A.2d 695, 714 (Del. 2009).

[255] Loral Space, 2008 WL 4293781 at *33.

[256] Id.

to pay fair value."[257] In the case that damages are awarded, fair value of the excess shares should be measured at the time of judgment.[258]

The calculation of the number of Southern shares issued in excess of Minera's fair value does not need to be mathematically precise.[259] As this Court has before explained:

> … the law does not require certainty in the award of damages where a wrong has been proven and injury established. Responsible estimates that lack mathematical certainty are permissible so long as the Court has a basis to make a responsible estimate of damages…where, as is true here, issues of loyalty are involved, potentially harsher rules come into play. Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly…. The strict imposition of penalties under Delaware law are designed to discourage disloyalty.[260]

Uncertainties in calculating that estimate are resolved against Defendants.[261]

Plaintiff's expert has opined that Southern issued to Grupo (through AMC) at least 24.7 million shares in excess of Minera's fair value. Plaintiff's expert's report and testimony provides a responsible estimate of the harm caused to Southern by defendants' disloyal conduct. Southern effected a 2-for-1 stock split on October 3, 2006 and a 3-for-1 split on July 10, 2008. Consequently, Grupo (through AMC) currently holds 148.2 million shares of Southern as a result of defendants' disloyal conduct. These shares are presently worth $5.17 billion. To fully disgorge the illicit profits defendants gained in connection with the Transaction, AMC must

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[257] Gentile v. Rossette, 2005 WL 2810683, *5 (Del. Ch.), rev'd on other grounds, 906 A.2d 91 (Del. 2006); see also Emerald Partners v. Berlin, 2003 WL 21003437, *20 (Del. Ch.), aff'd, 840 A.2d 641 (Del. 2003) (discussing appropriate remedy of canceling the excessive portion of shares issued to disgorge improper benefit from fiduciary).

[258] See Lynch v. Vickers Energy Corp., 429 A.2d 497, 503 (Del. 1981) ("we hold that Vickers will be required to pay rescissory damages to plaintiffs measured by the equivalent value of the TransOcean stock at the time of judgment").

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

[260] Bomarko, Inc. v. International Telecharge, Inc., 794 A.2d 1161, 1184 (Del. Ch. 1999), aff'd, 766 A.2d 437 (Del. 2000) (internal citations omitted).

[261] See, Thorpe v. CERBCO, Inc., 1993 WL 443406, *12 (Del. Ch.) ("Furthermore, once a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer.")

either pay fair value for each of those shares, or each of those shares must be canceled or returned to the Company. In addition, $60.20 in dividends has been paid on each of the 24.7 million Southern shares issued in excess of Minera's fair value (adjusted for stock-splits). Accordingly, to fully disgorge defendants of the illicit profits defendants gained in connection with the Transaction, defendants must pay damages in the amount of $1,486,940,000.[262]

V. PRE- AND POST-JUDGMENT INTEREST

Plaintiff requests pre-judgment interest on damages awarded in connection with the $1,486,940,000 in dividends wrongfully received by AMC from the date such dividends were paid by Southern to the date of judgment.[263] Plaintiff further requests post-judgment interest on all damages awarded. Delaware law is settled that "a successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues."[264] Generally, the legal rate of interest has been used as the benchmark for prejudgment interest.[265] In light of the sophistication of the defendants, interest should be compounded monthly.[266]

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[262] See ASARCO LLC v. Americas Mining Corp., 404 B.R. 150, 163 (S.D.Tex. 2009) (ordering the return of Southern shares to ASARCO to remedy AMC's fraudulent transfer and awarding damages equal to the amount of dividends that AMC received by virtue of its possession of [Southern] stock as well as prejudgment interest on those dividends).

[263] Id.

[264] Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co., 220 A.2d 778, 781-82 (Del. 1966).

[265] Valeant Pharma. Int'l v. Jerney, 921 A.2d 732, 755-56 (Del. Ch. 2005).

[266] See, Valaent, 921 A.2d at 756 (holding that fairness dictates that the award of interest should be compounded monthly when defendants are sophisticated senior executives).

CONCLUSION

For all the foregoing reasons, plaintiff's motion for partial summary judgment should be granted and defendants' cross motions for summary judgment should be denied.

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CERTIFICATE OF SERVICE

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION.	Consol. C.A. No. 961-VCS

AMC DEFENDANTS' PRETRIAL ANSWERING BRIEF

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PRELIMINARY STATEMENT[1]

The intent of Plaintiff's Opening Pretrial Brief seems to be to sow as much confusion as possible in the hope that uncertainty will convince the Court that the Merger was unfair. In part, Plaintiff does this by trying to lump alleged damages with whether there was a breach of fiduciary duty, regardless of *Plaintiff's* initial obligation to prove that there was a breach of fiduciary duty. When the misstatements and misdirection in Plaintiff's Pretrial Brief are cleared away, not one of Plaintiff's arguments has any legal or factual merit. Plaintiff cannot prove that the AMC Defendants breached any fiduciary duties in approving the Merger. Rather, the evidence does and will show that the Merger was the result of a robust process that was designed to and did ensure that the Merger was beneficial and fair to SPCC and its minority stockholders.

ARGUMENT

I. PLAINTIFF'S ATTACKS ON THE MERGER PRICE LACK MERIT

The Special Committee (and Professor Schwartz) did exactly what Plaintiff claims should have been done — they "compare[d] (i) the value of what was given up by the controlled subsidiary, and (ii) the value of what the controlled subsidiary received in return."[2] Plaintiff's real complaint is with the result that analysis yields.

A. *Associated Imports* Is Not Controlling

Plaintiff relies almost exclusively on *Associated Imports, Inc. v. ASG Industries,* 1984 WL 19833 (Del. Ch. June 20, 1984), *aff'd sub nom. Hubbard v. Associated Imports*, 497

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[1] Capitalized terms not defined herein have the meanings set forth in the AMC Defendants' Pretrial Brief ("AMC Defs. Pretrial Br."). Citations to Plaintiff's Opening Pretrial Brief, dated May 12, 2011, are in the form "Plaintiff's Pretrial Brief" or "Pl. Pretrial Br.".

[2] Pl. Pretrial Br. at 30.

A.2d 787 (Del. 1985), for the proposition that the only acceptable way to determine whether the Merger was fair to SPCC's stockholders was to compare Minera's DCF value to SPCC's market price. Plaintiff's argument contradicts Delaware law and the facts of this case.

Delaware law does not require directors to use the same specific valuation techniques in all circumstances.[3] Rather, Delaware law requires that directors closely examine the companies they are valuing and what drives their values — exactly what the Special Committee and its advisors did here. Delaware law also makes clear that the market price of a company's stock is not the sole permissible method of valuing a company.[4] "Directors may operate on the theory that the stock market valuation is 'wrong' in some sense, without breaching faith with shareholders."[5]

Plaintiff attempts to circumvent Delaware law by arguing that the cases the AMC Defendants cite are "inapplicable" because they do not "hold that the market price of a company's stock should be disregarded."[6] Plaintiff's argument demonstrates a fundamental

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3 AMC Defs. Pretrial Br. at 27-29 (D.I. 239).

4 *See In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *23 (Del. Ch. June 4, 2004) (Jacobs, J.) ("[T]he market price of shares is not always indicative of fair value") (citing *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 301 (Del. 1996)).

5 *Paramount Commc'ns Inc. v. Time Inc.*, 1989 WL 79880, at *19 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1990).

6 Pl. Pretrial Br. at 33. Plaintiff's reliance on *Union Illinois v. Korte*, 2001 WL 1526303,*7 (Del. Ch. Nov. 28, 2001) (Pl. Pretrial Br. at 32) is misplaced. . In *Union Illinois*, the director defendants approved and participated in a private stock sale in an effort to recapitalize a company that was on the brink of a financial crisis. The transaction involved the transfer of assets to the directors in exchange for desperately needed cash. The court determined that the director defendants acted in a good faith effort to save the company, but undervalued the company's shares. Specifically, the Court determined that the director defendants accepted an arbitrary share price set by the CFO, which they could not test or verify. Moreover, the director defendants did not obtain disinterested director approval, shareholder approval, or engage advisors to consider the value of the shares. The valuation issue in the case turned on whether to use

Footnote continued

misunderstanding of both what the Special Committee did and what the AMC Defendants argue. The Special Committee did not disregard SPCC's stock price. Rather, the Special Committee was fully aware of SPCC's stock price but determined that because SPCC and Minera were comprised of similar assets, they were best compared directly using the same set of assumptions. In part because the assumptions underlying SPCC's market price were unknown (which Plaintiff's expert admits[7]) and because a stock price is generally not a direct input into a DCF analysis, SPCC's market price was not used as an input in the DCF analysis. Consistent with Delaware law, the Special Committee relied on "other competent and sound valuation information that reflects the value of [SPCC]."[8]

Had the Special Committee used SPCC's market price as an input in its DCF analysis, it would have had to determine what assumptions were driving SPCC's market price to ensure that it used the same assumptions in the DCF analysis of Minera. That is, it would have had to calibrate a DCF model for SPCC's assets to match the observations of SPCC's stock price. As Professor Schwartz will explain at trial, it is likely that, at the time of the Merger, the market was using a long-term copper price that was higher than $.90/pound to price SPCC. If a long-term copper price higher than $.90/pound is used in the DCF analysis of Minera, the result confirms that the Merger was fair.[9] Plaintiff has not disputed and cannot dispute this fact.

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the appraisal "fair value" standard or the "fair market approach," concluding that the latter was the appropriate standard in that case. Notably, in determining the fair market value of the company's stock the court relied on a discounted cash flow to ascertain the company's fair market value. *Union Illinois* is irrelevant to this case.

7 *See* Beaulne Tr. 109:17-23; 116:6-8 (Confidential Coen Aff. Ex. 6).

8 *Smith v. Van Gorkom*, 488 A.2d 858, 876-77 (Del. 1985); *see also Finkelstein v. Liberty Digital, Inc.,* 2005 WL 1074364, at *12 n.20 (Del Ch. Apr. 25, 2005).

9 *See* Schwartz Report ¶¶ 47-51 (Affidavit of Marcus Montejo submitted in support of Plaintiff's Pretrial Brief, dated May 12, 2011, (hereafter "Montejo Pretrial Aff.") Ex. 45).

In addition, the only similarity between *Associated Imports* and this case is that they both involved mergers. In *Associated Imports* there was no special committee, the directors did not consult with financial advisors (or even each other) until the last possible moment, the transaction proceeded on a "fast track pace," and the transaction was structured in a way that required neither notice to nor a vote by the shareholders.[10] None of these factors was at play here (nor does Plaintiff even try to argue otherwise).[11]

B. **Goldman Sachs Did Not Ignore Its Valuation Principles**

Plaintiff argues that, in conducting a relative valuation, Goldman Sachs ignored its own valuation principles and Minera's actual value.[12] Plaintiff's argument, however, is as misplaced as the testimony upon which it relies.[13] Plaintiff plucks a snippet of deposition testimony from Martin Sanchez, a member of the Goldman Sachs team, entirely out of context. The full text of the question and answer (the bold and italicized text of which is the snippet of testimony Plaintiff cites) is set forth below:

> **Q**: And when you are doing a discounted cash flow analysis, did Goldman Sachs, or Goldman Sachs while you were working there, did Goldman Sachs typically show the value that the analysis generated for the company in a final presentation to the client?
>
> **A**: The thing was more, it depends obviously on the situations, but I would say that you generally show values for companies. But it depends on the particular situations.

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10 *Associated*, 1984 WL 19833, at *3-8; 14 n.8.

11 In addition, Plaintiff's argument that Grupo Mexico valued the 67.2 million shares of SPCC it received at market price (Pl. Pretrial Br. at 31) is not supported by the documents Plaintiff cites. Most of the documents Plaintiff cite relate to Grupo Mexico's proposal that the Merger be based on a floating exchange ratio, which the Special Committee rejected. None of the documents say what Plaintiff says they say.

12 Pl. Pretrial Br. at 11.

13 *Id.*

> **Q**. I f you were to do that with the DCF analysis in the final presentation, would you then compare that DCF value, the value that the discounted cash flow analysis came up with, with the value of the transaction as a measure to evaluate the fairness of the transaction?
>
> **A**. I f you look at a sell side of a company, there is only one DCF value to do, which is obviously the company you are selling. ***If you are buying a company, there is only one DCF value to do, which is the company that you are buying***. I f y ou merge companies, obviously what is most relevant is not to look at absolute values of each company, but what the exchange ratio in those two companies look like. So at the end of the day , what y ou need to do is basically put apples to apples comparisons and look at basicall y what is the implied exchange ratio. So more than absolute value, what matters is relative valuations. But, once more, it depends on the type of deal that you are working on.[14]

When read in context, Mr. Sanchez's testimony makes clear that Goldman Sachs did not ignore its own valuation principles. To the contrary, as Mr. Sanchez explained, the most important analysis when dealing with a merger is a comparison of the companies using the same set of assumptions, *i.e.*, an "apples to apples" comparison, exactly what the Special Committee and its advisors did. Nor did Goldman Sachs ignore Minera's actual value. As Plaintiff concedes, Goldman Sachs conducted a standalone DCF analysis of Minera (and many other preliminary analyses). But — and this is entirely consistent with the testimony by Mr. Sanchez that Plaintiff omits — instead of comparing the value derived from that analysis to SPCC's market capitalization, because this was a merger, Goldman Sachs compared Minera's DCF value to SPCC's DCF value, both of which were derived using the same set of assumptions.

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[14] Sanchez Tr. 39:18-42:5 (attorney objections and colloquy omitted) (Confidential Coen Aff. Ex. 8). Plaintiff similarly mischaracterizes Professor Schwartz's testimony. Plaintiff claims that at his deposition Professor Schwartz "was not able to identify a single thing he would have done differently had he been valuing Minera on a 'stand-alone' basis." *See* Pl. Pretrial Br. at 37 n.206. When asked how his assumptions would have changed had he been asked to conduct a stand-alone valuation, he stated "I would have to think about it." *See* Schwartz Tr. at 76:23 (Confidential Coen Aff. Ex. 7).

C. That Beaulne's And Goldman Sachs' DCF Analyses Of Minera Are Similar Is Unremarkable

Plaintiff argues that Beaulne's valuation of Minera is supported by Goldman Sachs' DCF analysis of Minera. That is not surprising because Beaulne created his valuation based almost entirely on the work Goldman Sachs did. Plaintiff does not challenge any of the underlying data or assumptions used by Goldman Sachs. Except for a lower discount rate, Beaulne used essentially the same assumptions and cash flow projections Goldman Sachs used. Indeed, Plaintiff's contention highlights that the only dispute here is the methodology — whether like assets should be compared using like assumptions (as the Special Committee, its financial, mining, and legal advisors, and Professor Schwartz did) or whether a value based on known assumptions should be compared to a value based on unknown assumptions (as Plaintiff insists should have been done). This case is not about how to value Minera; it is about how to compare the values of Minera and SPCC.[15]

D. Plaintiff Fundamentally Misunderstands Goldman Sachs' Contribution Analysis

For the first time in the 6½ years this litigation has been pending, Plaintiff purports to challenge Goldman Sachs' contribution analysis, arguing that it "deviates substantially from accepted business valuation models."[16] Specifically, Plaintiff argues that Goldman Sachs ignored SPCC's market multiple and instead relied on SPCC's "highly unreliable management projections provided by Grupo" to support the Merger.[17] Plaintiff's argument fundamentally misunderstands Goldman Sachs' contribution analysis. Contrary to

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15 *See* Beaulne Tr. 166:14-15 ("MR. BROWN: . . . [T]his case is not about the value of Minera Mexico.").

16 Pl. Pretrial Br. at 35.

17 *Id.* at 36.

Plaintiff's contention, Goldman Sachs did not ignore SPCC's market multiple.

As the Proxy explains, Goldman Sachs performed a contribution analysis to derive various illustrative implied numbers of shares of SPCC to be issued in exchange for Minera.[18] In its analysis, Goldman Sachs calculated illustrative implied EBITDA multiples for SPCC based on various EBITDA scenarios.[19] Goldman Sachs then applied the multiples calculated for SPCC to various estimates of Minera's EBITDA to derive enterprise values for Minera. Using the October 18, 2004 closing price of SPCC's stock ($46.41), Goldman Sachs calculated the implied number of shares that reflect the implied equity value of Minera derived using various EBITDA estimates and SPCC's multiples. The results of Goldman Sachs' contribution analysis are set forth in the analysis Goldman Sachs presented to the Special Committee and the Board.[20]

Goldman Sachs derived various EBITDA multiples for SPCC using both Wall Street research and non-public information. As Mr. Sanchez explained at his deposition, the non-public information "was derived from the due diligence that was done as part of this transaction. That information was not privy to the public."[21] Because SPCC's internal EBITDA projections were lower than the market's expectations, SPCC's implied EBITDA multiples were higher because the multiples were calculated based on SPCC's stock price (which did not reflect the lower internal EBITDA projections).

Moreover, the purpose of this part of Goldman Sachs' analysis was to provide a different perspective on the Merger, viewed at a single point in time. It applies different

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18 *See* Proxy at 36 (Public Coen Aff. Ex. D).

19 *Id.*

20 *Id.* at 37; *see also* Montejo Pretrial Aff. Ex. 23 at SP COMM 003753.

21 Sanchez Tr. 66:12-15 (Confidentiel Coen Aff. Ex. 8).

multiples to the current performance of each company to derive the implied number of shares to be exchanged. Plaintiff's contention that Goldman Sachs relied on "highly unreliable management projections provided by Grupo" because SPCC "outperformed its management EBITDA projections for both 2004 and 2005 by a substantial margin"[22] misapprehends Goldman Sachs' analysis. The Goldman Sachs Contribution Analysis is static, based on each company's then-current performance; the analysis is not forward looking.[23] As of the date of the analysis, the Special Committee's due diligence projected that SPCC would underperform the published EBITDA estimates,[24] a conclusion that Plaintiff does not challenge.[25]

Nor did the Proxy mislead the market. The Goldman Sachs Contribution Analysis is explained in detail, as are its results. The Proxy discloses that the calculated implied

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22 Pl. Pretrial Br. at 35-36.

23 *See* Sanchez Tr. 59:16-60:6 ("Once more, this analysis on page 24 looks at the static view of these companies. . . . This analysis does not capture what is the expected performance of both Southern Peru Copper and Minera Mexico.") (Confidential Coen Aff. Ex. 8). In contrast, a DCF analysis *is* forward-looking.

24 Mr. Sanchez explained that one of the reasons SPCC's projected EBITDA was lower than Wall Street's projection was because its ore grade body was decreasing due to the mine's configuration. *See* Sanchez Tr. 61:16-62:4 (Confidential Coen Aff. Ex. 8). Plaintiff also places great reliance on the fact that SPCC ultimately outperformed its EBITDA projections for 2004 and 2005 (Pl. Pretrial Br. at 36), but Plaintiff cannot and does not cite any evidence that the Special Committee or its advisors had any reason to believe the EBITDA projections were understated. If Plaintiff wants to engage in hindsight argument like this, then he must also be stuck with the market's long-term judgment that the Merger was accretive to SPCC.

25 Plaintiff seems to claim that A&S did not adjust SPCC's mine plans (Pl. Pretrial Br. at 11), but that is wrong: A&S did propose numerous changes to the forecast cash flows for both Minera and SPCC. *See* Montejo Pretrial Aff. Ex. 23 at SP COMM003744-47; Sanchez Tr. 82:10-83:25 (Confidential Coen Aff. Ex. 8); Handelsman Tr. 119:19-120:14 (Confidential Coen Aff. Ex. 3). And although A&S did give indications that it thought there might be expansion potential within SPCC's existing mines, the Special Committee explained what A&S was referring to and how the Special Committee took that into consideration. *See* Palomino Tr. 139:5-142:2 (Confidential Coen Aff. Ex. 2); Sanchez Tr. 148:8-149:4 (Confidential Coen Aff. Ex. 8).

number of SPCC shares to be issued using a Wall Street-derived EBITDA estimate is less than some of the EBITDA estimates based on management projections.[26]

E. Professor Schwartz's Opinion Is Not "Academic Bunk"

Professor Schwartz's decision to compare Minera and SPCC's values on a relative basis using the same set of assumptions was appropriate given the facts of this case. Plaintiffs do not challenge Professor Schwartz's qualifications with respect to valuing mine companies, mines, and commodities (which is not surprising given Beaulne's lack of qualifications with respect to any of those subjects), and Professor Schwartz will explain at trial that, had he been retained to evaluate the proposed Merger in the first instance and had before him the record the Special Committee had, he would have done the valuation on a relative basis. Such a relative valuation is a well-accepted valuation technique.[27]

1. A Stand Alone Valuation Of Minera Was Irrelevant To Professor Schwartz's Analysis

As Professor Schwartz explained at his deposition and will explain at trial, a

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[26] Proxy at 36-37 (Public Coen Aff. Ex. D). Moreover, a shareholder could use the information provided in the Proxy to determine that the multiple derived from management projections was higher than the multiple derived from Wall Street research. By multiplying the implied number of shares to be issued by the stock price, a shareholder could determine Minera's enterprise value. If that number is divided by analyst estimates of Minera's 2005 EBITDA projections the result is a multiple higher than 4.8.

[27] That Plaintiff resorts to labels like "bunk" is telling. A methodology that was specifically approved in *Associated* and is recommended in valuation texts cannot rationally be considered "bunk." *See Associated Imports*, 1984 WL 19833, *15; *see also* Gerhard Picot, HANDBOOK OF INTERNATIONAL MERGERS AND ACQUISITIONS: PREPARATION, IMPLEMENTATION AND INTEGRATION, 190 (Palgrave Macmillan, 2002); Jason A. Pedersen, THE WALL STREET PRIMER: THE PLAYERS, DEALS, AND MECHANICS OF THE U.S. SECURITIES MARKET, 176-77 (2008).

standalone valuation of Minera was irrelevant to his analysis. The Merger could best be understood and evaluated by comparing the values of the companies' mine assets on the basis of the same set of assumptions. Therefore, valuations of Minera only make sense when considered in the context of what assumptions drove those valuations. And Professor Schwartz's report contains separate valuations of both SPCC and Minera at the two endpoints of the long-term copper price range Professor Schwartz used. The equity valuation Professor Schwartz calculated for Minera at the top end of his long-term copper price range was more than $3.7 billion, which is the answer to Plaintiff's unsupported assertion that "[t]here is no expert testimony being offered in this case taking the position that Minera was worth anything close to $3.1 billion, let alone $3.7 billion."[28]

2. **Professor Schwartz Did Not Ignore SPCC's Market Price**

In comparing SPCC and Minera using the same set of assumptions, SPCC's market price was not directly relevant, just as it was not a direct input into the analyses the Special Committee's advisor prepared. Plaintiff's attempt to cast doubt upon Professor's Schwartz's analysis by stating that he "conceded that if he was valuing 67 million shares of a company traded on the New York Stock Exchange, one thing he would look at is the market price" is circular.[29] Professor Schwartz gave SPCC's market price the consideration he believed it warranted, and specifically used the SPCC market price to calibrate his DCF analysis of SPCC. As Professor Schwartz explained at his deposition: "[t]here are different procedures to value assets" and "[i]t would depend on the context" for which the valuation was to be used.[30] Like

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28 *Compare* Schwartz Report Ex. 2 (Montejo Pretrial Aff. Ex. 45) *with* Pl. Pretrial Br. at 31.

29 Pl. Pretrial Br. at 38.

30 Schwartz Tr. 14:5-18 (Confidential Coen Aff. Ex. 8).

Goldman Sachs (whose testimony Plaintiff also misquotes), Professor Schwartz concluded that in the context of a merger of similar companies with similar income-producing assets, a relative valuation using the same set of assumptions is the best methodology.

3. Plaintiff Uses Different Authors' Uses Of The Term "Relative Valuation" To Try To Create Confusion

Plaintiff argues that Professor Schwartz did not conduct the type of "relative valuation" discussed by Dr. Damodaran.[31] Plaintiff's argument, however, is an attempt at obfuscation — what is important is not what someone calls one method or another, but what those methods actually are, how they should be used, and whether they are used properly in a particular situation. Viewed from that perspective, Plaintiff's argument fails on all counts.[32]

Dr. Damodaran uses the term "relative valuation" to refer to a multiples analysis or a comparable companies analysis, not the type of analysis Professor Schwartz conducted. *Plaintiff admitted this in his Pretrial Brief*.[33] Notwithstanding this admission, Plaintiff quotes excerpts from Dr. Damodaran's book entirely out of context and argues that Professor Schwartz did not conduct a proper "relative valuation."[34] What Plaintiff is really arguing, which is undisputed, is that Professor Schwartz did not conduct a multiples or comparable companies analysis. Professor Schwartz compared two similar assets, SPCC and Minera, using the same set of assumptions. He also specifically explained why a comparables analysis was inappropriate

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31 Pl. Pretrial Br. at 38.

32 As the evidence will show at trial, the Special Committee and its advisors and Professor Schwartz all correctly used the relative valuation methodology. Not only did Beaulne not do so, he also misapplied the less-favored and less accurate multiples methodology he chose to use.

33 *See* Pl. Pretrial Br. at 35 n.193; *see also* Beaulne Tr. 100:3-10 (Confidential Coen Aff. Ex. 6).

34 Pl. Pretrial Br. at 38.

and why Beaulne's attempt to use that methodology failed.

Plaintiff also ignores the fact that Dr. Damodaran cautions against relying on multiples analyses for many of the same reasons Beaulne's analysis failed, and in particular because they are inherently subject to the market mis-pricing risks that the Special Committee noted here. In his chapter about multiples and comparables analyses, Dr. Damodaran devotes an entire section to the pitfalls of multiples analyses. For example, Dr. Damodaran explains:

- "While [multiples anal ysis] is easy to use and intuitive, it is also eas y to misuse"[35]
- "Use of multiples and comparables is less time and resource intensive than discounted cash flow valuation. Discounted cash flow valuatio ns require substantially more information than relative valuation."[36]
- "[T]he lack of transparency regarding the underly ing assumptions in [multiples analyses] makes them particularly vulnerable to manipulation."[37]
- "[U]sing multiples based on comparable firm s ... builds in errors (overvaluation or undervaluation) that the market might be making in valuing these firms"[38]
- "In discounted cash flow valuation, we are attempting to estimate the intrinsic value of an asset based on its capacity to generate cash flows in the future. I n [multiples analy ses], we are making a judgment on how much an asset is worth by looking at what the market is p aying for similar assets…. If, however, the market is systematically overpricing or underpricing a group of assets or an enti re sector discounted cash flow valuations can deviate from [multiples analyses]."[39]
- "The two approaches to valuation —discounted cash flow valuation and [multiples analysis]—will generall y yi eld different estimates of value for the same firm at the same poin t in time. I t is even possible for one approach to generate the result that the stock is undervalued while the other concludes that

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35 Aswath Damodaran, DAMODARAN ON VALUATION: SECURITY ANALYSIS FOR INVESTMENT AND CORPORATE FINANCE, 233 (John Wiley & Sons, 2nd ed. 2006).

36 *Id.* at 235.

37 *Id.* at 236.

38 *Id.* at 17.

39 *Id.* at 234.

it is overvalued."[40]

Dr. Damodaran's text supports the AMC Defendants' arguments and contradicts Plaintiff's arguments.

4. Professor Schwartz's Tests For Robustness Are Not Contrary To Delaware Law

Citing *In re Hanover Direct, Inc. Shareholders Litigation*, 2010 WL 3959399, *2 (Del. Ch. June 14, 2010), Plaintiff argues that "[t]he reliability of a particular valuation technique is tested with alternative valuation techniques."[41] But that is not what *Hanover* held. In *Hanover*, the Court declined to rely on plaintiff's expert's opinion concerning the fairness of a merger price due to "serious concerns" with her valuation analysis including, *inter alia*, the facts that (i) she changed her valuation while testifying, (ii) her demeanor on the stand was questionable, (iii) her inclusion of outlier data points; (iv) her disregard for other data points, *and* (v) the fact that her valuation was based on one technique.[42] That the expert had relied on one technique was not in itself the basis for discrediting her work. In fact, the Court made a point of noting "that there may well be circumstances where a single valuation methodology is valid and reliable, and is perhaps the best and only method by which to value a particular company."[43]

One reason Professor Schwartz did not conduct multiples analyses is because Plaintiff did not contest the underlying data and assumptions upon which the Special Committee relied.[44] Given that there is no dispute over the underlying data and assumptions, Professor

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40 *Id.* at 253.

41 Pl. Pretrial Br. at 40.

42 *Hanover*, 2010 WL 3959399, at *2.

43 *Id.*

44 *See* Beaulne Tr. 86:24-87:14 (Confidential Coen Aff. Ex. 6); *see also id.* at 87:22-88:4 (calling that method "the standard accepted practice"); *id* at 88:22-89:3 (calling methods

Footnote continued

Schwartz tested the robustness of his findings by varying the input values (including the long-term copper price and weighted average cost of capital) used in his DCF analysis for both companies and observing the impact of those varying inputs on his conclusion. Professor Schwartz's robustness test confirmed the validity of his opinion.[45]

Contrary to Plaintiff's contention, Professor Schwartz did not "back[ ] into his predetermined result and solv[e] for a higher long-term copper price."[46] *First*, Professor Schwartz concluded, based on largely the same data Plaintiff used, that the Merger price was fair at $0.90/pound. *Second*, Professor Schwartz used the market price to examine and explain the undisputed difference between the market price of SPCC and its DCF valuation at $0.90/pound. As a result of his sensitivity analyses, Professor Schwartz demonstrated that, given the primary variables that impact the value of copper companies,[47] it was likely that the market was using a long-term copper price higher than $0.90/pound to price SPCC toward the end of 2004.[48] Plaintiff does not contest these conclusions and Beaulne admits that he is unqualified to offer any opinions on these issues.

The Special Committee, moreover, *did* exactly what Plaintiff claims Professor Schwartz did not do. Aside from a relative valuation, the Special Committee's advisors

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used by SPCC and Minera "standard practice" and "accepted practice").

45 Notably, Beaulne did not conduct any sensitivity analyses for the long-term copper price, weighted average cost of capital, or any other input.

46 Pl. Pretrial Br. at 40.

47 Everyone agrees that copper prices are significantly responsible for the value of a copper company. *See* Beaulne Report at 12-13 (Montejo Pretrial Aff. Ex. 44); Schwartz Report ¶¶ 13-15 (Montejo Pretrial Aff. Ex. 45).

48 Schwartz Report ¶¶ 41-43 & Ex. 2 (Montejo Pretrial Aff. Ex. 45). Plaintiff also ignores the fact that the long-term copper price Professor Schwartz used was below the spot price at the end of 2004 and is less than half the average copper spot price since then.

conducted a contribution analysis and also conducted analyses based on multiples. Recognizing these facts, Plaintiff argues that "[a]lthough Goldman performed multiple analyses, neither is robust because they do not independently reach results that fall within the same range."[49] But Plaintiff's contention that Goldman Sachs' DCF for Minera yielded an implied equity value of approximately $1.2 billion while its contribution analysis yielded an implied equity value of approximately $2.8 to $3.1 billion misapprehends Goldman Sachs' analyses.[50] Goldman Sachs performed several DCF analyses for Minera during the course of its engagement; those analyses yielded a range of values based on a number of different assumptions.[51] Similarly, Goldman Sachs' contribution analysis provided a range of values based on different assumptions.[52] And none of this is remotely surprising: As Dr. Damodaran expressly notes, it is common for DCF analyses and multiples analyses to yield different results.[53]

II. PLAINTIFF'S ATTACKS ON THE SPECIAL COMMITTEE'S PROCESS FAIL

A. The Special Committee Did Not Give Up Key Protections For SPCC

Plaintiff's contention that the Special Committee gave up key protections (a collar and a majority of the minority vote requirement) ignores the forest for the trees. The Special Committee in fact negotiated numerous concessions that directly benefitted SPCC and its

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49 Pl. Pretrial Br. at 40. Notably, the case Plaintiff cites for the proposition that Goldman Sachs' other analyses were not "robust," *Muoio & Co. v. Hallmark Entm't Invs. Co.*, 2011 WL 863007, *17 (Del. Ch. Mar. 9, 2011), relates to assessing the credibility of expert witnesses, not the propriety of the work performed by a Special Committee's advisor.

50 Pl. Pretrial Br. at 40 n. 229. Plaintiff does not cite any documentary evidence to support the equity values he asserts Goldman Sachs derived for Minera.

51 *See* Montejo Pretrial Aff. Ex. 19 at SP COMM 003375-76; Montejo Pretrial Aff. Ex. 20 at SP COMM 006886-88. Plaintiff concedes that Goldman Sachs' DCF analysis of Minera yielded a range of values. *See* Pl. Pretrial Br. at 12.

52 Montejo Pretrial Aff. Ex. 23 at SP COMM 3753.

53 Damodaran, *supra*, at 253-54.

minority stockholders.

1. A Fixed-Exchange Ratio Protected SPCC's Minority Stockholders

The Special Committee's primary concern with Grupo Mexico's initial proposal was that it was premised on a floating exchange ratio that was based solely on the price of SPCC common stock over a period of time immediately prior to the closing, but did not take into consideration changes in the value of Minera that might arise.[54] Given the historic volatility of SPCC's trading price, the Special Committee concluded that a floating exchange ratio was not appropriate.[55] Accordingly, the Special Committee proposed a fixed exchange ratio with a collar. Although Grupo Mexico accepted the notion of a fixed-exchange ratio, it rejected a collar because it would send a negative signal to the market. Grupo Mexico also expressed a concern that a collar would allow speculators to arbitrage between the future SPCC stock price and the bottom limit of the collar and thus drive down the stock price.[56]

After careful consideration and consultation with their advisors, the Special Committee agreed to drop the requirement of a collar. The Special Committee and its advisors believed that a fixed-exchange ratio in itself was sufficient to protect SPCC's stockholders because the exchange ratio represented the fundamental value of both companies. Moreover, the requirement of a collar was less important to the Special Committee because SPCC and Minera were being valued on a relative basis and, thus, price fluctuations would have a similar effect on each company.[57]

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54 *See, e.g.,* Handelsman Tr. 97:10-98:8 (Confidential Coen Aff. Ex. 3); Ruiz Tr. 148:14-149:15 (Confidential Coen Aff. Ex. 4).

55 Proxy at 20 (Public Coen Aff. Ex. D).

56 *See* PX 57 at SP COMM 010489-90.

57 Palomino Tr. 73:8-76:5 (Confidential Coen Aff. Ex. 2); Sanchez Tr. 117:12-120:18

Footnote continued

2. The Two-Thirds Vote Provision Protected SPCC's Minority Stockholders

A key goal of the Special Committee was to ensure that the Merger could not be approved unilaterally by Grupo Mexico. A requirement that the Merger had to be approved by two-thirds of SPCC's stockholders ensured that Grupo could not force the Merger. In addition, Cerro and Phelps Dodge's agreement to vote in accordance with the Special Committee's recommendation ensured that Grupo Mexico could not strong arm the votes of the other stockholders.[58] Plaintiff's contention that the Special Committee gave up the requirement that the majority of SPCC's minority shareholders approve the Merger misses the point. Such a requirement was unnecessary because a two-thirds voting requirement achieved the Special Committee's intended goal – preventing Grupo Mexico from being able to unilaterally approve the Merger.

Plaintiff also ignores the actual results of the vote and the market's reaction to the Merger. The Merger was supported by an overwhelming majority of the votes cast: Of all the votes cast, less than 0.25% voted against any of the three questions in the Proxy Statement. The market also reacted favorably to the Merger – SPCC's share price rose after the Proxy was released and continued to rise thereafter. And Plaintiff's father bought more SPCC stock the day after the proposed Merger was announced[59] and plaintiff Sousa affirmatively voted for the Merger even after filing a complaint claiming it was unfair (which of course he did before the

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(Confidential Coen Aff. Ex. 8); Perezalonso Tr. 108:5-108:24 (Confidential Coen Aff. Ex. 9).

[58] Plaintiff's repeated assertions that Cerro and Phelps Dodge agreed to vote in favor of the merger (*e.g.,* Pl. Pretrial Br. at 7 & 25) are not supported by the record. Cerro and Phelps Dodge tied their votes to the Special Committee's recommendation. *See* AMC0024876-81; SPCOMM002459 (attached hereto as Exhibits 1 and 2).

[59] Confidential Coen Aff. Ex. 14 at TT00025 & TT00032.

Proxy was released, making his later vote even more telling).[60]

B. The Special Committee Used Its Leverage Against Grupo Mexico

Plaintiff tries to paint the Special Committee and its advisors as ineffectual, effectively kowtowing to Grupo Mexico's whims. As an initial matter, no one on the Special Committee or its advisors had anything to gain from being patsies for Grupo Mexico, and constituencies like the Peruvian pension funds that asked Mr. Palomino to serve on the board and Cerro were only interested in maximizing the value of their SPCC stock.

In addition, the Special Committee and its advisors identified why there were differences in the valuation first proposed by Grupo Mexico and the initial standalone valuation prepared by Goldman Sachs and used that information to create leverage when negotiating with Grupo Mexico.[61] In fact, the Special Committee threatened to walk away from negotiations in order to induce Grupo Mexico to improve the terms of its offers.[62] Moreover, Professor Schwartz demonstrated that the Special Committee's decision to negotiate the Merger based on a $0.90/pound long-term copper price enabled the Special Committee to negotiate more effectively because a rising copper price environment favored Minera more than SPCC.[63]

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60 Public Coen Aff. Ex. E.

61 *See* Montejo Pretrial Aff. Ex. 19 at SP COMM 003374; *see also* PX 43 at SP COMM 017997.

62 *See* Palomino Tr. 94:9-20 (Confidential Coen Aff. Ex. 2) ("What transpired is that we told Mr. Larrea that certain things had to change in order for us to be able to continue discussing the issue. He indicated that he wasn't ready to change these things. And so at that point we said, well, in that case there is nothing really left to discuss."); *id* at 94:25-95:3 ("The special Committee was not going to continue discussions or recommend this deal if we didn't get improvements on the conditions. . . that were existing at that point.").

63 *See* Schwartz Report ¶¶ 44-45 (Montejo Pretrial Aff. Ex. 45). Plaintiff's expert agrees that a rising copper price environment was better for Minera's assets than for SPCC's assets. *See* Beaulne Dep. Tr. at 89:22-90:10 (Confidential Coen Aff. Ex. 6).

C. The Special Committee Negotiated Meaningful Concessions

Plaintiff's contention that the corporate governance provisions and the special dividend the Special Committee negotiated favored Grupo Mexico also is without merit.[64]

1. The Special Committee Secured Important Corporate Governance Protections For SPCC And Its Stockholders

Plaintiff's contention that the Merger's corporate governance provisions favored Grupo Mexico is meritless. In fact, throughout the negotiations, Grupo Mexico resisted the Special Committee's efforts to incorporate additional corporate governance protections for SPCC's minority shareholders. Grupo Mexico argued that SPCC's minority stockholders did not need corporate governance protections beyond those provided by Delaware law and New York Stock Exchange rules.[65]

The Special Committee repeatedly discussed additional corporate governance protections with Grupo Mexico.[66] In late September, Grupo Mexico finally acceded to the Special Committee's demands regarding additional corporate governance protections, agreeing to all of the provisions for which the Special Committee had pressed.[67] Collectively, these

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64 Pl. Pretrial Br. at 19-21.

65 *See* Proxy at 17, 19 (Public Coen Aff. Ex. D); *see also* PX 29 at SP COMM 001623.

66 *See* Proxy at 24-25(Public Coen Aff. Ex. D).

67 *See id.* at 24-26. These provisions included (i) proportional representation of minority stockholders on SPCC's board of directors, (ii) a requirement that independent directors meet the New York Stock Exchange independence requirements and be nominated by a special nominating committee, (iii) a requirement that the audit committee review related-party transactions in advance of their consummation above a certain threshold, and (iv) a requirement that the company remain listed on the New York Stock Exchange for at least five years. *See id.* at 21.

Plaintiff's contention that the Special Committee's proposal for independent directors "actually eliminated the minority stockholders' right to elect directors" (Pl. Pretrial Br. at 19) is wrong. As amended following the Merger, SPCC's charter provides that the Board shall at all times include a number of Special Independent Directors. *See* Confidential

Footnote continued

additional corporate governance protections enhanced SPCC's minority stockholders' position in dealing with Grupo Mexico after the Merger.

2. The Special Dividend Did Not Favor Grupo Mexico[68]

Plaintiff's challenge to the $100 million special dividend is wrong. Plaintiff ignores the fact that the special dividend was based on shareholders' *pre-Merger* holdings. In other words, 45.8% of the $100 million was received by stockholders other than Grupo Mexico.[69] Moreover, there is nothing untoward about the fact that the Special Committee used the Special Dividend as a way to reduce the valuation differential between the Special

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Coen Aff. Ex. P at Article 8.2. A Special Nominating Committee was established, which has the right to nominate a proportionate number of independent directors based on the non-Grupo Mexico ownership in the common stock (not to exceed 6 nor be less than 2), with such Nominating Committee being comprised of 3 directors, 2 of whom would be independent. *Id.* at Article 8.4. Contrary to Plaintiff's contention, the Special Committee ensured that the minority stockholders would be represented on the board. The only thing Plaintiff cites for his contrary argument is a 2006 proxy statement discussing the requirements for amending SPCC's bylaws, which has nothing to do with what the Special Committee achieved.

[68] On the eve of trial, Plaintiff for the first time asserts that the special dividend was really 6% instead of 2.75% and that the special and regular dividends were responsible for approximately one third of the alleged overpayment of shares. *Compare* Pl. Pretrial Br. at 21 ("In total, the dividends increased by 8.1 million the number of shares Southern issued to Grupo above what the number of shares the dividend payments would have resulted in had Southern been valued at its market capitalization.") *and* Montejo Pretrial Aff. Ex. 34 ("OVERALL INCREMENTAL SOUTHERN PERU SHARES TO BE ISSUED DUE TO DIVIDENDS") *with id.* at 48 ("Plaintiff's expert has opined that Southern issued to Grupo … at least 24.7 million shares in excess of Minera's fair value."). Aside from the fact that they are woefully late, the arguments about the effect of the dividends are not even in Plaintiff's expert report. Montejo Pretrial Aff. Ex. 25 is clearly in the nature of expert opinion and has never before been suggested by Plaintiff.

And these assertions are substantively implausible. According to Plaintiff's untimely new expert theory, the $100 million special dividend — only 54.2% of which was paid to Grupo Mexico — was responsible for 4 million of the allegedly overpaid shares, approximately 16.2% of the alleged overpayment to Grupo Mexico. *See* Montejo Pretrial Aff. Ex. 25. Thus, Plaintiff is claiming approximately $1.08 billion in damages from the payment of $54.2 million in special dividends. *See* Pl. Pretrial Br. at 48-49.

[69] Proxy at 25 (Public Coen Aff. Ex. D).

Committee and Grupo Mexico's valuations of SPCC and Minera.[70]

D. The Registration Rights Agreements Did Not "Lock-Up" Stockholder Approval Of The Merger

Plaintiff's contention that Grupo Mexico used Cerro to force a deal and "lock-up shareholder approval" is not supported by the record. In fact, as the AMC Defendants will show at trial, the evidence is to the contrary.

As Plaintiff admits, Grupo Mexico did not indicate until late August that it would support SPCC offering Cerro and Phelps Dodge the opportunity to participate in a registered offering in order to increase the liquidity of SPCC's common stock.[71] By that time, the parties already had agreed to one of the major components of the deal, using a fixed-exchange ratio in determining the number of shares to be paid. At the time Grupo Mexico indicated its support for registration rights, it also proposed the exchange of 67 million shares of SPCC for its equity interest in Minera.[72] This was a reduction of over 13 million shares from Grupo Mexico's prior proposal.[73] In short, the negotiation of Cerro's registration rights had no effect on the financial terms of the Merger.

Moreover, contrary to Plaintiff's arguments, the Special Committee used Cerro's registration rights as a mechanism to ensure that Grupo Mexico could not force the Merger.[74] At

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70 Mr. Sanchez explained that because the $100 million dividend was an obligation of the company it was properly characterized as a debt. *See* Sanchez Tr. 100:14-23 (Confidential Coen Aff. Ex. 8).

71 Pl. Pretrial Br. at 21; Proxy at 22 (Public Coen Aff. Ex. D).

72 *See* Proxy at 22-26.

73 *Id.* at 22 ("During late July and early August . . . Grupo Mexico believed the number of shares of our Common Stock to be issued as consideration for the acquisition of Minera Mexico should be in excess of 80 million shares.") .

74 Plaintiff's contention that Grupo Mexico planned to grant Cerro and Phelps Dodge their registration rights since before the Merger was proposed is not supported by the

Footnote continued

the Special Committee's insistence, Cerro's registration rights agreement provided that Cerro would vote in accordance with the Special Committee's recommendation even if the Special Committee later withdrew its recommendation of the Merger.[75] Finally, Plaintiff's argument defies common sense. Cerro owned a significant amount of SPCC's outstanding stock and if the Merger was as mispriced as Plaintiff claims, it would have caused substantial damage to the value of Cero's SPCC stock.[76] Cerro and the Special Committee's interests were aligned – both wanted the best deal for SPCC and its stockholders.

E. The Minority Stockholders Were Informed

Plaintiff argues that the Proxy misleadingly gave stockholders the impression that Goldman Sachs relied on SPCC's market price in calculating the number of shares to be issued.[77] Plaintiff also argues, for the very first time, that the Proxy "misleads the market with regard to Goldman's Contribution analysis" because it does not explain how the multiples are derived.[78] Both arguments fail.

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document he cites. *See* Pl. Pretrial Br. at 46 n.250. The document Plaintiff cites purports to be a UBS "meeting agenda," but there is no evidence that that document reflected Grupo Mexico's position at that time. In any event, it is undisputed that Phelps Dodge had been seeking registration rights since before the Merger was proposed.

[75] Proxy at 26 (Public Coen Aff. Ex. D); *see also* SP COMM 002459-65 (attached hereto as Exhibit 2).

[76] Cerro did not receive the market price when it sold its shares into the market because it took an underwriting and minority block discount. Pl. Pretrial Br. at 29 & n.166. And Plaintiff again ignores context when he makes assertions about the "450 million profit" Cerro made when it sold its SPCC stock in 2005 after the Merger (Pl. Pretrial Br. at 29 & n.167, 42). As Plaintiff concedes, Cerro had been an SPCC shareholder *since 1955* and its basis in the stock was approximately $1.32 per share. *See* Pl. Pretrial Br. at 7, 29 n.167. That is very different from the profit Theriault made on the SPCC stock he purchased starting immediately after the Merger was announced. *See* Confidential Coen Aff. Ex. 14 at TT00025.

[77] Pl. Pretrial Br. at 25-26.

[78] *Id.* at 26-27.

First, the Proxy explains in great detail the DCF analyses Goldman Sachs performed of each company and how the number of shares to be issued was calculated:

> Using the illustrative implied equity values for both companies as of December 31, 2004. Goldman Sachs calculated illustrative implied numbers of our Common Stock to be issued corresponding to the respective illustrative implied values of 99.1463% of the outstanding Minera Mexico shares as of December 31, 2004.[79]

Not surprisingly, the only support Plaintiff cites for his argument comes from the section of the Proxy dealing with copper reserve analyses, not the explanation of Goldman Sachs' DCF analyses.[80]

Second, contrary to Plaintiff's contention, the Proxy explains Goldman's Contribution Analysis in detail, including how the EBITDA multiples were calculated.[81] The Proxy makes clear that the illustrative implied EBITDA multiples used in the Contribution Analysis were derived from management projections and selected Wall Street research analysts.[82]

F. Plaintiff's "Timing" Argument Is Wrong

Plaintiff argues that the timing of the events leading up to the Merger was improperly orchestrated by Grupo.[83] There are at least two problems with these arguments.

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79 Proxy at 35 (Public Coen Aff. Ex. D). Page 35 of the Proxy also explains how Goldman Sachs performed its DCF analysis of Minera and SPCC. Moreover, the Proxy clearly warns that Goldman Sachs' analysis is to be considered as a whole and that "[s]electing portions of the analyses or of the summary set forth above, without considering the analyses as a whole, could create an incomplete view of the processes underlying Goldman Sachs' opinion." *Id.* at 38.

80 *See id.* at 32.

81 *Id.* at 36-37.

82 *Id.*

83 *See, e.g.,* Pl. Pretrial Br. at 8-9 & 41-42. Plaintiff's argument that the minority shareholders were financially injured by the "timing" of the Merger (Pl. Pretrial Br. at 41)

Footnote continued

First, despite Plaintiff's innuendos, there is nothing wrong with strengthening a company's balance sheet before proposing a transaction. *Second*, Plaintiff cannot and does not dispute that once the Merger had been proposed, its timing was in the Special Committee's hands and proceeded on a schedule set by the Special Committee.[84]

And in the end these arguments miss a more fundamental point: If Plaintiff was right that the Merger was deeply flawed in every way it possibly could have been, then the Merger would have had a massively negative impact on the value of SPCC, and that impact would have been felt by all of SPCC's shareholders. Yet, Plaintiff never explains why Cerro and Phelps Dodge would vote for a deal that, if Plaintiff was right, should have decreased the value of their SPCC stock by a huge amount and affected the value they could get from selling their shares. And of course the market behavior and other uncontested facts show that the Merger was good for SPCC.[85] Finally, if Plaintiff was right that the Merger was misrepresented to the market (such as by overstating estimates of Minera's production), then Plaintiff would have pointed to some corrective disclosure to the markets during the 6½ years this case has been pending, and yet offers no such evidence at all.

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is completely unexplained and is nowhere discussed by Plaintiff's expert.

[84] Indeed, one of the very documents Plaintiff cites makes clear that the Special Committee did not bow to pressure from Grupo Mexico to speed up the process. *See* Montejo Pretrial Aff. Ex. 25 at UBS-SCC00005567 (UBS proposing a two-week deadline to reach an agreement).

[85] SPCC's stock price rose after the Proxy was released, and Plaintiff has offered no evidence that there was ever a price decline because the market "figured out" that the Merger was bad for SPCC. Theriault bought more SPCC stock *twice* after the Merger was announced and before filing this lawsuit. And Sousa voted for the Merger after filing his lawsuit. This latter point cannot be overemphasized: Sousa had commenced a lawsuit challenging the Merger as unfair and was represented by counsel, and *then* he voted for the Merger.

III. PLAINTIFF IS NOT ENTITLED TO DAMAGES AND, IN ANY EVENT, PLAINTIFF'S DAMAGES CALCULATION IS FLAWED

Plaintiff's damages arguments are also flawed. The AMC Defendants did not breach their fiduciary duties and are therefore not liable for any damages. But even if Plaintiff could establish a breach, which he cannot, any damages would only be a fraction of the amounts Plaintiff seeks.

First, despite demanding a preliminary injunction in the Complaint,[86] no plaintiff ever sought one. A pre-vote preliminary injunction motion is the preferred method for addressing disclosure claims in this Court,[87] and that would have given the parties an opportunity to address all of Plaintiff's allegations at the time. And the Court should not ignore Theriault and Sousa's actions during that same time (Theriault increased his holdings in SPCC immediately after the Merger was announced and Sousa voted for the Merger while he was a plaintiff in this case) and the overwhelming minority shareholder vote in favor of the Merger.

Second, a plaintiff waives the right to seek rescissory damages where, as here, he "repeatedly permitted [the case] to languish" after its initial filing.[88] In particular, it would be unfair to allow Plaintiff to benefit from increases in SPCC's stock price that occurred during the period of his long delay.[89] After filing their complaints in December 2004 and January 2005, plaintiffs did almost nothing for the next 4½ years.[90] Plaintiff's "thoroughly dilatory manner" in

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86 Public Coen Aff. Ex. 2.

87 *See In re Staples, Inc. Shareholders Litig.*, 792 A.2d 934, 960 (Del. Ch. 2001).

88 *See Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 698 (Del. Ch. 1996).

89 *See id.* at 699 (excessive delay renders rescissory damages inappropriate because it would enable a plaintiff to "sit back and 'test the waters,' opportunistically waiting to see whether the defendants achieve an increase in the value of the company").

90 *See* Defs' Summ. J. Ans. Br. at 2-4 (D. I. 187); Defs' Opp'n to Pls. Mot. to Set Dep. Location (D. I. 75).

prosecuting this case was explicitly recognized by Vice Chancellor Lamb.[91]

Third, even if successful, Plaintiff should not be awarded compound prejudgment interest in light of his dilatory prosecution. Plaintiff's own authority recognizes that "long delay on the part of a plaintiff in prosecuting his action" warrants elimination of the period upon which interest might otherwise be computed.[92] And Plaintiff's dilatory conduct militates against an award of compound interest.[93]

CONCLUSION

For the reasons set forth in the AMC Defendants' Pretrial Brief and herein, the AMC Defendants respectfully request that the Court enter judgment in favor of the AMC Defendants and dismiss this case with prejudice.

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91 *See* Hr'g Tr. 20:24-21:5 (Docket Entry 89) (Public Coen Aff. Ex. F).

92 *See Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 782 (Del. 1966); *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 909 (Del Ch. 1999); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 476 (Del. 1992); *see also Ryan*, 709 A.2d at 705 (reducing the rate of prejudgment interest "because of the plaintiffs' excessive delay in prosecuting this case").

93 *See Ryan*, 709 A.2d at 705; *see also Weinberger v. UOP, Inc.*, 517 A.2d 653, 657 (Del. Ch. 1986) (Delaware law disfavors compounding interest).

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAS MINING CORPORATION, GERMAN LARREA MOTA-VELASCO, GENARO LARREA MOTA-VELASCO, OSCAR GONZALEZ ROCHA, EMILIO CARRILLO GAMBOA, JAIME FERNANDO COLLAZO GONZALEZ, XAVIER GARCIA DE QUEVEDO TOPETE, ARMANDO ORTEGA GOMEZ AND JUAN REBELLEDO, Defendants Below / Appellants, v. MICHAEL THERIAULT, as Trustee for the Theriault Trust, Plaintiff Below / Appellee.	Case No. 29, 2012 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.	Case No. 30, 2012 On Appeal from the Court of Chancery Consol. C.A. No. 961-CS

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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 **CONFIDENTIAL - FILED UNDER SEAL**

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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 **CONFIDENTIAL - FILED UNDER SEAL**

PLAINTIFF'S PRE-TRIAL ANSWERING BRIEF

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Dated: June 9, 2011

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INTRODUCTION

The parties' opening pretrial briefs make clear that most of the critical facts at issue in this trial are not disputed. Grupo proposed that Southern issue $3.1 billion worth of Southern stock to acquire Grupo's interest in Minera. Southern formed a Special Committee to evaluate this proposal. The Special Committee valued Minera on a stand-alone basis, and concluded that "Minera's value might be lower than the value Grupo Mexico ascribed to it"[1] — at least $1 billion lower.[2] After several months of review and discussion with Grupo, the Special Committee changed its focus and adopted a "relative valuation" methodology. This relative value analysis was nothing more than a comparison of Minera's DCF value to Southern's DCF value. Applying this methodology, the Special Committee concluded that Southern should pay Grupo 67.2 million shares of Southern stock to acquire Minera. On the day the Merger Agreement was signed, those shares were worth $3.1 billion. However, the underlying DCF value for Minera in the relative valuation remained less than $2 billion.[3]

Defendants repeatedly characterize what happened in the eight months between Grupo's initial demand and the Special Committee's acceptance of that demand as "extensive negotiations" done at "arm's length."[4] Repetition does not make it so. Defendants state that the Special Committee members were "highly qualified and had extensive transactional experience,"[5] and that they hired "independent, highly skilled, and reputable" advisors.[6] But impressive resumes are not a substitute for actual negotiations. The Special Committee had

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[1] AMC Defs. Pretrial Br. at 27-28.

[2] Montejo Aff. Ex. 19 at SP COMM 003381 (Goldman using multiple valuation techniques valuing Minera at less than $2 billion).

[3] Montejo Aff. Ex. 44 at 47.

[4] AMC Defs. Pretrial Br. at 19-20, 26, 28.

[5] AMC Defs. Pretrial Br. at 17.

[6] AMC Defs. Pretrial Br. at 18.

tremendous bargaining power: Goldman repeatedly told the Special Committee that Minera was worth nowhere near $3.1 billion, yet Grupo was demanding $3.1 billion in Southern stock in the transaction. The Special Committee was well-positioned to extract meaningful financial concessions from its controlling stockholder by, among other things, simply pointing to Southern's stock price. Instead, aware of this billion-dollar price discrepancy, the Special Committee "determined that the most appropriate way of valuing these two mining companies … was by comparing them on a relative basis."[7] The Special Committee's change in valuation methodologies, of course, led the Company ultimately to pay Grupo exactly what it initially asked for: $3.1 billion in Southern stock. Defendants utterly fail to explain how the Special Committee could make such an important negotiating concession without achieving ***any*** price improvement from Grupo.

None of the "important concessions"[8] the Special Committee purportedly extracted from Grupo related to the most obviously important term – the price Southern would pay for Minera. Many were not concessions at all, but rather were terms proposed by Grupo in the first place.[9] Others, like restructuring Minera's debt or issuing a $100 million special dividend to Southern shareholders, were unrelated to the Special Committee's efforts or merely helped the parties to "harmonize" the "relative value" of a financially strong Southern and cash-strapped Minera.

In an entire fairness trial, independent directors are not simply ***presumed*** to have negotiated aggressively with a controlling shareholder.[10] The fact that discussions here spanned

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[7] AMC Defs. Pretrial Br. at 32.

[8] AMC Defs. Pretrial Br. at 9, 19, 28.

[9] Pl. Pre-Trial Opening Br. at 19-20.

[10] "[A] special committee [should act as a] surrogate for the energetic, informed and aggressive negotiation that one would reasonably expect from an arm's-length adversary." In re Trans World Airlines, Inc. S'holders Litig., 1988 WL 111271, at *7 (Del. Ch.).

eight months is hardly proof that the resulting Transaction was fair.[11] Instead, Defendants have the burden of demonstrating that this Transaction was entirely fair to Southern,[12] which the record demonstrates they cannot do.

Defendants' proof of fair price and fair dealing largely consists of pointing to the fact that the Special Committee members were well-credentialed and hired blue-chip advisors. However, their expert's opinion that the market price of Southern stock given to Grupo could be ignored by the Special Committee in favor of a "relative DCF" analysis strains all credibility. Moreover, while Defendants claim to have settled on relative valuation as a way to compare Minera and Southern "using the same set of assumptions," the evidence demonstrates that this comparison was anything but even-handed. The evidence at trial will clearly establish that Defendants cannot meet their burden of establishing that this Transaction was fair, because paying $3 billion for a company worth less than $2 billion, regardless of who the advisors were, was simply not fair.

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[11] See In re Loral Space & Commun's. Consol. Litig., 2008 WL 4293781, at *26 (Del.Ch.), aff'd, 977 A.2d 867 ("When, over the course of nearly a year, there appears to be no instance in which the Special Committee took any of the numerous opportunities available to it to explore the marketplace and determine whether it could obtain better terms than were available from the controlling stockholder, MHR, it is impossible for me to conclude that the Special Committee acted as an effective guarantor of fairness.").

[12] Kahn v. Tremont Corp., 694 A.2d 422, 429 (Del. 1997) ("To obtain the benefit of the burden shift, the controlling shareholder must do more than establish a perfunctory special committee of outside directors.").

ARGUMENT

I. THE TRANSACTION PRICE WAS UNFAIR

Entire fairness requires Defendants to prove "to the *court's* satisfaction" that the Transaction price was fair. [13] "[T]he transaction itself must be objectively fair, independent of the board's belief."[14] Here, the advice the Special Committee relied on was fundamentally unsound.[15] It thus makes little difference whether the Special Committee members actually believed that, for example:

- "the equity value of Minera was close to or even greater than the equity value of [Southern],"[16] or
- "the present stock market price of shares is not representative of true value,"[17] or
- relative valuation was "the most appropriate way to assess the fairness" of the Transaction.[18]

The Special Committee's beliefs cannot satisfy Defendants' evidentiary burden. [19] And while Plaintiff will demonstrate at trial that the Special Committee had ample reason to question the validity of these (and other) premises in concluding that the Transaction price was fair, this is not

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[13] Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995).

[14] Gesoff v. IIC Indus., Inc., 902 A.2d 1130, 1145 (Del. Ch. 2006); Reis v. Hazelett Strip-Casting Corp., 2011 WL 303207, at *10 (Del. Ch.) (same); Kahn v. Lynch Communications Sys., 1993 WL 290193, at *5 n.3 (Del. Ch.) (giving "little, if any, weight to [directors' opinions of fair value] in the absence of any analysis or objective support for them."), rev'd on other grounds, 638 A.2d 1110 (Del. 1994).

[15] Defendants mistakenly argue that "[t]o overcome the protections of §Section 141(e), a plaintiff must establish that the reliance [on experts] was unreasonable.," However, the Court's determination of fair price cannot be supplanted by "experts hired to give advice." Valeant Pharms. Int'l v. Jerney, 921 A.2d 732, 751 (Del. Ch. 2007). There is "no case where any court has held that Section 141(e) provides a defense in an entire fairness action." Id.

[16] AMC Defs. Pretrial Br. at 30 and 34.

[17] AMC Defs. Pretrial Br. at 32.

[18] AMC Defs. Pretrial Br. at 29.

[19] Gesoff, 902 A.2d at 1145 ("Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness.")

Plaintiff's burden. Rather, it is Defendants' burden to demonstrate the objective fairness of the price paid for Minera, which Defendants cannot do.

Other than repeatedly arguing that the Special Committee members reasonably relied on experts, Defendants' proof of fair price is remarkably thin. Defendants have no expert opinion on the stand-alone value of Minera. Defendants have no expert opinion of the stand-alone value of Southern. Defendants have no expert opinion on the value of the Southern shares paid to Grupo. And Defendants wrongly label certain facts as "undisputed," such as the sufficiency of the Proxy disclosures,[20] and "that increases in the price of copper would have a greater impact on the value of Minera than SPCC."[21] Plaintiff disputes both of these facts, among others, but more importantly will demonstrate at trial that (1) the fundamental premises underlying Goldman's valuation models are seriously flawed; (2) Defendants' and their expert's blind and singular reliance on relative valuation does not meet Defendants' burden of demonstrating fair price; and (3) the market's reaction to the announcement of the Transaction provides no evidence of fairness.

A. Goldman's Valuation Models Cannot Establish Fair Price and the Underlying Values Were Obscured

"Valuation is often done in several ways to zero in on an appropriate value."[22] After failing to value Minera on a stand-alone basis at anything close to what Grupo proposed, Goldman began to compare Minera and Southern on a "relative" basis.[23] Neither of Goldman's DCF models disclosed the underlying values of Minera or Southern, and Goldman's two methodologies did not zero in on an appropriate value for Minera. In fact, the value of Minera

[20] AMC Defs. Pretrial Br. at 6 n.8, 10 and 25.

[21] AMC Defs. Pretrial Br. at 29.

[22] Kevin K. Boeh & Paul W. Beamish, Mergers and Acquisitions (Sage Publications, Inc. 2007).

[23] Pl. Pre-Trial Opening Br. at 11-15.

underlying Goldman's "relative DCF" analysis was approximately $2 billion less than the value of Minera implied in Goldman's Contribution Analysis.[24] Goldman obfuscated the disparity in values by, among other things, avoiding the usual "football field" presentation of its conclusions.[25] And whereas earlier Goldman presentations of its Contribution Analysis stated the number and price of "implied" Southern shares to be paid in the Transaction, by October 2004 Southern's price per share implied in the analysis was conspicuously absent from the Special Committee materials.[26]

As seasoned professionals, the Special Committee members should have recognized the disparity in values and Goldman's decision not to clearly present its conclusions as indications that something in Goldman's analyses was terribly wrong.[27] Yet the Special Committee apparently looked the other way, and now Defendants and their expert maintain that Southern's market price was irrelevant.[28] But Defendants' own authority contradicts their position. As Mr. Tagliani states in The Practical Guide to Wall Street:

> And even if the analyst is highly confident of the estimations used in his analysis, what should he do if he arrives at a "correct" price for the company stock of $25 per share and then observes that the stock is currently trading in the market at $40? Is it likely that *everyone* else in the market is mispricing the stock and only he

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[24] Pl. Pre-Trial Opening Br. at 26. As discussed in Plaintiff's Pre-Trial Opening Brief, Goldman derived its selected multiple for this analysis by relying on dismal EBITDA projections for Southern provided by Grupo. Id. Compare S. Muoio & Co. LLC v. Hallmark Entertainment Investments Co., 2011 WL 863007, at *17 (Del. Ch.) ("The more robust approaches taken . . . used multiple valuation methodologies and independently reached results that fell within the same range.").

[25] Jason A. Pedersen, The Wall Street Primer: The Players, Deals and Mechanics of The U.S. Securities Market, p. 177 (Praeger Publishers 2009). Compare Montejo Aff. Ex. 23.

[26] Compare Montejo Aff. Ex. 23 at SP COMM 3753 (October 21, 2004 presentation) with Montejo Aff. Exs. 19 at SP COMM 003382 (June 11, 2004 presentation); 20 at 6899 (July 8, 2004 presentation); 21 at SP COMM 6830 (August 25, 2004 presentation); 22 at SP COMM 6805 (September 15, 2004 presentation).

[27] Pl. Pre-Trial Opening Br. at 45.

[28] Pl. Pre-Trial Opening Br. at 22-24; AMC Defs. Pretrial Br. at 35.

> knows the correct price? And even if this were the case – is there any reason the market must move to the "right" price? If it is wrong now, could it get "wronger"?[29]

Plaintiff will demonstrate at trial that Goldman's "right" price was very wrong, and it cost the Company and the minority stockholders dearly.

At trial, Defendants will be unable to prove Minera was worth anything close to $3.1 billion. Plaintiff will demonstrate that (1) using generally accepted business valuation models, the equity value of Minera was no more than $1.8 billion on the day the Special Committee approved the Transaction;[30] (2) Goldman's presentation of its advice was cryptic and paltry,[31] and (3) Defendants' DCF valuation of Southern is fundamentally unsound and unreliable. Moreover, Plaintiff will prove at trial that the record provides for only one reliable indication of value for the 67.2 million shares Southern paid to Grupo to acquire Grupo's 99.15% equity interest in Minera: Southern's per share market price. Plaintiff will demonstrate that valuing the Southern shares using market price is a generally accepted valuation methodology that comports with Delaware law and in fact is exactly how Grupo valued the shares it was paid in the Transaction.

B. Defendants' Expert's Relative Valuation Model Is Unsound and Unreliable

Defendants and their expert argue that relative DCF valuation of the two companies was the most appropriate method to determine the fairness of the Transaction.[32] But the argument is based on two entirely false premises: (1) that because the Transaction uses stock as currency,

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[29] Matthew Tagliani, The Practical Guide to Wall Street, Equities and Derivatives, p. 48 (John Miley & Sons, Inc. 2009).

[30] See Pl. Pre-Trial Opening Br. at 31, and 34-35. Plaintiff will further demonstrate at trial that Defendants' attack on Plaintiff's expert's opinion is without merit. Id. at 34-35, 37. Defendants offer no authority to support their contention that a company cannot value its stock using market price while using a DCF to value an acquisition target.

[31] Pl. Pre-Trial Opening Br. at 22-24, and 45.

[32] See AMC Defs. Pretrial Br. at 2, 9; Montejo Aff. Ex. 45 at ¶ 9.

comparative analysis of Minera and Southern is required; and (2) that Goldman (and Defendants' expert) in fact compared Minera and Southern using similar assumptions. These false premises render Defendants' relative valuation model unsound and unreliable, and demonstrate the objective unfairness of the price paid in the Transaction. Defendants' attempt to calibrate their expert's model using a ridiculously high long-term copper price only illustrates that the entire model is fundamentally flawed.

1. The Nature of the Transaction Currency Does Not Render Defendants' Relative Valuation Fair

The Transaction was an acquisition. When making an acquisition, "[t]here is only one DCF value to do, which is the company that you are buying."[33] Southern purchased Grupo's 99% stake in Minera using Southern stock as currency. Southern and Minera did not "merge."[34] Minera continues to exist as a separate entity and subsidiary of Southern. Minera should have been valued as an acquisition target. The Special Committee members understood that the consideration paid in the Transaction "could be cash. It could be shares. It could be part cash and part shares."[35] Grupo required shares. That does not change how Minera should have been valued. Defendants fail to explain how an acquisition that in litigation is now being described as a "stock-for-stock merger" did not require the Special Committee to conduct a stand-alone valuation of Minera.[36]

Defendants also do not explain why it was reasonable to value the Transaction currency at less than market price. Defendants' citations to cases in which directors concluded that a

[33] Sanchez 41:14-16.

[34] Sanchez 31:7-11 ("Q. So just so I'm clear, Grupo Mexico sold Southern Peru Minera Mexico and in exchange received Southern Peru stock; is that correct? A. That's correct."); Schwartz 7:25-8:4 ("SPCC paid a certain number of shares – or gave a certain number of shares for a controlling interest, 99.15, of Minera Mexico.").

[35] Palomino 57:7-10.

[36] AMC Defs. Pretrial Br. at 32; see also Schwartz 114:21-118:8.

target company's stock price was "not representative of true value" are inapposite.[37] Nor have Defendants presented any evidence that "the market consistently misvalued [Southern's] stock," or that "the board ha[d] reason to believe" that this was the case.[38] Defendants meekly suggest in a footnote that Southern's market price was not reliable because the Special Committee believed analysts "did not seem to be recognizing that [Southern's] ore grades were expected to decrease over time."[39] But this information was available in third-party published reports, and was therefore presumably assimilated into Southern's market price.[40] Defendants' failure to value Minera on a stand-alone basis and valuation of Southern's shares at less than market price is baseless and fails to establish fair price.

2. Minera and Southern Were Not Fairly Compared Using Similar Assumptions

Defendants claim to rely on a relative valuation so that "the two firms [would] be compared on comparable and equal and reasonable assumptions…."[41] Professor Schwartz also purports to have "conduct[ed] a relative valuation of their assets using the same assumptions and methodologies for both companies."[42] But Defendants' relative valuation applies materially different assumptions to Minera and Southern. Minera was valued based on new – and

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[37] AMC Defs. Pretrial Br. at 32 (citing Paramount Commc'ns v. Time Inc., 571 A.2d 1140, 1150 n.12 (Del. 1990); Smith v. Van Gorkom, 488 A.2d 858, 875-76 (Del. 1985)); see also Pl. Pre-Trial Opening Br. at 32-33.

[38] Id.

[39] AMC Defs. Pretrial Br. at 28, n. 89.

[40] Compare Montejo Aff. Exs. 20 at SP COMM 006920 (average ore grade at Cuajone and Toquapala 0.643% and 0.736%, respectively) and Supplemental Transmittal Affidavit of Marcus E. Montejo Ex. 46 at SP COMM 019380 (September 9, 2004 BBVA analyst report citing Southern data to show Cuajone and Toquepala ore grade 0.643% and 0.736%, respectively). Exhibits to the Supplemental Affidavit of Marcus E. Montejo being filed simultaneously with Plaintiff's Pre-Trial Answering Brief are hereinafter cited as "Montejo Supp. Aff. Ex. __".

[41] Palomino 192:17-21; AMC Defs. Pretrial Br. at 9.

[42] Montejo Aff. Ex. 45 at ¶ 9(i).

aggressive – life-of-mine plans that were repeatedly revised by outside consultants to maximize Minera's value.[43] Southern's life-of-mine plans, by contrast, were maintained by Southern management, were not optimized, and were not created or revised by outside consultants.[44] Moreover, Minera's life-of-mine plans provided for every conceivable expansion plan,[45] while Southern's did not.[46] This disparity affected the most critical inputs into the DCF models and caused Minera's DCF value to be substantially inflated relative to Southern's.[47] Ultimately, as Plaintiff will demonstrate at trial, Defendants' relative valuation was hardly "apples to apples."[48]

3. Defendants' Calibration of Their Relative Valuation Is Unsupportable

Defendants argue that they have not ignored market price but that, through Professor Schwartz's deductive reasoning, the market was valuing Southern using a higher long-term copper price than $0.90 per pound. To prove this, Defendants "calibrate" their expert's DCF valuation of Minera and Southern by increasing the assumed long-term copper price from $0.90 to $1.30 per pound while holding all other assumptions constant.[49] Defendants further argue that Minera is worth $3.7 billion and the Transaction is still fair under this "calibration" scenario because changes in the price of copper affect the values of Southern and Minera the same.[50] As discussed above and previously in Plaintiff's Pre-Trial Opening Brief, Plaintiff will demonstrate

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[43] Pl. Pre-Trial Opening Br. at 8-12.

[44] Pl. Pre-Trial Opening Br. at 11.

[45] Id.

[46] Id.

[47] Contrary to Defendants' assertion, Plaintiff has never accepted the cash flow forecasts for Southern derived by the Special Committee and its advisors. AMC Defs. Pretrial Br. at 13, n.36. Plaintiff challenged Southern's projections on summary judgment and challenges the projections at trial. Pl. Pre-Trial Opening Br. at 15-17, 24, 42 and 44; Montejo Aff. Ex. 27.

[48] Montejo Aff. Ex. 45 at ¶ 14.

[49] AMC Defs. Pretrial Br. at 14-15 and 37.

[50] AMC Defs. Pretrial Br. at 15, 37.

at trial that this contrived and self-serving explanation of the disparity in value between Southern's market capitalization and Defendants' expert's DCF value of Southern is both methodologically unsound and unsupported by the record.

Defendants' calibration is further undercut by their contention that the Special Committee's use of a $0.90 per pound long-term copper price was a "concession" obtained by the Special Committee that proves fair dealing.[51] Defendants cannot use a lower long-term copper price ($0.90 per pound) to argue fair dealing and simultaneously use a higher long-term copper price ($1.30 per pound) to argue fair price. The contradictory positions are self-defeating.

C. The Market Reaction to the Announcement of the Transaction Was Negative

Defendants point to the stock market's reaction to the Proxy as proof of the Transaction's fairness.[52] Specifically, Defendants assert that the Company's stock price increased for the two days after February 25, 2005, the date the Proxy was filed and, according to Defendants, the first time Southern's and Minera's financials were presented together.

Defendants present no competent evidence that the modest increases in the Company's stock price during that two day period on which they focus were at all related to the information contained in the Proxy.[53] But more importantly, as Plaintiff noted in his Pre-Trial Opening Brief,

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[51] AMC Defs. Pretrial Br. at 20.

[52] AMC Defs. Pretrial Br. at 36. This argument is somewhat ironic in light of Defendants' argument that the Company's stock price could be disregarded in valuing the consideration paid for Minera because the "board ha[d] reason to believe that the market consistently misvalues the company's stock." Id. at 32.

[53] This is particularly critical here because spot-prices for copper were on the rise. In any event, the closing prices alone are far from compelling evidence of the assertion Defendants are positing. As illustrated below, in the two days after the final Proxy was published, Southern stock closed 5.8% and 3.0% above its February 25, 2005 close, but then quickly retreated to below the February 25, 2005 closing price on the third trading day.

the final Proxy was not the first time that the market had been presented with financial information relating to the Transaction.[54] The Company's Preliminary Proxy filed with the SEC on November 22, 2004 and Southern's November road-show materials both included the same pro forma financials for Southern and Minera that Defendants claim were first presented on February 25, 2005.[55] Furthermore, Minera's financial results had been publicly filed with the SEC since 2002.[56] Accordingly, the market was capable of compiling pro forma financials when the terms of the Transaction were announced, immediately after which the price of Southern stock *declined*, as Defendants concede.[57]

What the market was not capable of determining were the adjustments that A&S made to Minera's projected production, which were omitted from Southern's November road-show materials, and the EBIDTA multiple Goldman actually used to value Minera's equity at $3.1 billion, which was omitted from the Proxy and misrepresented in the road-show. Also omitted from the Proxy were the underlying DCF valuations for Southern and Minera that Goldman used to determine the exchange ratio and relied on in rendering its fairness opinion. Thus, contrary to Defendants' argument, "the market" provides no evidence of the fairness of the Transaction.

Date	2/25/05	2/28/05	3/1/05	3/2/05
SCCO closing price	$59.47	$62.91	$61.28	$57.66

[54] See Pl. Pre-Trial Opening Br. at 25-28.

[55] Id.

[56] Since 2002, Minera regularly filed quarterly financial statements with the SEC on Form 6-Ks and annual financial statements on Form 20-Fs. (Minera's SEC filings are listed on EDGAR under its English translated name "Mining Mexico"). Minera was required to make these filings under Section 15(d) of the Securities Exchange Act of 1934 and Rule 15d-1 thereunder because it issued notes, registered pursuant to the Securities Act of 1933, which were publicly traded and outstanding at the time of the Transaction.

[57] See AMC Defs. Pretrial Br. at 36; Montejo Supp. Aff. Ex. 47.

II. THE TRANSACTION WAS THE PRODUCT OF UNFAIR DEALING

In addition to bearing the burden of proving fair price, Defendants also bear the burden of proving fair dealing, which they likewise cannot meet. Defendants can attempt to characterize the back-and-forth between Grupo and the Special Committee as "extensive negotiations,"[58] but they cannot avoid the stark fact that the Special Committee agreed to pay Grupo exactly what it asked for to acquire Minera: $3.1 billion in Southern stock. Defendants' claim that this result was born from arm's-length negotiation strains credibility. Rather, Goldman's successive presentations to the Special Committee, placed side-by-side, clearly illustrate that the Special Committee and its advisors abandoned compelling price arguments in favor of methodologies that pre-determined the result of their "negotiations." The Special Committee's effort cannot satisfy the exacting scrutiny of entire fairness and cannot warrant a burden shift. Moreover, in asking shareholders to vote on the Transaction, Southern failed to disclose material information. Consequently, the fairness burden remains with Defendants and they cannot meet it.

A. The Special Committee Did Not Simulate "Arm's-Length" Negotiations With Grupo

The parties agree that a properly-functioning special committee should simulate arm's-length negotiations with the Company's controlling shareholder.[59] Arm's-length negotiating, however, does not mean concocting and proposing the "best way" to value Minera when the "best way" favored the Company's controlling stockholder. Rather, the Special Committee was obligated to bargain hard for the best deal they could strike.[60] Instead of pressing Southern's

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[58] AMC Defs. Pretrial Br. at 2, 19, 28.

[59] AMC Defs. Pretrial Br. at 26; id. n.82 (citing Hallmark Entertainment Investments Co., 2011 WL 863007 (Del. Ch.); see also Loral Space, 2008 WL 4293781, at *22 (the "critical issue" when assessing fair dealing "is whether the Special Committee functioned as an effective proxy for arm's-length bargaining, such that a fair outcome equivalent to a market-tested deal resulted.").

[60] "[A] special committee [should act as a] surrogate for the energetic, informed and aggressive negotiation that one would reasonably expect from an arm's-length adversary." Trans World Airlines,

stock price and superior trading multiple to do that, the Special Committee blindly relied on a DCF value of Southern embedded in Goldman's relative valuation model that valued Southern at a fraction of its market capitalization and negotiated accordingly. Indeed, rather than leverage Southern's superior trading multiple, the Special Committee valued Minera at a premium to that multiple. Defendants argue that due diligence is what drove the Special Committee to rely on a relative valuation, but that claim is contradicted by the record. Regardless of the reason, the uncontroverted evidence is that the Special Committee's strategy failed to obtain any improvement in Grupo's proposed economic terms. In fact, by abandoning their insistence on a price collar, Southern ended up paying $600 million more than Grupo even proposed. Moreover, the "significant concessions" allegedly wrung from Grupo achieved nothing meaningful for Southern or its minority stockholders. In sum, the evidence demonstrates a process that arrives at a pre-determined result, rather than hard-nosed negotiations.

1. The Special Committee's "Best Way" to Value Minera Favored Grupo

Defendants describe the Special Committee's decision to rely on relative valuation as follows:

> The Special Committee and its advisors conducted various analyses using different methodologies to assess the economic terms of the Merger before ultimately determining that the best way to analyze and value the Merger was to compare SPCC and Minera on a relative basis, using the same assumptions (modified in company specific ways as appropriate) for both companies.[61]

1988 WL 111271, at *7. An independent committee "does not *ipso facto* establish the procedural fairness of an interested merger transaction." Kahn v. Lynch Communications Sys., 638 A.2d 1110, 1121 (Del. 1994). Indeed, the entire fairness standard exists because "in a merger between the corporation and its controlling stockholder—even one negotiated by disinterested, independent directors—no court could be certain whether the transaction terms fully approximate what truly independent parties would have achieved in an arm's length negotiation." Citron v. E.I. du Pont de Nemours & Co., 584 A.2d 490, 502 (Del. Ch. 1990).

[61] AMC Defs. Pretrial Br. at 9.

But the record plainly demonstrates that Goldman's relative valuation was not the "best way" to value Minera. Having on multiple occasions valued Minera at less than $2 billion, the Special Committee cannot justify paying Grupo $3 billion in Southern stock by saying that it believed relative valuation was the "best way" to value the Transaction. If, as Defendants themselves explain, "the assumptions underlying Minera's valuation would not necessarily be the same as those used by the market in pricing SPCC's stock,"[62] the Special Committee should have capitalized on this discrepancy in pressing their negotiations, not simply resting on its relative DCF valuation as the "best way" to consider the Transaction.

Defendants compare the Special Committee negotiations here to those of Hallmark.[63] This is an unworthy comparison. In Hallmark, the Court described a special committee that had "refused to engage" after the controlling shareholder made an inadequate counter-offer, and the controller thereafter made "a major economic concession."[64] The Court found that "the Special Committee functioned independently of Hallmark and reached the best deal possible through intense negotiations that were appropriately adversarial."[65] Here, Defendants weakly offer that the Special Committee "negotiated down (by approximately 7%) the number of shares to be exchanged for Minera."[66] This was hardly a "major economic concession." Southern's stock price had risen by exactly the amount that the Special Committee "negotiated [Grupo] down," so that the resulting 7% decrease (from 72.3 million to 67.2 million Southern shares) still equaled

[62] AMC Defs. Pretrial Br. at 35.

[63] AMC Defs. Pretrial Br. at 26 n. 82.

[64] Hallmark, 2011 WL 863007, at *7. The court found that by refusing to negotiate, it "forc[ed] Hallmark to bid against itself," id. at *15, which "adversarial conduct bespeaks independence." Id.

[65] Hallmark, 2011 WL 863007, at *14. "In the end, the Special Committee got a great result for Crown's minority stockholders." Id. at *15.

[66] AMC Defs. Pretrial Br. at 20.

$3.1 billion.[67] The Special Committee had more than a billion dollars of leverage and failed to use it.

2. The Special Committee's Exclusive Reliance on the Southern DCF Value Was Unreasonable

The New York Stock Exchange provided the Special Committee with a valuation for the Southern shares to be issued in the Transaction that was "forged in the crucible of objective market reality."[68] For purposes of satisfying the Special Committee's fiduciary duties, the market price of Southern's stock was sufficient.[69] Indeed, market price is exactly how this Court has valued shares of stock paid to controlling stockholders in very similar transactions.[70] Yet, the Special Committee regarded market price as irrelevant.[71]

The Special Committee instead relied on a DCF valuation of Southern that valued Southern at a fraction of its market capitalization. Southern's DCF value was not tested for reliability using any other valuation methodology. Southern's DCF value also was not disclosed to the Special Committee.[72] Defendants appear deliberately to miss the point when they argue that "SPCC's stock price was not hidden from the Special Committee."[73] The point is not whether the Special Committee members knew what Southern's stock price was; the point is

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[67] Montejo Supp. Aff. Ex. 47.

[68] Van de Walle v. Unimation, Inc., 1991 WL 29303, at *17 (Del. Ch.).

[69] Kahn v. Tremont Corp., 1996 WL 145452, at *9 (Del. Ch.), rev'd on other grounds, 694 A.2d 422 (Del. 1997) ("Where such a price can be ascertained because there is a market and there exists no reason to conclude that the market is impaired, then, except for circumstances on which the stock in question carries corporate control with it, that price should typically be regarded as fair for fiduciary analysis purposes.").

[70] Associated Imports, Inc. v. ASG Indus., Inc., 1984 WL 19833 (Del. Ch.).

[71] Ruiz 188:18-19 ("the price of the stock was irrel--totally irrelevant"); id. 193:10-12; Palomino 190:11-192:4.

[72] See Montejo Aff. Ex. 23.

[73] AMC Defs. Pretrial Br. at 34-36.

whether they understood what share price was *implied* by Goldman's analysis. Moreover, Defendants' claim that the Special Committee was "well aware" of "the fact that Goldman Sachs' DCF analysis of SPCC generated values that were below SPCC's observed market value under certain assumptions" is belied by the record.[74]

Defendants grasp at straws by referring the Court to pitch books presented to the Special Committee in support of its blind reliance on Southern's DCF value.[75] All these pitch books establish is that other firms proposed to use multiple valuation methodologies to evaluate Grupo's proposal.[76] Defendants specifically refer to J.P. Morgan's statement that "methodologies need to be applied consistently across [Minera] and [Southern]." But this simply confirms a widely-held expectation that comparing a DCF value of one company to the market price of another, particularly one with a controlling stockholder, might be *less* favorable than comparing both companies using DCF valuations.[77] As this Court is well aware, it is not uncommon for a publicly traded company with a controlling stockholder such as Southern to have a *higher* DCF value than its market capitalization implies.[78] But no pitch book

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[74] Compare AMC Defs. Pretrial Br. at 35 n. 108 with Palomino 190:12-14 ("Q. Is the implied dollar value from Goldman Sachs discounted cash flow for Southern Peru, is that apparent anywhere on page 21, 22 or 23? [objection] A. Well, as you can see there is no implied dollar value here in any place, because the purpose of the analysis is to make a relative valuation between the two companies."); Handelsman 143:3-7 ("Q. I mean, did they tell you, We have done a relative discounted cash flow analysis but the value we're using for Southern Peru is less than the stock's market price? A. Not that I recall.").

[75] AMC Defs. Pretrial Br. at 30.

[76] See Confidential Coen Aff. Ex. 20 at SP COMM 003028 (discussing multiple valuation methodologies), Ex. 19 at SP COMM 003027 (same); see also, The Wall Street Primer at 176-177.

[77] Plaintiff makes the same assumption on information and belief in the complaint. Compl. ¶59. Defendants' attempt to use this as some adverse admission is ridiculous. Plaintiff could not have possibly known when filing this action that in rendering its fairness opinion Goldman actually valued Southern at 44% of its market capitalization *because this fact was not disclosed.* As this Court is well aware, "[p]art of what happens in discovery is sometimes you find out stuff you didn't know . . .." Reis v. Hazelett Strip-Casting Corp., Del. Ch., C.A. No. 3552-VCL, Hr'g Tr., Apr. 8, 2010.

[78] See, e.g., Doft & Co. v. Travelocity.com Inc., 2004 WL 1152338, *10 (Del. Ch.); In re Emerging Commcn's, Inc. S'holders Litig., 2004 WL 1305745, *23 (Del. Ch.) (finding that the presence of a

recommended that if Southern's stock price was *higher* than its DCF value, its stock price should be ignored.

3. The Special Committee's Use of a Premium to Southern's Trading Multiple to Value Minera Is Not Evidence of Fair Dealing

The Special Committee also passed on an opportunity to leverage Southern's public trading multiple to obtain the best possible price for Southern and its minority stockholders. Goldman inexplicably values Minera using an EBITDA multiple that was *higher* than Southern's observed trading multiple.[79] Being a New York Stock Exchange company with a strong record of profitability and virtually no debt, one would expect Southern to be valued at a premium to Minera's implied trading multiple. After all, Minera carried a billion dollars in debt, a higher cost-basis, untested reserve reporting, highly speculative production plans, and its expansion plans required substantial capital expenditures.[80] Moreover, the Special Committee's mining expert advised the Special Committee that Southern would not realize any operating synergies from the Transaction. Instead, the Special Committee valued Minera at nearly a full point premium to Southern's public trading multiple (6.3 to 6.5x 2005E EBITDA v. 5.5 to 5.6x 2005E EBITDA).[81] Again, the Special Committee passed on an opportunity to create leverage to obtain

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controlling stockholder caused the "market price of ECM stock [to] reflect[] a minority discount."); Paramount Commcn's, Inc. v. Time Inc., 1989 WL 79880, *23 (Del. Ch.) ("The existence of a control block in the hands of a single shareholder or a group with loyalty to each other does have real consequences to the financial value of 'minority' stock."); see also, In re Staples, Inc. S'holders Litig., 792 A.2d 934, 955 (Del. Ch. 2001); In re Sunbelt Beverage Corp. S'holder Litig., 2010 WL 26539, *8 (Del. Ch.).

[79] Montejo Aff. Ex. 23 at 13 and 24.

[80] See Parker 50:2-22 (discussing his due diligence of Minera; "We felt that the capital expenditures were understated for both the Minera properties… It was apparent that the Minera properties had been severly 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… If you were going to show a 10 percent increase or a higher recovery, there had to be reason for it other than wishful thinking.")

[81] Montejo Aff. Ex. 23 at 13, 24.

the best possible price for Southern and its minority stockholders and instead "bargained for" a higher price.

4. The Special Committee's Switch To Relative Valuation Was Not Driven By Its "Due Diligence" Findings

Defendants' abrupt abandonment of methodologies that presented Minera's value on a stand-alone basis is not explainable by the Special Committee's continuing "due diligence."[82] The Special Committee and its advisors began due diligence of Minera in April 2004.[83] By June 11, 2004, A&S had visited Minera's mines and provided revised assumptions to the Minera projections.[84] In its June 11, 2004 presentation to the Special Committee, Goldman advised the Special Committee that Minera was worth no more than $1.7 billion.[85]

After substantially completing due diligence in June 2004, Goldman made "adjustments to Minera Mexico's economic model based on the special committee's operational due diligence"[86] in preparation for delivering the July 8, 2004 presentation to the Special Committee. This presentation was based upon "Projections for MM and SPCC that were prepared by their respective managements, as adjusted to reflect recommendations of A&S."[87] July 8, 2004 was the first time Goldman presented its relative DCF analysis to the Special Committee,[88] and (not

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[82] AMC Defs. Pretrial Br. at 27-29; Handelsman 54:3-5 ("Q. What was their rationale for coming to the conclusion that it was fair? A. They did due diligence."); Palomino 88:12-89:6 (through continued due diligence, the Special Committee's "valuation of Minera Mexican [sic] tended to go up").

[83] See Montejo Aff. Ex. 16 (email regarding April 2004 due diligence on Minera Mexico); Montejo Supp. Aff. Ex 48.

[84] See Montejo Aff. Ex. 19 at SP COMM 003338; Montejo Supp. Aff. Ex. 49 at SP COMM 003326 (A&S visited operations of Minera and Southern prior to June 8, 2004); Montejo Supp. Aff. Ex. 50 at SP COMM 017995-96.

[85] Montejo Aff. Ex. 19 at SP COMM 003381 ("Get/Give Analysis" summarizes values of Minera calculated using DCF analysis, look-through analysis, and public market analysis).

[86] Montejo Aff. Ex. 1 at 20 (discussing meetings between Goldman and UBS in June and July 2004).

[87] Id. Montejo Aff. Ex. 20 at SP COMM 006862.

[88] See Montejo Aff. Ex. 20.

coincidentally) the last time Goldman advised the Special Committee of Minera's value: no more than $2.085 billion.[89]

After July 8, 2004, there was no significant "due diligence" to which that sea change in methodology can be attributed. Throughout August and September the Special Committee's advisors continued to refine Minera's financial model in order to improve Minera's relative value in the Transaction, but they did not make similar revisions to Southern's financial model.[90]

5. The Special Committee Failed to Negotiate Any Price Improvement and Gave Away The Price Collar

It can neither be disputed that Goldman consistently valued Minera lower than the value Grupo ascribed to it,[91] nor that at the end of the day Southern paid to Grupo Southern shares with a market value equal to (indeed, more than) what Grupo initially demanded.[92] The Special Committee simply decided not to leverage, or even consider, the market's "view[] regarding the value of [Southern]."[93] Furthermore, the Transaction price collar that the Special Committee initially demanded — indeed, as late as September 30, 2004, insisted was so "essential" that the Special Committee "wouldn't approve the transaction without" it[94] — was traded away for

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[89] Id. at SP COMM 006885-89.

[90] See Montejo Aff. Ex. 20 at SP COMM 006862 (discussing that July 8, 2004 valuation of Minera does not include implementation of new optimization plan for Cananea that could yield additional $240 million in value to Minera); Montejo Aff. Ex. 22 at SP COMM 006779-800 (discussing revisions to Minera model "As per Recent Discussions with UBS and MM"); Parker 39-40, 50-51 (discussing visit to Mintec in August 2004 to review additional work concerning Minera performed by Mintec); Montejo Supp. Aff. Ex. 51 (discussing September 2004 revisions to Minera model). No such revisions were made to Southern's financial model. See Montejo Aff. Ex. 22 at SP COMM 006779-800 (discussing adjustments to certain Southern model inputs "to be consistent with MM projections" and update of Southern net debt).

[91] AMC Defs. Pretrial Br. at 28.

[92] Plaintiff's Pre-Trial Brief at 17.

[93] AMC Defs. Pretrial Br. at 28 n. 89.

[94] Handlesman Tr. at 155.

nothing of any benefit to Southern.[95] This choice by the Special Committee again benefitted Grupo at the expense of Southern and its minority stockholders – a $600 million expense. Thus, in eight months of what the Defendants call arm's-length negotiations, the Special Committee only managed to cause Southern to pay $600 million more for Minera than Grupo proposed. In sum, "[w]henever the Special Committee or its advisors had an opportunity to use leverage it had or create additional leverage, they found a way to avoid doing so."[96]

6. The Special Committee's "Negotiations" Did Not Result in "Significant Concessions" By Grupo

Contrary to Defendants' argument, nearly all of the "significant concessions" supposedly wrung from Grupo during the Special Committee's "extensive negotiations" were either first proposed by Grupo or otherwise disproportionately benefitted Grupo.[97]

- Reduction in Minera's Debt. Defendants credit the Special Committee with negotiating a 23% reduction in Minera's net debt.[98] But the Special Committee had little to do with Minera's debt reduction. Grupo began restructuring Minera's debt before it even proposed the Transaction to Southern.[99] Indeed, most of the

[95] According to Perezalonso, the price collar was traded for the special dividend, the reduction of Minera's debt, and the implementation of the transaction review committee. Perezalonso 108:22-109:11. However, as discussed supra and in Plaintiff's Opening Pre-Trial Brief, these were hardly "concessions" and provided no benefit to Southern or its stockholders.

[96] Loral Space, 2008 WL 4293781, at *25.

[97] The Special Committee did negotiate an agreement that Grupo would indemnify Southern for certain of Minera's environmental liabilities. But even here, the Special Committee failed to use leverage it had or create leverage to obtain the best terms for Southern. The Special Committee sought a $75 million threshold and a cap on liability equal to 100% of the Transaction price (which, consistent with Grupo's view of the value of Southern shares, was determined by market price). Montejo Aff. Ex. 31 at SP COMM 010439-40. What the Special Committee obtained was a $100 million deductible and a $600 million cap on liability. Montejo Aff. Ex. 1 at 26. The Special Committee therefore obtained less than 20% of the protection it sought ($600 divided $3.1 billion equity value). But more troubling is that the Special Committee agreed to this significantly lower amount of protection with little understanding of Southern's environmental risk. In the final hours of eight months of "extensive negotiations," Goldman asked A&S to investigate Minera's exposure to environmental liability. When A&S responded that "it would be a major multi-month project costing several hundred thousand dollars," the Special Committee chose not to pursue it. Parker 56:7-19. This decision not to investigate Southern's risk is surprising given the billion dollar environmental liability claims that drove ASARCO into bankruptcy.

[98] AMC Defs. Pretrial Br. at 19.

[99] Pl. Pre-Trial Opening Br. at 8.

debt reduction was the result of contractual pre-payments triggered by rising copper prices.[100]

- Special Dividend. Defendants credit the Special Committee with negotiating a $100 million transaction dividend.[101] But as Plaintiff argues in his Pre-Trial Opening Brief, Grupo disproportionately benefited from this dividend, and its principal effect, if not its purpose, was to drive down the value of Southern, not obtain a better price from Grupo.[102]

- Corporate Governance Provisions. Defendants credit the Special Committee with negotiating "significant corporate governance protections" for the minority stockholders.[103] To the contrary, as Plaintiff argues in his Pre-Trial Opening Brief, each of these protections was either proposed by Grupo, failed to provide any real protection to the minority stockholders, or actually benefited Grupo at the expense of Southern's minority stockholders.[104]

- Collarless Fixed-Exchange-Ratio. Defendants credit the Special Committee with negotiating a collarless fixed-exchange-ratio. This resulted in Grupo being paid hundreds of millions of dollars more in Southern shares than Grupo proposed.

- Super-Majority Shareholder Vote and Cerro's Support. Defendants credit the Special Committee with negotiating a super-majority voting requirement of 66-2/3% for shareholder approval of the Transaction and "securing a commitment from Cerro to vote . . . in accordance with the recommendation of the Special Committee." But these terms were proposed by Grupo.[105] Moreover, satisfaction of the 2/3 super-majority vote provision was a foregone conclusion. In exchange for its registration rights Cerro had already agreed to vote in favor of the Transaction.[106] But even if the Special Committee withdrew its recommendation for the Transaction and Cerro was thus required to withhold its vote,[107] Phelps Dodge's voting agreement obligated Phelps Dodge to vote in favor of the

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[100] Id.

[101] AMC Defs. Pretrial Br. at 19.

[102] Pl. Pre-Trial Opening Br. at 20-21.

[103] AMC Defs. Pretrial Br. at 19.

[104] Pl. Pre-Trial Opening Br. at 19-20.

[105] See, e.g., Montejo Aff. Ex. 31 at SP COMM 010489-90; Montejo Supp. Aff. Ex. 52.

[106] Pl. Pre-Trial Opening Br. at 21-22.

[107] See Montejo Supp. Aff. Ex. 53 ("In the event that the Special Committee of disinterested Directors of SPCC does not recommend (or withdraws such recommendation) to the Board of Directors of SPCC the approval of the Transaction, Cerro will not submit its proxy to vote in favor of the Transaction.").

Transaction regardless of whether the Special Committee changed its recommendation.[108]

- Lower Long-Term Copper Price. Defendants credit the Special Committee for valuing Minera using the same long-term copper price that Southern used for its internal planning, which also coincided with the consensus of long-term copper prices projected by analysts. But by relying on its DCF relative valuation, the Special Committee still managed to agree to Grupo's $3.1 billion asking price, which Defendants' expert justifies by using a much higher long-term copper price.

These, plus a limited environmental indemnity, are the "significant concessions" that the Special Committee "negotiated" in lieu of a price concession from Grupo. The sum of their result is that Southern and its minority stockholders would have been better off had the Special Committee never been formed. Such a dismal record cannot establish fair dealing.

B. The Proxy Did Not Fairly Disclose the Facts of the Transaction to Southern Shareholders

There is no question that the stockholder vote was uninformed.[109] What was disclosed to the stockholders[110] was even less information than the alchemy Goldman presented to the Special Committee.[111] Rather than affirmatively prove otherwise (they cannot), Defendants attempt to foreclose the argument.[112] But Defendants' burden in proving the Transaction was entirely fair – especially when Defendants seek a burden shift – includes the burden of proving

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[108] See Montejo Supp. Aff. Ex. 54 ("Taking into account that the Special Committee of disinterested Directors of SPCC did recommend to the Board of Directors of SPCC the approval of the Transaction and the Board consequently voted in favor of it, we kindly propose that PD, together with AMC, express their current intent, and PD and AMC do hereby express their current intent, to (i) submit their proxies to vote in favor of the Transaction and for such actions as are required to consummate the Transaction in accordance with the Special Committee's recommendation and (ii) take all action reasonably necessary to effect simultaneously with the closing of the Transaction the conversion of their Class A Common Stock into a single class of Common Stock with the rights and privileges as set forth in SPCC's Certificate of Incorporation as it currently exists, which would provide greater liquidity for all investors.").

[109] Pl. Pre-Trial Opening Br. at 25-27 and 46-47.

[110] Pl. Pre-Trial Opening Br. at 25-27.

[111] In re Southern Peru Copper Corp. S'holder Derivative Litig., Del. Ch., Cons. C.A. No. 961-VCS, Hr'g Tr., Dec. 21, 2010 at 71.

[112] AMC Defs. Pretrial Br. at 25.

the stockholder vote was fully informed.[113] If Defendants want to foreclose argument on the stockholder vote, Defendants cannot rely on the stockholder vote to prove entire fairness or shift the fairness burden.

III. PLAINTIFF IS AN ADEQUATE REPRESENTIVE

Defendants preserve their argument that Plaintiff is an inadequate fiduciary representative. The argument, however, is without merit. To disqualify a representative plaintiff, Delaware law requires defendants to prove "a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders."[114] Defendants cannot prove this. Defendants present no basis for the Court "to believe that [Plaintiff] doesn't want to kick [their] butt for the best interests of the stockholders of the company."[115] Since the Court's admonition nearly two years ago, Plaintiff and his counsel have doggedly prosecuted this action, moved for partial summary judgment making "fairly powerful points,"[116] defeated Defendants' attempt to shift the fairness burden, and seek relief of nearly $7 billion dollars at trial.[117] There is no question that this action is being maintained for the benefit of Southern and its stockholders.

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[113] Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983) ("But in all this, the burden clearly remains on those relying on the vote to show that they completely disclosed all material facts relevant to the transaction.").

[114] Emerald Partners v. Berlin, 564 A.2d 670, 674 (Del. Ch. 1989).

[115] Southern Peru Copper, Del. Ch., Cons. C.A. 961-VCS, Hr'g Tr. at 97.

[116] Id. at 113.

[117] Pl. Pre-Trial Opening Br. at 47-49.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court enter judgment in its favor and against the Defendants in an amount to be determined at trial.

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Dated: June 9, 2011

CERTIFICATE OF SERVICE

I, Marcus E. Montejo, do hereby certify on this 9th day of June, 2011, that I caused a copy of Plaintiff's Pre-Trial Answering Brief to be served via eFiling through LexisNexis File and Serve to counsel for the parties as follows:

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/s/ Marcus E. Montejo
Marcus E. Montejo (DE Bar No. 4890)

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

JOINT PRETRIAL STIPULATION AND ORDER

I. NATURE OF ACTION AND PROCEDURAL HISTORY

This is stockholder derivative action arising out of the acquisition by Southern Peru Copper Corporation ("Southern") of the approximately 99.15% of Minera México, S.A. de C.V. ("Minera") that was owned by Americas Mining Corporation ("AMC"), a wholly owned subsidiary of Grupo México S.A.B. de C.V. ("Grupo"), in exchange for 67,207,640 shares of Southern stock (the "Transaction"). Plaintiff asserts that the Transaction was an acquisition, whereas the AMC Defendants[1] assert that it was a merger. The Transaction was announced on October 21, 2004. In connection with the proposed Transaction, Southern's board formed a special committee to evaluate the Transaction on behalf of Southern's minority shareholders (the "Special Committee"). The AMC Defendants assert that the members of the Special Committee were independent and that the Special Committee was empowered to and and did evaluate and negotiate the proposed Transaction.

Following an eight month process, the Special Committee recommended the approval of the Transaction to Southern's board of directors, which unanimously approved the Transaction. In February 2005, Southern issued a proxy statement explaining the proposed Transaction and setting forth the date of the shareholder meeting to vote on the proposed Transaction. On March 28, 2005,

[1] The "AMC Defendants" are AMC, Germán Larrea Mota-Velasco ("Germán Larrea"), Genaro Larrea Mota-Velasco ("Genaro Larrea"), Oscar González Rocha ("Gonzalez"), Emilio Carrillo Gamboa ("Carrillo"), Jaime Fernando Collazo Gonzalez ("Collazo"), Xavier García de Quevedo Topete ("Xavier Garcia"), Armando Ortega Gómez ("Ortega"), and Juan Rebolledo Gout ("Rebolledo").

Southern's shareholders voted to approve the Transaction. The Transaction closed on April 1, 2005.

In December 2004, the first of three actions was filed challenging the Transaction. The other two actions were filed in January 2005.[2] By order dated January 24, 2005, the cases were consolidated for all purposes, and the complaint filed in Civil Action No. 961-N was designated as the operative complaint (the "Complaint"). The Complaint alleges that AMC and the individual defendants breached their fiduciary duty to Southern because the Transaction was not entirely fair to Southern. Two of the original plaintiffs, Lemon Bay and James Sousa, are no longer parties to this action.

The parties engaged in fact and third-party discovery, which concluded on March 1, 2010. Plaintiff produced its expert report on March 16, 2010. Defendants produced their expert report on April 23, 2010. Expert depositions concluded on June 16, 2010. On June 30, 2010, plaintiff moved for partial summary judgment. On August 10, 2010, the AMC Defendants cross-moved for summary judgment, or in the alternative, for a determination that plaintiff bears the burden of proof as to the entire fairness of the Transaction. The Special Committee Defendants[3] cross-moved for summary judgment on all claims on August 11, 2010. At the December 21, 2010 hearing on the parties' summary judgment motions, the Court denied plaintiff's motion and the AMC Defendants' motion. The Court granted the Special Committee Defendants' motion and dismissed the Special Committee Defendants from this action.

Plaintiff and the AMC Defendants filed their respective opening trial briefs on May 12, 2011

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[2] The three actions are Lemon Bay, LLP v. Americas Mining Corporation, et al., Civil Action No. 961-N (December 30, 2004), Theriault v. Luis Miguel Palomino Bonilla, et al., Civil Action No. 969-N (January 6, 2005) (error in original caption corrected), and Sousa v. Southern Peru Copper Corporation, et al., Civil Action No. 978-N (January 7, 2005).

[3] The "Special Committee Defendants" are Carlos Ruiz Sacristan ("Ruiz"), Harold S. Handelsman ("Handelsman"), Gilberto Perezalonso Cifuentes ("Perezalonso"), and Luis Miguel Palomino Bonilla ("Palomino").

and answering trial briefs on June 9, 2011. A four day trial is scheduled to begin June 21, 2011.

II. FACTS WHICH ARE ADMITTED AND REQUIRE NO PROOF

The following facts are admitted by the parties and require no proof, although inclusion of any fact herein is not an admission of its relevance or materiality to this proceeding:

A. The Parties

1. Plaintiff "Theriault Trust". Complaints were originally filed by three separate plaintiffs. Two of the original plaintiffs, Lemon Bay and James Sousa, are no longer parties to this action. Robert Theriault, as Trustee of and for the Theriault Trust, filed Civil Action No. 969-N on January 6, 2005. Robert Theriault died on May 19, 2008, and Michael Theriault succeeded his father as Trustee of and for the Theriault Trust. Michael Theriault was substituted for Robert Theriault in this Action on December 10, 2008. Between April 2003 and January 2008, the Theriault Trust bought and sold various quantities of Southern stock.

2. Defendants

a. AMC. AMC is a Delaware corporation and a wholly owned subsidiary of Grupo Mexico.

b. AMC Defendants. Germán Larrea, Genaro Larrea, Gonzalez, Carrillo, Xavier Garcia, Ortega, and Rebolledo were the members of Southern's board of directors (the "Board") at the time of the Transaction who did not serve on the Special Committee. These individuals were also directors and/or employees of Grupo at the time of the Transaction.

c. Southern. Nominal Defendant Southern is a Delaware corporation. Southern is an integrated copper producer that operates mining, smelting, and refining facilities. Prior to the Transaction, Southern

conducted these operations in Peru. Upon consummation of the Transaction, Southern expanded its operations to Mexico. Southern now owns approximately 99.95% of Minera. Until October 11, 2005, Southern was known as Southern Peru Copper Corporation. Thereafter, it became known as Southern Copper Corporation. Southern's common stock currently trades on the New York Stock Exchange under the symbol "SCCO."

B. Other Entities

3. Grupo. Grupo is a Mexican holding company listed on the Mexican stock exchange. At all relevant times Germán Larrea has served as the Chairman and CEO of Grupo. The Larrea family controls a majority of the capital stock of Grupo, which through AMC is, and was during the relevant period, the controlling stockholder of both Southern and Minera.

4. Minera. Minera is a holding company organized under the laws of the United Mexican States. At all relevant times Minera has engaged in the mining and processing of copper, molybdenum, zinc, silver, gold, and lead through its Mexico-based mining units.

5. ASC. Americas Sales Company, Inc. ("ASC") is a Delaware corporation and wholly owned subsidiary of AMC.

6. Cerro. Cerro Trading Company, Inc. ("Cerro") is a subsidiary of The Marmon Group and was one of Southern's founding stockholders during the relevant period. During the relevant period, the Marmon Group was controlled by the Pritzker family.

7. Phelps Dodge. Phelps Dodge Overseas Capital ("Phelps Dodge"), is a subsidiary of Phelps Dodge Corporation and was one of Southern's founding stockholders during the relevant period.

C. Ownership of Southern and Minera

8. Prior to the Transaction, Southern had two classes of stock: (1) ordinary common shares that were traded on the NYSE and (2) class A common shares (the "Founders Shares") that were owned by Grupo, Cerro and Phelps Dodge (the "Founding Stockholders"). Each class A common share had 5 votes versus 1 vote per share of ordinary common stock. Prior to the Transaction, Grupo owned 43.3 million Founders Shares, which equated to 54.17% of Southern's outstanding common stock and 63.08% of the aggregate Southern voting power (if those shares exercised their super majority voting rights). Cerro and its affiliates owned 11,378,088 Founders Shares, representing 14.2% of Southern's outstanding capital stock. Phelps Dodge owned 11,173,796 Founders Shares, representing 13.95% of Southern's outstanding capital stock.

9. Prior to the Transaction, Grupo owned approximately 99.15% of the stock of Minera. As a result of the Transaction, Southern acquired Grupo's 99.15% interest in Minera. As a result of subsequent stock acquisitions, Southern currently owns approximately 99.95% of the stock of Minera. Since the closing of the Transaction, Minera has existed as a subsidiary of Southern.

10. Prior to the Transaction, Grupo was entitled to appoint 9 directors to the Board, Cerro was entitled to appoint 2 directors to the Board, and Phelps Dodge was entitled to appoint 2 directors to the Board. The holders of the Company's common stock elected 2 directors to the Board.

D. Grupo Proposes the Transaction

11. In September 2003, Grupo engaged UBS Investment Bank ("UBS") to provide advice with respect to a possible strategic transaction involving Minera and Southern.

12. Grupo made a formal presentation to the Board on February 3, 2004, in which it proposed that Southern acquire Grupo's interest in Minera in exchange for newly-issued Southern common stock.

13. Grupo's initial proposal asserted that Minera's enterprise value was $4.3 billion, inclusive of $1.3 billion in net debt. The proposal also contemplated that Southern would acquire AMC's shares of Minera in exchange for approximately 72.3 million shares of Southern, with the precise number of shares to be determined based upon the market price of Southern's common stock. As a result of the proposed Transaction, Minera would become a 98.84% (later revised to 99.15%) subsidiary of Southern.

E. The Special Committee

14. In response to Grupo's February 3, 2004 proposal, Southern's Board appointed the Special Committee to evaluate the Transaction and make recommendations about it to Southern's Board. Southern's Board announced the proposed Transaction and the formation of the Special Committee on February 4, 2004. On February 12, 2004, the Special Committee was granted its mandate.

15. The Special Committee was comprised of directors Ruiz, Perezalonso, Handelsman, and Palomino.

16. Ruiz, who chaired the Special Committee, has been a member of Southern's Board since February 12, 2004. Ruiz was appointed to the Board by Grupo. Ruiz was a Mexican government official for 25 years before co-founding an investment bank, where he advises on M&A and financing transactions.

17. Palomino has been a member of Southern's Board since March 19, 2004. Palomino was nominated to the Board by Grupo upon the recommendation of certain Peruvian pension funds that were among Southern's minority shareholders. Palomino was elected to fill a vacancy created by the resignation of Pedro-Pablo Kuczynski ("Kuczynski") from the Board to accept the post of Minister of Economy and Finance of the Republic of Peru. Palomino has a Ph.D in finance from the Wharton School at the University of Pennsylvania and has worked as an

economist, financial advisor, and analyst for various banks and financial institutions. Palomino served as Chief Executive Officer and the Senior Country and Equity Analyst of Merrill Lynch, Peru, where he covered all companies in Peru, Venezuela, and Colombia, including Southern.

18. Perezalonso has been a member of Southern's Board since 2002. Perezalonso was nominated to the Board by Grupo and elected by holders of the ordinary common shares in April 2004. Perezalonso has a law degree and an MBA and has spent most of his career on issues relating to finance and strategy, managing multi-billion dollar companies such as Grupo Cifra, S.A. de C.V., Grupo Televisa, S.A.B., AeroMexico Airlines, and Corporation Geo S.A. de C.V.

19. Handelsman has been a member of Southern's Board since August 2002 as a designee of Cerro. Handelsman graduated from Columbia Law School and worked at Wachtell, Lipton, Rosen & Katz as an M&A attorney before joining the Pritzker family interests as General Counsel of the Hyatt Group of Companies. Handelsman had been employed by entities affiliated with the Pritzker family since 1978.

F. The Special Committee's Advisors

20. After interviewing several potential legal advisors, on February 26, 2004, the Special Committee retained Latham & Watkins LLP ("Latham") as its United States legal advisor. On March 25, 2004, the Special Committee engaged Mijares, Angoitia, Cortes y Fuentas SC ("Mijares") as its Mexican counsel.

21. After interviewing five potential financial advisors, on February 26, 2004, the Special Committee engaged Goldman, Sachs & Co. ("Goldman") as its financial advisor.

22. On April 14, 2004, the Special Committee engaged Anderson & Schwab, Inc. ("A&S") as its mining consultant.

G. The Special Committee's Work Relating to the Transaction

23. Over the eight months that the Special Committee worked on the terms of the Transaction, Special Committee meetings were held on the following dates:[4]

Special Committee Meetings

Date
February 13, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM0019541-44.
February 17, 2004, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM001481-82.
February 20, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019545-47.
February 24, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019548-49.
February 26, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019550-51.
March 2, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019553-55.
March 11, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019571-72.
April 1, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019556-57.

[4] Pursuant to the stipulation between Plaintiff and the AMC Defendants, agreed to on April 25, 2011, the meeting minutes of the Special Committee produced on January 23, 2011 (bates stamped SP COMM 019541 – SP COMM 019609) shall not be introduced or admitted as evidence in connection with the trial in this action. However, Plaintiff stipulates that (i) the meetings of the Special Committee set forth in paragraph 24 herein took place and (ii) were minuted. To be clear, the Special Committee meeting minutes produced prior to January 23, 2011 may be introduced and admitted into evidence in connection with the trial in this action. Minutes for Special Committee meetings the AMC Defendants and the Special Committee believe were held on August 5, 2004 and August 25, 2004 were not produced by the Special Committee during discovery.

Date
April 21, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019558-60.
April 29, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019573-75.
May 13, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019561-62.
June 11, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019563-65.
June 23, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019566-68.
July 8, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019576-78.
July 20, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019569-70.
September 14, 2004, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM019589-90.
September 15, 2004, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM019591-93.
September 23, 2004, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM019594-95.
September 30, 2004, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM109596-97.
October 1, 2004, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM019598-99.
October 12, 2004, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM019600-01.
October 14, 2004, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM016902-03.

Date
October 18, 2004, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM019604-06.
October 21, 2004, as identified in signed Special Committee meeting minutes bates stamped SPCOMM019579-82.
January 14, 2005, as identified in unsigned Special Committee meeting minutes bates stamped SPCOMM019607-09.

24. On March 2, 2004, the Special Committee met with Latham and Goldman and discussed the scope, objectives, and timing of financial, operational, and legal due diligence to be conducted on behalf of the Special Committee. At this meeting, Goldman also reviewed with the Special Committee certain publicly available financial and operational information concerning Minera and Southern.

25. On March 4, 2004, Ruiz sent a letter to Germán Larrea. In this letter, Ruiz requested that Grupo provide the Special Committee with a term sheet for the proposed Transaction containing sufficient detail for the Special Committee to begin its analysis of the proposed Transaction.

26. On March 25, 2004, Grupo sent a term sheet to the Special Committee relating to the proposed Transaction. In the term sheet, Grupo proposed, among other things, that the consideration to be paid by Southern would be based on an enterprise value for Minera of approximately $4.3 billion.

27. On April 1, 2004, the Special Committee met with Goldman and Latham to discuss the March 25 term sheet. Following discussion with Goldman and Latham, the Special Committee concluded that the term sheet did not provide sufficient detail or information for the Special Committee to evaluate Grupo's proposal.

28. On April 2, 2004, Ruiz sent a letter to Germán Larrea requesting additional information with respect to Grupo's March 25 term sheet. In this letter, Ruiz explained that the Special Committee required, among other things, information regarding the number of Southern shares that Grupo proposed to be issued in connection with the Transaction.

29. During the week of April 12, 2004, the Special Committee's advisors began their business, operational, and financial due diligence review of Minera. On April 16, Goldman and A&S met with members of Minera's senior management to conduct a detailed review of Minera's operations.

30. On April 21, 2004, the Special Committee met with Goldman, Latham, and Mijares to discuss the progress of legal, operational, and financial due diligence.

31. On April 29, 2004, the Special Committee met with Latham, Mijares, Goldman, and A&S, and the advisors reported on the progress of their legal, operational, and financial due diligence.

32. On May 13, 2004, the Special Committee met with Latham, Goldman, and Mijares to discuss the revised term sheet and the progress of due diligence.

33. On May 21, 2004, Goldman and A&S met with Southern's senior management at Southern's offices in Lima, Peru to review of Southern's operations.

34. During the course of its evaluation of the Transaction, Goldman presented the Special Committee with various valuation analyses based on the information it gathered from due diligence it conducted in conjunction with A&S.

35. In its June 11, 2004 presentation, Goldman presented the results of a discounted cash flow ("DCF") analysis for Minera using Minera's management projections, adjusted projections based on A&S's due diligence of Minera, and a range of sensitivities for long-term

copper prices, discount rates, and ore milled. Goldman also presented the results of its "Illustrative Contribution Analysis" and "Illustrative Look Through Analysis."

36. On June 16, 2004, Goldman and UBS met to discuss the respective views of the Special Committee and Grupo with regard to the appropriate valuation of Minera.

37. On June 23, 2004, the Special Committee met with representatives of Goldman, Latham, and Mijares, at which the Special Committee's advisors provided an update on the progress of legal, financial, and operational due diligence. Goldman also provided an update on its discussions with UBS regarding valuation. Goldman also discussed with the Special Committee recent developments in the market for Southern stock, a preliminary financial review of Southern, and certain portions of Minera's operations.

38. In its June 23, 2004 presentation, Goldman presented, among other things, the results of a DCF analysis for Southern under various projection scenarios and a range of sensitivities for long-term copper prices, discount rates, and ore milled.

39. In its July 8, 2004 presentation, Goldman presented the results of a DCF analysis of Minera using revised projections. Goldman also compared values for Minera and Southern from DCF analyses in "Relative Discounted Cash Flow Analyses" that set forth hypothetical numbers of Southern shares to be issued under certain assumptions.

40. Following these discussions, Grupo agreed with the Special Committee's proposal that the number of shares to be issued in the Transaction would be determined based upon a fixed-share exchange ratio. On August 21, 2004, Grupo delivered a revised term sheet to the Special Committee. The term sheet proposed that Southern issue 67 million shares of common stock as consideration for Grupo's interest in Minera. In the term sheet, Grupo stated that its proposal that 67 million shares be issued was made "after an extraordinary effort to come to an agreement." The

term sheet also indicated that Grupo would support an underwritten public offering of Cerro and Phelps Dodge's Founders Shares following the completion of the proposed Transaction.

41. On September 7, 2004, Grupo's counsel distributed a draft Agreement and Plan of Merger to Latham.

42. On September 23, 2004, the Special Committee's advisors distributed a revised draft of the Merger Agreement and a term sheet to Grupo's advisors. The revised Merger Agreement and term sheet proposed that Southern issue to Grupo 64 million Southern shares as consideration in the Transaction. It also proposed, among other things, that the Transaction be subject to (i) a "majority of the minority" vote of disinterested stockholders of Southern (without giving effect to any super majority voting rights), and (ii) a 20% "collar" around the fixed value exchange ratio, with both parties granted a walk-away right if the average trading price of Southern common stock in the 20 day period prior to the third day prior to the stockholder vote was outside of this "collar."

43. On October 5, 2004, German Larrea and members of the Special Committee met to discuss the remaining outstanding issues in connection with the Transaction. At this meeting, they agreed that Southern would issue to Grupo 67 million shares of Southern common stock as consideration in the Transaction. This amount was later revised upward to 67,207,640 to account for Grupo's 99.15% ownership of Minera rather than its previously-represented 98.84% ownership. The parties further agreed that (i) the aggregate amount of net debt of Minera would not exceed $1.0 billion as of the closing of the Transaction; (ii) Southern would pay a $100 million special dividend to its stockholders (with approximately 45.8% of that dividend to be received by stockholders other than Grupo); and (iii) AMC would indemnify Southern for certain pre-closing environmental matters and conditions of Minera.

44. Also at the October 5, 2004 meeting, Grupo and Cerro agreed that if the parties reached agreement with respect to the terms of the proposed Transaction, both Grupo and Cerro would indicate their intention to vote in favor of the Transaction.

45. On October 8, 2004, the Special Committee and Grupo, through their advisors, agreed that a vote of holders of 66⅔% of the Founders Shares and common shares (including Grupo and without giving effect to any super majority voting rights) in favor of the Transaction would be required to approve the acquisition of the shares of Minera.

46. On October 21, 2004, Cerro and AMC entered into an agreement pursuant to which Cerro agreed to vote in accordance with the Special Committee's recommendation regarding the proposed Transaction, and AMC agreed to support an underwritten public offering of Cerro's Southern stock.

H. Recommendation and Approval

47. October 21, 2004, the Special Committee met with its advisors to consider the final terms of the Transaction.

48. Following the Special Committee's and the Board's recommendation of the proposed Transaction, Southern, SPCC Merger Sub, Inc., ASC, AMC and Minera then entered into an Agreement and Plan of Merger (the "Merger Agreement").

I. Terms of the Merger Agreement

49. The Merger Agreement provided, among other things, that AMC would transfer its ownership of Minera shares to ASC and ASC would then merge with a newly-formed subsidiary of Southern, with ASC surviving as a wholly-owned subsidiary of Southern.

50. In consideration thereof, Southern would issue 67,207,640 newly-issued Southern shares to AMC. In addition, prior to the closing of the Transaction, the $100 million special dividend would be distributed by Southern based upon shareholders' pre-Transaction

holdings. As a result of the Transaction, all Founders Shares would be converted into shares of Southern ordinary common stock on a one-for-one basis and all super majority voting rights would terminate.

J. Governance Changes

51. The terms of the Transaction included certain governance provisions to be adopted by Southern. These included (a) the formation of a special nominating committee to nominate a proportional number of independent directors (not to exceed 6 nor to be less than 2), with such committee being comprised of three directors, two of whom would be independent; (b) an "Affiliate Transactions Committee" to evaluate and review in advance all related party transactions that involve consideration of more than $10,000,000; and (c) that Southern stock would remain listed on the New York Stock Exchange or another major stock exchange.

K. Shareholder Approval and Closing of the Transaction; Post-Closing Events

52. On November 22, 2004, Southern filed with the SEC its preliminary proxy statement soliciting stockholder approval of the Transaction (the "Preliminary Proxy").

53. On February 25, 2005, Southern filed with the SEC its definitive proxy statement soliciting stockholder approval of the Transaction (the "Proxy"). Southern sent the Proxy to Southern's shareholders soliciting their vote to approve the Transaction at a special meeting of stockholders to be held on March 28, 2005.

54. At the March 28, 2005 special shareholder meeting, the Transaction was approved by the holders of more than 90% of the outstanding capital stock of Southern. The official vote tally is set forth in Southern's Quarterly Report (Form 10-Q) for the quarter ended March 31, 2005.

55. The Transaction closed on April 1, 2005.

L. [RESERVED]

III. ISSUES OF FACT AND LAW THAT REMAIN TO BE LITIGATED

A. Plaintiff's Statement:

1. Whether the Transaction was entirely fair; and

2. Whether plaintiff is entitled to an award of fees and costs.

B. AMC Defendants' Statement:

1. Whether the AMC Defendants breached any fiduciary duties when they approved the Transaction between Southern and Minera that was negotiated over an eight month period, recommended by the Special Committee, and overwhelmingly approved by the holders of Southern's stock.

2. In late February 2004, the Special Committee's legal advisors requested that Grupo's legal advisors provide a detailed term sheet relating to Grupo's proposal to sell Minera to Southern.

3. On May 7, 2004, Grupo sent a revised term sheet to the Special Committee. In the term sheet, Grupo proposed, among other things, that, for purposes of the Transaction, Minera's enterprise value was approximately $4.3 billion, consisting of an equity value of approximately $3.1 billion and net debt of approximately $1.2 billion. Grupo further proposed that the number of Southern shares to be issued for Minera's $3.1 billion in equity value would be calculated based on the 20-day average closing price of Southern stock beginning five days prior to the closing of the Transaction.

4. On June 11, 2004, the Special Committee met with Goldman, A&S, Latham, and Mijares to receive preliminary due diligence reports. Goldman discussed with the Special Committee the May 7 term sheet, a preliminary financial review of Minera, and recent developments in the market for Southern stock.

5. Following this June 11, 2004 meeting, the Special Committee agreed that representatives of the Special Committee should meet with Germán Larrea and inform him that the Special Committee had received a preliminary report from its advisors and that there were substantial differences between the views of the Special Committee and Grupo regarding Grupo's term sheet. Because of the substantial difference in views, the parties agreed to ask their respective advisors to meet and discuss the appropriate valuation of Minera.

6. On July 8, 2004, the Special Committee met with Latham, Mijares, and Goldman to discuss recent developments in the negotiations with Grupo and to receive a report regarding the ongoing due diligence process.

7. At this July 8, 2004 meeting, the Special Committee also discussed the possibility that Grupo might offer Cerro and Phelps Dodge the opportunity to participate in a registered offering of Southern common stock following the completion of the proposed Transaction. After discussing this issue with its advisors, the Special Committee concluded that it would ask Grupo to be kept informed of the progress of any such discussions, but that the Special Committee would not otherwise involve itself in discussions regarding registration rights.

8. During late July and early August 2004, Goldman and UBS discussed the respective views of the Special Committee and Grupo regarding valuation issues. During these discussions, UBS indicated that Grupo believed that the number of shares of Southern stock to be issued as consideration for the acquisition of Minera should be in excess of 80 million shares.

9. Several times over the following two weeks, Ruiz and other members of the Special Committee spoke with Germán Larrea regarding valuation issues. On July 20, 2004, Ruiz provided an update to the Special Committee and its advisors regarding these discussions. Following discussion with its advisors, the Special Committee decided to request a new proposal from Grupo to address its concerns relating to valuation and corporate governance matters.

10. On August 5, 2004, the Special Committee met to discuss the substantial gap that remained between the exchange ratio for Minera proposed by Grupo and the Special Committee's view concerning an appropriate exchange ratio. The Special Committee concluded that Ruiz would inform Germán Larrea that the Special Committee had instructed Latham and Goldman to negotiate with Grupo's advisors over the next two weeks in an attempt to determine if the parties could reach agreement relating to Grupo's proposal.

11. On August 25, 2004, the Special Committee met with Goldman, Latham, and Mijares. During this meeting, Goldman provided an update on their discussions with UBS regarding the August 21 term sheet, including valuation methodologies and proposals relating to the exchange ratio. Also at that meeting, the Special Committee discussed the registration rights provisions in the August 21 term sheet, and again decided that the Special Committee would inform Grupo that it wanted to be kept informed of any discussions between Grupo, on the one hand, and Cerro and Phelps Dodge, on the other, but that the Special Committee would not participate in the negotiations regarding proposed registration rights.

12. On September 15, 2004, the Special Committee met to discuss business and legal issues raised by the draft Agreement and Plan of Merger.

During this meeting, the Special Committee also discussed issues relating to the number of shares of Southern stock to be issued as consideration for the acquisition of the shares of Minera.

13. On October 18, 2004, the Special Committee met with Goldman, Latham, and Mijares to discuss certain remaining open issues. At this meeting, Handelsman informed the other members of the Special Committee that Cerro had received a letter from Grupo indicating that Southern would be willing to provide registration rights to Cerro on certain terms and conditions, including Cerro's agreement to vote in favor of the proposed Transaction. The Special Committee objected to Grupo's attempt to condition the registration rights on Cerro's agreement to vote in favor of the proposed Transaction. On October 20, following discussions between Ruiz and Germán Larrea, Grupo agreed to amend the provisions of the draft Cerro agreement to reflect that Cerro would vote in accordance with the Special Committee's recommendation.

14. At the October 21, 2004 meeting, Latham gave a presentation on the fiduciary duties of the Special Committee in connection with the proposed Transaction. Goldman provided a presentation of its analysis and methodology and opined that the proposed Transaction was fair to Southern from a financial point of view.

15. After considering the presentations of its counsel and financial advisors, the Special Committee met in executive session without any representatives of the Committee's advisors present. In this session, Handelsman informed the Special Committee that he would abstain from voting on whether to recommend to Southern's Board that it approve the Transaction to alleviate any appearance of a conflict of interest as a result of his negotiation on behalf of Cerro for registration rights.

16. Following these discussions, the Special Committee (other than Handelsman) then voted to recommend that Southern's Board approve the proposed Transaction based on their determination that it was in the best interests of Southern stockholders. Handelsman then stated that he agreed with the Special Committee's recommendation.

17. The Special Committee, along with its legal and financial advisors, subsequently met with the Southern Board and reported its recommendation. Latham and Goldman also made a presentation. Based on its review of the terms of the proposed Transaction, the Southern Board unanimously approved the proposed Transaction on October 21, 2004.

18. On December 22, 2004, Phelps Dodge and AMC entered into an agreement pursuant to which Phelps Dodge agreed to vote in accordance with the Special Committee's recommendation regarding the proposed Transaction, and AMC agreed to support an underwritten public offering of Phelps Dodge's Southern stock.

19. James Sousa filed his complaint on January 7, 2005. Sousa voted for the Transaction after filing his complaint. Sousa died while this action was pending.

20. On June 15, 2005, Cerro and Phelps Dodge sold their Southern shares in an underwritten offering at $40.635 per share.

21. The members of the Special Committee were independent and disinterested. Ruiz, Palomino, Perezalonso and Handelsman had no affiliation with any of the other Southern directors or any Grupo affiliates before joining the Southern Board.

22. Southern's stock price closed at $45.92 per share on October 21, 2004, closed at $43.72 per share on October 22, 2004, and closed at $43.80 per share on October 25, 2004.

23. The London Metal Exchange copper spot price was $1.480525/lb. on December 31, 2004.

24. Southern's stock price closed at $59.47 per share on February 25, 2005, closed at $62.91 per share on February 28, 2005, and closed at $61.28 per share on March 1, 2005.

25. The Theriault Trust bought 500 shares of Southern stock on October 22, 2004.

26. The Theriault Trust bought 500 shares of Southern stock on December 13, 2004.

27. The Theriault Trust bought 500 shares of Southern stock on May 17, 2005.

28. The Theriault Trust bought 500 shares of Southern stock on October 4, 2005.

29. The Theriault Trust sold 500 shares of Southern stock on October 4, 2005.

30. The Theriault Trust sold 400 shares of Southern stock on November 7, 2005.

31. The Theriault Trust sold 500 shares of Southern stock on January 27, 2006.

32. The Theriault Trust sold 500 shares of Southern stock on January 31, 2007.

33. The Theriault Trust bought 500 shares of Southern stock on January 9, 2008.

IV. STATEMENT OF THE RELIEF SOUGHT BY EACH PARTY

A. Relief Sought by Plaintiff:

1. Order defendants to cancel or return to Southern all Southern shares of common stock paid in excess of the fair value of Minera as determined at trial;

2. Order defendants to pay Southern monetary and/or rescissory damages in the amount to be determined at trial; and

3. Award fees, expenses and costs to plaintiff and plaintiff's counsel.

B. Relief Sought by Defendants:

1. Enter judgment in favor of the AMC Defendants; and

2. Dismiss the Complaint with prejudice.

V. AMENDMENT OF THE PLEADINGS

Neither party seeks amendment to the pleadings.

VI. WITNESSES

A. Fact Witnesses:

1. Luis Miguel Palomino Bonilla

2. Harold S. Handelsman

3. Armando Ortega Gomez

4. Raul Jacob

5. James Del Favero (The AMC Defendants intend to call this witness. Plaintiff objects to the calling of this witness. The parties intend to raise this issue at the pre-trial conference).

B. Expert Witnesses:

1. Daniel Beaulne

2. Eduardo Schwartz

C. Stipulations Regarding Witnesses:

1. If a witness is called by a party other than the party controlling the witness, the party controlling the witness will present the witness' direct testimony first. The party calling the witness then will cross examine the witness, with the scope of cross examination not limited to the scope of the direct examination.

2. Unless recalled for rebuttal, each witness will be called only once.

3. The parties agree that the deposition transcripts and video lodged with the Court may be used during trial by all parties, including in pre and post trial submissions. The admissibility of such deposition testimony shall be subject to the Court's determination of any evidentiary objection made by a party as if the deponent were testifying live at trial. The merits of any other objections to particular testimony (unless resolved at or before trial) will be addressed in the parties' post trial briefs.

D. Reservation of Rights:

1. The parties reserve the right not to call any of the foregoing witnesses live and to rely on deposition testimony.

VII. EVIDENTIARY ISSUES REQUIRING RESOLUTION

The parties do not anticipate any significant evidentiary issues. However, the parties reserve the right to raise evidentiary objections at trial concerning specific documents and testimony depending upon the reason or bases for which the document or testimony is offered.

VIII. TRIAL EXHIBITS

1. The parties will collectively work to finalize a list of joint trial exhibits (the "Exhibit List") by Friday June 17, 2011. The parties will submit to the Court the Exhibit List prior to the commencement of trial.

2. The parties may supplement the Exhibit List at any time prior to the close of trial with each side reserving its right to object to any such supplemental exhibits. In addition, the parties reserve the right to introduce such additional exhibits as deemed appropriate in rebuttal to any evidence introduced by the opposing party.

3. Insofar as is feasible before the trial commences, all trial exhibits will be premarked and will indicate whether they may be admitted into evidence without objection.

4. Complete sets of deposition transcripts and deposition videos have been lodged with the Court.

IX. ESTIMATE OF TRIAL TIME

The Court has allotted two full days and two half days for trial beginning June 21, 2011. The parties reserve the right to request up to two (2) additional trial days from the Court.

X. AMENDMENT TO PRETRIAL ORDER

This Order may be amended upon application to the Court by any party for good cause shown, or by agreement of the parties with approval of the Court.

PRICKETT, JONES & ELLIOTT, P.A.

By: /s/ Marcus E. Montejo
Ronald A. Brown, Jr. (DE Bar No. 2849)
Marcus E. Montejo (DE Bar No. 4890)
1310 King Street
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(302) 888-6500

Attorneys for Plaintiff

OF COUNSEL:

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(610) 667-7706

MORRIS, NICHOLS, ARSHT &
TUNNELL LLP

By: /s/ Kevin M. Coen
S. Mark Hurd (DE Bar No. 3297)
Kevin M. Coen (DE Bar No. 4775)
1201 North Market Street
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(302) 658-9200

Attorneys for Defendants Americas Mining Corporation, Germán Larrea Mota-Velasco, Genaro Larrea Mota-Velasco, Oscar Gonzalez Rocha, Emilio Carillo Gamboa, Jaime Fernando Collazo Gonzalez, Xavier Garcia de Quevedo Topete, Armando Ortega Gómez, and Juan Rebolledo Gout

OF COUNSEL:

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McCLOY LLP
Alan J. Stone (DE Bar No. 2677)
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One Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000

Ashby & Geddes

By: /s/ Richard L. Renck
Richard I.G. Jones, Jr. (DE Bar No. 3301)
Richard L. Renck (DE Bar No. 3893)
P. O. Box 1150
500 Delaware Avenue, 8th Floor
Wilmington, DE 19899
(302) 888-5502

Attorneys for Nominal Defendant Southern Peru Copper Corporation (now known as Southern Copper Corporation)

Dated: June 14, 2011

SO ORDERED this ____ day of _____, 2011.

_____
Vice Chancellor

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:	38136569
Current Date:	Jun 22, 2011
Case Number:	961-VCS
Case Name:	CONF ORDER In re: Southern Peru Copper Corp Shareholder Derivative Litigation
Court Authorizer:	Leo E Strine

Court Authorizer Comments:

This order is granted subject to the rulings made at the pretrial conference held on June 15, 2011.

/s/ Judge Leo E Strine

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

- - -

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

APPEARANCES: (via telephone)

RONALD A. BROWN, JR., ESQ
MARCUS E. MONTEJO, ESQ.
Prickett, Jones & Elliott, P.A.
for Plaintiff

S. MARK HURD, ESQ.
KEVIN M. COEN, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
DOUGLAS W. HENKIN, ESQ.
MIA C. KOROT, ESQ.
of the New York Bar
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

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Expiration: Permanent

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June 15, 2011

BY eFILING
AND BY HAND

The Honorable Leo E. Strine, Jr.
Court of Chancery
New Castle County Courthouse
500 North King Street
Wilmington, DE 19801

RE: In re Southern Peru Copper S'holder Derivative Litig.,
Del. Ch., Cons. C.A. No. 961-VCL

Dear Vice Chancellor Strine:

I write on behalf of Plaintiff in the above matter in advance of this afternoon's telephonic pre-trial scheduling conference. On Monday, June 13 we were informed that Defendants intend to request an unusual modification to the trial schedule in order to accommodate a new witness. Plaintiff objects to Defendants' proposal, as described below.

Defendants have been unable to secure the attendance at trial of any member of the team from Goldman, Sachs & Co. ("Goldman") that advised the Special Committee regarding the fairness of the transaction that is the subject of this litigation. On May 31, 2011, Defendants first alerted Plaintiff that Martin Sanchez, the Goldman representative whom Plaintiff deposed, might not be available to testify at trial. Notably, although Mr. Sanchez was no longer employed by Goldman at the time of his 2009 deposition, this was the first time Plaintiff heard Mr. Sanchez might not be available to testify at trial. In that same conversation, Defendants proposed that they would either (i) secure Mr. Sanchez's appearance at trial, or (ii) arrange for a different member of the Goldman advisory team to testify at trial, and allow us the opportunity to depose that person prior to the trial.[1]

Plaintiff followed up several times with Defendants over the next week. Last Thursday, June 9, Defendants informed Plaintiff that Mr. Sanchez was "definitely not showing up" and told

[1] Defendants also proposed another new witness whom they intended to call at trial, Mr. Raul Jacob, whom Plaintiff deposed yesterday.

Plaintiff that Defendants were "working on Werner."[2] See Ex. A. Plaintiff wrote back, asking, "And you're working on a couple of potential deposition dates for him, too?" Id. Defendants responded, "Of course. I am not optimistic that we will get him to trial, ***in which case we will have no live Goldman witness.***" Id. (emphasis added).

On Monday, June 13, Plaintiff was surprised to receive a new proposal that Defendants wanted to call James Del Favero, whom defendants described as a member of Goldman's "fairness opinion committee." See Ex. B. Since Mr. Del Favero is apparently unavailable either to testify at trial or to be deposed prior to the trial, Defendants informed Plaintiff that they "have dates he is available to testify in July and plan to raise this issue with the Court." Defendants apparently intend for the trial to proceed next week, with Mr. Del Favero to be deposed and then testify after every other witness has finished. This proposal should be rejected.

First, Mr. Del Favero's testimony is not relevant to the issues presented in the trial. He gave no advice to the Special Committee, and was not present when Goldman advised the Committee.[3] Goldman's "internal" views of the fairness of the transaction are also not relevant. Notably, when Mr. Sanchez was deposed, Plaintiff sought to ask him questions not just about Goldman's advice to the Special Committee, but about Goldman's "typical" practices, and those questions were blocked by both counsel to the Special Committee and counsel to Goldman. For example, when asked a question about what Goldman "typically" did while he was employed there, the Special Committee's counsel stated, "I object to the form. This is not an expert witness." See Ex. C at 39-40. Goldman's counsel stated that Mr. Sanchez "is here to talk about what Goldman did in his role and what he did in acting as financial advisor to a special committee," and told Plaintiff that we could not be "wasting his time about things that Goldman Sachs may or may not do on a general basis." Id. at 43-44. Mr. Del Favero's anticipated testimony would thus represent a significant reversal of course from Defendants' prior litigation position.

Second, allowing Mr. Del Favero to testify now, months after the close of fact and expert discovery, would be completely unfair to Plaintiff. Since Mr. Sanchez was deposed, Plaintiff has made dozens of strategic decisions about how to prosecute this case, including how Plaintiff prepared his expert reports and conducted expert depositions. Now, with their eleventh-hour request, Defendants essentially ask the parties and this Court to conduct an entire trial, and then give Defendants the opportunity to put Mr. Del Favero on in rebuttal, which would unduly prejudice Plaintiff.

---

[2] Martin Werner was a member of the Goldman team that advised the Special Committee, and the Special Committee minutes reflect that he was present at approximately 10 of the approximately 22 Special Committee meetings attended by Goldman.

[3] According to the Special Committee meeting minutes, Mr. Del Favero apparently attended just a single Special Committee meeting, on February 17, 2004, when Goldman was pitching its services to the Committee. The Special Committee did not determine to retain Goldman as its financial advisor until February 26, 2004.

The trial dates in this matter have been firm for months. Defendants' inability to produce at trial a relevant Goldman witness who advised the Special Committee is not a reason to accommodate irrelevant and prejudicial testimony that they previously declared a "waste of time." The trial should proceed without a Goldman witness.

Respectfully yours,

/s/ Ronald A. Brown, Jr.

Ronald A. Brown, Jr.
(DE Bar No. 2849)

RAB/dt
Enclosures

cc: S. Mark Hurd, Esquire (w/ enclosures, by eFiling)
Kevin M. Coen, Esquire (w/ enclosures, by eFiling)
Richard L. Renck, Esquire (w/ enclosures, by eFiling)

EXHIBIT A

Lee Rudy

From: Stone, Alan [AStone@milbank.com]
Sent: Thursday, June 09, 2011 4:33 PM
To: Lee Rudy
Subject: Re: southern peru

Of course. I am not optimistic that we will get him to trial, in which case we will have no live Goldman witness.

From: Lee Rudy <lrudy@ktmc.com>
To: Stone, Alan
Sent: Thu Jun 09 16:27:56 2011
Subject: RE: southern peru

And you're working on a couple of potential deposition dates for him, too?

From: Stone, Alan [mailto:AStone@milbank.com]
Sent: Thursday, June 09, 2011 4:24 PM
To: Lee Rudy
Subject: Re: southern peru

He is definitely not showing up. We just found out this morning. We are working on Werner.

From: Lee Rudy <lrudy@ktmc.com>
To: Stone, Alan
Sent: Thu Jun 09 16:20:49 2011
Subject: southern peru

This Sanchez guy is really keeping us in suspense, huh?

Lee D. Rudy, Esq.
Kessler Topaz Meltzer & Check, LLP
280 King of Prussia Road
Radnor, PA 19087
direct dial (610) 822-2202
facsimile (610) 667-7056

Lee Rudy

From: Montejo, Marcus E. [MEMontejo@Prickett.com]
Sent: Monday, June 13, 2011 3:16 PM
To: Brown, Ronald A.; Hanrahan, Michael; Marc Topaz; Lee Rudy; James H. Miller
Subject: FW: SPCC

Update on Goldman.

From: Korot, Mia [mailto:MKorot@milbank.com]
Sent: Monday, June 13, 2011 2:59 PM
To: Montejo, Marcus E.
Cc: Henkin, Douglas W.; Stone, Alan
Subject: RE: SPCC

Marcus,

The AMC Defendants intend to call James Del Favero, who was on the fairness opinion committee that reviewed this deal at Goldman Sachs. Given the new trial schedule and Mr. Del Favero's own scheduling issues, Mr. Del Favero cannot testify next week. However, we have dates he is available to testify in July and plan to raise this issue with the Court during the pretrial conference on Wednesday. To the extent Plaintiff wants to take Mr. Del Favero's deposition, we are working on getting dates for him to be deposed the week of June 27.

Mia

From: Montejo, Marcus E. [mailto:MEMontejo@Prickett.com]
Sent: Monday, June 13, 2011 2:32 PM
To: Korot, Mia
Subject: RE: SPCC

Mia, any update on Goldman?

From: Korot, Mia [mailto:MKorot@milbank.com]
Sent: Friday, June 10, 2011 5:58 PM
To: Montejo, Marcus E.
Subject: RE: SPCC

Marcus,

Thank you for confirming the location and time of Mr. Jacob's deposition. I will be attending the deposition for the defendants. With respect to Goldman, I will have an answer for you on Monday. The new schedule complicated matters slightly. Finally, I will get you comments to the pretrial stip as soon as I can. If not this evening, tomorrow.

Mia

EXHIBIT B

Montejo, Marcus E.

From: Korot, Mia [MKorot@milbank.com]
Sent: Monday, June 13, 2011 2:59 PM
To: Montejo, Marcus E.
Cc: Henkin, Douglas W.; Stone, Alan
Subject: RE: SPCC

Marcus,

The AMC Defendants intend to call James Del Favero, who was on the fairness opinion committee that reviewed this deal at Goldman Sachs. Given the new trial schedule and Mr. Del Favero's own scheduling issues, Mr. Del Favero cannot testify next week. However, we have dates he is available to testify in July and plan to raise this issue with the Court during the pretrial conference on Wednesday. To the extent Plaintiff wants to take Mr. Del Favero's deposition, we are working on getting dates for him to be deposed the week of June 27.

Mia

From: Montejo, Marcus E. [mailto:MEMontejo@Prickett.com]
Sent: Monday, June 13, 2011 2:32 PM
To: Korot, Mia
Subject: RE: SPCC

Mia, any update on Goldman?

From: Korot, Mia [mailto:MKorot@milbank.com]
Sent: Friday, June 10, 2011 5:58 PM
To: Montejo, Marcus E.
Subject: RE: SPCC

Marcus,

Thank you for confirming the location and time of Mr. Jacob's deposition. I will be attending the deposition for the defendants. With respect to Goldman, I will have an answer for you on Monday. The new schedule complicated matters slightly. Finally, I will get you comments to the pretrial stip as soon as I can. If not this evening, tomorrow.

Mia

From: Montejo, Marcus E. [mailto:MEMontejo@Prickett.com]
Sent: Friday, June 10, 2011 5:21 PM
To: Korot, Mia
Subject: Re: SPCC

Mia,

To follow-up on our earlier call, this confirms that Jacob's deposition will be held at our offices in Wilmington at 9:30 am

on Tuesday. Please let me know who will be in attendance for defendants. Any update on Goldman? When do you expect to turn a draft of the pre-stip?

Thanks,

Marcus

From: Montejo, Marcus E.
Sent: Friday, June 10, 2011 12:47 PM
To: 'Korot, Mia' <MKorot@milbank.com>
Subject: SPCC

Mia,

Just wanted to confirm the substance of our telephone conversation earlier today during which you (i) confirmed that Ruiz will not be appearing for trial (ii) stated that you are still working to determine whether a Goldman witness will be appearing at trial and hope to have a status later this afternoon and (iii) stated that you plan to turn a draft of the pre-trial stip to us later this afternoon. As discussed, I will confirm the start time and location of Jacob's deposition scheduled for Tuesday shortly.

Thanks.

Marcus E. Montejo
Prickett, Jones & Elliott, P.A.
1310 King Street
Wilmington, DE 19801
(302) 888-6539 (direct dial)
(302) 658-8111 (fax)
MEMontejo@Prickett.com

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 **CONFIDENTIAL - FILED UNDER SEAL**

YOU ARE IN POSSESSION OF A DOCUMENT FILED IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE THAT IS CONFIDENTIAL AND FILED UNDER SEAL.

If you are not authorized by Court order to view or retrieve this document, read no further than this page. You should contact the following person:

Ronald A. Brown, Jr. (DE Bar No. 2849)
Marcus E. Montejo (DE Bar No. 4890)
PRICKETT, JONES & ELLIOTT, P.A.
1310 King Street
Wilmington, Delaware 19801
(302) 888-6500
Attorneys for Plaintiff

EXHIBIT C

C O N F I D E N T I A L

ATTORNEYS' EYES ONLY

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
Consolidated C.A. No. 961-N

----------x

IN RE SOUTHERN PERU COPPER CORPORATION
SHAREHOLDER DERIVATIVE LITIGATION

----------x

October 21, 2009
10:41 a.m.

Videotaped Deposition of MARTIN SANCHEZ, taken by Plaintiffs, pursuant to Subpoena, held at the offices of Fried Frank Harris Shriver & Jacobson LLP, One New York Plaza, New York, New York, before Todd DeSimone, a Registered Professional Reporter and Notary Public of the State of New York.

SANCHEZ - ATTORNEYS' EYES ONLY

uses. 11:10:39AM
Q. Where do you work today? 11:10:40AM
A. I work at Bank of America 11:10:42AM
Merrill Lynch. 11:10:43AM
Q. To complete your background, 11:10:44AM
what are your current responsibilities at 11:10:53AM
Bank of America? 11:10:55AM
A. My title is head of mergers for 11:10:56AM
Latin America. 11:10:59AM
Q. Did you join Merrill Lynch 11:11:00AM
before it was purchased by Bank of 11:11:03AM
America? 11:11:06AM
A. Sure. 11:11:06AM
Q. Is that where you -- is that 11:11:06AM
where you left to work when you left 11:11:10AM
Goldman Sachs? 11:11:12AM
A. That's correct. 11:11:12AM
Q. Is it fair to say that 11:11:16AM
currently at Bank of America you hold the 11:11:19AM
same position that Mr. Varoli did when you 11:11:21AM
were working at Goldman Sachs? 11:11:23AM
A. No. Mr. Varoli was head of 11:11:24AM
investment banking. I am responsible for 11:11:27AM
mergers and acquisitions. 11:11:29AM

SANCHEZ - ATTORNEYS' EYES ONLY

Q. I understand. Thank you. 11:11:30AM
I want to talk just a little 11:11:39AM
bit about discounted cash flow analyses. 11:11:40AM
You said that it looks to 11:11:48AM
predict the future performance of a 11:11:51AM
company, I think. Is that accurate, a 11:11:53AM
discounted cash flow analysis? 11:11:55AM
A. It doesn't predict the future 11:11:56AM
of the company. The discounted cash flow 11:11:58AM
analysis, what it does is it looks at a 11:12:01AM
set of predictions that obviously capture 11:12:03AM
the current performance of the company and 11:12:06AM
also what the company is expected to do in 11:12:08AM
the foreseeable future and discounts back 11:12:10AM
that expected performance into present 11:12:15AM
value. 11:12:17AM
Q. And when you are doing a 11:12:18AM
discounted cash flow analysis, did Goldman 11:12:20AM
Sachs, or Goldman Sachs while you were 11:12:24AM
working there, did Goldman Sachs typically 11:12:25AM
show the value that the analysis generated 11:12:27AM
for the company in a final presentation to 11:12:29AM
the client? 11:12:31AM
MR. BRANDT: I object to the 11:12:32AM

SANCHEZ - ATTORNEYS' EYES ONLY

form. This is not an expert witness. 11:12:33AM
MR. WAGNER: I'm asking him 11:12:36AM
what he did in his experience at Goldman 11:12:37AM
Sachs. I'm not asking for any expert 11:12:39AM
testimony. 11:12:40AM
MR. BRANDT: Can I hear the 11:12:41AM
question read back. 11:12:42AM
(The record was read.) 11:13:04AM
A. The thing was more, it depends 11:13:08AM
obviously on the situations, but I would 11:13:10AM
say that you generally show values for 11:13:12AM
companies. But it depends on the 11:13:18AM
particular situations. 11:13:19AM
Q. If you were to do that with the 11:13:20AM
DCF analysis in the final presentation, 11:13:22AM
would you then compare that DCF value, the 11:13:26AM
value that the discounted cash flow 11:13:28AM
analysis came up with, with the value of 11:13:30AM
the transaction as a measure to evaluate 11:13:32AM
the fairness of the transaction? 11:13:34AM
MS. GOLDSTEIN: I object to the 11:13:36AM
form. 11:13:37AM
MR. BRANDT: I object to the 11:13:37AM
form. 11:13:38AM

SANCHEZ - ATTORNEYS' EYES ONLY

A. Could you repeat the question 11:13:39AM
again? I'm sorry. 11:13:40AM
(The record was read.) 11:14:00AM
A. It depends once more on the 11:14:02AM
deals, because you have deals in which you 11:14:04AM
buy companies. You have deals in which 11:14:07AM
you sell companies. You have deals in 11:14:08AM
which you merge companies. Every single 11:14:10AM
deal is different. 11:14:13AM
If you look at a sell side of a 11:14:14AM
company, there is only one DCF value to 11:14:16AM
do, which is obviously the company you are 11:14:18AM
selling. If you are buying a company, 11:14:20AM
there is only one DCF value to do, which 11:14:22AM
is the company that you are buying. If 11:14:24AM
you merge companies, obviously what is 11:14:25AM
most relevant is not to look at absolute 11:14:28AM
values of each company, but what the 11:14:32AM
exchange ratio in those two companies look 11:14:37AM
like. 11:14:40AM
So at the end of the day, what 11:14:41AM
you need to do is basically put apples to 11:14:42AM
apples comparisons and look at basically 11:14:44AM
what is the implied exchange ratio. So 11:14:47AM

SANCHEZ - ATTORNEYS' EYES ONLY

more than absolute value, what matters is relative valuations. But, once more, it depends on the type of deal that you are working on. 11:14:51AM 11:14:53AM 11:14:55AM 11:14:56AM

Q. You just described for us a number of categories of kinds of deals. How would you categorize the Southern Peru deal that you were working on? 11:14:57AM 11:14:59AM 11:15:01AM 11:15:05AM

A. The Southern Peru deal ultimately was a merger in the sense that -- well, not technically a merger, but it was basically an exchange of shares for shares in which one asset -- one company was contributing to another in exchange for shares. 11:15:06AM 11:15:09AM 11:15:11AM 11:15:13AM 11:15:15AM 11:15:21AM 11:15:24AM

Q. So in an acquisition situation where one company is acquiring another company or exchanging stock, as you mentioned, do you recall any instances where in that context that Goldman Sachs did not perform a discounted cash flow analysis and present the results of that analysis to the client? 11:15:36AM 11:15:55AM 11:15:56AM 11:16:00AM 11:16:06AM 11:16:10AM 11:16:12AM 11:16:15AM

MS. GOLDSTEIN: Let me just 11:16:16AM

SANCHEZ - ATTORNEYS' EYES ONLY

interpose an objection or a statement, whatever you want to call it. 11:16:20AM 11:16:22AM

MR. WAGNER: I'm going to object to your statement. This is a Delaware deposition. You may object to the form. 11:16:23AM 11:16:24AM 11:16:26AM 11:16:28AM

MS. GOLDSTEIN: This is in New York. 11:16:28AM 11:16:28AM

MR. WAGNER: These are under the Delaware rules. 11:16:28AM 11:16:28AM

MS. GOLDSTEIN: It is pursuant to a New York subpoena. It is not an objection. It is a statement. 11:16:29AM 11:16:29AM 11:16:31AM

MR. WAGNER: You can't make statements on the record in Delaware. 11:16:32AM 11:16:34AM

MS. GOLDSTEIN: Fine. Go off the record. This is not a statement. It is a New York deposition, okay? It was noticed in New York. 11:16:36AM 11:16:36AM 11:16:36AM 11:16:36AM 11:16:36AM

Let me just say this right now. I'm trying to be very patient here, but asking a third-party witness and wasting his time about things that Goldman Sachs may or may not do on a general basis is a 11:16:41AM 11:16:41AM 11:16:43AM 11:16:45AM 11:16:47AM

SANCHEZ - ATTORNEYS' EYES ONLY

total and complete waste of time. 11:16:50AM

MR. WAGNER: I'm not asking on a general basis. I'm asking him about his experience. 11:16:52AM 11:16:53AM 11:16:55AM

MS. GOLDSTEIN: He is not an expert. He is here to talk about what Goldman did in his role and what he did in acting as financial advisor to a Special Committee. We are not going to spend the entire day discussing every iteration of what investment bankers do day and night. It is inappropriate. It is harassing and it is a waste of time. 11:16:56AM 11:16:58AM 11:16:59AM 11:17:02AM 11:17:05AM 11:17:07AM 11:17:09AM 11:17:13AM 11:17:15AM

Ask him about what he did in this case, and if you have questions about how Goldman did its valuations and why as it relates to what they did for this Special Committee, that is fair grounds. But asking academic questions about how investment bankers do their work is really inappropriate. 11:17:16AM 11:17:18AM 11:17:19AM 11:17:22AM 11:17:24AM 11:17:26AM 11:17:28AM 11:17:31AM

MR. WAGNER: I'm not asking any academic questions. I'm not seeking any expert opinions here. I'm merely asking 11:17:32AM 11:17:32AM 11:17:34AM

SANCHEZ - ATTORNEYS' EYES ONLY

him to recall his work history at Goldman Sachs and what he did at Goldman Sachs. 11:17:36AM 11:17:41AM

Hold on, I'm still talking. 11:17:44AM

MS. GOLDSTEIN: Finish. 11:17:45AM

MR. WAGNER: I didn't interrupt you. 11:17:47AM 11:17:49AM

MS. GOLDSTEIN: Then finish. 11:17:49AM

MR. WAGNER: I can proceed in this deposition any way I see fit, and I'm going to. If you want to block the deposition and if you want to terminate the deposition, then that's a matter we can take up with the Vice Chancellor and with the New York courts. 11:17:51AM 11:17:52AM 11:17:54AM 11:17:55AM 11:17:57AM 11:17:59AM 11:18:01AM

MS. GOLDSTEIN: You will take it up with the New York court because that is what this subpoena is noticed under. I will give you a few more minutes to ask questions about general academic investment banking issues. He is not here as your expert. Ask him about what he did in this case with respect to this committee. 11:18:02AM 11:18:03AM 11:18:05AM 11:18:07AM 11:18:08AM 11:18:11AM 11:18:13AM 11:18:15AM 11:18:17AM

Q. Were you aware of any of the 11:18:48AM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, June 21, 2011
9:10 a.m.

- - -

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

- - -

TRIAL TRANSCRIPT - VOLUME I

- - -

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

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for Nominal Defendant Southern Peru Copper Corporation (now known as Southern Copper Corporation)

ALBERTO de la PARRA, ESQ.
JAVIER GOMEZ, ESQ.
In-House Counsel for Grupo Mexico

- - -

THE COURT: Good morning.

MR. BROWN: Good morning, Your Honor. Shall we do the introductions first?

THE COURT: Sure.

MR. BROWN: At the counsel table with me is Lee Rudy at the front table and Eric Zagar. At the back table, you know Marcus Montejo from my firm, Jamie Miller, and one of the paralegals from the Kessler Topaz firm, Johanna Yen.

THE COURT: Good morning, everyone.

Good morning, Mr. Stone.

MR. STONE: Good morning. With me today is Douglas Henkin, my partner, and I think you know Mr. Coen from Morris Nichols. Mr. Renck is here.

THE COURT: Good morning Mr. Renck.

MR. STONE: And one of my associates, Seth Zoracki.

THE COURT: Good morning.

MR. STONE: Also here from Mexico City is Alberto de la Parra, who is the general counsel of Grupo Mexico, and also counsel for Grupo Mexico, Javier Gomez.

THE COURT: Good morning, everyone.

You may proceed.

MR. STONE: Looks like we'll get right into it and call the first witness.

THE COURT: I read the pretrial brief, so I feel well into it and deeply enmeshed in copper.

MR. STONE: Your Honor, the defendants call Luis Miguel Palomino.

MR. STONE: For the convenience of the Court and parties, we've distributed witness binders. You should have one on your desk.

LUIS MIGUEL PALOMINO BONILLA, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STONE:

Q. Good morning, Mr. Palomino. Could you tell the Court about your educational background beginning after high school?

A. Yes. I studied economics at the Universidad del Pacifico in Peru. And I then obtained a Ph.D in finance from the University of Pennsylvania, the Wharton School.

Q. Okay. Did you work between your undergraduate years and getting your Ph.D?

A. Yes. I worked for about three years

at the Central Bank of Peru, the National Development Corporation, and an affiliation of the National Development Corporation.

Q. Could you tell the Court about your employment history after obtaining your Ph.D?

A. When I completed my Ph.D., I first was a consultant for about six months for the InterAmerican Development Bank. I then worked as a researcher at a research institution in Lima with a group of economists led by Jeffrey Sachs where we prepared a structural adjustment and stabilization program for Peru. I then became the chief economist of a leading consulting firm there.

I then headed -- set up and headed a brokerage firm in Peru, and I was hired to set up the local office of a British broker called Smith New Court. About a year after that, Smith New Court was acquired by Merrill Lynch, and I became a head of the Merrill Lynch office in Peru, which position I held until 2000. I then was transferred by Merrill Lynch to New York, where I became chief economist for Latin America.

And since I left there at the end of 2002, I have worked as an independent consultant in

various positions. I have also been a professor of financial economics and corporate finance at both the undergraduate and graduate level of the Universidad del Pacifico.

Q. And what years did you work for Merrill Lynch?

A. From 1995 until 2002.

Q. And what positions did you hold there?

A. I was a CEO of Merrill Lynch in Peru. My main responsibilities were research at that point. I was the country analyst and equity analyst for Peru initially until 1998, and from '99 to 2004, Peru, Colombia and Venezuela.

Q. When you went to New York, what was your position?

A. I was chief economist for Latin America and in charge of coordinating all strategic recommendations for the region.

Q. While you were at Merrill Lynch, what industries did you cover?

A. While I worked in Peru, I was the equity analyst for Peru. In those days, the emerging market coverage was typically done on a country basis as opposed to sectoral basis. As opposed to being

covered by sectors, it was covered on a geographical basis. So I did most sectors that were relevant in the Peruvian stock market. So I did mining, which is big in Peru; I did the banking sector; I did cement, and a couple other companies, electricity and the like.

Q. And what mining companies did you cover while at Merrill Lynch?

A. We covered Southern Peru Copper. We covered Minsur and we covered Compania de Minas Buenaventura.

Q. What is your current occupation?

A. I hold several positions. I am on two boards, one of them being Southern Copper. I am head of a think tank called the Instituto Peruano de Economia in Lima, and I do private consulting. And I also am the director of the master in finance program at the Universidad del Pacifico.

Q. For which company other than Southern Copper do you serve on the board of directors?

A. For a company called Aventura Placa.

Q. And what is the business of that company?

A. It is a mall developer and operator, I

think the second largest in Latin America.

Q. And what type of consulting assignments do you generally do?

A. Often, it's some valuation issues. We do some strategic planning for financial decision-making by companies, some advice on M&A, that kind of work.

Q. Okay. You mentioned that you taught. What courses did you teach?

A. I taught financial economics and corporate finance.

Q. And during what years?

A. Initially, from 1989 to 1992, I taught financial economics alternating between the undergraduate and the graduate program, each semester. I then have taught -- at different opportunities, I taught financial economics once. I believe that was in around 19 -- I'm sorry -- around the year 2007, I believe. And then I taught corporate finance in I believe it was 2009 was the last time, I think.

Q. Are you currently a director of Southern Copper Corporation?

A. Yes, I am.

Q. Just so we're clear, Southern Peru

Copper Corporation changed its name to Southern Copper?

A. Yes. Following the merger and other issues, yes.

Q. Okay. When did you become a director of Southern Peru Copper Corporation?

A. That was around March of 2004.

Q. And how was it that you became a director of Southern Peru Copper Corporation?

A. I was contacted initially by executives of the Peruvian pension funds who held a significant number of shares in Southern Peru, and asked me if I would be willing to be on the board of the company because they intended to propose that I be nominated to the board. And they were interested in having somebody independent and that they knew on the board, because of the size of their investment there. And I agreed.

And I was subsequently contacted by Mr. Armando Ortego from the general counsel of Southern, and asked if I wanted to be on the board, and I agreed.

Q. Do you recall how much stock the pension funds held?

A. I believe they held about one-half or something of what was called the float, and something on the order of 8 or 9 percent, I believe was the figure.

Q. And at the time that Ortega contacted you, did you have an understanding of who you were replacing on the SPCC board?

A. Yes. I was told from the very beginning.

Q. Who was that?

A. Mr. Pedro-Pablo Kucyzinski.

Q. Who was Pedro-Pablo Kucyzinski?

A. He's a well-known financial executive. He's worked in Peru in the Central Bank in the past. He was Minister of Energy and Mines in the Belaunde Administration in the 1980s. I understand he had a high position in First Boston in the U.S. at some point.

He then ran some private equity funds and did other private business in Peru and the United States.

Q. What if any understanding did you have of why Mr. Kucyzinski was leaving his position on the SPCC board?

A. He was leaving because he was becoming Minister of Finance and Economics in Peru.

Q. Now, prior to being contacted by Mr. Ortega, did you have any affiliation with Grupo Mexico?

A. No.

Q. When did you first learn about the possible sale of Minera Mexico to Southern Peru Copper Corporation?

A. I believe when the pension funds initially contacted me, they made mention that there was some transaction coming up, that they were particularly interested in me being there to be a part of the decision process. I didn't know the details, and I believe I found out the details when I joined the special committee and was informed of what was going on.

Q. So at the time you joined the SPCC board, what was the status of the discussions relating to this proposed transaction?

A. At that point, not much had transpired yet. They had -- the committee members had already selected legal counsel, Latham & Watkins, and Goldman Sachs, and that was as far as they had gotten when I

joined.

Q. When you joined the SPCC board, did you immediately become a member of the special committee?

A. Yes. I believe I was asked to -- when I was asked to become a member of the board, they asked me specifically if I would serve on the special committee, and I agreed to that too.

Q. Now, when you joined the special committee, who were the other members of the special committee?

A. They were -- Mr. Carlos Ruiz Sacristan was the chairman, Mr. Hank Handelsman, and Mr. Gilberto Perezalonso.

Q. What was your understanding with respect to whether any members of the special committee were affiliated with Grupo Mexico?

A. My understanding was that they were not, that they were independent. And our own legal counsel went through this issue of independence with each one of us and with the group as a whole.

Q. What was the purpose of the special committee as you understood it?

A. To evaluate the transaction that had

been proposed and to decide whether we would recommend it or not to the board.

Q. I want you to take a look at what's been marked as Joint Exhibit 16, which is Tab 1 in the binder that should be up there.

A. Tab 1, you said?

Q. Yes.

A. Yes.

Q. And ask you to flip over a couple of pages behind the cover e-mail and the cover letter.

A. Mm-hmm.

Q. And there are some resolutions there. Do you recognize those resolutions?

A. Yes. I saw them at some point. This is resolutions that took place before I joined the Southern board. I believe it's the resolutions which formed the independent -- the special committee to evaluate the transaction.

Q. Now, if you take a look at the fourth paragraph, the one that begins "NOW, THEREFORE, BE IT RESOLVED ...."

A. Yes.

Q. And I'm not going to read the whole thing, but it charges the special committee, and I'll

read at the end, " ... with the duty and sole purpose of such Special Committee to evaluate the Transaction in such manner as the Special Committee deems to be desirable and in the best interests of the stockholders of the Corporation."

A. Mm-hmm.

Q. To what extent did the special committee have the authority to negotiate with Grupo Mexico?

A. Well, as it says here, 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.

So to that extent, there was negotiation going on, and we were aware that this was something we had to do in order to comply with our duties.

Q. And to what extend did the special

committee, in fact, negotiate?

A. In the way that I explained. We did that extensively throughout the whole process.

Q. What authority did the special committee have to retain advisors?

A. We had full authority to retain any and all advisors we required at our sole discretion.

Q. And who did the special committee retain as their advisors?

A. As I indicated, we retained Latham & Watkins for U.S. legal advice. We retained the law firm of Mijares in Mexico. We retained Goldman Sachs for the financial advice. And we retained, later on, a mining consultant, Anderson & Schwab.

Q. And what involvement did you have in the involvement of the special committee's legal and financial advisors?

A. I was not a part of the selection of Goldman Sachs and Latham & Watkins, but I was a part of the selection of Mijares and Anderson Schwab.

Q. What if any concerns did you have about the special committee's retention of Latham & Watkins and Goldman Sachs as its advisors?

A. None.
Q. Okay. And what involvement did you have with respect to the retention of Anderson & Schwab?
A. I participated in evaluating the various mining specialists, mining consultants that made proposals to us, and we decided to go with Anderson & Schwab. That was part of the decision process.
Q. And why did the special committee retain Anderson & Schwab?
A. I don't recall the details, but we thought that they were better -- that they were better consultants than the other ones that we had evaluated.
Q. Okay. How did the special committee learn of Anderson & Schwab?
A. I believe that the various consultants that we evaluated and received proposals from were suggested by Goldman Sachs, I think. They suggested a number of opportunities. I don't remember how many exactly, probably three or four. And we evaluated them and decided on Anderson Schwab.
Q. If you would turn to Tab 2, which is what's been marked as Joint Exhibit 66, do you

recognize this document?

A. Yes, I have seen this document.

Q. And what is it?

A. It is a letter addressed to Carlos Ruiz Sacristan directed to the special committee from Armando Ortega, secretary of the board, responding to our comments on the term sheet that they sent on March 25th.

Q. Okay. Directing you to the second paragraph, I'm not going to read the entire thing, but it raises an issue with respect to the execution of the engagement letter with Anderson & Schwab.

A. Yes.

Q. And it says that two of the outside consultants who would serve as the mining team, Mr. Charles Smith and Mr. Ralph Stricklen, have a conflict of interest with SPCC, and for these reasons, Mr. Ortega is asking the committee to consider other mining consultants.

What happened as a result of Mr. Ortega's request that the committee not hire or not -- not hire the two consultants, Mr. Smith and Mr. Stricklen?

A. Well, we looked into the matter, and

indeed, Mr. Smith was suing the company, had a legal conflict with the company; so, yes, indeed, he had a conflict of interest and we asked that he not be part of the team. We decided that Mr. Stricklen did not have anything that really amounted to a conflict of interest and what we needed for service, and we maintained Anderson & Schwab with changing Mr. Smith.

Q. Now, generally speaking, how did you use the financial, legal and mining advisors to evaluate the proposed transaction?

A. As one would when one hires experts, we used their expert opinion for the matters in which they were qualified; the mining consultants, for instance, regarding mining technical issues in the mining and ore bodies and mining technologies and forecasts and costs and the like; we used Goldman Sachs for the financial advice; and we used our legal counsel in the United States and Mexico for legal matters.

Q. And to what extent did you rely on these advisors in determining whether to recommend the proposed merger to SPCC's board?

A. In the matters that we consulted with them to a great extent, that's what we hired them for.

Of course, we had to make the choices, the decisions in the end, but we relied heavily on their advice.

Q. I want to talk a little bit about the special committee process. Approximately how often did the special committee meet?

A. There was no regular meeting schedule, but we met quite frequently. Dozens of meetings, I'd say, both in person and over the phone.

Q. Were minutes kept of the special committee's meetings?

A. Yes, they were.

Q. What was the process for keeping minutes of the special committee's meetings?

A. I believe counsel would keep minutes of the meetings as they were going on. They would prepare a draft, and the draft would be reviewed at later meetings, and approved with any changes that were necessary.

Q. Did the minutes accurately reflect what took place at the special committee's meetings?

A. Of course. That's what they're for.

Q. Take a look behind Tab 3. This is Joint Exhibit 129.

A. Mm-hmm.

Q. What is this document?
A. This is the proxy statement that was prepared for the proposed transaction.
Q. I want you to take a look at Page 16. And I'm referring to the numbers at the bottom of the page, not the ones at the top right. There is a section there that says, "THE MERGER" and then a subsection that says, "Background of the Merger." Are you familiar with this background of the merger section?
A. Yes, I have read the proxy statement.
Q. And did you read this proxy statement before it was sent to the shareholders?
A. I believe so.
Q. And what is generally contained in this section on the background of the merger?
A. It explains roughly how the process worked, and it gives a fairly detailed account of what the special committee did and how the negotiations proceeded until the transaction -- until we recommended the transaction to the board.
Q. Now, do you believe that this section provides an accurate summary of the special committee's process and valuation of the merger?

A. It is a summary, but yes, it is fairly accurate, I would say.

Q. Now, in terms of the process with respect to the transaction, when you joined the special committee, what was the status of the back and forth between the special committee and Grupo Mexico?

A. When I joined, as I indicated, not much had been done because the proposal, the Grupo Mexico proposal had not been presented in such a way that it could be adequately evaluated. There was no properly determined consideration, for example. It seemed to be more of a vague notion that a merger could take place, but it hadn't been specified or clarified in such a way that we could sit down and evaluate it as a proposal.

Q. At some point did the special committee receive a more detailed proposal from Grupo Mexico?

A. Yes. Actually, I think there were a couple of intervening steps before we finally received what we considered a proper term sheet.

Q. Okay. Let's take a look behind Tab 4. This is Joint Exhibit 155. Do you recognize this document?

A. Yes. This is the so-called term sheet that they presented on March 25th of 2004.

Q. Okay. And if you would turn over to the second page of the document, there is a section there that says, "Proposed Consideration." What was the proposed consideration in the proposal?

A. It says proposed consideration is the enterprise value of M&M amounts to $4,318 million, but that is not a consideration. There is no proposed consideration that can be evaluated. They were making statements of some information that did not amount to a proposed consideration.

Q. And what was the special committee's reaction to this term sheet?

A. The one I just told you, that we went back to them and said, This is not something that we can evaluate because this is not a proper term sheet.

Q. Take a look at the next tab, which is Joint Exhibit 83.

A. Mm-hmm.

Q. Do you recognize this document?

A. Yes. It's minutes of a special committee meeting.

Q. Were you in attendance at this

meeting?

A. Yes, I was.

Q. Okay. It notes in the first substantive paragraph that the purpose of the meeting was among other things to discuss the term sheet received from Grupo Mexico relating to Grupo Mexico's proposal to sell Minera Mexico to the company in exchange for shares of the company's common stock.

A. Mm-hmm.

Q. What was the result of those discussions at this meeting?

A. As I've indicated, we concluded that there was -- it was not a proper term sheet and we could not really do our job with it, and we requested that they presented a proper term sheet.

Q. Who was appointed to make that request?

A. I don't remember exactly. It's here on the minutes, I'm sure.

Q. Who among the committee members had the most discussions with Mr. Larrea?

A. Most of the discussions were held by Mr. Ruiz Sacristan, first, because he was chairman of the committee and, second, because he was based in

Mexico. Where, in my case, I was at that point based in Washington, D.C., and Hank Handelsman was based out of Chicago, so it was more complicated for us to contact Mr. Larrea.

So while we all did meet with him on some opportunities, Mr. Ruiz Sacristan, and to some extent, Mr. Gilberto Perezalonso, met with him more frequently.

Q. Would you look at Tab 6, which is Joint Exhibit 65?

A. Mm-hmm.

Q. What is this document?

A. It is a letter by Carlos Ruiz Sacristan and the presentation of the special committee to Mr. German Larrea, the chairman of the board of Grupo.

Q. And what was the purpose of this letter?

A. It was a letter sent to try to help them in clarifying what an appropriate term sheet was. Since we had asked for a term sheet before and had not received one that was appropriate, we sent some ideas on what it is that we needed to be clarified.

For example, as you can see, it says,

For proposed consideration, please indicate what it is that you say you want to be paid in shares, tell us how many shares, what is the ratio you're talking about, what is a number of other information we needed, the net debt of Minera Mexico, the structure of that debt, the tax implications of the proposal. They had mentioned creating a single class of common stock. How that would work. Corporate governance issues that had not, I believe, been mentioned in their term sheet and we thought should be included. Various issues that are indicated there.

Q. Okay. If you would turn to Tab 7 which is Joint Exhibit 84, do you recognize this document?

A. Yes. It's also minutes of a meeting of the special committee.

Q. If you look at the second page of the document, there is a paragraph at the bottom, and it says, "Mr. Ruiz advised the other members of the Committee and the Committee's advisors that he intended to meet with Mr. Larrea, Armando Ortega, the General Counsel of Grupo Mexico, and representatives of Mijares."

To your knowledge, did Mr. Ruiz meet

with Mr. Larrea?

A. As I can recall, he did.

Q. And was it common for Mr. Ruiz or Mr. Perezalonso to meet with Mr. Larrea?

A. Yes, it was fairly common. In general, we tried to have the communication flow from our advisors to their advisors, but at some points it was to the advantage of -- in order to be more precise, avoid communication errors, and go directly to who was in the end making the decisions on Grupo Mexico, we would contact regularly Mr. Larrea.

Q. In your experience, is Mr. Larrea someone who likes to have meetings on the phone?

A. No. I believe Mr. Larrea never has phone meetings.

Q. Did Grupo Mexico eventually provide the special committee with a revised term sheet?

A. Yes, they did.

Q. Take a look at Tab 8.

A. Mm-hmm. It's the revised term sheet that was presented by Grupo.

THE COURT: Mr. Stone, just for the record, I think it probably would be useful when you have the witness go to the tab, to also ask him to

identify the Joint Exhibit number, just because when we go back over the transcript -- these witness-specific binders are extremely helpful, but going back, it may not be clear what Tab 8 is to anybody at 2:00 in the morning doing a post-trial brief, or me at some more reasonable hour reading the transcript.

MR. STONE: Yes. I was trying to do that myself, Your Honor, and I slipped up on this one.

THE COURT: It's fine.

MR. STONE: This is Joint Exhibit 156.

BY MR. STONE:

Q. And generally, what were the revised terms that Grupo was proposing in this term sheet?

A. If I recall correctly, we considered that this was a proper term sheet that we could work with. It had a specified consideration, and it addressed one by one the issues that we had asked to be informed of or said that should be part of a revised term sheet. And so we -- this is something we could start to evaluate and work on.

Q. Okay. What was the special committee's reaction to this term sheet?

A. Initially, there were many aspects to

the term sheet. The first reaction was, Okay. We finally got something that we can really work on. Second, they were -- I believe they were asking for the consideration to be made in a number of Southern Copper shares which would be floating depending on the value, on the price of Southern Copper shares in the market.

So they were fixing the value of Minera Mexico at a given level and then letting the price of Southern Copper float, and the number of shares result from that. So there was one fixed value and another one which was moving, and that was a concern.

Q. And what did the special committee do after receiving this revised term sheet in terms of the process and in terms of what its advisors were instructed to do?

A. Well, our advisors began working on obtaining information and doing the due diligence, both legal and financial, and the mining consultants did the mining due diligence, if that's what we can call it, to obtain all the information that they needed in order to advise us with regards to the valuation of Minera Mexico and, at our request, the

valuation also of Southern Copper. Southern Peru Copper, then.

Q. Okay. Let's take a look at Tab 9. That's Joint Exhibit 101. What is this document?

A. It is the June 11th presentation that Goldman Sachs made to the special committee. As it says there, it's preliminary materials presented to the committee.

Q. Is this the first such presentation that you received from Goldman Sachs?

A. I believe so.

Q. I want to pause for a second and discuss the dynamic between the special committee and Goldman Sachs. Can you describe that dynamic?

A. In general, we would instruct them as to what it is we wanted them to do, and then they would use their expertise and do so, prepare the information and advice that we had asked them for, and then they would present it to us.

In general, the things that they would present to us were -- gave us -- they would give us information on how the values that were being determined were being reached, how sensitive they were to the various assumptions, and gave us guidance with

regards to this information.

Q. To what extent, if at all, did the special committee critically analyze the work that was coming out of its experts?

A. Well, we always questioned and asked them how come, why did they do it this way, and tried to understand what they were doing. At some points, I'm sure that we asked them to do some things that they hadn't done or to change some things that they did. But in general, they know how to do their work. They're good at what they do. And so we took a lot of their advice.

Q. Let's go back to Joint Exhibit 101. What was the purpose of this presentation?

A. It was a first presentation, as I recall, on the first work that they had done on valuation for Minera Mexico. Minera Mexico was not a listed company. There was not a lot of public information on it. They had visited a data room and obtained information. I'm not sure if at this point they had interviewed the top executives, but I think they had. We can check and look at the details.

And with that initial information, they presented a preliminary view of what Minera

Mexico was about.

Q. Taking a look at Page 4 of the presentation, which is an executive summary and process update --

A. Mm-hmm.

Q. -- what were the various analyses that Goldman Sachs applied in this presentation?

A. As can be read there, the attachment here contains a preliminary analysis of public market comparisons, discounted cash flow analysis, some of the parts, market valuation from Grupo Mexico.

They take into account a number of issues that had to be considered when doing these valuations. It mentioned that Anderson & Schwab is looking into the issue of synergies from the potential merger, contribution analysis of Minera Mexico in Southern Peru.

And it indicates that at this stage, they haven't been looking at the legal due diligence yet because there was not enough information at that point.

Q. Okay. If you would turn to Page 31 of the presentation, it has an identification number that ends in 3369.

A. Yes.

Q. There is a section there on valuation analyses. And there is a discussion of some of the projections. And there are two cases, an MM case and an A&S case. What were those two cases?

A. The so-called MM case was the projections and forecasts based on the information provided by the Minera Mexico management. And the A&S case referred to the adjustments made to those projections by Anderson & Schwab. They had reviewed all the information presented by the management of Minera Mexico and revised it, adjusted it, according to their expert opinion.

Q. Okay. And how did the assumptions with respect to long-term copper prices vary as between those two cases?

A. Well, Anderson & Schwab was proposing 85 cents I believe at that point, from what I can see here. And Minera Mexico management was using a $1 per pound of copper forecast for the long-term. And there were other issues, too, in terms of -- if I remember correctly, I don't know at which stage in the valuation it was, but Anderson & Schwab also corrected for increased capital expenditures, increased costs of

other nature, reduced recovery rates, and production overall, so there were various adjustments made, if I remember correctly, all of them reducing the value that would have resulted from the management projections.

Q. Okay. Speaking of those adjustments, take a look at Page 36 of the presentation.

A. Yes.

Q. What does that chart show?

A. It is pretty much what I was just mentioning. What they do is, in this chart, they illustrate the reconciliation between the MM case and A&S case, is how do you get from what Minera Mexico is proposing to how do you get to what Anderson Schwab are saying.

And you start by saying what the consideration is, what the enterprise value for the company is, you take away the debt, you get the equity value of the company, and you start subtracting the Anderson Schwab issues.

First, copper price outlook, the impact that lower copper prices would have on the value.

Second, we are not at this point -- at

that point, we did not have enough information yet to ascribe any value to tax benefits and others that Minera Mexico was claiming existed. There was issues of reduced production, as I indicated earlier, of cost increases and increased capital expenditures.

In addition, there was also the issue of the price of molybdenum. It is the second most important product of both the Peruvian operations and the Mexican operations. So what you assumed regarding the price of moly also had an impact on price of forecasts and valuation.

Q. Turn over onto the next page and the page that follows, 37 and 38. What are those pages?

A. They are sensitivity analysis tables for the discounted cash flow valuation of Minera Mexico. What they do is they present under various assumptions regarding this case, on the first chart, the price of copper and the discount rate used in both the MM case and the A&S case.

And in the second page, it's a sensitivity analysis where instead of the copper price, we have different assumptions regarding production of Minera Mexico. In this case they were using the 85 cents for copper, long-term price for the

other ones.

Q. And in general, how did the range of values in these preliminary DCF analyses compare to the number that Grupo Mexico was ascribing to Minera Mexico in its proposal?

A. Well, as you can see, in general, the numbers tended to be lower. Only under the most optimistic assumptions, the numbers come close to what Minera Mexico had been proposing. What I mean, what these sensitivity analysis tables do is, since we're looking at a two-dimensional presentation, you can only look at two at a time, the sensitivity to two factors at a time. There are, in fact, other factors that are important, as we can see on the next page where they deal with production also. You can only look at them two at a time.

And so you get an idea of the main factors that affect valuation, and there are many other minor ones. How sensitive is the estimated valuation to changes in the basic assumptions? Typically, you would look at -- towards the center of the table is what, at the point where the table is presented, tends to be what would be considered the more central value, but you have to see what the

options are and how sensitive the analysis is.

Q. Okay. What was the committee's reaction to this fact that the range of values was generally lower than the values that Grupo Mexico was ascribing to Minera Mexico?

A. I guess it wasn't that surprising that it was low. One would imagine that when you make an initial proposal, you're going to try to get the highest price you can get. We did our job of trying to do the valuation. This was preliminary, mind you, but the preliminary numbers indicated that what Grupo Mexico was asking was too much.

Q. Take a look at Page 39. What is this illustrative look-through analysis?

A. If I remember correctly, what this does, and it's illustrative, is Grupo Mexico was listed on the stock market in Mexico and Grupo Mexico had several parts, Minera Mexico being one of them. So one way of trying to approach a valuation for Minera Mexico is to see how much is Grupo Mexico worth and then try to take off the other parts and what the residual value would be, what Minera Mexico would be worth, according to this analysis.

The trouble, of course, is that since

none of the other parts of Grupo Mexico were listed on the stock market, how you valued them and what percentage of Grupo Mexico's value could be ascribed to each its parts was a little difficult to determine.

But they did that under certain assumptions, assuming zero value for ASARCO and GFM, and assuming a premium to GM, and they have various ways of evaluating it. And then you subtract the parts that are not Minera Mexico, and you come up with a valuation, a residual valuation of Minera Mexico.

Q. And what was your reaction to this analysis?

A. Well, first of all, the results were also that Minera Mexico was valued at considerably less than what they were asking for, but this analysis is quite limited. It's quite arbitrary in terms of what it is that you assume.

And the other issue is that the transaction that had been proposed conceptually, before you determined a price for it, was a good idea. That is, if you had been the same -- if the shareholders of one of the other companies had been 100 percent the same, the merger would have in principle been a good idea, because what you were

getting was Mexican assets in Minera Mexico, which was an unlisted company that was part of a Mexican conglomerate with Mexican accounting standards, with no U.S. corporate governance provisions, no New York Stock Exchange or SEC regulatory issues here.

And you were trying to take those Mexican assets that were being evaluated, given these conditions, to become a part of a U.S. listed company, with all that says with regard to accounting standards, with corporate governance provisions, minority protection for shareholders, SEC supervision, New York Stock Exchange requirements and the like.

So in principle, these Mexican assets that were going to be made part of a U.S.-based company should increase in value considerably because of the new circumstances that I just mentioned. So the idea was that the transaction should create substantial value.

And then if you are just looking at what the situation is right now, you are not going to get a proper -- you're not going to give proper credit to the creation of value that we expected to take place.

Q. Turn if you would to Tab 10, which is

Joint Exhibit 88. What is this document?

A. It is also minutes of a meeting of the special committee.

Q. And I note that it is dated June 11th, which is the same date as the previous exhibit we looked at. Is this the minutes for the meeting where Goldman Sachs made their first presentations?

A. Yes, it is. Yes, they are.

Q. Look at the third page of the document. The first paragraph that's not redacted there says, "Following this discussion, the members of the Committee agreed that Mr. Ruiz and Mr. Perezalonso should meet with German Larrea, Mota-Velasco, Chairman of the Board of Directors of Grupo Mexico, as early as possible the following week to explain that the Committee had received a preliminary report from Goldman Sachs and its other advisors and to explain to Mr. Larrea that there are substantial differences between the views of the Committee and Grupo Mexico regarding the valuation of Minera Mexico."

What were the substantial differences between the views of the special committee and Grupo Mexico regarding the valuation of Minera Mexico?

A. As it says right there, "In

particular, the Committee instructed Mr. Ruiz and Mr. Perezalonso to describe to Mr. Larrea that the three of the principal areas of difference with respect to the estimates for Minera Mexico and the Company provided by their respective managements involved assumptions regarding commodity prices, taxes, and the views of Anderson & Schwab." Which I believe reflects -- refers to cost issues, recovery issues, capex issues.

Q. With respect to the assumptions about copper prices, what was the difference there?

A. We -- as I indicated earlier, Minera Mexico management was using the long-term copper price of a dollar for copper per pound, and we were proposing we use a lower number. Anderson & Schwab was proposing 85 cents. The consensus among market analysts at that point was more like 90 cents.

The committee was aware that the higher the price used for copper, the more advantageous the situation would be for Minera Mexico. They would be more expensive, relatively speaking, because although higher copper prices would benefit both companies, they would tend to benefit Minera Mexico more than Southern Copper in terms of value

because they had a higher cost structure, and so the results were somewhat more sensitive to higher copper prices than to Southern.

So 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 Mexico. And again, it's just as a matter of prudence.

Q. And this is something that the special committee discussed and adopted as a strategic tactic?

A. Sure. The fact that the lower the price, the better for us, that was quite clear from the beginning.

Q. Okay. What about the taxes, the tax issue that's raised in this paragraph? What was that?

A. I don't recall exactly, but if I do remember, the important tax issues that were related to the transaction in general were about the value of NOLs, I believe it was, and whether you could actually be able to take full credit for them or not. And I believe at this point, the legal due diligence hadn't even -- was not complete, so we weren't yet sure whether those -- the tax benefits of the claim would actually accrue or not, so that was part of the issue.

Q. Okay. As we read before, the members of the committee agreed that Mr. Ruiz and Mr. Perezalonso should meet with Mr. Larrea. Did that happen?

A. Yes.

Q. Now, as of this date, 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. We, of course, were still evaluating and seeing whether there was anything that we were missing, but the figures appeared, from the work we had done and our consultants had done up until that point, our advisors, that the price was too high.

Q. Take a look at what's behind Tab 11, which is Joint Exhibit 89.

A. Mm-hmm.

Q. What is this document?

A. Again, it is minutes of a meeting of the special committee on June 23rd.

Q. It notes on the second page that, "Representatives of Goldman Sachs reported on their discussions with UBS regarding Grupo Mexico's proposed valuation of Minera Mexico."

Did Goldman Sachs give a presentation on this date, June 23rd?

A. Yes.

Q. Okay. Take a look at Tab 12, which is, I'm sorry, Joint Exhibit 102. Is this the presentation that Goldman Sachs presented on June 23rd?

A. Yes, I believe so.

Q. Turn, if you would, to Page 16 of the presentation. It says, "Discussion of SPCC Projections." What is this -- what did this section cover?

A. Give me a moment.

Q. Sure.

A. Well, as it indicates, it's a preliminary review of estimates, and it shows estimates for various financial results for Minera Mexico and for Southern Peru Copper.

Q. What about the pages that follow, Pages 18 through 23?

A. Pages 18 to 23 are a discussion of forecasts for Southern Peru Copper. Goldman Sachs and Anderson Schwab began by doing a valuation of Minera Mexico, and then they proceeded to do a similar

valuation of Southern Peru Copper; and I believe this is the preliminary results of those analyses.

Q. Let's look at Page 18. It says "Changes to Company Assumptions."

A. Mm-hmm.

Q. What were the changes that were made to SPCC's assumptions?

A. As you can see there, the only significant change that Anderson Schwab recommended for Southern Copper was to increase the capex that had been presented by management. In general, the other figures were taken as valid.

Q. It says, "Capex increase for Elo smelter modernization program." What was that program?

A. The Peruvian government had required Southern Peru Copper to reduce emissions to the Elo smelter to certain agreed levels, and that required a substantial investment to be able to comply with a new environmental requirements. And I believe that what Anderson Schwab was saying here was that what had been budgeted by management for the Elo modernization should have been budgeted higher; that there was going to be more expenditures than had been planned.

Q. Okay. The next bullet point down talks about valuation analysis presented under two different scenarios, and it describes an SPCC case and an alternative case. What were those two cases?

A. The SPCC case as in the Minera Mexico case refers to management projections. The alternative case refers to -- if I remember correctly, we adjusted the forecasts or projections for Southern Copper based on what the Wall Street analysts seemed to be estimating or projecting for the company in the future.

Specifically, and this happens often, it appeared to us that the valuation that the Wall Street analysts were ascribing to Southern Peru Copper was based on the assumption that ore grades were higher than they would eventually be. That is, we all know what the average ore grade of the reserves are or is, but at the moment when this was taking place, the ore that was being mined had a higher grade than the average. Therefore, in the future, that ore grade was going to decline. We knew this for a fact. In fact it's part of the mining plan.

But apparently, Wall Street analysts were using the current ore grade for future

production, and that was giving them a different result than what we expected to actually happen.

Q. Okay. Take a look at Pages 22, 23, and 24. And would you describe what these pages show?

A. It's similar to what we saw before from Minera Mexico. It's a sensitivity analysis of the discounted cash flow valuation for Southern Peru Copper in this case.

How the values of -- how the DCF calculated values varied as you changed some of the key assumptions in the valuation: In this case, copper price and discount rate; and on the next page, moly price and discount rate; and also production, changes in production levels and discount rate.

Q. Okay.

A. As you see, when the price of copper is taken to be fixed, 85 cents is being used there.

Q. If you wouldn't mind turning back to Page 4 of this presentation.

A. Yes.

Q. Under SPCC public market valuation, there is a line that says SPCC implied market cap, and then there is a number, 21 June. Under the column 21 June, 2004, it says, 3,116. What does that number

represent?

A. I'm sorry. The number 3,189, you say?

Q. 3,116.

A. 3,116.

Q. Yes.

A. It is the estimated market price of Southern Peru Copper. You take the number of shares outstanding and the share price and you multiply it.

Q. Okay. Now, to what extent did Goldman Sachs discuss with the special committee that the range of its equity values derived from its DCF analyses were generally below this implied market capitalization of SPCC?

A. Well, it came up in the discussion, of course, because we knew what the market value was and the discounted cash flow numbers tended to be, again, depending upon assumptions, but they tended to be somewhat lower.

Among various issues that you're looking at here, the price of the reserves for the different companies was on the low side compared to what we knew existed in other companies.

So there were various reasons that could lead to different valuations of the company.

The discounted cash flow was one way of valuing it. Looking at the market price at present was another way of valuing it. And we were aware of what these things meant, and took each accordingly.

Q. What was your belief as to whether SPCC's market capitalization reflected the value of the company?

A. My impression at that point, to the extent that that mattered much, was that it would appear that 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.

Typically, there is a very strong relation between the price of a resource company and the price of the resource that it is mining. And Southern Copper is no exception to that. However, for those who are in the business for the long haul, we are aware that prices fluctuate, and that when prices tend to have increased a lot, it does not necessarily mean they're going to stay there for the long run.

You make long-term price assumptions based on a number of approaches. Typically, long-term, what you tend to do for very long-term price assumptions is look at ideas of what costs would

be for the industry to be able to sustain supply and the like and base it on that.

So my impression at that point was that the market was probably getting ahead of itself basically because of copper price assumptions and, to a lesser degree, because of ore grades. Again, it was not particularly important for the -- when you wanted to make the comparison of DCF numbers, because if you used these same numbers for Minera Mexico and for Southern Peru Copper and on the same parameters, then you were comparing apples to apples.

If, instead of the price that the market was thinking for copper, we used another price which we thought was more appropriate, we were valuing both companies with the same metrics, with the same parameters.

Q. Take a look at the document behind Tab 13, which is Joint Exhibit 103.

A. Mm-hmm.

Q. What is this document?

A. It is a letter sent by the Goldman Sachs team to the special committee and its counsel regarding, as it says, "preliminarily observations regarding discussion materials received from UBS."

Q. And what about the analysis that's attached?

A. Okay. There is a discussion on various points of the information presented by UBS. In the first case, it says that UBS --

Q. I'm referring to -- I'm sorry. Maybe I'm -- take a look at the page that has an identification number 6858.

A. Okay. The presentation?

Q. Yes. What is that attachment?

A. That is the presentation materials for the committee that were used for the presentation of this information presented by UBS.

Q. Okay. Were these presented at a meeting of the special committee?

A. I believe so. I don't know if it was in person or telephone. I'm sure we can find out if we look at the record.

Q. Okay. And what was the purpose of this presentation?

A. It was to present to the special committee various valuations of Minera Mexico and Southern Peru Copper as a result of the work that Goldman had been doing and the information obtained

and the discussions they had had with UBS and the like.

Q. Okay. Looking at Page 4 of this presentation, the executive summary, I'm looking at the third bullet point. There are a number of dashes. The second dash says, "Under the Term Sheet proposal, the actual number of SPCC shares to be delivered to GM could be significantly higher or lower than the number of shares indicated in this example, depending on the price of SPCC stock at a period near closing of the transaction."

Can you explain that statement?

A. Yes. As I indicated earlier, when they presented their revised term sheet, they proposed that the value of Minera Mexico equity be fixed in dollar terms and that the number of shares of Southern Copper that should be paid as consideration for Minera Mexico would be calculated in some way approached by the market price, the 20-day average of the price at a certain date.

The point is that as the price of Southern Peru Copper shares fluctuated, the number of shares that would have to be shared for Minera Mexico would fluctuate also in the same proportion.

As you can see, there is -- at the moment that this presentation was made, if you took what the proposal -- what the revised term sheet was, they were asking for, implicitly asking for, 90.6 million shares of Southern Copper in exchange for Minera Mexico. And this value would fluctuate, of course, up and down, depending on how the price of Southern Copper stock would go.

Q. Turn if you would to Pages 29, 30, and 31. What do these pages show?

A. Again, they are more sensitivity analyses of Minera Mexico discounted cash flow valuation using, again, a copper price, discount rate, moly price, and assumptions on production.

Q. Do you recall whether these numbers for Minera Mexico were lower or higher than numbers presented in the June 11th presentation?

A. Just by looking at the numbers, they seem to be somewhat lower than the previous ones.

Q. And what is the -- what's the reason that they were lower?

A. The reason that they were lower, it's the same parameters. I can't recall exactly at this point, but something in the information prepared by

Goldman Sachs between the previous presentation and this one had led to somewhat lower values. I'm not sure if it's the Anderson Schwab numbers, because I think they were already there in the previous one.

Q. To what extend did the Anderson Schwab numbers change over time as they completed their due diligence?

A. They varied as the due diligence progressed. Some numbers got worse; some numbers got better. I believe that there were some improvements in Cananea reserves, eventually even some recovery I think in Cananea. There were some numbers that got better. There were some improvements in Cananea reserves and production ore grades. There were others where the numbers got worse. So there were fluctuations as they did their expert analyses and got more information.

Q. Turn if you would to Pages 39, 40, and 41. What do these pages show?

A. It's similar in a way to the previous analysis of sensitivity, except that if you do exactly these -- you use exactly the same parameters to evaluate the discounted cash flow of Minera Mexico and the discounted cash flow of Southern Copper, you then,

assuming that these valuations are the valid ones, you get an implied exchange ratio and a number of shares of Southern Peru Copper that would have to be paid for Minera Mexico, given those valuations.

And again, you can do sensitivity in the same way. As the values of one or the other change, you get variations in the number of shares that would have to be paid. As I indicated, as the prices of copper get higher, in the sensitivity analysis, the price of Minera Mexico goes up because, as I've already mentioned, Minera Mexico tended to have a stronger reaction to higher copper prices than Southern Peru because of the higher costs.

Likewise, as the discount rate gets lower, the price that had to be paid for Minera Mexico also tends to get higher because Minera Mexico had much more reserves and longer-lived reserves. So if the future is more valuable, Minera Mexico became relatively more valuable also in the relative valuation.

Q. To what extent does this relative discounted cash flow analysis depend on the stock price of SPCC?

A. It doesn't depend in any way.

Q. Why not?

A. Because what we have here is two comparable valuation mechanisms. We use the discounted cash flow or Goldman Sachs used the discounted cash flow to value, under the same parameters, two mining companies. What the market value of one of them might be is not relevant to this analysis.

You are comparing -- that's why it's called a relative analysis -- the value of one company versus another company, using as a valuation mechanism one that does not take into consideration the market price of either company.

Q. Now, when Goldman Sachs presented this relative discounted cash flow analysis, what was your view with respect to the validity of this methodology?

A. I thought it was a good methodology. When you do valuations, you always take various approaches to give you an indication of where the -- what the results would be under different assumptions and approaches. But in general, the relative discounted cash flow analysis is one that I would tend to attach more importance to, typically.

Q. Now, in your studies as an

undergraduate in economics and at the Wharton School, you were exposed to various valuation methodologies?

A. Yes, I was.

Q. And have you continued to work with valuation in your career since then?

A. Yes, both before and after my doctoral studies.

Q. And in your view, based on your experience, is a relative valuation an accepted valuation methodology for valuing similar companies?

MR. RUDY: Objection. This is getting into expert testimony.

MR. STONE: Your Honor, I'm certainly able to have the witness testify about his understanding based on his background. He happens to be a Ph.D. in finance. I don't think it's expert testimony at all. I'm asking about his reaction and what his frame of mind was at the time.

MR. RUDY: Your Honor, each of the depositions of fact witnesses were limited specifically to fact testimony, and this is now opinion testimony in the realm of an expert. This is very analogous to expert testimony, which was prevented during discovery when we were deposing these

same witnesses.

THE COURT: What was prevented exactly?

MR. STONE: Your Honor, I would like to see where it was prevented because I don't recall that, sitting through Mr. Palomino's deposition.

MR. RUDY: In this specific witness, I don't believe it was. This issue was throughout the pretrial discovery -- the Goldman Sachs witness, for example, this was specifically prevented.

MR. STONE: Your Honor, we didn't represent --

THE COURT: As I understand it, the testimony is simply to get the witness's understanding of, you know, as a person who came to the special committee with a certain amount of background, of whether this was a sound way to look at this transaction.

I'm not going to be overwhelmed by it or bound by it, but it seems to me to be fair given that, you know, the plaintiff's claims attack the bona fides of the special committee and whether they're well motivated to a range of whether they're Goober Pyle. So I'm going to allow it on that basis.

I'm not taking it as an expert. It's more like I'm getting this gentleman's understanding as a member of the special committee of whether he was applying an appropriate valuation method in his view, based on his experience.

So I will allow the question and answer. If you want to maybe ask it again, Mr. Stone, so the witness -- unless he's fully caffeinated and clearer than I am this morning, he may wish to hear it again.

MR. STONE: Could we perhaps have it read back?

(The reporter read back as follows:

"Question: And in your view, based on your experience, is a relative valuation an accepted valuation methodology for valuing similar companies?")

A. Yes, of course, it's used all the time. As when I did equity analyses at Merrill Lynch and we wanted to compare different companies to see which one was recommended, particularly in the same sector or similar companies, relative discounted cash flow valuations were typically the most used form of valuation in order to recommend which stock was more or less attractive or better valued.

BY MR. STONE:

Q. Would you please turn to the document behind Tab 14? That's Joint Exhibit 90. What is this document?

A. Another -- minutes of the meeting of the special committee in this case of July 20th.

Q. On the first page, in the first substantive paragraph, it says that, "Mr. Ruiz announced that the purpose of the meeting was to prepare for a meeting later in the day between the members of the special committee and German Larrea in advance of a meeting of the full board of directors." Do you see that?

A. Yes.

Q. Did such a meeting occur?

A. Yes.

Q. Who attended that meeting?

A. I believe it was the whole committee. There was a board meeting the next day so we were all there and took advantage of that. We did this on a couple of occasions that -- taking advantage of board meetings to have meetings of the committee and have everybody present.

Q. What happened at that meeting?

A. I don't remember the exact date for a moment. I believe that at that meeting, we tried to impress on Mr. Larrea that there were substantial differences still between what they were proposing and what the committee thought was acceptable, and to convince him what the main issues were, and to -- if he wanted the deal to go ahead, that adjustments would have to be made to the proposal.

Q. And what was Mr. Larrea's reaction to the special committee's views?

A. I don't recall exactly which date because we spoke with him on more than one occasion, but around this date. I don't know if it was in this meeting or there was one shortly afterwards, in the following weeks. What I recall specifically is that we met with him and told him that there were still significant differences, and that if the proposal was not, you know, changed substantially, we could not reach an agreement.

And he responded that he would not change the proposal. And so we said, Well in that case, that's it. We cannot recommend it. We'll just finish the job here and let it go at that. He said, Okay. So we shook hands; and as we were walking out

the door, Mr. Larrea said something like, On the other hand, and called us back, and indicated that he would try to make an effort to revise -- review the proposal and present something that was acceptable.

Q. Okay. Did Mr. Larrea make a new proposal at that time?

A. Yes. Sometime after this conversation we had, a revised term sheet was presented to the committee.

If I remember correctly, at this point, the price of the shares of Southern Copper was moving around, but the implied price at that point would have been something like 80 million shares.

Q. I want you to turn back to the proxy statement, which is under Tab 3.

A. Tab 3?

Q. Yes. Again, this is Joint Exhibit 129. If you would turn to Page 22, in the second full paragraph on that page, it talks about a special committee meeting on August 5th. And it continues, in the middle of the paragraph, " ... the special committee decided that Mr. Ruiz would inform Mr. Larrea that the special committee had instructed Latham & Watkins and Goldman Sachs to negotiate with

Grupo Mexico's advisors over the next two weeks in an attempt to determine if the parties could reach agreement relating to Grupo Mexico's proposal."

Is that an accurate description of what happened at that meeting?

A. Yes, as far as I can recall.

Q. Okay. And --

A. I don't know what exactly happened on what date, but the general description of what's going on is as I recall it.

Q. And to your knowledge, did Latham & Watkins and Goldman Sachs engage in discussions with the advisors for Grupo Mexico at this time?

A. Well, both Goldman Sachs and Latham & Watkins were engaging in discussions with them almost continually or over the course of the whole process, so I'm sure, yes.

Q. Okay. Now turn to Tab 15. This is Joint Exhibit 157. What is this document?

A. As it says, the revised term sheet that Goldman Sachs had received from UBS over the weekend, and this is dated August 23rd.

Q. Okay. And what were the general terms

of the proposal in this revised term sheet?

A. I think I'm missing pages in this number because it starts -- okay. Yes, I'm sorry. It's here. The order was different than I recalled.

They revised their proposal and reduced their -- they changed the consideration in two ways. First, they talked about 67 million shares as a given number as opposed to the average of the number of shares over a certain period using a price, and it was 67 million. So they reduced the number of shares that they had been asking for until then, and then they changed the way in which the numbers would be calculated to a fixed number of shares. And there were others as to regarding corporate governance and other issues.

Q. In that paragraph on proposed valuation consideration, it notes that Grupo Mexico was making or AMC is making this proposal, and it says, "After an extraordinary effort to come to an agreement ...."

Do you agree that there was an extraordinary effort to come to an agreement?

A. I'm sure that they -- if they had substantially reduced what they were asking, it was

the right phrasing for them to say it was an extraordinary effort. It's part of negotiations. I imagine it must have been an extraordinary effort for Mr. Larrea to accept reducing a proposal.

To us, it basically brought numbers to within a stone's throw of what we thought was reasonable. And so at this point, we thought that further negotiation was warranted, and that a deal could possibly be reached.

Q. On the second page of the draft term sheet, there is a section that says "Proposed Liquidity and Support Provisions." And there is a discussion in here of offering the minority founding shareholders the opportunity to participate in a registered offering of SPCC common stock.

Who were the minority founding shareholders that were referred to here?

A. Those would be Cerro Corporation and Phelps Dodge.

Q. What is Cerro?

A. It is a company that owned a significant percentage of Southern Copper shares. If I remember correctly, it was something like 14 percent.

Q. And what about Phelps Dodge?

A. Phelps Dodge was another significant shareholder, founding shareholder of Southern Peru, and they owned something like I think 17 percent.

At that point, there were different types of shares too. The founding shareholders held the Class F shares and the rest of the shareholders, the minority, held another class of shares, Class A.

Q. And what was Grupo Mexico proposing to do with respect to the dual classes of stock in connection with the transaction?

A. If I remember correctly, from the very beginning, part of the deal, the transaction, was to unified the share classes into a single share class, which is in general beneficial for a corporation.

Q. And where did this concept of providing liquidity support to the founding shareholders originate?

A. I believe that it was initially mentioned by Grupo itself in the initial proposal, but it made sense. If they didn't suggest it, we might have thought about it. It made sense because if you're going to unify the shares into a single class, which is a good thing for a corporation to have, you

want to make sure that any large shareholder which might exit does not unduly affect the price of the share by a disorderly sale or exit.

If you're going to have a large block of shares being sold, you want that to be done in an organized fashion with a road show and support of the company and the like. And that would be ideal if that were to be done.

Q. Please take a look at the document behind Tab 17. That's Joint Exhibit 69. What is this document?

A. When we received their revised revised term sheet, and as I said, we thought that they were getting close to where a deal could be negotiated and agreed on, it became more practical to stop waiting for them to come with something at us, and to go directly to suggest what are the things that needed to be changed for us to feel comfortable with the proposed transaction.

And so we took their revised revised term sheet and sent them a memo or a letter indicating the things that we wanted to --

Q. Maybe we're on different documents here, but I'm looking at Joint Exhibit 69 which is an

August 31st, 2004 letter.

A. This is Tab 17, you said?

Q. Tab 16.

A. Oh, I'm so sorry. Okay. I was looking at the wrong exhibit.

Q. What is Joint Exhibit 69?

A. It is a letter sent by Carlos Ruiz Sacristan to the special committee, Mr. German Larrea, regarding the issue of proposed liquidity and support provisions that they had sent to us in their revised revised proposal.

Q. In the letter, Mr. Ruiz says that, "The committee has authorized me to inform you that the committee supports in principle the creation of additional liquidity," and then it continues near the end of the paragraph, "For this reason, we believe registration rights of the type referred to in the revised term sheet would be advantageous to the public stockholders as a whole."

Why were the registration rights advantageous to the public stockholders as a whole?

A. As I mentioned a moment ago, if you have a single share class and you have large blocks of shares held by certain shareholders, you want to make

sure that if, at some point, the shareholder wants to dispose of those shares, it be done in a way that does not unduly affect the market price of the stock.

If they were small amounts of shares to be traded in normal trading volumes, it shouldn't be a problem. If you want to dispose of a large block, it could affect the price of the shares and, therefore, all stockholders; and it's better that be done in an orderly fashion with appropriate mechanisms.

THE COURT: Why don't we take our break and come back as close to 11:00 as we can.

(A recess was taken.)

MR. STONE: May I proceed, Your Honor?

THE COURT: Yes.

BY MR. STONE:

Q. Mr. Palomino, just to reorient you, we were discussing the special committee's view about liquidity support. And in the context of Joint Exhibit 69, which is behind Tab 16, what role did the special committee want to have with respect to the creation of additional liquidity?

A. As I indicated and as is written in the letter that we are looking at to Mr. German Larrea from the committee, the committee supported the idea of there being liquidity support for the reasons I just stated but had no authority, of course, to negotiate these liquidity support provisions with the minority founding shareholders.

So what we asked is that any negotiations take place directly between Grupo Mexico or Phelps Dodge or Cerro, and that we just be kept informed of any progress of these negotiations, but we were not to be a part of it.

Q. And was the special committee kept informed?

A. Yes.

Q. When is it that the special committee first saw a draft agreement relating to registration rights for Cerro?

A. A draft agreement as such, I don't think we saw that until the very end, very near the end of the whole process.

Q. And who provided that draft agreement to the special committee?

A. That would be Mr. Handelsman.

Q. Okay. And at the time that the draft agreement was shared with the special committee, what was the status of the special committee's evaluation of the proposed transaction?

A. We were negotiating the final legal details of -- what is the legal term for protection against liabilities? We were negotiating the final stages of some of the legal aspects of it. I think at that point we had already reached agreement on almost all the issues, including the price.

Q. What was your understanding of the relationship between Mr. Handelsman and Cerro?

A. I understood that Mr. Handelsman worked for the Pritzker organization in some form. He was counsel to Mr. Pritzker or something like this,

and that the Pritzker organization was affiliated with Cerro, and that is why Mr. Handelsman was a representative of Cerro on the board. But I had no further knowledge than that.

Q. What was the nature of the discussions, if any, between the special committee and Mr. Handelsman regarding Cerro selling its shares of SPCC stock?

A. I don't believe we had any specific discussions on that. There were the general conversation regarding the desirability of, you know, orderly sales if anybody did it. But the issue of Cerro specifically selling its stock or how or why or whatever was never brought up until we saw the draft agreement between Cerro and Grupo Mexico.

Q. And in your view, did the fact that Mr. Handelsman negotiated the registration rights agreement on behalf of Cerro with Grupo Mexico create a conflict of interest?

A. I don't see why that would be a conflict of interest.

Q. Why not?

A. Cerro was a shareholder of Southern. Nothing in terms of what the committee was negotiating

on behalf of Southern shareholders was in conflict with what Cerro would want. What Cerro wanted was the same thing as any other shareholder would want, certainly any of the minority shareholders. And the negotiating registration rights on his side in no way influenced what we were doing, nor did it create any conflict with other shareholders of Southern, because as we just said, having olderly mechanisms set in place for any sale of large blocks of stock was a good thing for all shareholders. So there was no conflict of interest.

He was dealing with some issues that were separate from what the committee was dealing with, but they were not issues that were in conflict with what the committee was dealing with.

Q. All right. Take a look at the exhibit that you mistakenly looked at before, which is behind Tab 17, Joint Exhibit 159. What is that document?

A. Yes, this time I am right. It is the special committee -- as I was indicating, the special committee received the revised revised term sheet from Grupo, and we answered with some specific questions or requests regarding each of the points, as is indicated in this document. That is what this is. And exactly

what was said is there in each detail from consideration to covenants, closing conditions, indemnifications, warranties, et cetera, et cetera.

Q. In terms of the consideration, what was the special committee proposing at this point?

A. We were asking for or proposing 64 million shares instead of the 67 million shares that they had in their last proposal.

Q. Okay. And there is a section here on valuation protection. In the first bullet it refers to a majority of the minority vote of disinterested stockholders of SPCC. Why did the special committee propose a majority of the minority vote of the disinterested shareholders?

A. Well, besides legal considerations, it would have been desirable to have the majority of the minority shareholders decide on this matter; that is, to not have Grupo Mexico vote and see whether the non-Grupo Mexico -- that is, nonconflicted shareholders, if we can call -- if we can say that -- if they voted as a majority in favor of the transaction. That would have been ideal.

Q. The next bullet point says a 20 percent collar around the fixed value exchange ratio.

Why did the special committee propose a 20 percent collar?

A. The collar, I believe, was suggested by our advisors. The idea of the collar was that, as I have indicated before, the price of Southern Copper and the price of Minera Mexico, being two roughly similar-size mining companies of the same mineral, would respond to roughly the same factors in roughly the same way.

We have already indicated that the price of copper was somewhat more beneficial for Minera than for Southern, but in general, the movements in the value of Southern Copper or the movements in the value of Minera Mexico would be similar and respond to similar factors. Therefore, the relative exchanging shares for shares was relatively immune to these movements.

But there were two things that we had to consider. The most important one is although most factors would be common, it was feasible, it was possible, that some other factor that only affected one of the two companies be present. For example, suppose that a gold mine had been discovered under the Southern Peru's copper deposits of great value and

that that increased the Southern shares substantially. That would change the name of the game because it would be a factor that was affecting Southern but not Minera, and we should probably at that point try to renegotiate. Likewise if something similar happened in Minera Mexico, of course, that only affected Minera Mexico and not Southern.

So that was the first consideration, try to mitigate the risk that something extraneous could change what we at this point thought was a reasonable exchange rate.

The second factor of lesser importance was that if the price movements, which tend to be the thing that most affects share prices in the short term, the price movements of copper, that is, are not large, the relative impact on the two shares would not be that different. But if there were large movements in the price of copper, as I indicated, then the relative valuations would be affected somewhat. So we also wanted to have some kind of a mitigation on the risk of that happening.

That was the idea of the collars.

Q. If you would turn over to the next page, there is a provision under the closing

conditions category that says MM's net debt at closing is capped at $1.105 billion. Why did the special committee want to cap Minera Mexico's net debt at $1.1 billion?

A. Well, we wanted to cap it at some figure. The figure, I believe, that we understood existed at some point was 1.105. And so when you are going to acquire something, you are acquiring the debt, too. And if there suddenly were to be more debt, then we were acquiring something of lesser value. So what we were acquiring, the value of what we were acquiring is affected by how much debt there is, and so we wanted to make sure that there was a cap on the debt.

If they wanted to have less debt than that, well, so much better for us. But a cap on the debt is a reasonable, you know, as I understand, standard provision of these things.

Q. If you turn over to page that has an identification number that ends in 27546. And there is a title at the top of that page, "Part 2, Corporate Governance." And on that page and the next there are a number of corporate governance provisions.

Why were the corporate governance

provisions important to the special committee?

A. Because if the transaction was completed, Grupo Mexico would have a very large majority of the shares of Southern Peru Copper, and minority shareholders might not have adequate protection. That is, beyond the protection already granted by standard law, we wanted to ensure some additional protection that was not included in the then existing bylaws of Southern Peru Copper. So we wanted to do -- make some changes that gave better protection to minority shareholders.

Q. What was Grupo Mexico's reaction to this revised term sheet that was sent to them by the special committee?

A. I believe they agreed to some of the issues that we asked for, and they refused to accept some of the ones that we had suggested --

Q. What was their reaction --

A. -- or asked for.

Q. Yes. What was the reaction to the proposal of 64 million shares?

A. At that point and for a while they stuck to their 67 million.

Q. Okay. Did Grupo Mexico agree to a

provision requiring a majority of the minority?

A. No, they did not.

Q. And what did they propose instead?

A. I don't know if they proposed it or if it was as a result of further negotiations. Maybe we proposed it eventually when they refused to get the -- to accept the majority of the minority. We ended up with having a supermajority vote, so two-thirds of the shareholders had to approve it, not just a majority, which meant that Grupo by itself could not approve the transaction. It needed to have the agreement of at least another 12 percent or something like that of shareholders.

Q. And what was your reaction to Grupo Mexico's rejection of the majority of the minority vote?

A. Well, I wasn't surprised that they wouldn't want to do that, if I put myself in Mr. Larrea's shoes. This was a strategic decision of great importance to the company, and he could argue that to let a small number of shareholders, potentially one group, for example, to block a transaction of this importance was not necessarily something that he would be happy with. So I

understood his opposition.

It would have been wonderful if he accepted. Our view was that it would have been voted favorably for by the majority of the minority, which is why we were proposing it. But, you know, it was not something that surprised us that he was not willing to do so.

Q. Now, what was Grupo Mexico's position with respect to the 20 percent collar?

A. They did not agree with it, and they indicated -- and I think that in this sense they were largely right -- that although the collar was supposed to mitigate some risks and that was the intention of it, it created other risks for the transaction.

It created a lot of uncertainty in the market with regards to whether the transaction was going to take place or not, under what circumstances, and that it, therefore, probably did not, all in all did not add in the sense of our intention of reducing the risk to a transaction taking place in conditions that were not appropriate.

So we did not accept the collar. We agreed with that. We did not insist on the collar anymore.

Q. Now, it has been suggested in this litigation that because there was no collar on the transaction, SPCC overpaid by $600 million due to the increase in SPCC's stock price between October, when the merger agreement was signed, and the close of the transaction. What is your reaction to that?

A. Well, that shows a lack of understanding of what was going on, what the valuations reacted to.

As I have indicated several times and as is obvious from any number, Minera Mexico's value increased more when the price of copper went up than Southern Peru Copper's value. So the higher the price of copper, which was the main driver of the price of Southern Peru Copper in those days and the main explanation of why it went up -- although there was another one that I will mention in a moment -- then, in fact, the better for us. The transaction became relatively more attractive. If the price of copper jumped substantially, Minera Mexico's value increased more than Southern Peru's value, and so it was actually advantageous to us that that occur.

So what, in fact, happened was that the copper, the world price of copper, indeed,

increased significantly. That increased the price of Southern, but in our view, it increased the price of Minera Mexico even more, so the deal was more attractive as a result of this behavior in the stock prices than before it. It was actually good for the Southern Peru shareholders.

The other issue is that the price increased, among other reasons, too, because the market took the transaction favorably, and that led to a recovery in the price. Initially there had been doubts in the market about if the transaction was favorable or not or what, how, under what conditions it would be reached. When the information came out and all the work done and the conditions that we obtained were out in the market, the stock also reacted favorably.

Q. Now, with respect to the corporate governance provisions that the special committee suggested, did Grupo Mexico agree to those?

A. I believe they accepted some and they did counterproposals to go halfway for some of them. There were further negotiations. I know they did not accept the ones we put here. Some of the ones that are stated here were later changed somewhat, not

material in the sense of the way -- in the sense of the protection granted to minority shareholders but in terms of the specifics.

In general, almost all of what was proposed here in terms of corporate governance was obtained in the end in negotiations, although Grupo did not accept it initially, did not accept some of them initially.

Q. Okay. Please turn to Tab 18 in your binder, where you should find Joint Exhibit 41. Do you recognize this email?

A. Yes, I believe so.

Q. There is a reference in here to a potential meeting with Mr. Larrea in Mexico City. Did such a meeting occur?

A. Yes, I believe it did.

Q. Okay. And if you look back at page 25 of the proxy statement very briefly --

A. Yes.

Q. -- it says in the first full paragraph, "On October 5, members of the special committee met with Mr. Larrea to discuss the remaining outstanding issues in the transaction, which included," and then it continues.

Is that the meeting that is referred to in the email?

A. Yes, I believe so. The dates coincide.

Q. What was discussed at that meeting?

A. What is indicated there in the proxy. We were at 64 million. They were at 67 million. There was some issue on indemnities. There was some issue on corporate governance, as I indicated, and a couple of other legal issues, I think, that were outstanding, too. And we were trying to reach an agreement on them so that the transaction was acceptable to us.

Q. What was the result of that meeting with Mr. Larrea?

A. I don't recall exactly, but from what I recollect, I think that was the meeting where we agreed on the special dividend, if I remember correctly, which was a way in which we bridged the difference between the 67 and 64.

We had also at that point received information that the Minera Mexico's net debt was going to be lower than what we had originally required. That also helped to bridge the gap between

the 64 and the 67.

And the numbers worked out so that the difference between the special transaction dividend and the valuations in the total Minera debt corresponded to that difference. So we got what we wanted. Although the number of shares was different, in terms of value it was equivalent.

And we made progress on the corporate governance provisions. I am not sure if from that meeting we got the final results. Probably not. But we made some progress on corporate governance.

I think some progress also was made on the indemnities and the like.

But if I remember correctly, several of these issues were still pending for a few days while they were worked out between lawyers and so on.

Q. Did the special committee eventually recommend the merger to SPCC's board?

A. Yes, we did.

Q. Okay. And when was that?

A. That was on October 21.

Q. 2004?

A. 2004.

Q. Okay. Let's take a look at Tab 19.

That's Joint Exhibit 106. What is that document?

A. It is the presentation that Goldman Sachs prepared for the special committee immediately before the special committee -- in the last meeting we had before recommending to the board that the transaction be approved.

Q. And did Goldman Sachs, in fact, present this material at that special committee meeting?

A. Yes.

Q. Take a look at page 2 of the document. It has an identification number that ends in 4900. There is a discussion of the financial terms, and in one of the subtitles it says "Financial Terms: Issuance of approximately 67.2 million SPCC Shares in Exchange for approximately 99.15 percent of Minera Mexico."

Why was the consideration 67.2 million shares rather than 67 million shares?

A. Because the percentage of Minera Mexico that we were buying increased from 99.8-something to the 99.15 that is indicated here. That explains the .2 difference. We got more of the company and we paid a little bit more for it in the

same proportion.

Q. Okay. Turn with me to page 15 of the analysis. What is contained in this section?

A. As it says, discussion of Minera Mexico and Southern Peru's life of mine projections, which I imagine refer to the DCF, discounted cash flow valuation.

Q. And why are these life of mine projections important?

A. Discounted cash flow has to be made over the relevant time period; that is, you are comparing two assets that are generating cash flows over a certain time period. You value those cash flows through time, and you need to consider them all.

Specifically, as I have mentioned before, the reserves of Minera Mexico were proportionately larger than those of Southern Peru; and therefore, their value in the long term would be higher than in Southern Copper.

In fact, as you can see in page 17, if we look at the last two lines, it says what the free cash flow that was forecast for the companies was. In the current year the free cash flow -- the estimate for 2006, the free cash flow -- sorry.

If you compare the cash flows of Minera Mexico, which are on page 17, with those of Southern Copper on page 19, what you have is that the cash flows of Southern Copper are higher in the initial years than those of Minera Mexico, but then in the, say, 2012, 2013, the cash flows of Minera Mexico are substantially higher than those of Southern Copper. And so through time the production profile and the relative values of the companies would be affected.

Q. If you turn back to page 16, there is a discussion there of the methodology. What was the copper price that Goldman Sachs was assuming in its analysis, the long-term copper?

A. The long-term copper price was 90 cents/pound, as we had been assuming for a while, I think. If you see all the DCF numbers that we have had, the central value on the table was always 90 cents, which was always what in principle we were looking at as a base number.

Q. And again, how did that compare to the number that management of Minera Mexico and management of Southern Copper were using?

A. They were using a dollar, as I

indicated before, and we preferred to be more conservative, for the reasons I have already explained to you.

And those numbers, by the way, were what The Street forecasts said at that point. I remember that we went over that in the last presentation. It is probably here somewhere. Yes, here it is on page 28. It has a list of what the long-term copper forecast to the market is, and the median was 90 cents. The mean was 91 cents. The numbers went from .85 to a dollar.

Q. Take a look at pages 21, 22 and 23.

A. Yes.

Q. And what do these pages show?

A. As before, it does -- it is a multiple sensitivity analysis based on the discounted cash flow values of Minera Mexico and Southern Peru Copper. As before, it compares what the shares that would be -- the number of shares that we would have to pay for Minera Mexico in order to -- following the relative valuation according to discounted cash flow and adjusted for various copper prices, discount rates, the percentage of the tax benefits, essentially NOLs, if I remember correctly, that, in fact, one would be

able to take advantage of.

And lastly, a very important issue that surfaced near the end of the negotiations, which was the royalty rates which the Peruvian government was apparently going to impose on Southern Peru Copper. You know, in the near term it was being discussed in the Peruvian Congress as this was going on.

Q. All right. Let's just stop at that point for a moment on the royalties. Describe what these royalties were.

A. Peru in 2004 did not have any mining royalties, which are -- I guess legally they are not tax but a contribution paid to the state that is quite common for mineral resources. The Peruvian Congress was discussing imposing royalties on mining operations, and the number that had been presented to Congress was a royalty tax of 3 percent beginning at certain size of production and slightly lower, 1 to 2 percent, for smaller operations.

In the case of Southern, which was the largest producer of copper in Peru, the relevant rate was the 3 percent if that legislation actually went through. At that point what the exact result would be

was not known yet, but it was likely that there was going to be a royalty tax imposed.

Q. Okay. The number that was in the legislation that was presented to the Peruvian Congress, what number was that?

A. As I said, the upper rate for higher, large-size producers was 3 percent.

Q. Okay. Then you also mentioned that there are tax benefits, and these three pages each have a different case for 100 percent, 50 percent or zero percent of tax benefits. What were those tax benefits?

A. Minera Mexico had, if I remember correctly, NOLs. I am not sure that there were perhaps some other tax benefits. And again, the question is would you be able to fully utilize them or not. That depended on a number of issues.

And so what our advisors did is prepare sensitivity analysis: What if we could make full use of the tax advantages, what if we only got half of them, what if we got none of them, and saw the effect on valuations.

None was probably less likely, and 100 percent was perhaps optimistic. But how much you

would get is somewhere in that range.

Q. Did the royalty that was proposed in the Peruvian Congress go into effect?

A. Yes, indeed. It still is in effect. In fact, they are discussing raising it again now. And it went in at a 3 percent rate. And mind you, the royalty is 3 percent of sales, so depending on how profitable the operation is, it can substantially impact profitability or not be that big on profitability, depending on how -- what your profits-to-sales ratio is.

Q. Now, looking at these three pages -- and there is quite a matrix of potential numbers of shares here that are to be paid for Minera Mexico. How did you, based on these three pages, determine whether $67 million was a fair consideration for Minera Mexico?

A. 67 million shares.

Q. Yes, 67 million shares, yes.

A. Yes. As I indicated before, these are sensitivity analysis. It doesn't mean that we think all of these values are equally probable or that we can't really distinguish between one or the other.

It is made there so you understand how

much higher, how much lower it can get depending on certain assumptions. We used some base case of what we think are the reasonable assumptions. We know there is uncertainty when we do this, but we have to make a choice.

Typically, what you would see in one of these presentations is that the central numbers are typically what is considered the base case, and then you do what if it is a little more, what if it is a little less, in either direction.

Here, if we take the central number of all the central numbers here, it would be the central number in the central table of the three pages, of the second of the three pages, and the central number there, as you see, is 69.2 million; so, in fact, a little higher than what we had already agreed at that point. And this is assuming royalty of 2 percent, which ended up being 3, assuming 50 percent of tax benefits. I understand it was higher than that. I think probably almost all, if not all, the tax benefits were, in fact, used.

And so the middle value of 69.2 was, in fact, higher than what we were obtaining.

Q. In terms of your view of the value of

Minera Mexico and the value of Southern Copper, did that view change throughout the eight months that the special committee was considering the transaction?

A. It changed somewhat. To begin with, just to give you an example, the relative valuation is what matters here again. Southern Copper was going to have to put up with the royalties, which were not on the radar initially. To give you an idea, the middle middle number 69 million with 2 percent royalties, it would be 66.8, I think, million if it were 1 percent royalties, and I believe that number was probably very close to 64 million, which is what we were saying, without the royalties.

So our 64 million number we were dealing with was the number without royalties, if I remember correctly. With royalties it would have been higher. We were satisfied that we were getting what we wanted.

Q. What, if anything, did you learn about Minera Mexico that caused your view of its value to be higher than initially?

A. Well, there were two things. At the very beginning several of the valuation methodologies would indicate that Minera Mexico was worth

considerably less than what they were proposing. But a number of things happened.

Oh, and before that, there was one valuation methodology that said Minera Mexico was really cheap actually, was when you were looking at via the reserves, I mean the copper that you were buying on the ground. The value of, you know, percent of copper on the ground reserves, which is just one way of looking at it, was quite low, was very cheap compared to what you were getting elsewhere.

In fact, if I am not mistaken, the very end, the last valuation we were buying the reserves at something like five cents per pound of copper on the ground. And the valuation of other mining companies tended to be significantly higher.

Now again, this is just one parameter, but it does indicate that the real value here was getting all those reserves and all that value in the future.

Okay. So from the beginning, that was one valuation that was attractive. The others were not so much, were not attractive, in fact, at the beginning.

As we found out more, two things

happened. First, some things increased the value of Minera Mexico. There were tax benefits that, indeed, did accrue. There were some improvements in production, expected production rates at Cananea and recovery rates and costs, I think, included with that.

And then there was the effect of as the prices -- as the price in the market moved up, the higher prices would make it -- I mean, if you attached a market value to the number of shares we were paying for it, it would show that the prices were going up, but that was, in fact, a reflection that the price of Minera Mexico itself was going up because the price of copper in the market was going up. So, yes, the price increased in that sense, too, but that was reasonable because the price of copper was going up, and that, indeed, increased the value of Minera.

So all these factors were taking place.

Q. Okay. And I think you mentioned this already, but what, if anything, did you learn during the process that caused you to lower your perspective with respect to the value of SPCC?

A. Well, there was a small, a small adjustment suggested by Anderson Schwab in capital

expenditures, so that lowered it a bit. And as I just indicated, the royalty taxes, that was a significant impact. That did affect the value of the company quite a bit. And you had -- under certain assumptions, you could be lowering your available cash flow by, you know, 20 or 30 percent from that. Under other assumptions it would be only 6 or 8 percent. But it was a significant impact. That also affected the numbers.

Q. Okay. Take a look at page 24, just a couple of pages. It is a page that is titled "Contribution Analysis at Different EBITDA Scenarios." Can you explain what you understood this analysis to be.

A. Yes. Give me a minute, please, to remember this page.

Okay. Yes, the title seems a little confusing because it says contribution analysis, and that is not what I would typically call a contribution analysis, which is why I was confused for a moment.

What this is trying to do is using estimates of EBITDA, of earnings before interest, taxes, depreciation and amortization, and using what the implied multiple of EBITDA is to the market value

of Southern and then use these multiples and apply them to the EBITDAs of Minera Mexico, and then try to come up with valuation based on these EBITDA forecasts and multiples. That's what it is trying to do.

And as it says, implied SPCC shares to be issued according to this valuation, and it indicates for the year 2005, it goes from a low of 53 million to a high of 73 million shares.

Q. And how did this analysis influence your consideration of the proposed transaction?

A. Well, it is another number to look at, but it is quite limited, because this analysis is based on one year, and not only just any year but the coming year.

And as we have indicated before, the long-term prospects of Minera Mexico, because of its higher, larger reserves, were better than those of Southern Peru Copper. So if I look at what is going on this year, I am going to get an impression that it does not hold through time. Yes, this year, Southern Peru Copper had higher EBITDA than Minera Mexico, and that would probably be the case for a few years, but eventually, the EBITDA of Minera Mexico would be substantially higher. If I remember correctly, the

numbers were more than double what Southern Peru was coming. And that is all included in the discounted cash flow analysis, the discount rate you use and all that.

The one thing that it is important to understand, too, that I missed earlier, when we first started looking at the transaction in early 2004, another thing that was occurring in Minera Mexico is that Minera Mexico had been in pretty difficult financial conditions until 2002 or beginning of 2003, I believe. When the copper price started to recover, their situation started to improve rapidly. And among other things, they started to be able to do appropriate maintenance and replacing aging equipment, which they hadn't been able to do.

Somebody told me that at one point, you know, at their worst position, their suppliers were repossessing trucks in the mine and things like that.

So when they started to do better because of better copper prices, that also improved their operations, improved their production, and these things probably made their way a little bit into better numbers, too, as the improvements surfaced. So

if you look at historical numbers, which is what we were looking at initially, they were probably not the best guide to what the company could do if it were not facing the difficult financial circumstances as it had faced before.

Q. Did Goldman Sachs issue an opinion concerning the fairness of the transaction?

A. Yes, they did.

Q. Take a look at the document behind Tab 20. Do you recognize the document?

A. Yes, I do.

Q. What is it?

A. It is the -- well, two things: The letter presenting the fairness opinion of Goldman Sachs and the fairness opinion itself.

Q. Okay. And what did Goldman Sachs conclude about the fairness of the transaction?

A. The last page, the last two lines "Based upon and subject to the foregoing, it is our opinion that, as of the date hereof, the Exchange pursuant to the Agreement is fair from a financial point of view to the Company."

Q. Did you agree with that opinion?

A. Yes, of course, or we would not have

recommended it.

Q. What happened after Goldman Sachs made its presentation to the special committee on October 21?

A. We agreed to -- well, we decided to vote on whether we would recommend or not. We all voted in favor, except Mr. Handelsman, who abstained from voting to avoid any appearance of conflict of interest. And once we had all unanimously voted in favor, Mr. Handelsman indicated that he was in favor, too.

Q. And did the special committee then recommend the transaction to the board of directors of SPCC?

A. Yes, we did.

Q. And did the board of directors of SPCC vote to approve the transaction?

A. Yes, it did.

Q. And did you participate in that vote?

A. Yes.

Q. And how did you vote?

A. In favor, of course.

Q. Okay. What did you rely on in voting to approve the transaction?

A. On all the information that we had obtained throughout the whole process, including all the advice from our -- from the experts that we had hired for the various tasks that we had given them, and my belief that this was a fair transaction that would, in fact, create value for all shareholders of Southern Peru Copper, in particular the minority shareholders.

Q. Take a look at pages 27 and 28 of the proxy statement, which again is Tab 3. There is a section that begins on the bottom of page 27 and carries over to page 28 called "Factors Considered by the Special Committee."

Does this section accurately set forth the factors considered by the special committee in recommending the transaction to the board?

A. I am sure it is a good summary of the factors we considered. I am sure there were many other of lesser importance that were also considered.

Q. Okay. I want to walk through just a few of these. The first bullet point says, "The current economic, industry and market trends affecting each of our company and Minera Mexico in their respective markets, including those which favor the

consolidation of copper mining businesses in the hands of a relatively small number of large companies."

Can you explain that factor?

A. Yes. There was and still is a trend towards mining companies consolidating -- that is, becoming a smaller number of larger producers -- than used to be the case. The market tended to value this positively, and it granted some what I would call strategic advantages to companies that did accomplish this.

So one of the drivers of the proposed merger was to create a larger company.

Q. The second point says, "The transaction's potential enhancement in our relative cost position resulting from commodity diversification into zinc and precious metals and a decrease in our volatility of earnings after the acquisition of Minera Mexico due to a relatively lower exposure to molybdenum." Can you explain what that refers to?

A. Yes. The diversification was one of the results of the transaction. The diversification in terms of zinc and precious metals probably decreased our volatility as diversification does in general. It would not appear to be one of the major

drivers, from my perspective. It was an additional minor point in favor.

Q. Okay. The third bullet point says, "The relative production profiles of Minera Mexico and our company (including an anticipated decline in our ore grades) and the expected improvement in our production profile as a result of the acquisition of Minera Mexico." What does that refer to?

A. This is very important. It is what I have mentioned before. From a long-term perspective, the greater reserves and eventually greater production capacity at the Mexican mines would be in favor of -- would be favorable for the company overall. And we took that into account when doing all the evaluations.

Q. And then finally, if you go down four bullet points from there, there is one that says, "The fact that we would become more geographically diversified and less exposed to 'country risk' as we would have mining operations in both Peru and Mexico, making us less susceptible to volatility based on political and economic developments than we are at the present time." Can you explain that?

A. Yes. This was an important factor, a very important factor in the decision, too.

Southern Peru Copper was exposed to, you know, heavily exposed or 100 percent exposed to Peruvian risk, to Peruvian country risk, political risk. Although Peru at that point had overcome the more serious political violence and problems that it had in the past and seemed to be doing quite well and had a good future, things could always change and the company would be subject to political risk.

In the 1970's the company was nearly expropriated. In fact, it was the only large mining company in Peru that was not expropriated, to give you an idea.

So having operations in different countries and particularly in a country like Mexico, which had a lower country risk value, was also beneficial overall for the long-term advantage of the shareholders or benefit of the shareholders. In fact, the fact that the royalty suddenly happened at the last minute before the transaction brought that to mind.

Q. I want to take you back now to the beginning of this process again, when the transaction was first announced in February of 2004. At that time did any shareholders raise concern about the proposed

transaction?

A. At some point during the process, you say?

Q. Yes.

A. We got a letter from Phelps Dodge expressing concern about the proposed transaction. I don't remember exactly when, but at some point in the process. Around the middle of it, I think.

Q. And what, if anything, did the special committee do to address Phelps Dodge's concerns?

A. We arranged to have a telephone conference call with Phelps Dodge to hear their concerns, and we participated, we arranged it. We had a conference call with them.

Q. And how did the special committee respond after having that call with Phelps Dodge?

A. Well, with Phelps Dodge exactly all we did is listen to them. We did not -- there was no discussion. We didn't talk with them in any other way. We just listened to them.

As a result of that, it didn't really change any of our views or affect in any way what is going on because everything that they had mentioned as concerns were concerns that we had already viewed and

were evaluating, taking care of. It did not add in any way to what we knew or thought or what worried us.

Q. Mr. Palomino, in your view, did the special committee do a good job?

A. I think we did a fabulous job.

Q. And why?

A. Because we were diligent. We worked hard. We had a very nice mix of skills. We worked very well as a group. We had very good advisors. We took our time, and we had the interest of the shareholders, particularly the minority shareholders, in mind at all points. We were all independent. I think we did a very good job. I am very proud of what we did.

Q. And in your view, was the transaction that resulted from this process a fair one?

A. In my view, of course, it was a fair one or I would not have recommended it.

But I think that beyond what my opinion at that point was, all we need to do is look at what happened afterwards. The company's value increased tremendously. Every shareholder of Southern Peru has benefited tremendously as a result of the transaction, not only because the price of copper has

gone up, of course, but because the multiples of the company have improved substantially.

Before the transaction, Southern Peru be and, of course, Minera Mexico indirectly via Grupo Mexico traded at significant discounts to their peers. Nowadays Southern Peru trades at a surplus, at a premium to its peers on almost all counts. And a large part of that is due to the success of the transaction of having a larger company, of bringing these undervalued Mexican assets to the U.S. market and having them better valued, to the synergies that arose, to a number of other issues that increased the value.

MR. STONE: Your Honor, I pass the witness.

THE COURT: Mr. Rudy.

CROSS-EXAMINATION

BY MR. RUDY:

Q. Good afternoon, Mr. Palomino.

A. Good afternoon, or almost.

Q. I have 12:00 on my watch.

At the time that you came onto the special committee, the committee was in the process of considering an initial proposal by Grupo Mexico to

acquire the interests that the company was considering -- I apologize. The proposal was for 72.3 million shares of Southern Peru stock in exchange for Grupo's 99 percent interest in Minera Mexico; is that right?

A. No, I don't think that is correct.

Q. Do you have Exhibit 108 there? It is not in your binder but it is in the rack behind you.

A. 108?

Q. Correct.

A. Okay.

Q. Sir, I recognize you were not on the board in February, but when you came onto the board, that was the current proposal being considered by the special committee; is that right?

A. As I have indicated before, the proposal did not indicate in a clear way what exactly was the consideration that was being proposed. So I am not sure how you can ascribe a specific number of shares to a proposal that did not have a specific way of determining the number of shares.

Q. Well, Grupo Mexico assigned a specific number of shares to them, did it not?

A. From the term sheet that we have seen

before in one of the exhibits, there is no such -- the term sheet that I saw at that point did not have any such number of shares.

Q. Will you turn to --

A. Maybe at some point they presented something before, but not in a proposal to the committee.

Q. Will you turn to page 19912 in that document? There is a very small page No. 4. Do you see that?

A. Yes.

Q. And you see at the top of that page it says "Transaction Overview."

A. Yes.

Q. Right. And then in the first box on the right side, on the top, it says, "SPCC to acquire Minera Mexico from AMC in a stock for stock deal." Do you see that?

A. Yes.

Q. And then there is a dash and then it says, "Financed through the issuance of common shares; initial proposal to issue 72.3 million shares." Do you see that?

A. I also see the footnote to it.

Q. Okay. And can you read the footnote?
A. It says, "Indicative number of SPCC shares to be issued. Assumes Minera Mexico equity value of 3.05 billion and SPCC share price of 42.2 as of January 29, 2004."
So as it says, it is an indicative value --
Q. Right.
A. -- not anything else.
Q. And what does "indicative value" mean to you?
A. It says that it is an approximation given certain assumptions.
Q. Okay. The question that I asked you before you turned to this exhibit was whether at the time you came on the committee that the committee was considering a proposal for the company to buy Minera Mexico for 72.3 million shares, and you said no, I believe. Is that right?
A. I said that I don't think that's correct and I still think so. This is a presentation made to the board of directors where there is an indicative number under certain assumptions. This is not a proposal to the committee of disinterested

directors that states what the consideration, the proposed consideration is.

Q. Okay. Well --

A. So the answer is no, we were not considering that because there was no such proposal. You are mistaken.

Q. And the fact that Grupo describes it as an initial proposal, the committee did not consider it as a proposal; is that your testimony?

A. What my testimony is is that this is an indicative number in a PowerPoint presentation made to the board of directors and not the communication that was given to the special committee.

Q. Okay. You are aware that upon receiving this presentation from Grupo Mexico, that the board decided to form a special committee; correct?

A. Exactly.

Q. And the special committee was formed why, in your understanding?

A. Because Grupo Mexico wanted to make a proposal and would have to deal with a special committee of disinterested directors, of independent directors, in order to do this at an arm's length, as

an arm's-length transaction.

Q. So you are saying that the board formed a special committee in anticipation of a forthcoming proposal?

A. No. Grupo Mexico had indicated that they wanted to carry out the merger, but the special committee had not received at any point a term sheet or a specific proposal that indicated how exactly, what exactly the consideration was going to be.

Q. Okay.

A. Clearly, I mean, in order to help -- and I am not trying to be an obstacle here -- the fact that they put the 72.3 million shares indicated that they were thinking somewhere in that vicinity of numbers, but it was not clear, and it was very important that it be made clear, how exactly they got there and why and to what -- you know, it was subject to what changes and what matters.

Q. Right.

A. That this is what Grupo Mexico was having roughly in mind around that time, yes, that's what Grupo Mexico apparently had in mind around that time. And we were aware of that. But that was not what was presented as a proposal to the committee.

Q. Okay. And if you look again at the footnote that you read, is it your understanding that 72.3 million shares of Southern Peru stock at the price of $42.20 was equal to $3.05 billion at that time?

A. If I do the math, I would imagine that that's what it adds up to. I am sure they did the multiplication right.

Q. You were asked about a document that is at Tab 4 in your binder. It is Joint Exhibit 155.

A. Yes.

Q. Do you recall being asked questions about this document?

A. Sorry?

Q. Do you recall being asked questions?

A. Yes.

Q. Okay. The first page of that document, you see that this is a letter from Mr. Ortega to Mr. Ruiz; is that right?

A. Yes.

Q. And the first sentence of the letter says "This letter is a more detailed response to your letter to our Chairman, Mr. . . . Larrea . . ., dated March 4"; right?

A. Yes.
Q. And the next page that you were, I believe, shown on direct examination, Item (1), it says, "Proposed Consideration."
A. Yes.
Q. Do you see that?
And it says the enterprise value of Minera Mexico amounts to 4.318 billion or 4,318 million; correct?
A. Yes.
Q. And how does that relate to the document I showed you a moment ago, if you recall?
A. In a not very clear way. I mean, I could speculate and try to make sense out of the two and see how they could correspond to one another in some ways, but they don't say the same thing, and neither is very helpful in terms of determining what the consideration is. Saying that the enterprise value of Minera Mexico was 4,318 million means nothing. They could have said, you know, Minera Mexico has two offices or three mines or the color of the building is pink and that wouldn't have helped either.
Q. Okay. I am going to ask you to look

at Exhibit 155 in the binders. It is not in the binder that your counsel gave you. Exhibit 155, Joint Exhibit. I am sorry. 155 you just had.

A. 155?

Q. I apologize. 156.

A. Yes.

Q. Okay. Now, this is described by Grupo Mexico as a revised term sheet; is that right?

A. Yes, that's what it says in the cover letter.

Q. Okay. And the cover letter is -- at the bottom it says 7077; is that right?

A. Yes, 7077.

Q. Okay. And that is dated May 7, 2004; right?

A. Yes.

Q. And then if you turn to the next page, 7078. Do you see that?

A. Yes.

Q. It says, "Proposed Consideration"?

A. Yes.

Q. And proposed value of Minera Mexico is 4.3 billion; right?

A. Yes.

Q. And it has an equity value of 3.147 million and 1.153 billion in debt as of April '04; correct?

A. Yes.

Q. And Grupo is proposing that it receive Southern Peru shares in the acquisition; right?

A. Yes.

Q. And this term sheet describes the transaction as a proposed acquisition of Minera Mexico; right?

A. I guess so, yes.

Q. Well, it says that in the middle of the paragraph.

A. Yes.

Q. And this term sheet proposes that the number of shares to be issued would be calculated by dividing Minera's proposed equity value by the 20-day average closing share price of Southern Peru beginning five days prior to the closing of the transaction. Do you see that?

A. Yes.

Q. Okay. And you, I think, said on direct examination that this was adequate in terms of specificity for the committee to consider?

A. To begin working on, yes.
Q. You testified on direct that you were concerned about this proposal, and I believe you said words to the effect that one value was fixed and the other was floating; is that right? Do you recall testifying to that?
A. Yes.
Q. To clarify, which of the values were you testifying or are you testifying was fixed in this proposal and which was floating?
A. The fixed value was the equity value for Minera Mexico, which is the 3.147 million, according to what they say here. Saying that that value of 3.1 million -- or billion -- sorry -- would be exchanged for a number of shares, and the number of shares that would be exchanged would vary. That was the floating number. It would vary in accordance with the price of Southern Peru shares.
Q. So you are saying that the value of Minera Mexico under this proposal was fixed --
A. In the way they were presenting it, they were giving it as a fixed value, yes.
Q. And the number of shares was floating?
A. Yes, the number of Southern Peru

shares that would be equivalent to that fixed value that they were proposing for Minera Mexico would vary according to how the price of those Southern Peru shares in the market moved, yes.

Q. And why was that of concern to you?

A. Because as I have indicated before, these are two roughly similar companies producing both copper, and the fluctuations in the price of one of these companies which was listed, one the other one was not, would most likely and under most factors reflect similar movements in the price of the other company.

If, for example, it was the copper price, which is the most, you know, common factor behind movements in the price of these shares, were moving, both shares would be affected in similar fashions. And therefore, having one of the numbers fixed and the other floating would bring substantial risk that if the share price of Southern Copper went down, for example, we would end up paying huge numbers, huge value for Minera Mexico, despite the fact that Minera Mexico would theoretically have also decreased in value for the same reason. So it was not -- it was a very risky way of doing the valuation.

Of course, we could have also made a lot of money if the price of copper suddenly went to, you know, $10 a pound and they wished to stay with 3.1, but then they would just backtrack and probably remove, you know, retract from the proposal and there would be no upside.

So it was risky and it didn't make a lot of sense, in our view.

Q. You testified on direct examination that around this time -- I believe you said it was in June 2004 -- that you believed that Southern Peru's stock was overvalued. Do you recall saying that?

A. I thought that the market price reflected forecasts of copper that were a little bit higher than what we thought was the case.

Q. Your testimony, I believe, was that you said that the market was getting ahead of itself. Do you recall saying that?

A. Yes.

Q. And at that time Grupo you knew was asking for Southern Peru shares; right?

A. Yes.

Q. And those shares had a value in the market at that time; right?

A. Yes.
Q. And you said you believed that Grupo was asking for too much for Minera at that time; right?
A. Yes, under most counts. As I said, if you look at reserves, maybe not. But in general, yes, it appeared to be somewhat expensive.
Q. Okay. I believe it is in your book at Tab 9. It is the Goldman Sachs book from June 11, 2004.
A. Yes.
Q. This is JX-101. And you were asked about -- one of the pages of this presentation you were asked about was the look-through analysis, which is on page 39. Do you recall that?
A. Yes.
Q. And I don't recall your exact words, but when you were describing this analysis that Goldman presented to the committee, you said that the analysis doesn't exactly work because Grupo's component parts aren't valued publicly. Do you recall testifying to that effect?
A. Something to -- something similar to that, yes.

Q. One of the largest assets that Grupo Mexico owns is its shares of Southern Peru or at that time was its shares of Southern Peru; is that right?

A. Right.

Q. Right. And this page actually lists that when it breaks out the component pieces of Grupo Mexico, does it not?

A. Yes.

Q. And that's when it says SPCC stake; right?

A. Yes.

Q. And Goldman Sachs describes as one of the assets of Grupo Mexico its stake in Southern Peru, and it lists that according to its market cap; right?

A. Yes.

Q. And it says that the market cap of Grupo's ownership of Southern Peru is 2 billion, 2.474 billion; right?

A. Yes.

Q. Could you turn to Exhibit 158, Joint Exhibit. Okay. This is a September 7 revised term sheet from Grupo Mexico; right?

A. Yes.

Q. And can you read on page -- it starts

on 14582, where it says, "Proposed Valuation and Consideration." Do you see that?

A. 14582?

Q. Correct.

A. Yes, I can see.

Q. And it says, "Proposed Valuation and Consideration"; right?

A. Yes.

Q. Could you just read that first sentence that continues onto the next page?

A. Yes, it says, "Based on the analysis and several conversations between the financial advisors of AMC and the Special Committee of Disinterested Directors and after an extraordinary effort to come to an agreement, AMC is willing to propose a new value for its 98.84 equity interest in Minera Mexico of 67 million shares of" Southern Peru Copper.

Q. Right. And I believe you were asked about a prior document that also used that phrase "extraordinary effort." Do you recall being asked about that on direct?

A. I think it was the same document actually, but yes.

Q. And are you aware as of September 7, 2004 what the value of 67 million shares of Southern Peru was, according to its market price?

A. I don't remember at this point.

Q. Okay. So you don't know what price Southern Peru stock closed at on September 7, 2004, do you?

A. Of course not.

Q. Okay. I wouldn't expect you to remember it, but there is actually an Exhibit 18 in one of the binders behind you which lists them. I would ask you to pull that out.

A. Yes.

Q. Okay. And do you see that that's a table that is in reverse chronological order?

A. Yes.

Q. And so could you just look to see what the stock price of Southern Peru shares were on September 7?

A. The close was at $41.86.

Q. I am not sure if we are looking at the same column. It is September 7, 2004.

A. Oh, no. I am sorry. I read -- I got the numbers mixed up.

Q. It is in the middle of page 8.
A. Yes. It is 45.72. Sorry.
Q. Right. And I have a calculator, but will you accept my representation that if you multiply 67 million shares times that price, that that offer was valued at 3.06 billion, according to the market price?
A. Probably, yes.
Q. And you described the extraordinary effort earlier, and it is your testimony that there had been an extraordinary effort to get Grupo Mexico to this point, to make this offer?
A. I said that they claimed it was an extraordinary effort.
Q. And then on October 21, 2004, the day that the special committee approved the transaction, are you aware that the market value of the 67.2 million shares that were being issued to Grupo Mexico were worth 3.09 billion according to their market price?
A. No, but I believe you if you say so.
Q. You testified on direct examination that Minera's value went up more than Southern Peru's value if copper prices went up. Was that what you

said?

A. That's correct.

Q. Were you referring to long-term prices, short-term prices, or to some other type of price?

A. In general, any price. Obviously, the more durable the price increase would be, the better for Minera. But any price increase was proportionately better for Minera Mexico than for Southern. If the price went up only one day, it was better for Minera. The difference in only one day would be very minor, of course, but it would always be somewhat more beneficial for Minera.

Q. What effect, if any, does copper pricing have on the calculation of each of these company's reserves?

A. Reserves, depending on all sorts of geological issues, may be affected by movements in prices. Typically, higher prices would tend to increase reserves and lower prices would tend to decrease them, because reserves are calculated on the basis of economic feasibility, I mean, can they be economically mined.

Q. And that's what reserves --

A. Yes, but exactly how much depends very much on the nature of the deposit. Some deposits are very sensitive to price changes. Other deposits are not very sensitive to price changes. But typically, most of them will have some reaction to different prices.

Q. And so is it fair to say that because reserves are defined as a function of economic viability of actually mining the copper, that the price increase of copper would actually also increase the size of a company's reserves? Right?

A. Typically, yes.

Q. Okay. And you said that Minera Mexico was more sensitive to copper price increases than Southern Peru was; right?

A. Yes, on the cost side, yes.

Q. And was Minera Mexico also more sensitive when you consider expanding reserves that could be resultant from rising copper prices?

A. I don't recall at this point exactly if it was or not.

Q. Do you recall if that was something that you discussed with your financial advisors when you were considering the transaction?

A. I believe we have discussed that, but I don't recall at this moment the number.

Q. You are aware that in 2004 Southern Peru actually commissioned Mintec to analyze its own reserves; right?

A. Yes.

Q. Okay. And the results of that study were not finished until about 2006; is that right?

A. I don't remember the exact dates, but I know these studies typically take a long time, yes.

Q. One of the issues that the special committee had to discuss in considering these proposals was whether, instead of giving Southern Peru's shares, the acquisition could be done for cash or some combination of cash and stock; is that right?

A. That was always a possibility, yes.

Q. And when you say it was always a possibility, you mean that the committee discussed it?

A. Yes, we did -- well, we had to answer to a proposal, but we always had to evaluate what alternatives could be suggested or expected for them to change if it was the case. But yes, we did discuss it.

Q. And you discussed it with your

financial advisor?

A. Yes, I believe we did.

Q. You testified that the special dividend, the $100 million special dividend helped to bridge the difference, I think was your expression, between the value of Southern Peru and the value of Minera Mexico; is that right?

A. Bridge the difference between what they wanted and what we were willing to pay.

Q. Right. And you said that also that capping the debt had a similar effect on bridging that difference; right?

A. Reducing the debt had a similar effect, yes.

Q. Right. Another way to bridge that difference would have been to offer less shares; correct?

A. Yes.

Q. For the relative valuation that you described to work, the inputs into the DCFs for both companies have to be accurate; right? Would have to be solid numbers; right?

A. Well, they would have to be comparable to begin with, you know, equally negotiated.

Q. Right.
A. And it should be something that is reasonable, because, of course, if we invent any old number, then that might not help, yes.
Q. So if you use make-believe numbers or numbers that wouldn't be realistic, then that would call into question the conclusions that that analysis yielded; right?
A. Yes. It would certainly reduce the validity of the analysis or the -- how useful it is, yes.
Q. You have Tab 19 in front of you, which is the October 21 presentation? It is Joint Exhibit 106.
A. Yes, got it.
Q. Do you have that?
A. Yes, I do.
Q. And this is the final board presentation made by Goldman Sachs at the meeting where the special committee voted to recommend the transaction; right?
A. Yes.
Q. Okay. And if you turn to pages 21 to 23. You testified about them on direct.

A. Yes.
Q. Okay. And these are the various matrices?
A. Yes.
Q. And the market capitalization of Southern Peru which is implied by these relative DCF analyses is not shown on these pages, is it?
A. No, not on these pages. There is enough numbers as it stands, yes.
Q. There is -- I am sorry?
A. In the same page and given all that you are trying to show, there is not really room to show anything else on these pages.
Q. Okay. Are there other pages in this presentation that have the implied market capitalization of Southern Peru from these ranges?
A. I don't -- I am not sure.
Q. Do you want to take a minute and look?
A. The implied capitalization of all these ranges?
Q. Right.
A. No, of course not.
Q. Okay. Well, how about of some sample set of those ranges?

A. There is a market capitalization of certain number of shares in some places, yes. Some of the valuations here assume certain market capitalization, and given the certain number of shares which would match, then you would have here two, yes.

Q. What are you pointing to?

A. For example, when you look at SPCC page 2, SPCC public market valuation, 46.4, number of shares --

Q. I am sorry. What page in the document are you looking at?

A. Page No. 2.

Q. Okay.

A. As you can see at the very beginning, it shows what the market cap of Southern Peru is at the then current market price, October 18, and then it shows if you paid 67.2 million shares for 99 percent of Minera Mexico, what the implied value is for Minera Mexico. So we have both the value of Southern and the implied value for Minera Mexico under the 67 million.

Q. I am asking whether the implied value of Southern Peru that would -- the value of Southern Peru that would be implied by giving 67.2 million shares, is that --

A. I don't think I understand your question.

Q. Is there a DCF value for Minera Mexico, an actual dollar value that is in this presentation of October 21? Not a relative value but an actual DCF value?

A. I am not sure. I would have to look through. Perhaps. (Pause)

I don't seem to find any dollar value of the DCF here.

Q. An earlier presentation from Goldman Sachs actually had an actual DCF value for Minera Mexico in them; right?

A. Yes, and for Southern Peru, too.

Q. Right. And you were asked about, for example, the June 11 presentation, where it actually had a DCF value pegged for Minera and then it had an actual -- withdrawn.

You recall testifying about the June 11, 2004 presentation materials where there was an actual DCF value for Minera in there; right?

A. That was the first presentation.

Q. Right.

A. Yes.

Q. And there is also nothing in this presentation that gives the implied dollar value of the shares that are being offered at each of these sensitivities, is there?

A. Not at each of these sensitivities, but yes, at the price that was being proposed, the 67.2 million.

MR. RUDY: One second, Your Honor.

(There was a pause.)

BY MR. RUDY:

Q. You testified about page 2 in this presentation. Will you turn back to that page?

A. Yes.

Q. Okay. And the implied equity value of Minera Mexico is 3.146 billion; right?

A. Yes, that's what it says.

Q. And was the DCF value that Goldman presented at 67.2 million shares the same as that, higher than that or lower than that?

A. I don't recall exactly, but I would presume it was probably somewhat lower than that.

Q. You don't know?

A. I don't remember is what I said.

Q. And at the time of this presentation

you think you knew it?

A. Yes, I did.

MR. RUDY: Nothing further.

THE COURT: Why don't we pause there, come back at 1:30.

(Luncheon recess taken at 12:31 p.m.)

AFTERNOON SESSION

THE COURT: Mr. Stone.

MR. STONE: Your Honor, I have no redirect.

THE COURT: Thank you, sir. Pretty good, huh?

THE WITNESS: Thank you.

THE COURT: I wish I could go with you. Have a good day.

Next witness.

MR. STONE: Your Honor, the defendants call Mr. Hank Handelsman. And we're going to distribute some witness binders.

HAROLD S. HANDELSMAN, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STONE:

Q. Good afternoon, Mr. Handelsman.

Could you summarize for the Court your education after high school?

A. I received a B.A. degree in political science from Amherst College in 1968. I received a J.D. degree in 1973 from Columbia University School of

Law.

Q. Would you summarize for the Court your employment history?

A. After I got out of law school, I clerked for Judge William Timbers on the Second Circuit. After that, I was an associate for four or five years at the law firm of Wachtell Lipton Rosen & Katz. And since 1978, I have been an attorney for the Pritzker interests in Chicago.

Q. And what is the Pritzker interests?

A. Let me add that I also have been employed -- well, the Pritzker interests are -- the Pritzker family is wealthy family based in Chicago, and the family owns, through trusts, a myriad of businesses.

Also, after college, I worked at Hyatt Corporation as the general counsel, one of the Pritzker interests. And I am currently an adjunct professor of law at Kent Law School in Chicago.

Q. Other than what you just mentioned as being the general counsel of Hyatt, what other positions have you held at the Pritzker family interests?

A. I'm currently the general counsel and

I'm the executive vice president of a firm called the Pritzker Organization. The Pritzker Organization is a group that provides legal, financial and analytical services to the companies owned by the Pritzker interests.

Q. What were your primary responsibilities as general counsel of the Hyatt Group?

A. I was principally involved in mergers and acquisitions transactions and financing transactions, and I oversaw the operational counsel, the counsel that dealt with the hotel business.

Q. Throughout your years and your involvement with the Pritzker family interests, how many merger and acquisition transactions have you been involved with?

A. Several hundred.

Q. Have you ever been involved in any conflict transactions?

A. I have.

Q. Which companies?

A. I was involved in the privatization of Hyatt Corporation in the late '70s and of Hyatt International Corporation in the early '80s.

Q. Have you ever served as a director of a public company?

A. Yes, I have.

Q. And for which companies?

A. I was a director of American Medical International Hospital Management Company; the director of Braniff Airways, an airline; director of a company called Dalfort Corporation that owned an aircraft maintenance business and a chewing tobacco company; and a director of Southern Peru.

Q. When did you first become a director of Southern Peru Copper Corporation?

A. Sometime in 2002.

Q. Now, we've been -- you weren't here this morning, but as I mentioned this morning, Southern Peru Copper Corporation has changed its name to Southern Copper Corporation, so I may refer to it as Southern Copper Corporation from time to time.

How did you become a director of Southern Peru Copper Corporation?

A. One of the Pritzker interests acquired an interest in Southern Peru a long time ago, and when Southern Peru became a public company in the '90s, there was a shareholders agreement among the founding

shareholders of Southern Peru which included Cerro Trading Company, which is a Pritzker interest.

Under that shareholders agreement, each of the founding shareholders was entitled to a proportionate representation on the board of directors of Southern Peru. And by formula, Cerro Trading had two directors, and I was appointed to be one of them.

Q. Who was the other director?

A. His name is Jaime Claro.

Q. What did you understand your mandate to be as an appointee of the Pritzker interests or Cerro?

A. First, I was a fiduciary for the shareholders of the corporation, and, along with that, intended to protect the Pritzker interests, who owned about 14 or 15 percent of the company.

Q. What was Cerro Trading Company?

A. Aside from its ownership in Southern Peru Copper, I don't know.

Q. Okay. Who were the other founding shareholders of Southern Peru Copper Corporation?

A. The company goes back at least to the '50s, and most of the principal world-renowned copper companies were original founding shareholders in the

late '90s or early 2000s. Grupo Mexico bought the share of Southern Peru that was then owned by ASARCO; and at that point, the three founding remaining shareholders were Grupo Mexico, Phelps Dodge or an affiliate of Phelps Dodge, and Cerro Trading.

Q. Did you have any connection or affiliation with Grupo Mexico before you joined the SPCC board?

A. No.

Q. Now, we're here today talking about a transaction that was originally proposed in 2004 and approved and closed in 2005 between Southern Peru Copper and Minera Mexico. When did you first learn about the possibility of that particular transaction?

A. At a board meeting in early February of '04.

Q. Okay. If you would look at Tab 1 in your witness notebook, which is Joint Exhibit 108. This is a presentation to the SPCC board of directors dated February 3, 2004. Do you recall being at a meeting February 3rd, 2004, where this was presented?

A. Yes, I do.

Q. And at that time, what was your understanding of the proposed transaction?

A. My understanding was the suggestion was a merger of two very similar Latin American principally copper-producing companies.

Q. What was your reaction to the proposal that was presented on February 3rd, 2004?

A. I really didn't have a reaction. I didn't know enough about the Mexican company to have a view.

Q. What occurred at the SPCC board meeting after this presentation was presented?

A. The board voted to establish a special committee of disinterested directors to consider the transaction.

Q. Why did the board discuss appointing a special committee to consider the transaction?

A. Aside from it being on the agenda, it's a common practice in transactions that have elements of a conflict.

Q. Who were the initial members of the special committee?

A. The initial members were Gilberto Perezalonso and -- forgive me if I say these names wrong.

Q. I'm no better than you, so go ahead.

A. -- Pedro-Pablo Kucyzinski, and me.

Q. And did the composition of the special committee change?

A. It did.

Q. And how did it change?

A. Pedro-Pablo Kucyzinski -- that's a tongue twister to me -- resigned from the board of Southern Peru to take a position as Finance Minister of Peru. And two additional members of the committee were placed. One's name is Carlos Ruiz and the other, Miguel Palomino.

Q. To your understanding, to what extent, if any, were any of the members of the special committee as it was finally constituted affiliated with Grupo Mexico?

A. I don't think they were.

Q. And to your understanding, did any of the members of the special committee have a personal or financial interest in the transaction?

A. No.

Q. Take a look at the document behind --

A. I owned a few shares of Southern Peru and I assume that some of the other directors did, but it was like 5 or 600 shares.

Q. Take a look at the document behind Tab 2 in your witness notebook. It should be Joint Exhibit 16. And I know that this is difficult to read. This is the set of resolutions appointing a special committee that was discussed earlier today. And I want to direct your attention to the third page of the document where the actual resolution is set forth.

And there is a paragraph, the fourth paragraph down, that says, "NOW, THEREFORE BE IT RESOLVED ...." Do you see that?

A. Yes.

Q. At the end of that paragraph, it states that " ... the duty of the committee" -- "the duty and sole purpose of such Special Committee is to evaluate the Transaction in such manner as the Special Committee deems to be desirable and in the best interests of the stockholders of the Corporation."

To what extent was the special committee empowered to negotiate with Grupo Mexico?

A. Well, the way I looked at this in the first instance was that the word "evaluate" meant just that. That was that the committee was to educate itself and determine whether they believed that the

proposed transaction was a good one or a 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.

Q. And is that the way that the relationship between the special committee and Grupo Mexico in fact proceeded?

A. It was.

Q. Who was the chairperson of the special committee?

A. Carlos Ruiz.

Q. And the special committee was empowered to retain advisors according to these resolutions. Which advisors did the special committee retain?

A. It retained an investment banker, Goldman Sachs. It retained two sets of counsel. M&A counsel was Latham & Watkins, New York office, principally. It retained Mexican counsel for Mexican law issues, and I can't pronounce the name of that

Mexican counsel. And it retained a mining expert firm called Anderson & Schwab.

Q. Okay. Focusing on the legal counsel, which law firms did the special committee consider for M&A counsel?

A. It considered Latham, it considered Paul Weiss, it considered Cleary Gottlieb, and it considered Sullivan & Cromwell.

Q. How did the special committee come up with a list of law firms that it considered?

A. The special committee knew that I was an attorney that practiced in the area of mergers and acquisitions, and asked for my recommendations, and I recommended those firms as well as a few others.

Q. And on what basis did you recommend these law firms?

A. Those law firms had either in the recent past represented Pritzker interests or represented people against Pritzker interests in M&A type transactions.

Q. And to what extent was the fact that these law firms had either represented the Pritzker interests or had been opposed to them disclosed to the special committee?

A. Well, that's the reason that I suggested them. They took my word for the fact that I had had experience with these firms and the experience was positive.

Q. And in your view, did the relationship between the Pritzker interests and these law firms create any conflict?

A. No.

Q. Which investment banks did the special committees consider?

A. Lehman Brothers, Credit Suisse First Boston, JPMorgan, Goldman Sachs, and Merrill Lynch.

Q. Why did the special committee decide to retain Goldman Sachs?

A. I think -- I don't know that Goldman would like this answer, but I think it was a process of elimination. Lehman Brothers and Credit Suisse were not thought to have had either mining or Latin American experience, which we thought was important. We were of the view that JPMorgan Chase had relationships with Grupo Mexico or its principals. Merrill Lynch was too expensive in relative terms. And Goldman had Latin American experience, a Mexico City office, and mining experience, and came up with

what we considered to be an acceptable fee proposal.

Q. What if any work had Goldman Sachs done for the Pritzker interests?

A. At that time, I don't think a lot. We, you know, we prided ourselves in doing transactions without using investment bankers when we could.

Q. Did you disclose the fact that Goldman Sachs had done some amount of work for the Pritzker interests?

A. Oh, I disclosed that all of those firms had done work with the Pritzker interests. There isn't a major banking firm in the United States with whom we haven't done substantial business.

Q. Why did the special committee decide to retain a mining consultant?

A. In speaking to Goldman Sachs, it became clear that there were technical issues involving mining that Goldman did not have experience in. Those technical issues related principally to how one mines ore, how the mine is constructed, how the overburden is removed, how one attacks various grades of the ore body, what the life of the mine would be. And there is generally something called a mining plan,

which is a multi-year plan as to how one will address the resources of the mine. And Goldman did not feel that it had the experience to deal in those technical issues as opposed to valuation and marketing matters with respect to mining companies.

Q. So how did the special committee go about hiring a mining consultant?

A. I actually -- Goldman Sachs suggested several mining consultants with which it had experience. Anderson & Schwab was one of them. I believe members of the special committee asked Southern Peru what they thought of these mining experts, and Anderson & Schwab was thought to be a decent choice.

Q. Okay. Take a look at Tab 3 in your witness notebook. It's Joint Exhibit 112. This document is titled, "SOUTHERN PERU COPPER CORPORATION PRINCIPLES OF CONDUCT OF SPECIAL COMMITTEE OF DISINTERESTED DIRECTORS OF THE BOARD OF DIRECTORS."

Do you recall seeing this document?

A. Yes, I do.

Q. Okay. And just very generally, what did these principles of conduct provide?

A. I view this as a charter for the

special committee. Much like audit committees and compensation committees and nominating committees of public companies have charters, this was the charter for this special committee.

Q. And to the best of your recollection, did the special committee follow this charter?

A. Other than not adopting a secretary, I think the answer is yes.

Q. Approximately how often did the special committee meet?

A. Unlike public companies that have scheduled board meetings, the special committee met when it needed to meet. And over a period of seven or eight months, it met over 20 times, formally, that is, in person. It met probably an equal number of times on the telephone, informally, when we had something to discuss.

Q. Were minutes generally kept of the special committee's meetings?

A. Of the in-person meetings, yes.

Q. What was the process for keeping minutes of the special committee's meetings?

A. I think at virtually every one of the special committee's meetings, there was a young lawyer

from Latham & Watkins, and that young lawyer listened to the proceedings, went back home, and prepared draft minutes. Those minutes were circulated amongst the members of the committee. Sometimes the members commented; sometimes they didn't. And then the minutes were finalized and left with counsel.

Q. Okay. And did the minutes generally reflect what took place at the special committee's meetings?

A. Yes.

Q. Take a look at Tab 4 in your witness notebook. This is the proxy statement.

A. Yes.

Q. Do you recognize it?

A. I do.

Q. And take a look at Page 15. I'm sorry. Page 16. I'm looking at the numbers on the bottom of the page, not in the upper right-hand corner.

A. I'm there.

Q. Okay. Do you see there is a section there, the background of the merger?

A. Yes.

Q. Are you familiar with that section of

the proxy statement?

A. Yes, I am.

Q. Is that something that you've reviewed in the past?

A. Yes.

Q. And did you review it before it went out to the stockholders?

A. Yes.

Q. Do you believe that the description of the merger in the proxy statement accurately reflects the special committee's valuation of the merger?

A. Yes.

Q. Turn to Tab 5. We may come back to this document at times. Tab 5 is Joint Exhibit 63. It's a March 4th letter to Mr. Larrea from Mr. Ruiz. Do you remember this letter?

A. I do.

Q. What was the purpose of this letter?

A. Well, the presentation at the February 3rd board meeting was, Let's merge, and why don't you pay us 3-point-something billion dollars for Minera Mexico, period, stop. And there wasn't enough specificity in that proposal for a committee or its experts to address.

So when nothing further came from Southern Peru or Grupo Mexico, the special committee, with the help of counsel, drafted a letter and said, These are the kinds of points that we need to know about in order to begin our valuation. And so it was a request of the committee to Grupo Mexico to provide flesh to the bones of the suggestion.

Q. Okay. Did Grupo Mexico respond to this letter?

A. Yes.

Q. Take a look at Tab 6, which is Joint Exhibit 155. Is this the response to the letter that we just looked at, Joint Exhibit 63?

A. I think so, yes.

Q. Taking a look at the annex to the letter, which is the second page of the document, what did this so-called term sheet provide with respect to the proposed consideration?

A. It again provided a value for Minera Mexico but not a way to address that value in terms of shares of Southern Peru --

Q. Okay.

A. -- or cash or anything else for that matter.

Q. So did this term sheet provide the special committee with sufficient information to begin evaluating the transaction?

A. Well, it did and it didn't. We asked our advisors to speak with the advisors of Grupo Mexico, which was UBS, and we asked Anderson & Schwab to talk to Minera Mexico management and Grupo Mexico management to understand more about Minera Mexico. But in terms of the details for the transaction, it wasn't all that helpful.

Q. So you started the due diligence process at least to get it started, but there was really nothing to evaluate in terms of the consideration?

A. Correct.

Q. Okay. So did you then request, even once again, additional information?

A. That's my recollection.

Q. Okay. Take a look at the document behind Tab 7, which is Joint Exhibit 65. Was this that second request for specificity?

A. Yeah. That's about a week later, and the special committee tried to tie down some of the terms of the transaction so that it could address

them, but it's an evaluation process.

Q. And how did Grupo Mexico respond to this letter?

A. They sent another term sheet.

Q. Okay. Take a look at the document behind Tab 8, which is Joint Exhibit 156. Is that the term sheet that they sent?

A. Yes.

Q. And what was the proposed consideration set forth in this term sheet?

A. It was a floating exchange rate using shares of Southern Peru to attain an equity value of 3-point-some billion dollars for Minera Mexico. That is, however many shares it took to arrive at 3-point-some billion dollars was to be the consideration.

Q. You'll notice that the footer says "UBS." What was UBS's role in this transaction?

A. My understanding is that they were the advisor to Grupo Mexico, just like Goldman was the advisor to the special committee.

Q. And to your knowledge, were there frequent conversations between Goldman and UBS regarding the terms of the transaction?

A. I think the conversations were constant.

Q. So what was the special committee's reaction to this May 7 term sheet?

A. Insofar as the consideration was concerned, it was the consensus of the committee that a floating exchange rate was a nonstarter. And the reason for that was one could not predict the number of shares that Southern would have to issue in order to come up with the consideration requested.

Hypothetically, if the stock of Southern Peru went way down, and it had been a very volatile stock, and the copper market, which is a derivative of the stock price, was a very volatile thing as well, it could become -- the number of shares of Southern that you'd have to issue would be infinite.

On the other side, if the value of Southern Peru stock went up, it would issue less shares. But to take that risk was something that the committee did not favor.

Q. Okay. So what did the special committee do after receiving this revised term sheet?

A. One, it asked its experts to try to

value Minera Mexico and to -- and I believe that there were conversations between Mr. Ruiz and Mr. Larrea about the fact that certain elements of this term sheet were very difficult for the committee to accede to.

Q. Generally speaking, what types of analyses did Goldman Sachs do to value Minera Mexico?

A. Well, over a period of time, it did a lot of valuation, but initially, it did a discounted cash flow analysis. It looked at Grupo Mexico, which was a public company in Mexico, and pulled out from the value, the market value of Grupo Mexico, the value of Southern Peru, to leave a balance, and then tried to figure out from that balance what value Minera Mexico had of that balance.

It also did a contribution analysis as to what, based upon the suggested consideration, the contribution of EBITDA and revenues to the combined company, each of Southern Peru and Minera Mexico, would contribute. And it did an analysis of the value of the proven and probable reserves of both companies to see how they related to each other.

Q. What did you learn from these preliminary analyses that Goldman Sachs performed?

A. That their results showed that the value of Minera Mexico was substantially less than the asked price of Grupo Mexico by a substantial margin, except for the assets in the ground analysis, which showed that Minera Mexico had basically better and more reserves and cheaper reserves than Southern Peru did.

Q. So what did the special committee do to reconcile these different values?

A. I think one of the things they did is they went back to Mr. Larrea and advised him that based upon the initial views of Goldman Sachs, that the transaction didn't look like it was as favorable as it should be to the shareholders of Southern Peru, and asked -- and the special committee asked its advisors to continue on the path of trying to understand why the market value of Southern Peru and the discounted cash flow analysis value of Minera Mexico didn't jibe.

Q. Okay.

A. And so the committee asked, and I don't remember which member of the committee asked, that Goldman Sachs perform a discounted cash flow analysis of Southern Peru as well as they had done for

Minera Mexico, because it didn't seem to the committee that companies that were pretty similar and whose earnings were different but also pretty similar should have values that were as dissimilar as the asked for Minera Mexico and the discounted cash flow analysis result for Minera Mexico.

Q. Take a look at the document behind Tab 10, which is Joint Exhibit 102. This is a June 23rd presentation by Goldman Sachs. Do you remember seeing this analysis?

A. I saw so many analyses from Goldman Sachs, I can't tell one from the other anymore, but the answer is yes.

Q. Let's take a look at Pages 22 through 24 and maybe that will remind you whether this is the discounted cash flow of SPCC that the committee requested that Goldman perform.

A. Yes.

Q. Now, turning back in this presentation to Page 4, you'll see on Page 4, under the first heading, "SPCC Public Market Valuation," that there is an implied market cap for the company of about 3.1 billion. Did the committee compare that market capitalization to the results of the discounted cash

flow that Goldman performed of SPCC?

A. They did.

Q. Okay. What was the committee's reaction to the fact that the DCF values generated were generally lower than the market cap?

A. I think the committee was somewhat comforted by the fact that the DCF analysis of Minera Mexico and the DCF analysis of SPCC were not as different as the discounted cash flow analysis of Minera Mexico and the market value of Southern Peru.

Q. And why was that important?

A. Well, it gave some clarity as to how the numbers came out, and showed that our initial reaction that these were two very similar companies in very similar businesses with pretty similar earnings patterns -- it showed how those two companies on one measure of valuation were far more comparable than they were on the valuation of the stock, the public stock of one, and the discounted cash flow analysis or cash-producing power of the other.

Q. And so what did the special committee do after learning that Minera Mexico and SPCC's DCF values were relatively close in range?

A. Well, initially, when we thought that

the value of Southern Peru was its market value and the value of Minera Mexico was its discounted cash flow value, or the value of it as a part of Grupo Mexico or contribution, those were very different numbers.

The numbers became less different and more understandable as you viewed both companies in the same valuation technology. And so it made us feel that there might be a basis upon which these two companies could combine as a merger of equals on a basis of their relative value as opposed to value determined by stock price on one side and DCF on the other.

Q. Take a look at the document behind Tab 11. This is yet another Goldman Sachs presentation. It's Joint Exhibit 103. And the Goldman presentation is actually an attachment to the cover letter. Do you recall seeing this presentation?

A. Yes.

Q. Let's look at Page 16.

A. Okay.

Q. There are a couple of lines near the bottom of the presentation that look at the reserves of not only SPCC and Minera Mexico but a couple of

competitors. Do you recall discussing the reserves line and the implied reserve multiple?

A. Yes. I may have spoken wrongly before, but what I said is one of the analyses that Goldman did was to value the copper in the ground of both companies, and said if you pay X dollars a share for this company, what is the derivative value that you're paying for the proven and probable reserves of its copper in its mines?

And what this demonstrates is that at the stock price of Southern, you were paying 10 or 11 cents a pound for the copper that it owned in the ground. And at the asked price for Minera, you were paying something like 6 or 7 cents a pound for copper.

Q. What did that tell you about the proposed transaction?

A. If that were the only measure of value that you used, it would show that Minera Mexico was a good buy at the asked price, but of course we had these other valuation metrics.

Q. Turn to Page 39 of this presentation. It says, "Relative Discounted Cash Flow Analysis." Is this the relative valuation that you referred to before?

A. Yes, but it uses variable prices for copper in different discount rates, and it uses a fixed price for copper and different prices for moly to come up with a -- they call it a hypothetical number of shares that would be paid for Minera Mexico.

Q. Okay. And what was your reaction to seeing this analysis presented by Goldman Sachs?

A. Basically, I thought that a merger of two equal companies with different characteristics was basically a good idea if you could get to the right price. When you used the discounted cash flow analysis metric against market price, it didn't look like the right price. When you looked at the companies on this basis, it was a lot closer to the asked and seemed to make sense.

There were things going on at Southern Copper and things going on at Minera Mexico that made a relative valuation, to me, an important criteria. And so it gave me comfort that we weren't paying double for the company.

Q. Okay. Let's go back to the proxy statement, which I think is Tab 4, and let's look at Page 22.

A. I'm with you.

Q. Okay. The first full paragraph discusses the fact that during late July and early August, there were discussions between Goldman Sachs and UBS, and that during these discussions, UBS indicated that based on additional operational cost information relating to Minera Mexico, after consideration of debt reduction that was occurring at Minera Mexico, Grupo Mexico believed the number of shares to be issued as consideration should be in excess of 80 million shares. Do you recall that occurring?

A. Yes, I do.

Q. What was the special committee's reaction to Grupo Mexico's new-found belief that the consideration now should be 80 million shares?

A. I guess if you don't ask, you don't get; but we were having trouble getting to the original asked. The stock price of SPCC had gone up and, therefore, 80 million shares was a substantially higher ask than the original one which we were having trouble getting to. So we thought it was either a negotiation or a significant overreach.

Q. Okay. Were the parties at this point at an impasse?

A. I think you could say that.

Q. Looking at the next paragraph, it says that, "The special committee met on August 5th and discussed the substantial gap that remained ...." And after discussing alternative ways to reach agreement, the committee decided that Mr. Ruiz would inform Mr. Larrea that the special committee thought the advisors should meet and see if any agreement could be reached.

Do you recall that occurring?

A. I do.

Q. To the best of your recollection, did Latham & Watkins and Goldman Sachs negotiate with Grupo Mexico's advisors during this period?

A. That's my understanding.

Q. And what happened as a result of those negotiations?

A. Well, what I think happened is that the 80 million share suggestion came off the table and the suggestion came down to 60-odd million shares, which, while a bit higher than -- was in the realm of reason based upon Goldman's valuation of the relative value of the two companies.

Q. Let's take a look at the document

behind Tab 12 in your witness binder. This is Joint Exhibit 157. And it's an e-mail dated August 23rd, 2004, that attaches a document called "Draft Term Sheet." Do you remember seeing this document?

A. Yes, I do.

Q. Okay. How does this term sheet differ from what Grupo had proposed originally?

A. During the negotiations that we just talked about, there were a lot of things negotiated. There was not only value negotiated, but there was how you kept Minera Mexico in an understandable fashion, what its debt would be, what the terms of that debt would be, how the transaction would be structured as a tax-free transaction, and on and on and on.

This particular term sheet addressed minority protections somewhat and took the asked, as I view it, from 80 million shares to 67 million shares.

Q. In the paragraph on "Proposed Valuation and Consideration," there is a phrase here that says, " ... after an extraordinary effort to come to an agreement, AMC is willing to propose a new value for its 98.84 percent equity interest in Minera Mexico of 67 million shares of SPCC."

Would you agree that this offer was

the result of an extraordinary effort to come to an agreement?

A. I think it was horse trading. I think it was part of the negotiation process. I had no evidence that it was extraordinary. Kind of ordinary to me.

Q. And the 67 million shares that was being proposed in this term sheet, to what extent was that a fixed number?

A. It was a fixed number.

Q. Take a look at the second page of the term sheet. And there is a section there on proposed liquidity and support provisions. Did the special committee support proposed liquidity and support provisions as a part of the merger?

A. From the very beginning of this transaction, the issue of liquidity for founding shareholders who didn't otherwise have liquidity was an issue. My recollection is that that was first suggested by Grupo Mexico in the first response to the committee's request for a more fulsome explanation of the proposal.

And every one of the pitches that we got from the investment bankers said, You have a

problem here because there is a very small public float.

If you think about it, and I am not that good at math, but Grupo Mexico had 54 percent of the company. Phelps Dodge had like 17 percent of the company. So that's 54 plus 17, 71. We had like 15 percent of the company. That's like 86. And the Peruvian pension funds for whom Miguel Palomino was a representative had 9 percent. And they were all -- we were all long-term holders, and we all had directors, so we were all affiliates. So none of us really could sell our shares.

So that the public vote of this company was 6 or 7 percent. And everybody thought that that was not a good idea. And quite frankly, we had an interest in selling our shares.

Q. Why would it be a benefit to those 6 or 7 percent public shareholders to allow the founding shareholders to have registration rights?

A. Well, I'm not an economist and I'm not an investment banker, but it's my understanding that when you have a very small float, that stock doesn't trade efficiently, the market is not efficient; that if a bunch more stock in the company, our 14 or

15 percent and Phelps Dodge's 16 or 17 percent, went into the public, that the market for Southern Peru stock would be much better, would be followed by more analysts, and that there would be a more efficient market just generally.

Q. And to what extent --

A. And both we and Phelps Dodge wanted to get out. So you had a thing that was good for the company or at least not bad, and you fulfilled the desires of your substantial minority shareholders.

Q. What involvement did the special committee have in securing liquidity and support provisions for the founding stockholders?

A. The position of the committee is it wanted to know about that process, but it didn't want to negotiate it. It wanted to let it be negotiated between, in principle, Cerro Trading and Grupo Mexico.

Q. If you can flip back to the proxy statement for a moment.

A. Number 4?

Q. Yes, page 24.

A. I'm with you.

Q. Okay. At the very top, it says, "On September 23, the special committee met with

Latham & Watkins, Mijares and Goldman Sachs to review a revised draft of the Agreement and Plan of Merger and a term sheet that Latham & Watkins would provide to Milbank Tweed."

Do you recall that meeting occurring?

A. Yes, I do.

Q. Now, take a look at the document behind Tab 13. I'm sorry.

A. You know what? I don't have a document behind Tab 13.

Q. We have loose copies of it. I apologize.

THE COURT: It's because it's an unlucky number.

MR. STONE: That's it.

THE COURT: I've always just wondered about that in like hotels and building. When people are really superstitious about the number 13, it must be about the actual depiction of the number, not the actual numerical fact. There is a deeper epistemology about whether that's a fact. If you're in a hotel and you're on Floor 14 and there is no 13 button, you must have a very particular view of fate that that renders you safe; right?

MR. STONE: I'm sure that's true.

THE COURT: If you just started having Friday the 14ths now and just skipped the 13th --

MR. STONE: I'm sure someone who is superstitious wouldn't want to think about that.

THE COURT: Am I the only one? I wonder how many people have thought about that in an elevator bank. You probably have much deeper thoughts than I do.

THE WITNESS: I thought you were doing like they do in an interview where they ask somebody to open the window and the window is nailed shut.

THE COURT: No. Actually, we've done versions of "Punk'd" here with Ashton Kutcher in Chancery.

MR. STONE: Okay. Back to the testimony.

BY MR. STONE:

Q. Mr. Handelsman, taking a look at Joint Exhibit 159, is this the term sheet that is referred to in the passage that we just read from the proxy statement?

A. Yes, it is. Yes. This is a real term sheet, not like the term sheets that we kept getting,

but this is one that is very detailed about all aspects of the transaction.

Q. Okay. I just want to go through a few of the terms.

Under the "merger consideration," what was the special committee proposing in response to the proposal by Grupo Mexico of 67 million shares?

A. 64 million shares.

Q. There is some provisions under valuation protection near the bottom of the page. The first bullet point says, "a 'majority of the minority' vote ...." Why was the special committee proposing the majority of the minority vote?

A. Because counsel let us know what better practices or best practices were or are in Delaware law, and I think they convinced us that that was a nice have.

Q. And the next bullet point has "a 20 percent 'collar' around the fixed value exchange ratio ...." Why was the special committee requesting a 20 percent collar?

A. Well, just like a floating exchange ratio can have in certain circumstances untoward results, you can have something that approached those

untoward results if you have the fixed exchange ratio too, because the stock of one company could go down and, therefore, the person who is the recipient of that stock isn't getting as much as they thought they would; or the stock of the issuer, Southern Copper, could go up, and then Grupo Mexico would get a lot more than it was asking for.

And so this also, in my experience, anyway, gives negotiating power to both sides in the event of peculiar market movements.

Q. Okay. There is a provision on the next page that says, "Closing Conditions." And there is a reference to Minera Mexico's debt being capped at 1.105 million. Do you see that?

A. I do.

Q. Why was that a concern of the special committee?

A. Well, when you buy a company, you buy it along with its warts, and one of the warts of Minera Mexico is it had a lot of debt, and Southern didn't. And you wanted to make sure that that debt was, one, not more than a certain number, and two, had certain characteristics before you would want to take on that burden.

I think that the debt of Minera Mexico was actually in the billion 3 to billion 4 range at this time. And what we were basically saying is, Pay down some of your debt, fellows.

Q. Page ahead to the page that has an identification number that ends in 546. That's a page that's titled, "PART II - CORPORATE GOVERNANCE."

A. Yes.

Q. What was the special committee proposing generally with respect to corporate governance provision?

A. Well, Grupo Mexico was proposing all along that the minority shareholders of Southern Peru would have those protections that Delaware law gives them. And based upon advice of Latham as to what was commonplace in these kinds of transactions, Latham suggested that the minority have a certain fixed number, minimum number of directors, and that they be appointed in a particular way so that there would also be minority representation on the board, kind of like it was where we were on the board, even though Grupo Mexico owned more than 50 percent of the votes of the company when I was on the board.

Q. Did Grupo Mexico accept the special

committee's proposal of 64 million shares of SPCC?

A. It did not.

Q. Did Grupo next accept the special committee's proposal of a majority of the minority provision?

A. It did not.

Q. What shareholder approval provision was the special committee able to achieve instead?

A. Well, although the documentation of it happened at the last moment, the special committee got Grupo Mexico to agree that the vote of the shareholders would have to be two-thirds.

And as a practical matter, that meant that either Cerro or Phelps Dodge would have had to have approved the transaction in order for a two-thirds vote to have been obtained, as a practical matter; and, therefore, the terms of the deal would have had to have satisfied one or both of Phelps Dodge or Cerro.

Q. Okay. Did Grupo Mexico accept the special committee's proposal of a 20 percent collar?

A. No.

Q. And what was your reaction to that?

A. Latham thought the collar was

important. I thought the collar had some meaning, but I thought that it was less important because I believed -- based upon 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, 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 would certainly have been better to have the collar.

Q. Did Grupo Mexico accept the special committee's proposal of capping Minera Mexico's net debt?

A. They did.

Q. Okay.

A. But at a lower number than this, at the final go-around.

Q. And did Grupo Mexico accept the special committee's corporate governance provisions?

A. Generally, yes.

Q. How did the special committee bridge the gap between the 64 million shares and the 67 million shares?

A. The way I look at it is the special committee's views increased the value of Minera Mexico

by requiring that the debt be 2 or $300 million less than the debt would have been had we done nothing; and two, it decreased, at least for the moment, the value of Southern stock by having Southern use some of its cash to pay a special dividend.

So if you put the two of those together, you see that the value of what was being merged or acquired in the merger went up, and the value of the specie that was being used in the merger went down to the tune of 3 or $400 million.

And if you simplistically divide $40 into $400 million, you get 10 million shares. So a way to look at this is to say, with the changes that we made, we're worth 10 million shares.

Q. Now, it's been suggested that the main beneficiary of the special dividend was Grupo Mexico because they had owned 54 percent of SPCC's common stock. What is your reaction to that?

A. Well, my reaction to it is it's true, they owned 54 percent of the stock, and they got 54 percent of the dividend, but the reality is -- and people are playing with billions of dollars around here, but we have to come down and be grounded. My client got 15 or $16 million that it wouldn't have

had, and so the little shareholders of the company got their pro rata portion of this dividend as well. But we got like $1.30 a share for 14 or 15 million shares and Joe Dokes who had 100 shares got $130. And I don't think that's inconsistent.

Q. Did the special committee ultimately recommend the merger to the SPCC board?

A. It did.

Q. Do you recall when that was?

A. In October of '04.

Q. Take a look at what's behind Tab 14 in your witness notebook, Joint Exhibit 106.

A. Yes.

Q. It's a document that's entitled, "Discussion Materials for the Special Committee of Disinterested Directors," October 21, 2004. Was this the presentation that Goldman Sachs gave to the special committee on that day?

A. Yes, it was. Yes, it is.

Q. Okay. Take a look at Page 2 of the presentation. It's titled, "Analysis of Financial Aspects of Transaction."

A. Yeah.

Q. What generally is the information set

forth on this page?

A. This is a presentation of what the value of Southern was based upon the shares outstanding and its stock price and the value being paid for Minera Mexico shares in the merger, multiplying the number of shares they were getting, 67.2 million shares, and adding to it a billion dollars of debt to come up with the enterprise value of Minera Mexico.

Q. I want you to skip ahead to Page 21. And my question is: This page and the two pages that follow it, are these a similar relative valuation as the previous presentation that we reviewed?

A. Yes, with different assumptions.

Q. Does this presentation set forth the underlying values for SPCC and Minera that are used to calculate the hypothetical number of shares to be exchanged?

A. Yes, it does.

Q. Well, I mean are the DCF values, the equity values, derived from the DCF set forth on these pages?

A. Only indirectly. They're set forth in terms of the consideration, not set forth in terms of

absolute numbers, no.

Q. Okay. And --

A. But the way you come up with these numbers is to use the relative DCF calculations.

Q. Okay. Did it matter to you that the DCF values themselves were not set forth on these pages?

A. Not really.

Q. Why not?

A. Because the goal that I was trying to achieve is to whether or not a transaction in which 67.2 million shares of Southern Peru was being traded for substantially 100 percent of the shares of Minera Mexico made sense in the relative valuation context; and these numbers suggest to me that it does, that they do.

Q. Okay.

A. This is more masticated than just giving the raw numbers of the relative DCFs.

Q. Did Goldman Sachs issue an opinion concerning the fairness of the transaction?

A. They did.

Q. Take a look at what is behind Tab 15.

A. Yes.

Q. Do you recognize this as Goldman's fairness opinion?

A. I do.

Q. And what did Goldman conclude in this opinion?

A. It says at the end, "Based upon the subject of the foregoing, it is our opinion that, as the date hereof, the Exchange pursuant to the Agreement is fair from a financial point of view to the Company," the company being Southern Peru.

Q. Did you agree with that conclusion?

A. I did. I do.

Q. Why?

A. Well, I did because I thought the committee did a very good job. I thought this was a very good task, and I thought it took an awfully long time, and I thought it was more effort than I've seen put in by most committees doing this kind of work; and that's why I did.

I do because I don't think it's hyperbolic to say that the Southern Peru merge with Minera Mexico has been if not the, one of the best performing stocks on the New York Stock Exchange since the date of this merger.

And if you look at a chart comparing this deal to any other index, the S&P, NASDAQ, Dow Jones, and especially important to me, to companies like Freeport-McMoRan, which are other companies in the same business, this combined company as a market matter has outperformed them all by an enormous amount. So I'm proud of the fact that we did this.

Q. Okay. So did the committee recommend this transaction to the SPCC full board?

A. Without me participating, it did.

Q. Why didn't you participate?

A. 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 there is a potential for a conflict or there is an appearance of a conflict, then I won't vote.

I was one of four people. I was not

the chairman of this committee. I didn't, as I have a wont to do, control the committee. We were a committee of equals. And if people thought that my participation in the vote was a bad thing, like Goldman's counsel did, I said, Well then, I won't vote.

Q. What was your role with respect to the negotiation of Cerro's registration rights offering?

A. I had talked to the general counsel of -- I guess he was the general counsel -- both of Grupo Mexico and Southern Peru, Armando Ortega, about registration rights from the time of the first term sheet that Grupo Mexico sent. And at the time of one of their last term sheets, which was about in August, the terms of what deal we would have were set out. And I was prepared to live with that and live with their word for that.

At the last moment, I think either the day of or the day before, the day that the committee was supposed to vote, I was supplied with a document that was to document our registration rights.

And for the most part, it was consistent with the understanding that I had with Armando all along, but it required that in

consideration for our registration rights, that we agree to vote in favor of the merger. And I said that that was a nonstarter; that I wasn't trading registration rights for votes.

The registration rights were something that had been discussed all along. The registration rights were something that put us in a similar position to all the other minority shareholders of the company, with a possible exception of Phelps Dodge. But since Phelps Dodge did not have a director, they weren't affiliates and were free to sell on the market.

And so I said, I'm not willing to recommend this to my principals. And there were discussions. And I said, We will vote the way the special committee votes, and that's it, period, end stop. And that's what happened.

Q. Okay. Just before I explore that a little bit, to what extent did Cerro actually need registration rights to sell its shares into the market?

A. At the time of the vote of the special committee, we would have been restricted in selling our shares by the volume restrictions of Rule 144

because notwithstanding the fact that there was a 54 percent stockholder, we couldn't get a legal opinion that said that we were not an affiliate and that these were not restricted shares.

Q. Well, to what extent could Cerro have trickled those shares out into the marketplace?

A. Well, we could have done that. Or what we could have done, which is what Phelps Dodge did, is have our nominees resign from the board of directors and wait 91 days; and after 91 days, we would have ceased to be an affiliate, and the shares would cease to be restricted stock, and we could have sold the stock without volume limitations, other than the practicalities of the market.

But to do so would have been probably bad for us because we would have been a constant seller in the market, which would have put down-pressure on the market; and two, it wouldn't be good for Southern for the same reason.

So, to me, registration rights was a win-win. It was a win for us because it permitted us to sell our stock, although we sold it for about a fourth of what we would have gotten had we kept it. And it was good for SPCC because they had a better

float and they had a more organized sale of the shares.

Q. Now, at the time that you received this first draft agreement from Mr. Ortega relating to Cerro's registration rights, at what point was the committee in their process?

A. By that time, the committee had basically concluded that a deal at 67.2 million shares, coupled with the other bells and whistles that is the limitation on debt, the dividend, the governance rights and so forth, was a good idea.

Q. Were the other members of the special committee aware of the fact that you were negotiating Cerro's registration rights agreement with Grupo Mexico?

A. All along. I really didn't negotiate them. The provisions in the one term sheet that we looked at -- and I don't recall its date -- were, except for the voting issue, consistent with the document that Armando gave us a few days -- the day or a few days prior to the vote of the special committee, so it was no surprise.

Q. Did you participate in the board of directors' vote on the transaction?

A. You know, I don't remember.
Q. Okay. Did the board of directors ultimately approve the transaction?
A. Yes.
Q. Did you believe that representing Cerro in connection with its registration rights created a potential conflict of interest?
A. I didn't and I don't, but I could see how others could.
Q. I just wont to look quickly at Tab 16, the final document in your witness notebook. Is this the final registration rights agreement for Cerro?
A. I think so. It has my initials on it. But I couldn't sign for Cerro, so I think this went back to somebody in Chicago who signed it.
Q. Now, on Page 2, there is a provision that I think you discussed before that says in the event that the Special Committee recommends the approval of the transaction, the board consequently votes in favor of it, Cerro would vote consistent with the special committee. Do you see that?
A. Yes.
Q. And what would happen, reading further, near the bottom of that paragraph, in the

event that the Special Committee of the board of directors did not approve the transaction?

A. That Cerro would not vote in favor of the transaction.

Q. Right. When did Cerro sell its shares of SPCC?

A. In June of 2005.

Q. And did Cerro sell its shares at the market price?

A. Subject to underwriting discounts, yes.

Q. Now, before the special committee recommended -- I'm sorry. Before 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.

Q. Okay. Mr. Handelsman, do you think

that the special committee did a good job considering and ultimately recommending the proposed transaction?

A. I deep in my heart do.

Q. Okay. And why?

A. Mr. Stone, I teach this issue. I think I understand what special committees are supposed to do. I try to convey to young lawyers or young prospective lawyers what they are supposed to do. I sincerely believe that this committee did those things that I teach, and that I teach those things that this committee did, and what is required or expected by Delaware law. That's what I think we did, and I'm proud of it, and I think history proves it out.

MR. STONE: Your Honor, I pass the witness.

CROSS-EXAMINATION

BY MR. RUDY:

Q. Good afternoon.

A. Hi.

Q. In the transaction as it was approved on October 21st, 2004, the company acquired Minera Mexico for 67.2 million shares. That's right; right?

A. Well, I call it a merger and you're

calling it an acquisition, but that's what happened.

Q. In the transaction, 67.2 million shares were issued in exchange for Minera?

A. Correct.

Q. And measured at their market price, those shares on that date had a value of $3.1 billion. Right?

A. In October?

Q. Yes.

A. Yes.

Q. On May 7, 2004, backing up to the first proposal that you thought had substance to it, do you recall that proposal?

A. No. Why don't you direct me to it.

Q. Okay. It's Tab 8 in your book. This is Joint Exhibit 156.

A. Yes, I have it.

Q. This is styled as a revised term sheet, since February 3rd, and a subsequent iteration before this one. Right?

A. Yes.

Q. And if you turn to, I think it's the third page of this document, where it says "Proposed Consideration."

A. Yes.
Q. It says that Grupo is demanding Southern Peru stock with value of $3.174 billion as of that date. Right?
A. Yes.
Q. And the way that the number of shares is to be calculated, according to this May 7 proposal from Grupo, is to use a 20-day average of Southern's share price using the date five days prior to the closing of the transaction; right?
A. Yes.
Q. And do you know if the special committee had accepted this proposal in May, how many shares would have been issued?
A. Somewhat less than the number of shares that were ultimately issued. I haven't done the math recently, but yes.
Q. About 15 million shares less?
A. I don't think so, but less shares.
Q. About 52.8 million shares, does that sound about right?
A. I don't know. I mean, you've done the math. If that's the math, then I agree with you. It's a simple calculation.

Q. Okay. You testified on direct examination about a proposal from Grupo to issue 80 million shares that was described in the proxy as happening in late July, early August. Do you recall talking about the 80 million share proposal?

A. I do.

Q. And you described it as either an overreach or a negotiating proposal?

A. I did.

Q. Okay. And do you know as of late July or August that the value of 80 million Southern Peru shares was $3.1 billion?

A. I don't.

Q. Would you like to refer to -- there is an exhibit that has the prices of Southern Peru stock if you'd like to --

A. If you say that's what it is, I trust you.

Q. You talked about a proposal of 64 million shares that the committee made in September, September 23rd. Do you recall talking about the 64 million counterproposal?

A. Yes.

Q. And how did the special committee come

up with the number of shares, 64 million?
A. I don't recall.
Q. You talked about the committee's authority on direct examination. Do you recall that?
A. I do.
Q. And you were asked about whether the committee had the authority to negotiate or to evaluate. Right?
A. Yes.
Q. I'll ask you to turn to Tab 2 in your binder. This is Joint Exhibit 16.
A. Yes.
Q. That was the document that you were asked to read from that describes the committee's authority; right?
A. Yes.
Q. And you see that the second page of that document is a letter from Armando Ortega to the board. Do you see that?
A. Yes.
Q. And it's before you get to the actual resolution; right?
A. I'm with you.
Q. And do you see that it says, the last

sentence or the last phrase there, it says this is a " ... draft that takes into consideration the remarks made by Mr. Harold S. Handelsman in connection with the mandate of the CDD" -- committee of disinterested directors. Right?

A. Yes.

Q. -- "to confirm that they are entrusted solely to evaluate the Transaction." Do you see that sentence?

A. Yes.

Q. Do you recall providing some sort of feedback to a prior draft of this document where you made a comment about what authority the special committee should have?

A. Yes.

Q. And did you suggest that the committee should have solely the authority to evaluate the transaction?

A. I don't remember what the prior draft said. I know that the point that I was making is that the committee had to have the right to say no. And however the language was couched before that, I wasn't convinced that it said the committee had the right to say no.

And to me, maybe not to others, the term "evaluate" means you have the right to determine an outcome and say yea or nay, and that's what I thought was important because I thought that would generate a negotiation.

Q. So have you seen a prior draft of this document?

A. At one point, I did.

Q. Since 2004?

A. No.

Q. And the letter says, " ... confirm that they entrusted solely" -- I'm just focusing on the word solely -- "to evaluate ...." Right?

A. Yes.

Q. And your recollection as you sit here now, though, is that the prior draft was more restrictive on the committee's authority?

A. That's my recollection.

Q. Okay. Would you turn to Tab 14 in your book? This is Joint Exhibit 106.

A. I'm with you.

Q. And these are the presentation materials from Goldman Sachs on October 21, 2004. Right?

A. Yes.
Q. You looked at page -- I'll ask you to turn to Pages 21, 22 and 23 again. You looked at those on direct examination.
A. Yes.
Q. Are you there?
A. Yes, I am.
Q. And these pages present various numbers of Southern Peru's shares that would be issued in exchange for Minera Mexico under certain assumptions. Right?
A. Yes.
Q. You see that at the top of each of these pages, it says "Based on A&S cases." That's Anderson & Schwab. Right?
A. Yes.
Q. And Anderson & Schwab are the mining consultants that the special committee hired to quality-check the projections that were used by Goldman Sachs in coming up with DCF values. Right?
A. Yes.
Q. And you don't know what DCF values for either Minera or Southern Peru Goldman Sachs used when comparing the two companies on these two pages, do

you?

A. Do I know the numbers?

Q. The DCF values of the two companies that were being compared.

A. No.

Q. And those values are not in these presentation materials, are they?

A. The DCF values of Minera Mexico and Southern Peru are in other presentations by Goldman Sachs but not in this one, as I recall. They were trying to get to the ultimate issue, not continue on this issue of relative value, but show what relative value meant in terms of number of shares, because that was what we were trying to address.

Q. I just asked you whether those values were in these presentation materials, and I think you said no; right?

A. Right.

Q. And you don't know how Goldman Sachs came up with the number of shares that would be issued under each of the various scenarios in these metrices, do you?

A. Well, if you read the footnote, it makes a lot of assumptions. It doesn't disclose the

DCF values, but it does talk about those things that Goldman considered. And then you have the variations of the different royalty numbers, different issues about tax benefits, and so forth.

But no, if the point you're trying to make is that the relative DCF numbers of the two companies do not appear in this presentation as opposed to some other presentation, that's correct.

THE COURT: Let's pause there and we'll come back at 3:30.

(Discussion held off the record.)

(Recess taken.)

THE COURT: We will wait out Tobacco Jones. Off the record.

(Discussion off the record.)

THE WITNESS: Your Honor, I apologize for keeping you waiting.

THE COURT: All right.

MR. RUDY: Thank you.

BY MR. RUDY:

Q. Could you turn to Tab 9. Do you still have the binder in front of you?

A. I do.

Q. And this is just Joint Exhibit 101.

A. I am with you.

Q. And these are Goldman Sachs presentation materials from June 11, 2004; right?

A. Yes.

Q. And if you look through these materials, you see that Goldman Sachs in these materials lays out the DCF value of Minera Mexico in black and white in this document; is that right?

A. It does.

Q. Okay. If you turn to page 36, do you believe that that's your handwriting on page 36?

A. No, it is not my handwriting.

Q. I believe in your deposition you may have thought it was. Do you recall that?

A. No. I don't think it is my handwriting.

Q. In any event, if you look at the equity value as per A&S case -- do you see that? It is three columns from the right there.

A. Yes.

Q. And what does that column signify, in your understanding?

A. Well, this chart is what I call or what in finance is called a ladder, and what it does is it starts with one value and then it increases and decreases that value to get to another value.

And this one is a 980 -- what looks to be a $985 million value plus real estate tax benefits and synergies that get to a billion and a half dollar value for Minera Mexico. Is that what you mean?

Q. You have answered my question.

A. That's what I asked.

Q. And if you turn to page 42, this page is called an illustrative get/give analysis. Do you see that?

A. Yes.

Q. And this page summarizes the valuations that Goldman Sachs did using these three different valuation methodologies and juxtaposes them against the $3.1 billion ask for Minera; right?

A. Yes.

Q. And what is the give and what is the get? If you could summarize what entity is under give and what entity is under get.

A. Well, the give to me is the consideration that Southern Copper was going to pay in the merger for substantially 100 percent of the stock.

Q. Which is Southern Copper's shares; right?

A. Yes.

Q. Okay.

A. And the get is the value of what Minera Mexico was.

Q. Right. So --

A. What Southern Copper would have received in the merger for giving up $3.1 billion worth of stock.

Q. Okay. I asked you whether these types of black and white DCF analyses were present in the October 21 materials, an I think you said that they

didn't appear to be there. Is that right?

A. Yes.

Q. Do you know why these standalone DCF values weren't in the October 21 presentation?

A. I don't know what you mean by "these DCF analyses."

Q. Well, I asked you whether there were standalone DCF values in the October 21 presentation, and I think you said there weren't.

A. Right. But there was a progression. There was a progression of doing a DCF analysis on Minera Mexico and then there was a -- it progressed to doing a DCF analysis on Southern Copper, and that progressed into a thought of relative valuation rather than a comparison of the market value of Southern Copper to a DCF or other valuation of Minera Mexico.

And when you got to the relative valuation matrix, then to me the appropriate measurement was not necessarily the relative DCF valuation of the two companies but what that relative DCF valuation meant in terms of give and get at that point and using that methodology.

Q. The 67.2 million shares that were being given to Grupo Mexico in exchange for Minera,

how much were they worth?

A. I think at the time that the deal was approved by the board, they were worth about $3.1 billion, and I think at the time the transaction closed they were worth about $3.6 billion.

Q. Did the committee consider how much -- whether, in fact, the company could have sold 67 million shares into the stock market for some amount of money?

A. I don't think so, because that was about 85 percent of the then outstanding, so I don't think that we considered it seriously.

Q. Did the committee consider using cash to finance this transaction instead of stock?

A. Yes.

Q. You testified about Cerro and Phelps Dodge's -- well, when Cerro sold its shares in June of 2005; right?

A. Yes.

Q. And you said that you sold those shares at about the market price, subject to underwriting discounts. Do you recall that?

A. Yes.

Q. And do you know that the offering was

more than two times oversubscribed for those shares at the time that it was done?

A. I don't know that, but it wouldn't surprise me.

Q. You attended a meeting with Mr. Larrea on October 5 of 2004; right?

A. I don't recall.

Q. Okay. If you just turn to the proxy statement. I think it is Tab 4 in your binder.

A. Yes.

Q. And it is around page -- I think it is page 25. This is -- the proxy is Joint Exhibit 129.

A. Yes, I am with you.

Q. And do you recall where that meeting was?

A. I don't think I attended this meeting.

Q. Okay. Well --

A. I don't recall, but I don't think I did.

Q. Well, the proxy statement refers to discussions between Mr. Larrea and members of the special committee, and it also talks about conversations between Mr. Larrea and Cerro. Do you know if someone other than you was engaged in those

negotiations on behalf of Cerro?

A. Could you point me to that provision, please?

Q. The Cerro piece?

A. Yes.

Q. You are on page 25 of the proxy?

A. Yes.

Q. The large paragraph in the middle of the page.

A. Okay. Let me just read it, please.

Q. The last sentence of that paragraph.

A. I don't recall that.

Q. You don't recall that agreement on --

A. I don't recall having that discussion. I never would have agreed to that, but I don't recall having that discussion. It doesn't mean it didn't happen. I just don't recall it.

Q. When you say you never would have agreed to that, what is it that you never would have agreed to?

A. That I would have indicated an intention to vote. I didn't have the right to do that.

Q. Okay.

A. I couldn't have voted. If the committee voted no, I couldn't have said that Cerro would vote yes. I just -- I didn't do it at the end and I wouldn't have done it then.

Q. Did you review a draft of this document before it was sent to the shareholders?

A. I did.

Q. And do you know if you made any comments about this at that time? I know it is several years ago.

A. I don't recall.

Q. Do you know whether there were other people on behalf of Cerro that were speaking to Mr. Larrea at about that time about Cerro's interest in selling its shares?

A. I am sure there weren't.

Q. You are sure there were not?

A. There were not.

Q. And when you say you never would have -- I just want to be clear what your testimony is. The proxy statement says that on October 5, substantial agreement about the terms of this deal was reached; correct?

A. Yes.

Q. So, for example, 67 million shares were agreed to? Do you see that?
A. Yes.
Q. And there was an agreement to limit the aggregate amount of Minera's debt to a billion dollars; right?
A. Yes.
Q. And a pre-transaction dividend of $100 million would be paid; right?
A. Yes.
Q. And there was some general agreement about Grupo's environmental indemnity obligations?
A. Yes.
Q. And then the proxy says that during that meeting "Grupo and Cerro agreed that, if the parties reached agreement with respect to the terms of the proposed transaction, both Grupo Mexico and Cerro would indicate their intention to vote in favor of the transaction in the proxy statement to be sent to our stockholders."
A. I am not trying to be difficult with you. I just don't recall that happening.
Q. I am asking whether you don't recall it or whether you -- you said earlier, "I would never

have agreed to that."

A. No, what I said was I would never have agreed that Grupo Mexico and Cerro would indicate their intention to vote in favor of the merger if the special committee didn't. I didn't agree to that when it was proposed at the end and I wouldn't have agreed to it then. But I don't recall this happening.

Q. Okay. Well, taking Cerro out of the picture, the special committee on October 5 generally agreed to all of those terms of the transaction; right?

A. Correct.

Q. Okay. And those terms substantially became the terms of the final transaction; right?

A. With elaboration, yes.

Q. Right. And then the proxy statement talks about a meeting three days later between representatives of Grupo and the special committee on October 8. Do you see the same page of the proxy?

A. "On October 8, representatives of Latham & Watkins, Milbank Tweed and Grupo Mexico," that one?

Q. Yes. And that paragraph states in substance that, among other things, that an agreement

on a two-thirds vote was reached on October 8. Do you see that?

A. That's what it says.

Q. Do you recall that fact?

A. No, I don't.

Q. Do you have any reason to believe that that is not a true statement, that on October 8 that there was agreement reached on the two-thirds vote?

A. No. I assume that if it says that, it happened.

Q. Again, not to quibble, but do you also assume that it happened that Grupo Mexico and Cerro agreed to the terms from the prior paragraph?

A. When I reviewed this proxy statement at the time, I didn't find it -- any fault with it.

Q. Right.

A. And so at the time I must have thought this was true. Today I have absolutely no recollection about that.

Q. Okay. Now, if you take the October 5 meeting and the October 8 meeting, on October 5 there was substantial agreement about the major terms of the deal; right?

A. Many of them.

Q. Right. Well, the price term, the dividend, the debt, the environmental liabilities; right?

A. Right.

Q. And then October 8 there is an agreement then on a two-thirds vote; right?

A. Yes.

Q. And a two-thirds vote, I think you testified, would require Grupo Mexico plus either Cerro or Phelps Dodge; right?

A. Yes.

Q. I don't think it is in your binder there, but next to you there is an Exhibit 52. If you could pull that out.

A. I am sorry, but I have one that says Exhibit 71 to 110. I have another one that says Exhibits 1 to 25, another one that says 111 to 134 and another one that says --

THE COURT: Donna, could you help the witness?

THE WITNESS: So I don't have what you just asked me for.

THE COURT: There must be a binder missing. There must be --

MR. COEN: It is in the rack.

THE COURT: Right. It probably got moved around.

THE WITNESS: Turn to which exhibit?

BY MR. RUDY:

Q. 52.

A. Yes, I am there.

Q. You see that that starts with a fax page from Mr. Larrea to you?

A. Yes.

Q. Okay. And then the next page appears to be a letter that's to Cerro?

A. Yes.

Q. And do you see that in the first paragraph, last sentence, it says, "We would like to obtain your agreement that you will vote to approve this Transaction." And the paragraphs below describe the terms of such agreement. Do you see that?

A. Yes.

Q. And this is from Mr. Larrea to you -- right? -- dated October 13?

A. Yes.

Q. And the fax page says, "As per our conversation on this matter"; right? The fax page is

one page prior.

A. Yes.

Q. Okay. Do you see that?

A. Yes, I do.

Q. Do you recall having a conversation with Mr. Larrea at or before that date, October 13?

A. No.

Q. Okay. And then looking again at the body of the letter, where it says, "SPCC" -- it is about halfway down the first page. "SPCC is willing to provide full management support," et cetera?

A. Yes.

Q. For a secondary offering; right?

A. Yes.

Q. Okay. And then the second to last paragraph of that letter on the next page, do you see that it says in the event that the special committee recommends the transaction, et cetera?

A. Yes.

Q. Okay. And do you agree that in that paragraph that Mr. Larrea is actually proposing language that Cerro's agreement to vote in accordance with the special committee's recommendation, that that's actually his language that is being proposed to

you?

A. It does seem to say that.

Q. And you also agree that if the proxy is true, that on October 5 there was an agreement between Cerro and Grupo Mexico and between the special committee and Grupo Mexico on most of the terms, and that on October 8 there was also already an agreement as to a two-thirds vote; right?

A. Yes.

Q. Okay. I am going to ask you to look at Tab 8, which is in the binder that your counsel gave you, which is Exhibit 156.

A. Yes.

Q. Now, you see here that Grupo had been proposing that the transaction be based on a floating exchange ratio; right?

A. Yes.

Q. Okay. And then the special committee counterproposed that the transaction be based on a fixed exchange ratio with a 20 percent collar; right?

A. Substantially later, but yes.

Q. Substantially -- I am sorry?

A. Later, but yes.

Q. Okay. And I will ask you to look at

Tab 13 in your binder, which is Exhibit 159.
A. Yes.
Q. And the committee -- this is the counterproposal substantially later that you referred to, I guess; right?
A. Yes.
Q. And it says on valuation protection, on the second page of that document --
A. Yes.
Q. -- that the committee considers it essential that the merger agreement contain provisions described in that box; right?
A. Yes.
Q. And the two provisions are majority of the minority and a 20 percent collar; right?
A. Yes.
Q. And Goldman Sachs had suggested that the special committee ask for a fixed exchange ratio rather than a floating exchange ratio; right?
A. I don't remember whether it was Goldman Sachs or us, but somebody did.
Q. Okay. Do you recall at your deposition being asked whether Goldman advocated that the committee ask for a fixed exchange ratio and you

said that was your understanding?
A. I don't recall that.
Q. And you also don't recall whether they advised you that there should be a collar then?
A. I think that the advice about the collar came from Latham & Watkins.
Q. And as you testified, Grupo said that they would agree to a fixed exchange ratio but with no collar; correct?
A. Yes.
Q. And the special committee agreed to that collarless fixed exchange ratio; right?
A. Yes.
Q. Goldman didn't give any analysis to the special committee about whether the fixed exchange ratio would be fair without a collar, did it?
A. Goldman said the financial terms were fair, and I consider that a part of financial terms, so I think they did say it was okay.
Q. At the end of the process; right?
A. Correct.
Q. But at the point of -- during the negotiations, when the special committee agreed that they didn't need a collar on this transaction, do you

recall getting any advice from Goldman Sachs as to that?

A. I don't.

Q. You understand that Grupo Mexico had the ability to vote its shares against this transaction after October 21; right?

A. Yes.

Q. So the collar really only protected the company against the share price going up; right?

A. Yes.

Q. And if the share price went down, to the extent that Grupo Mexico wanted to vote no, it could do that; right?

A. Yes.

Q. The document that you have in front of you, when it describes the collar, states that it would give -- both parties would be granted a walk-away right; right?

A. Yes.

Q. And Grupo already had a walk-away right; right?

A. I don't think so. There was no contract at this point. The time that it took from this early part of October till October 21 was for the

lawyers to draft a contract. And, you know, I didn't know at that time what it said, so I didn't know at that time whether Grupo Mexico was going to vote -- agree to vote in favor of the transaction or not.

I do know that they ultimately agreed that they wouldn't commit to vote one way or the other. But I don't know what the status of that was at this time.

Q. And you know that after October 21, 2004 Southern Peru's stock went up by approximately $10 a share; right? Between then and the closing.

A. I don't know by how much, but it went up substantially.

Q. And if there had been a collar on the transaction, do you know whether it would have been triggered by that price movement?

A. It might have been.

Q. You testified that you called someone at Goldman Sachs prior to I don't know if you said the closing or the vote, to get their opinion about if anything had changed; right?

A. Yes.

Q. Okay. Who did you call?

A. I don't recall.

Q. You know it was someone at Goldman Sachs, though?

A. There was a whole team of people from Goldman Sachs, and I called one of them. I think his name was Sanchez, but I am not sure.

Q. Okay. When you would call Goldman Sachs, were there specific people who you would speak to or did you speak to anyone who was available on the team?

A. My recollection is that there was a woman named Fernandez who came from Brazil, who was one of the senior members of the team, and I spoke with her from time to time, but that the head member of the team was a guy called Sanchez, and I spoke with him most. But I didn't speak with them much.

Q. Okay. You testified about a DCF -- a presentation that was made to you on June 23, which analyzed Southern Peru's -- which was a DCF analysis of Southern Peru. Do you recall talking about that presentation?

A. I do, but I don't remember the date. I mean, I take your word for it.

Q. Okay. And you testified that when you saw the DCF value of Southern Peru, that you were I

think your word was comforted by it. Do you recall saying that?

A. I do.

Q. And why were you comforted by seeing that Southern Peru's DCF value was so much less than its stock price?

A. Because I looked at these two companies and I knew basically what they earned. I knew what their assets looked like. I had an idea of what their projections were, and I assumed that their values would be somewhat comparable.

And as I have said before, when you did a DCF analysis of Minera Mexico and you looked at the market value of Southern Peru, they weren't comparable. They were quite different.

So my gut feeling was that this was a transaction of a merger of equals. That was not suggested by a comparison of the DCF valuation with the market valuation, but it was consistent with my thinking when you looked at the DCF of both companies on a relative basis.

THE COURT: But you have been in M&A a long time.

THE WITNESS: True.

THE COURT: Markets -- I mean, the market is missing way high here?

THE WITNESS: No. I think the market missed way low on Grupo Mexico is what I actually think. It was in a Third-World country. It wasn't subject to the kinds of scrutiny that American companies were. It was embedded inside a Mexican company that did other things. The company, frankly, because of the troubles with ASARCO had not been cared for well and had been capital-constrained.

And the whole premise of this transaction was to use the fisc of Southern Peru and its pristine balance sheet to develop the mining assets of Minera Mexico, and I believe that's what happened.

So I don't think that the market overvalued SPCC as much as it undervalued Grupo Mexico.

THE COURT: So when I decide this case, it is not on the basis that you couldn't have actually gotten that value that's in the market price for the Southern Peru shares.

THE WITNESS: Could we have sold Southern Peru for equal to or greater than its market

price?

THE COURT: Yes.

THE WITNESS: Is that what -- I think so.

THE COURT: Except for the control factor.

THE WITNESS: Well, yes. It couldn't have been sold unless Mr. Larrea wanted it sold.

But I believe that that -- I believe that the market value accurately reflects the value of a company in the public market as long as there is no hidden agenda somewhere. So if there is --

THE COURT: But you believe you got value that was as good as you would have gotten in a market sale of Southern Peru?

THE WITNESS: In terms of buying Minera Mexico?

THE COURT: Yes.

THE WITNESS: Yes, I do.

THE COURT: So that was as good or a better deal than if you just simply sold out control of Southern Peru.

THE WITNESS: I think it turned out to be a fantastic deal, Your Honor.

THE COURT: Okay. But you believed that at the time. I mean, you realized --

THE WITNESS: I believed it at the time and I do today.

THE COURT: And you knew, obviously, what the value was of what you were getting, giving up, and you believed that what you were getting when you kicked the tires on it and looked behind it on the real cash flow potentials, you believed it was worth the candle.

THE WITNESS: I do. I did and I do.

THE COURT: Okay. 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.

THE WITNESS: No.

THE COURT: Okay.

THE WITNESS: No. We thought Southern Peru was a pretty good company.

THE COURT: 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.

THE WITNESS: Usually that's a denigration of value --

THE COURT: Yes.

THE WITNESS: -- not an increase in value.

THE COURT: I understand. But we see a lot of wacky cases in this court. Not saying this is a wacky case. But there are securities where they trade so little that if you actually tried to trade substantially more, the effect on the market price would be downward, not upward, if you get my drift.

THE WITNESS: 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.

THE COURT: Okay.

BY MR. RUDY:

Q. Sir, did you make an assessment of the value of Minera as of October 21, 2004?

A. Of course.

Q. Well, so what was the value of Minera?

A. 67.2 million shares of Southern Peru's stock at its market price.

MR. RUDY: One second, Your Honor. (Pause) Nothing further.

MR. STONE: Just one question, Your Honor.

REDIRECT EXAMINATION

BY MR. STONE:

Q. Mr. Handelsman, you were asked about whether the committee considered using cash in the transaction. Why didn't the committee use cash?

A. Well, it would have gotten -- it would have had to have gotten the cash. Minera Mexico already had a billion-three or a billion-four of debt. SPCC had a commitment based on environmental factors to build a new smelter in Ilo for between 800 million and a billion and a half dollars, which it was going to have to borrow to buy. So if -- that means that the combined debt of the two companies before you started the transaction was, let's say, 2 billion-plus.

If you are then going to pay even the DCF value for Minera Mexico, you would have had to

borrow another $2 billion. So the combined entities would have had $4 billion of debt.

Putting aside it is not my job to decide whether that amount of money could have been borrowed -- I doubt it, but it is possible -- but it would have defeated the purpose of this merger. The purpose of the merger was to combine the operations of these two companies in a noncapital-constrained way in order to achieve the kinds of results at the Minera Mexico that had not been achieved because the company had been capital-starved for a while. So it didn't make any sense to pay cash for the company.

If I had to make the decision whether you were going to pay cash for the company or not buy the company, I would say not buy the company.

MR. STONE: That's all I have, Your Honor.

THE COURT: Thank you, Mr. Handelsman. You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. STONE: Your Honor, as I told you before, we have one witness who is arriving within the hour from Mexico and another one who is arriving from

Peru tomorrow morning.

THE COURT: Okay.

MR. STONE: So at this point we don't have anyone else to put on. And nonetheless, I think we probably can finish this week if the examinations are as efficient as they have been so far.

THE COURT: Do plaintiffs have anybody?

MR. BROWN: We have our expert witness here.

THE COURT: Well, it is up to you. I mean, I don't want to, you know, -- it is 4:05. I don't like downtime. On the other hand, I also don't like unexpectedly having counsel having to do something. But it is your choice, Mr. Brown.

MR. BROWN: Well, I mean, I don't mind doing it, Your Honor, but I think based on what I know about the timing of the other witnesses, we are not going to have a problem getting this done.

THE COURT: Okay.

MR. BROWN: That's my opinion.

MR. STONE: Yes, I think that's right.

THE COURT: If that's your opinion, then I am going to -- it is a professional one. I

mean, and I will rely upon it. But what I don't want to do is end up with backtracking. So, I mean, you are moving rapidly, so why don't we go with that, and then it will be more natural for the witness and you as well.

MR. BROWN: Okay. I mean, if you want to do it, we will do it.

THE COURT: No, I don't want to, because again, I don't want to push -- and you think about -- I mean, I understand it from your perspectives. You think about things in a certain way. And it is also the witness -- I doubt we will get done the witness. Then you will have to go back. And so I would rather not do that.

So you have got -- they are coming from Peru and Mexico?

MR. STONE: Yes, Your Honor.

THE COURT: Okay.

MR. STONE: I mean, ideally, we would put one on tomorrow morning and another one on on Thursday morning, which would be very brief. I am not sure that we can get both of them on because one is just arriving tomorrow morning.

THE COURT: The one from Mexico.

MR. STONE: The one from Peru.

THE COURT: Okay.

MR. STONE: Taking a night flight.

THE COURT: The one from Mexico will want to go on, and then he will want to watch the Gold Cup semifinal --

MR. STONE: More than likely.

THE COURT: -- if he is really Mexican. If he does not, then I think he will be inauthentically Mexican. But you would have to find out where he can get Fox Soccer Channel or Univision tomorrow evening at 9:00.

MR. STONE: We will figure that out.

THE COURT: Because just as a courtesy to him, I feel -- the Peruvian may be interested, too, but it will be a little less passionate and interested than the Mexican witness will be.

So thank you for being so cooperative with each other and for making good progress. It is rare that we are actually ahead of schedule. We will try to keep that way, and I will see you tomorrow. We will go from 9:00 to somewhere around noonish. What we will do is we will take a very brief morning break.

Will we have both witnesses tomorrow?

MR. STONE: Your Honor, as I said, we will only have the one who is coming in from Mexico. The one from Peru is arriving in the morning, and so --

THE COURT: Well, do you think it is going to take all morning?

MR. STONE: I expect that the witness we are putting on tomorrow will have about an hour of direct.

THE COURT: Okay. How about cross?

MR. BROWN: Half an hour max, I think.

THE COURT: Well, then what I am wondering -- well, let's just see where we are, but it may make sense to be ready to use some of the time, if we can, if that doesn't put your witness out. But with a little bit more -- you know what I am saying?

MR. BROWN: Yes. I think -- I mean, I don't mind. We had some discussion about it. I am not sure I really know the answer. But we don't mind sort of piecemealing this to bits and pieces.

THE COURT: Oh, no. I understand. But why don't you do that. I mean, just be prepared. You may want to start, you know, the testimony, the direct of your expert. Then it will only be broken up

by a day; right? Because --

MR. STONE: Actually, it probably is broken up only by an hour, because the witness we are putting on on Thursday morning is really, we think, a half hour of direct and a half hour of cross at the most.

THE COURT: Right. And do you have an expert?

MR. STONE: We do.

THE COURT: Okay.

MR. STONE: He has been here the entire time, so he can go on as soon as --

THE COURT: Well, who would go next? I mean, who is going to go first with the experts?

MR. BROWN: We were going to do it that we went first.

THE COURT: Okay.

MR. BROWN: If it needed to be switched around, it doesn't bother me.

THE COURT: You two work that out. What I am saying is let's use each morning as productively as we can in light of the breaks so that we don't run -- I also don't want anybody -- it would be good if you could finish Friday. I don't want

anybody at 3:00 in the afternoon feeling like they are rushing. You know what I mean? Where you are up there and you are saying I want to rush against the clock.

MR. BROWN: But, Your Honor, I will say, I mean, we want to get it done as soon as possible, but even if we did one witness tomorrow, one witness Thursday morning, the two experts, I mean, the expert -- this is -- it is a strange case.

Like, the issue that is the real subject of this agreement is pretty narrow. And so I don't expect a huge amount, you know, lengthy --

THE COURT: It is pretty narrow but it is huge.

MR. BROWN: That's exactly correct. It is a small issue, but -- defining it is easy. The magnitude of it, it seems large. So that the expert testimony --

THE COURT: Yes. What I am getting at, just so you all know what I am going to be asking about in the briefs, I am not not sure conceptually -- we just had Mr. Handelsman testify; right? I think what he is saying is that properly marketed and examined, what you bought in Minera -- what he is

saying is, I believe, what he is buying in Mexico is of the same value of what he was giving up in Southern Peru; that it is not that there is some real -- this is not like someone, I guess, stubbornly looking, saying, "Silver ought to be valued like gold. I can't figure out why the market values gold more than silver, but it does, darn it, but they should be worth the same, and I am going to do an exchange." I didn't understand his testimony that way.

I think his testimony is, frankly, you know, if you could freely market what we were getting in Minera in the M&A market, it would generate the value that we were giving up in Southern Peru. And that's where I think the experts -- because I am not sure it is this big conceptual gap. I could be wrong about that. But it may be a factual one, again, about motivations and all, and that's what I meant, you know.

But that's on my mind, and you will have to think about it in the briefs, because I am going to be -- I am the 12, and I will have to write up about that. But that's in my mind what I am wrestling with sort of as a matter of thinking about the case. Because I am not -- again, I am not sure it

is an analytical gap as much as a factual, you know, did they make the right judgment about ball-parking these things. But, you know, you guys can set me -- you are both excellent lawyers, and you will be able to set me straight in your papers.

But thanks again for the progress. We will see you tomorrow.

MR. STONE: Thank you, Your Honor.

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(Court adjourned at 4:13 p.m.)

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, June 22, 2011
9:00 a.m.

- - -

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

- - -

TRIAL TRANSCRIPT - VOLUME II

- - -

CHANCERY COURT REPORTERS
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THE COURT: Good morning, everyone. You may proceed.

MR. BROWN: Your Honor, just a point of scheduling. Mr. Stone and I spoke earlier. If it's okay with the Court, the way we'd like -- the way we've agreed to proceed is there will be a witness today, Mr. Ortega. He's not going to take up the entire three-hour block. The last fact witness will -- is coming in later today. So he'll be tomorrow. He's extremely short. So we'd like to start the experts after the fact witnesses.

So then we'll do our expert tomorrow. We have -- we're virtually certain that he'll be finished tomorrow. So Friday we'll just have the defendants' expert.

THE COURT: If you're confident, that works for me.

MR. STONE: I think that works, Your Honor.

MS. KOROT: Good morning, Your Honor. My name is Mia Korot in the law firm of Milbank Tweed. I wasn't here yesterday.

The defendants call Mr. Armando Ortega

as their next witness.

ARMANDO ORTEGA, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KOROT:

Q. Good morning, Mr. Ortega.

A. Good morning.

Q. Mr. Ortega, could you please summarize for the Court your education?

A. Yes. I started attorney at law at the Escuela Libra de Derecho, it's a law school in Mexico. And then I made postgraduate studies on international trade at the Itam, which is University in Mexico.

Q. Could you please summarize for the Court your employment history after your postgraduate studies?

A. Yes. I did work for 18 years for the Mexican government primarily on international trade matters. And then, in year 2001, I went to the private sector to work for Grupo Mexico, which is a natural resources and transportation company where I was the general counsel.

And in year 2002, I was nominated as the general counsel of Southern Peru Copper

Corporation, which was the name of Southern Peru Copper Corporation initially, and then it was changed to the current name which is Southern Copper Corporation.

Then in year 2010, I left Grupo Mexico and I went to work for a Canadian company, a mining company called New Gold. I'm the vice president of Latin America for that company and the director general of its subsidiary in Mexico called Minera San Xavier.

Q. Mr. Ortega, you said you worked for the Mexican government for approximately 18 years. What positions did you hold with the Mexican government?

A. I held several positions, and primarily as negotiator for international trade matters. I did participate in the NAFTA negotiations. I did participate in the negotiations between Mexico and the European Union for the free trade agreement. And I also did participate as negotiator on international matters in Geneva related to the creation of the World Trade Organization and similar arrangements.

Q. Mr. Ortega, when did you first learn

about the possible merge of Minera Mexico and Southern Peru Copper Corporation that's the subject of this litigation?

A. I first heard about this transaction at the end of year 2003. But for the transaction as such, I learned in its full details when it was presented to Southern Copper Corporation's board in February 2004.

Q. Just going back for a moment. What was your position in or around February 2004 at Grupo Mexico or SPCC?

A. In Grupo Mexico I was the general counsel. And in Southern Corporation I was the general counsel, the secretary of the board, and I was member of the board. I was a director.

Q. And when you first learned about the proposed merger, what was your understanding of that proposal?

A. Well, my understanding was that it would be a related party transaction and we were advised by our outside counsel -- U.S. lawyers -- that we should take several precautions related to that transaction in order to insure that it would be fair.

Q. What happened after you first learned

about the proposed merger in February 2004 when it was presented to the SPCC board?

A. After the transaction was presented to the board, the board established or formed a special committee of disinterested directors in order to have this special body analyze and, if so, merit it and approve the transaction later on.

Q. Who were the initial members of that special committee that was formed?

A. The initial members of that committee were Mr. Pedro-Pablo Kucyzinski. Mr. Perezalonso and Mr. Harold Handelsman.

Q. And how come you were not a member of that committee?

A. Well, I was not entitled to be a member of that committee because I was a nonindependent. I was related to the proponent of the transaction with Grupo Mexico.

Q. Did the composition of the special committee change?

A. Yes. It changed, because after the formation -- days after the formation of the committee, the chairman of that committee, Mr. Pedro-Pablo Kucyzinski left the board because I

was nominated by the Peruvian government as minister of finance, and in his place, Mr. Miguel Palomino entered into the board as an independent member.

And around the same days -- I don't recall which position -- Mr. Carlo Sacristan also joined the board and he was elected as chairman of that body.

Q. To what extent were any of the members of the special committee affiliated with Grupo Mexico?

A. They were not affiliated to Grupo Mexico.

Q. You testified that Mr. Ruiz came onto the special committee. Do you recall whether there were any concerns raised about Mr. Ruiz joining the special committee?

A. One of the members of the committee, and precisely the exiting member, Mr. Kucyzinski raised a question concerning Mr. Carlos Sacristan because Mr. Ruiz Sacristan was proposed by the minority stockholder by Grupo Mexico. So he was concerned that that fact could in and of itself create a problem.

Q. What was done to address Mr. Kucyzinski's concern?

A. Mr. Kucyzinski suggested that the special committee would talk to U.S. lawyers -- to lawyers of his confidence -- in order to insure that Mr. Carlos Ruiz would be effectively disinterested and that issue would not be an obstacle to the proper functioning of the body.

So there was a meeting or a conference call -- I don't recall what position -- where this issue was addressed. And at the end the members of the disinterested body, together with the lawyers, confirmed that Mr. Carlos Ruiz Sacristan was effectively disinterested and independent.

Q. Mr. Ortega you should have a binder by you. If you could turn to Tab 1 of that binder. That document's be marked JX 59.

A. Yes.

Q. Do you recognize this document?

A. Yes, I do recognize it.

Q. What is this document?

A. Well, it's precisely a communication that I did address to the board in connection with an issue raised by Mr. Kucyzinski regarding whether Mr. Ruiz Sacristan was fit or not to be part of this special committee body. And here I am briefing the

board that there was a discussion with lawyers that Mr. Kucyzinski recommended and that in the end they were satisfied -- fully satisfied that he was -- Mr. Carlos Ruiz -- both independent and disinterested in the transaction.

Q. Did you have any concerns about the independence of any of the members of the special committee?

A. No.

Q. Mr. Ortega, in your view, what was the special committee's mandate?

A. The special committee's mandate was to insure that the transaction could be then in an arm's length manner and that it would be fair for all the stockholders.

Q. Did that include the ability to negotiate?

A. Yes, of course. And they did so for many months.

Q. Did the special committee retain any advisors to assist them in their consideration of the transaction?

A. Yes. The special committee was empowered to retain several advisors and, in fact,

they retained a financial advisor. They retained an outside counsel and they retained a mining consultant.

Q. Do you recall what the names of those advisors were?

A. Yes. The financial advisor was Goldman, Sachs. The outside counsel was Latham & Watkins, and the mining consultant was Anderson & Schwab.

Q. Did the special committee also retain Mexican legal counsel?

A. Yes. They retained a well-known Mexican law firm call Mijares, and this law firm helped them with the analysis of law information in Mexico.

Q. You mentioned that the special committee retained a mining consultant. If you could turn to Tab 2 in the binder. It's a document marked JX 66.

A. Yes.

Q. Do you recognize this document?

A. Yes, I do recognize it.

Q. What is this document?

A. Well, this is a letter that I did address to the chairman of the committee regarding

precisely the engagement of Anderson & Schwab.

Q. If can you look at the second paragraph of this letter. I'll summarize. You discuss the retention by -- of the special committee of Anderson & Schwab and two people that were assigned to the Anderson & Schwab team, Mr. Charles Smith and Mr. Ralph Stricklen. And you write about a potential conflict of interest with SPCC. What was that conflict of interest?

A. Well, in this letter I'm raising the concern that, in our view, Anderson & Schwab was more a management consultant than a mining consultant, and therefore they were in need of hiring additional mining experts -- several of them -- eight.

Here the point I'm making is that two of them had a conflict of interest with Southern. Without recalling too much of the details, I do recall that the first gentleman, Mr. Charlie Smith, used to work for Southern and we were in the midst of litigation. And Mr. Ralph Stricklen, who was somehow a supplier or something like that, and we had terminated an agreement with him. So our concern was that this could influence their views and we raised those concerns to the committee.

Q. And what happened after you raised those concerns to the special committee?

A. Well, in one of the cases -- in the case of Mr. Charlie Smith, committee didn't retain him. And in the case of Mr. Stricklen, the committee retained him because they thought that he would not influence his work -- the fact that we mentioned.

Q. And other than your letter identifying your conflict -- a potential conflict of interest with Mr. Stricklen and Mr. Smith -- what if any other concerns did you have about the special committee's retention of Anderson & Schwab?

A. No other concern.

Q. Turn to Tab 3 in your binder. There's a document marked JX 67.

A. Yes.

Q. What is this document?

A. This is the engagement letter with Anderson & Schwab between Southern Peru and Anderson to engaged them.

Q. Who is this letter addressed to?

A. To Mr. Carlos Ruiz, the chairman of the committee, and to myself.

Q. Why is this letter addressed to you?

A. Well, it is addressed to me because the company was formerly the one who hired and paid for the fees of every consultant or every advisor. So it was addressed to me because I was the interlocutor and I was the one who was insuring that they got paid.

Q. What involvement did you have in the special committee's retention of its advisors other than acting as an interlocutor?

A. None.

Q. Based on your observation, to what extent did anyone else at Grupo Mexico have an influence on the special committee's retention of its advisors?

A. No member of Grupo had any influence.

Q. Mr. Ortega, once the special committee was formed and started evaluating the transaction, what role, if any, did you have with respect to that process?

A. Well, my main role, as I said, was to act as an interlocutor between the proponent, which was Grupo Mexico and the special committee of disinterested directors. And a process like this demands a lot of transmission of information.

I was in charge of the data room that

was formed to provide all the requested information by the committee and its advisors. And that data room was very demanding because it contained financial information, legal information, corporate information, in particular, of the Mexican assets. And that was my main role.

On the other side also to insure that we would now, as part of Southern Copper, act properly in terms of the process to be followed. That was my other role.

Q. In your role as interlocutor in transmitting information, was there ever a time that the committee was denied any information?

A. No, not at all.

Q. Was there ever a time that the committee's advisors were denied information?

A. No.

Q. You also mentioned -- well, what involvement did you have in the transmission of term sheets between the special committee and Grupo Mexico?

A. I was the one trusted to precisely do that -- to transmit the term sheet proposals -- and that was my participation. I, for example, crafted the letters addressed to the committee, including this

information.

Q. And what role, if any, did you have in crafting the substantive terms of the merger?

A. My role was limited, if at all, to the legal side of the term sheet. But Grupo had previously engaged its own financial advisor to help in the substantial part of the proposal.

Q. Based on your observation of the special committee's process, to what extent did anyone from Grupo Mexico try to influence the special committee and its process?

A. No one at Grupo Mexico did try to influence in any way or in any manner the works or mandate of the committee.

Q. And approximately -- over approximately what period of time did the special committee evaluate the proposed transaction?

A. As I said, it was a long time because the committee was established at mid February 2004 and it reached its final task at the end of October that year. So around eight months.

Q. And based on your role as interlocutor and providing information back and forth between Grupo and the special committee, how would you describe the

special committee's relationship with Grupo Mexico?

A. Well, there were respectful relations. But I have to say that the committee was very demanding and there were many petitions that were put on the table. Some related to the structure of the transaction itself, but others related to corporate government changes within the company where the transaction was to be approved. So it was a very active, a very active negotiation. A very active transaction, if I might say.

Q. Did there come a time when the special committee voted to recommend the merger between Minera and SPCC to SPCC's board?

A. Yes. As I said, at the end of October, 2004, the committee finally -- it was able to finish its task and it presented it to the rest of the board the transaction to be approved. And it did so and the special committee was in favor of that transaction and the board did approve the transaction.

Q. And what happened after the special committee made its recommendation to the SPCC board recommending the merger?

A. Well, the board approved the transaction, as recommended by the special committee.

And afterwards, some of the managers of Southern Copper were empowered to continue working on the transaction in order to present this transaction for the approval of the stockholders. And in particular, they were entrusted to start working on the proxy statement, since Southern Copper is a U.S. listed company. It was obliged to craft the proxy statement for its stockholders.

Q. Backing up to October 21st, 2004, when the special committee made its recommendation to SPCC's board, do you recall what happened at that meeting after that recommendation was made?

A. After that meeting? Well, the board approved, as I said, the transaction and the committee made the presentation to the board. They had their financial advisor making a presentation, and they had their outside counsel making also a presentation and highlighting the several aspects that were taken into account, including some of the protections for the minority stockholders, for example.

Q. And did you vote to approve the merger?

A. Yes. I was a director and I did approve the merger.

Q. And why did you vote to approve the merger?

A. Well, because it was an arm's-length and fair transaction and because I had witnessed that it was done properly.

Q. When you say you witnessed that it was done properly, what do you mean?

A. Well, I was participating. I did participate in the process, so I was sure that several of the normal concerns of any stockholder had been taken into account.

Q. Take a look at Tab 4 in your binder. This document is marked JX 129. It's the proxy statement that you were just discussing. What involvement, if any, did you have in preparing this February 25th, 2005 proxy statement?

A. I did participate in the crafting of this document, but merely to insure that it would accurately reflect all the process that took place regarding the approval of this transaction, and that all the information contained was also correct and accurate because, as you may see, there are a lot of data regarding each of the subsidiaries and financial information and legal information, et cetera. So that

was my participation.

Q. Did SPCC shareholders ultimately vote on whether to approve the transaction?

A. Yes. An overwhelming majority of Southern Copper's stockholders did approve the transaction.

Q. Mr. Ortega, to the best of your knowledge, did any shareholders ever raise any questions or concerns about the proposed transaction?

A. Yes. There's one of the then so-called founding stockholders, Phelps Dodge, did raise questions regarding the transaction.

Q. You said Phelps Dodge was one of the founding shareholders. Who were the other founding shareholders?

A. Grupo Mexico and Cerro Trading.

Q. What were the concerns that Phelps Dodge raised?

A. Well, the concerns were related precisely to the nature of the transaction. I mean, being a related party transaction, they were concerned that it would be done properly. So that was the crux of their concerns.

Q. Were Phelps Dodge's concerns shared

with the special committee?

A. Oh, yes. Phelps Dodge made known their concerns, and these concerns were transmitted to the special committee of disinterested directors. And to the best of my knowledge, they met or held conversations together with their lawyers. And in the end Phelps Dodge was satisfied that these concerns were addressed by the special committee.

Q. I want to switch gears a little bit and talk about registration rights. Did there come a time when either Cerro Trading Company or Phelps Dodge approached the company seeking registration rights?

A. Yes.

Q. And when was that?

A. Both companies did approach Southern for getting their registration rights agreement. Initially it was Phelps Dodge. I don't recall with precision, but during 2004. And several at the end of that year, around the same time when the transaction was approved.

Q. And do you know why Phelps Dodge or Cerro needed trading rights to sell their shares and why they couldn't just sell them on the market?

A. Well, I'm not a legal U.S. expert, but

I understand that for being in those days affiliated companies, they had an impediment under securities laws in the States to openly sell their shares. So in order to do that properly, they need a registration rights agreement. There was a threshold of volume that they can sell and all that. That is my understanding.

Q. You mentioned that Phelps Dodge had sought registration rights in 2003. What was the company's response to their request for registration rights at that time?

A. I don't recall with precision exactly when was the first time that Phelps Dodge asked for such an agreement. I do recall that Grupo Mexico had a resistance -- I would say a natural resistance -- to granting such agreement, and more in the midst of the ongoing analysis of the transaction because Grupo Mexico thought that it could have a bearing and impact in terms of the market perception of an existing stockholder in the midst of a transaction.

Q. And did there come a time when the company changed its mind with respect to registration rights?

A. Yes. After the transaction was

approved by the board and, in particular, because the special committee of disinterested director asked for it because they could see that it could grant additional liquidity to the company. Grupo Mexico was ready to grant the agreement, and it did so.

Q. What involvement, if any, did you have in the negotiation of the registration rights agreement with either Cerro or Phelps Dodge?

A. Well, I did participate in negotiations, together with my U.S. outside counsel. And that was my participation.

Q. What role, if any, did the special committee have in that process?

A. Well, the only role I do recall was the recommendation that I referred to, which is that it would be beneficial to the company to enter into this registration rights agreement in order to enhance the liquidity of the company. But the special committee did not have any direct participation in the negotiation of the corresponding agreements, neither with Cerro nor with Phelps.

Q. So what extent were drafts of the registration rights agreements shared with the special committee?

A. As far as I recall, the draft that was shared with the committee was between Cerro -- sorry. One of these drafts was shared with a committee. That is what I do recall.

Q. Do you recall whether the special committee had any comments to the drafts that they saw?

A. Well, that draft, the one I'm referring to, it would have been something previous to the last draft, if I may say so, that draft was shared to the committee, and the committee didn't like a provision that it contained. The agreement contained a clause by virtue of which -- by granting the registration rights agreement to Cerro, Cerro would commit to vote in favor of the transaction. So the committee didn't like that provision and they asked the company to withdraw it.

Q. And did the company withdraw that provision?

A. Yes.

Q. What happened to that provision, if you recall?

A. I don't recall any of the details, but I do recall that both Cerro and Grupo agreed to leave

away that provision and Cerro agreed to vote in conjunction with the vote that the committee would have because all this was happening in the previous days to the approval of the transaction.

MS. KOROT: Thank you, Mr. Ortega. Pass the witness.

CROSS-EXAMINATION

BY MR. ZAGAR:

Q. Good morning, Mr. Ortega.

A. Good morning.

Q. You said earlier that, at the time this transaction was being discussed, you served as general counsel of Southern Peru; correct?

A. Yes.

Q. At that time you also served as secretary of the board of Southern?

A. Yes.

Q. And at that time you also served as general counsel of Grupo Mexico; correct?

A. Correct.

Q. And for the transaction that is the subject of this litigation, you were acting as general counsel of Southern Peru; correct?

A. Yes.

Q. You were also part of a group of executives that was advising on this transaction, weren't you?

A. Yes.

Q. And that group of executives was led by German Larrea; right?

A. Right.

Q. In this transaction, Mr. Larrea was proposing that Southern Peru acquire Grupo Mexico's interest in Minera; correct?

A. Correct.

Q. So Grupo was on one side of the transaction and Southern was on the other side; right?

A. Yes.

Q. And the group of executives of which you were a part was advising Mr. Larrea on the Grupo side; right?

A. Right.

Q. The special committee was representing the Southern side; right?

A. Right.

Q. You testified earlier that you were in charge of the data room; correct?

A. Correct.

Q. The data room for which company?

A. Well, the data room was established for the benefit of the special committee of disinterested directors. And I have to clarify the following. I had the role in those days of both general counsel of Grupo and general counsel of Southern Copper. And with regard to this transaction, I consulted with my outside counsel about my role. And my outside counsel confirmed to me that the interests of Southern Copper and, in particular, of minority stockholders, were the task and mandate of precisely the special disinterested committee. And there was no other executive who would do the job that I was doing internally. So I had those two roles.

During the transaction, I was representing Grupo in the sense that I was serving as the interlocutor of their proposals and positions to the special committee of disinterested directors. But, when for example, overviewing the data room, I was the general counsel of Southern, but the general -- the general role that I had was, again, to serve as a breach between the proponent of this transaction and the special committee, and to serve as the vehicle to insure that all the information

necessary to allow the members of the committee and their advisors to scrutinize and evaluate the assets and the contingencies were available.

Q. My question was, the data room that you were in charge of, which company was that data room for?

A. Well, the data room pertained to Southern Copper. I mean, because the assets -- the assets which were the content of the data room -- were of Minera Mexico, because all the information that was in the data room was for Minera Mexico to make available the information of those assets to the special committee.

If I understand your question, the data room was for Southern Copper Corporation, but its content had the assets of the Mexico subsidiary owned by Grupo Mexico.

Q. And the data about Minera Mexico came from Grupo; correct?

A. Yes.

Q. And there was some data about Southern Copper -- Southern Peru Copper, wasn't there?

A. Yes.

Q. And that data also came from Grupo;

right?

A. Yes.

Q. Mr. Ortega, you have a new binder in front of you.

A. Yes.

Q. This one has letter tabs. If you would turn to letter E, please, which is joint Exhibit 63.

A. Yes.

Q. This letter dated March 4, 2004, is from the special committee to Mr. Larrea; correct?

A. Yes.

Q. And it is addressed to "German Larrea Mota-Velasco, Chairman of the Board of Directors, Grupo Mexico"; correct?

A. Correct.

Q. In the second paragraph the letter says that, ". . .the Committee would very much appreciate receiving a detailed term sheet describing Grupo Mexico's proposal. . ." Correct?

A. Correct.

Q. If you could turn to Tab F, which is Joint Exhibit 155. This letter dated March 25th, 2004, is from you to Carlos Ruiz, the chairman of the

special committee; correct?

A. Yes.

Q. And the first sentence of the letter says, "This letter is a more detailed response to your letter to our chairman, Mr. German Larrea Mota-Velasco dated March 4, 2004." Correct?

A. Correct.

Q. And if you look at the next to the last sentence of the letter, it says, "Attached as an annex to this letter is a term sheet that we hope the Committee finds responsive to the issues raised in your letter." Correct?

A. Correct.

Q. So this letter and the term sheet that was enclosed as the annex was Grupo's response to the special committee's March 4th letter; right?

A. Right.

Q. And you were part of the group of executives that was advising the Grupo side regarding the term sheet that was enclosed here; correct?

A. Um-hum.

Q. But in the first sentence of the letter, when it refers to our chairman, Mr. German Larrea, that's referring to Mr. Larrea as chairman of

Southern; correct?

A. It can be. He was the chairman in those days of both companies.

Q. Well, the letter is on Southern Peru Copper Corporation letterhead; right?

A. Yes.

Q. And at the bottom you signed the letter, "Mr. Armando Ortega, Secretary of the Board of Directors." Right?

A. Right.

Q. And you were secretary of the board of Southern; right?

A. Yes.

Q. Not the secretary of the board of Grupo?

A. No.

Q. If you could turn to the next Exhibit G, which is Joint Exhibit 156.

A. Um-hum.

Q. And if you turn -- excuse me. On the cover e-mail, this is from you to Carlos Ruiz, the chairman of the special committee; right?

A. Yes.

Q. If you turn to the letter that is at

the bottom stamped 7077, it's the second page of the exhibit.

A. Yes.

Q. The first sentence of the letter says, "Please find enclosed Appendix containing Grupo Mexico's revised Term Sheet. . ." Correct?

A. Correct.

Q. And you were part of the group of executives that advised Grupo regarding this revised term sheet; correct?

A. Correct.

Q. And this letter is also on Southern Peru Copper letterhead; right?

A. Yes.

Q. Again, you signed the letter, "Armando Ortega, Secretary of the Board?

A. Yes.

Q. If you could turn back to Exhibit B and this is Joint Exhibit 62.

A. Yes.

Q. If you could turn to the second page of the exhibit, this is a confidentiality agreement that's dated February 4, 2004; correct?

A. Correct.

Q. And you signed this agreement on or about February 4; right?

A. Yes.

Q. And if you look at the last page of the exhibit, you signed it as general counsel of Southern; correct?

A. Correct.

Q. As of February 4, 2004, the special committee of disinterested directors had not yet been formed; correct?

A. Yes.

Q. And if you look at the first page of the exhibit, on February 18th you sent the executed confidentiality agreement to the special committee; right?

A. Yes.

Q. And you also signed that letter as general counsel of Southern?

A. Yes.

Q. If you could turn to the last exhibit in the book, which is S, as in Sam.

A. Yes.

Q. This is Joint Exhibit 159. This e-mail dated September 23rd, 2004 is from you to seven

people; correct?

A. Yes.

Q. And the first five people on the to line, Messrs Xavier Garcia de Quevedo, Eduardo Gonzalez, Jaime Collazo Gonzalez, Ligia Sandoval Parra, and Augustin Santamarina. They're all members of that group of executives that was advising Grupo on the transaction; right?

A. Not all of them. The people who were advising as part of this executive committee, the chairman of Grupo, were primarily out of these people you are referring to, Mr. Xavier Garcia De Quevedo, Mr. Eduardo Gonzalez and Mr. Santamarina and Mr. Silberstein.

Q. Okay. Another person on this to line is an attorney at Milbank, Tweed; right?

A. Yes.

Q. And Milbank, Tweed was Grupo's outside counsel in this transaction; correct?

A. Yes.

Q. And the last person is Mr. Silberstein who was at UBS; correct?

A. Yes.

Q. And UBS was Grupo's financial advisor

in this transaction?

A. Yes.

Q. In the last sentence of this e-mail you say, ". . .we should work out with outside counsel (Latham and Mijares) and with Goldman Sachs the final form of our arrangement, including putting on board a deal with PD through a bilateral negotiation." That's what that says; right?

A. Yes.

Q. By "our arrangement," you meant an agreement whereby Southern would acquire Minera; correct?

A. Yes.

Q. And by "a deal with PD," you meant a registration rights agreement with Phelps Dodge; correct?

A. Yes.

Q. And by "bilateral negotiation," you meant a negotiation between Phelps Dodge and Grupo; correct?

A. Correct.

Q. You were not suggesting that Phelps Dodge negotiate with the special committee?

A. No, not at all.

Q. So Mr. Ortega, we've now gone through a number of documents that you signed as a representative of Southern but you were also advising on the Grupo side. So I ask you which side were you on?

A. I was the representative of Grupo Mexico acting as interlocutor vis-a-vis the special committee. But at the same time I played the role as -- in particular -- as secretary of the board of the company, in this case of Southern Copper Corporation. So in that sense -- in that sense I had two tasks: one is general counsel of Grupo, and the other one is secretary -- primarily a secretary of Southern Copper.

But, again, as I said before, before engaging into these tasks I asked for counsel to my lawyers in the United States, and what they told me is that the crux of this transaction would be to insure that a proper body would be established, comprised by disinterested and independent members, that would have the full ability to evaluate and negotiate the best terms of an arm's-length transaction that in the end would be fair to the company and its stockholders.

So that question of having two hats

was not important precisely because there was a body entrusted to representing the interests of the minority stockholders.

Q. If you could turn to Exhibit H in the binder, which is Joint Exhibit 115. Specifically I would turn your attention to page six of this document which is stamped at the bottom 19886. The heading on the page is transaction rationale.

Under that heading, "Transaction Rationale" there's a subheading that says "Higher visibility." And under that it says, "the inherent value of [Minera Mexico] is not fully reflected in Grupo Mexico's share price; the sale of [Minera Mexico] to [Southern Peru] will make this value explicit. Investors will value [Southern Peru] and [Minera Mexico] assets at the same multiple (multiple migration) the market value of Grupo Mexico's mining operations will increase (positive effect on the share price)."

That's what that says; correct?

A. Correct.

Q. If you could turn to Page 23 of this exhibit. The stamp at the bottom is 19903, and the heading at the top of the page is, "Value Creation

Potential." You have that?

Q. If you look at the stamp at the bottom it's 19903.

A. 903. Sorry. Yes. Now I have it.

Q. So under the heading, "Value Creation Potential" it says, "Untap the true value of [Minera Mexico] through multiple migration"; correct?

A. Correct.

Q. And this exhibit -- this document was created by UBS; correct?

A. Yes.

Q. And UBS was Grupo's financial advisor?

A. Yes.

Q. And this presentation, which is dated January 30th, 2004, was made to Grupo's board of directors; correct?

A. Yes.

Q. So in this presentation UBS was advising Grupo's board that migrating Minera's assets to Southern's multiple would be beneficial to Grupo Mexico; correct?

A. Correct.

Q. If you could turn to Tab D in the binder. And this is Joint Exhibit 108.

A. Yes.

Q. If you could turn to the fourth page, which is the first substantive page of the presentation entitled, "Transaction Overview." Are you there?

A. Yes.

Q. This says that Grupo's initial proposal to Southern was for Southern to issue 72.3 million shares to acquire Minera; correct?

A. Yes.

Q. And in the footnote, Footnote 1, it says, "Assumes [Minera Mexico's] equity value of. . .$3,050 million and [Southern Peru] share price of. . .$42.20 as of January 29th, 2004." Correct?

A. Correct.

Q. So Grupo was proposing that Southern give Grupo $3.05 billion of Southern stock to buy Minera; correct?

A. Um-hum.

Q. If you could turn back to Tab G, Exhibit 156 and specifically to the first page of the revised term sheet. Under "Proposed consideration," Grupo was proposing that Southern give Grupo $3.147 billion of Southern stock to buy Minera;

correct?

A. Correct.

Q. And the number of shares would be determined by the 20-day average closing share price of Southern beginning five days prior to the closing of the transaction; correct?

A. Correct.

Q. And on October 21st, 2004, the parties agreed that Southern would give Grupo 67.2 million shares of Southern stock -- correct? -- at the end of the transaction? That's not in this exhibit.

A. Sorry.

Q. I'm not referring to the exhibit. I'm asking, on October 21st, 2004, the parties agreed in the final agreement that Southern would give Grupo 67.2 million shares?

A. Exactly. That was the number of shares.

Q. And on that date, October 21st, 2004, the 67.2 million shares were worth $3.1 billion; right?

A. I don't recall the amount.

Q. If you could turn to Exhibit K, which is Joint Exhibit 18. This is a chart of Southern

stock prices and it's in reverse chronological order. October 21st, 2004 -- well, it's actually the day before that, October 20th -- excuse me -- October 21st, 2004, you will find towards the bottom of Page 7. And you'll see that the stock of Southern Peru closed at $45.92 on that day; right?

A. Yes.

Q. So if you multiply the 67.2 million shares times $45.92 per share, you get about $3.1 billion; right?

A. Well, I don't know if that is the case. I would assume it is the case, yes.

Q. I have a calculator, if you want to do it?

A. Do it and I will trust you.

Q. Okay. So originally Grupo was asking for a $3.1 billion worth of stock, and in the end it got $3.1 billion worth of stock; right?

A. Yes.

Q. If you could turn to Tab F, which is Joint Exhibit 155. And specifically, if you could turn to the term sheet and drawing your attention to item (5), which is, "Terms and conditions for the assumption or other treatment of [Minera Mexico's]

debt." That says, "It is currently contemplated that, Substantially all of [Minera Mexico's] debt, other than its Yankee Bonds, would be refinanced at or prior to the closing of the proposed transaction." Correct?

A. Correct.

Q. So even before proposing the transaction to sell Minera, Grupo had already planned to refinance Minera's debt; correct?

A. Um-hum.

Q. In fact, some of Minera's debt had already been financed as of March 25th, which was the day of this term sheet; correct?

A. Correct.

Q. If you could turn again to Tab G, Joint Exhibit 156, and specifically, if you could turn to Schedule A to the term sheet which is entitled, "Minera Mexico Debt Structure."

A. Yes.

Q. This page shows Minera's debt structure as of April 30th, 2004; correct?

A. Correct.

Q. And under "Term Loan A," it says, "Mandatory prepayments: Excess cash flow, working capital, metal price, early asset sale, asset

disposition." Correct?

A. Correct.

Q. And under "Term Loan B," it says, "Other terms: Same as Term Loan A." correct?

A. Correct.

Q. As of April 30th, 2004, Minera, in fact, had made some prepayments pursuant to the metal price condition; correct?

A. Um-hum.

Q. If you could turn to Tab L, which is Joint Exhibit 125, specifically Page 20 of that exhibit.

A. Yes.

Q. In the fourth full paragraph of this page it says that, as of April 2004, Minera had already prepaid $115 million and expected to prepay more than $80 million by the end of the second quarter of 2004; correct?

A. Yes.

Q. And it further says that Minera ". . .would be in a position to effect additional prepayments by the end of 2004." Correct?

A. Correct.

Q. If you could turn to Tab M, as in

Mary, which is Joint Exhibit 160, and specifically, if you look at the third page in -- excuse me -- the third page of the outline, which is stamped 10491.

A. Yes.

Q. And specifically in the box next to "Covenants." Here the special committee proposed that Minera's debt at the closing of the transaction be capped at $1.105 billion. Correct? That's what the special committee was proposing?

A. Yes. Let me see here. Yes.

Q. And Grupo's response to that was that Grupo agreed to cap Minera's debt at $1 billion even; correct?

A. Um-hum.

Q. Which is $105 million less than the special committee was asking for; right?

A. Yes.

Q. If you could turn to the next tab, Tab N, as in Nancy. This is Joint Exhibit 157. And turning your attention to the "Draft Term Sheet."

A. Yes.

Q. Under the first section entitled, "Corporate Governance Provisions," there's a Section called "Related Party Transactions." And that says,

"Such transactions will continue to be thoroughly reviewed by the Audit Committee of [Southern Peru] (disposition to consider amendments to rules and procedures, if any)." Correct?

A. Yes.

Q. So prior to the transaction with Minera, Southern's audit committee was already thoroughly reviewing related party transactions; correct?

A. Correct.

Q. If you could turn back to Tab M, as in Mary, Joint Exhibit 160. And if you would turn to the page with the stamp 10497, which is the second to last page.

A. Yes.

Q. Next to "Related Party Transactions" it says that the special committee proposed a threshold of $500,000 for related party transactions that the audit committee would have to approve; correct?

A. Correct.

Q. And in response to that, Grupo proposed a threshold of $10 million; correct?

A. Correct.

Q. And in the final agreement that the parties signed, they used the $10 million threshold; correct?

A. Correct.

Q. In 2004, Southern Peru had not engaged in any related party transactions of more than $10 million, had it?

A. I don't recall with precision.

Q. If you could turn to Tab O, which is Joint Exhibit 128, and specifically to Page A61 of that document.

A. Yes.

Q. Item No. 17, "Related Party Transactions."

A. Yes.

Q. This describes the related party transactions that Southern engaged in in 2004, 2003, and 2002; correct?

A. Correct.

Q. And this goes over to the next page, A62. You can read the section if you like. My question is, this section does not disclose any related party transactions in 2004 of more than $10 million, does it?

A. Well, there is a page A62 in there. In the fourth paragraph a description of a sale to Marmon Group - Cerro Wire of $219 million.

Q. Was there a single transaction with Cerro of $219 million?

A. No. It was a yearly sale, according to this. And I think the rest of the transaction, sir, as you say, below that threshold, the one you mentioned.

Q. And that's for all three years, 2004, 2003, and 2002?

A. Yes.

Q. If you could turn back to Tab M, as in Mary, Joint Exhibit 160. And directing your attention to the second page of the outline, which is stamped 10490.

A. Yes.

Q. On this page the special committee was proposing a 20 percent collar around the fixed exchange ratio with both parties granted a walk-away right if at the time of the shareholder vote the price of Southern Peru stock was outside the collar; correct?

A. Correct.

Q. But Grupo Mexico always had the right to vote against the transaction; correct?

A. Correct.

Q. And Grupo had the right to vote against the transaction regardless of what Southern's stock price was; correct?

A. Correct. Are you talking about the final form of the merge agreement?

Q. At all times. Correct?

A. Okay.

Q. And even if the special committee recommended in favor of the transaction, Grupo still had the right to vote against it; right?

A. Right. I'm just trying to recall one of the provisions of the merger agreement where both parties could walk away, not just Grupo.

Q. Also on this page, the special committee is proposing that a majority of the minority shareholders would have to vote in favor of the transaction for it to be approved; correct?

A. Correct.

Q. And in response to that, Grupo proposed that two-thirds of the outstanding shares, including Grupo's own shares, would have to vote in

favor of the transaction for it to be approved; correct?

A. Yes.

Q. And on October 8th the parties agreed that two-thirds of the outstanding shares would have to vote in favor of the transaction for it to be approved; correct?

A. Yes. I said yes.

Q. If you could turn to Exhibit P, which is Joint Exhibit 52, and specifically turning your attention to the second page of the exhibit, which is the letter addressed to Cerro Trading Company.

A. Yes.

Q. Grupo Mexico sent this draft to Cerro on October 13th, 2004; correct?

A. Correct.

Q. And the second to last sentence in the first paragraph of the letter says, "We would like to obtain your agreement that you will vote to approve this Transaction and the paragraphs below describe the terms of such agreement." Correct?

A. Correct. And before I did answer in my previous intervention that this was a request by Grupo Mexico, which initially was accepted by Cerro,

but then the special committee didn't accept it and it was changed.

Q. If you look at the third paragraph on the second page of the letter --

A. Yes.

Q. -- which begins "In the event." That says that if the special committee recommends the transaction and Southern's board approves the transaction, then Cerro agrees to vote in favor of the transaction; correct?

A. Correct.

Q. And the proposal in this paragraph was made by Grupo Mexico; correct?

A. It was, yes.

Q. And Grupo and Cerro together held more than two-thirds of Southern's outstanding stock; correct?

A. More than two-thirds?

Q. Grupo owned about 54 percent and Cerro owned about 14 percent --

A. It is the case, yes.

Q. If you could turn to the next tab, Tab Q, which is Joint Exhibit 14.

A. Yes.

Q. This is a draft agreement that Phelps Dodge sent to Grupo Mexico on October 29th, 2004; correct?

A. Correct.

Q. And the third -- excuse me. Turn to page two of the letter. I'm sorry. If you look at -- there's a cover letter and then there is a draft agreement. If you turn to the second page of the draft agreement, which is stamp ending in 0020.

A. 0020. Yes.

Q. The third full paragraph on this page says that Phelps Dodge and Cerro will vote in favor of the transaction subject to some conditions, including a decision by the special committee to withdraw or modify its recommendation; correct?

A. Correct.

Q. And the proposal in this paragraph was made by Phelps Dodge; correct?

A. Correct.

Q. And Grupo and Phelps Dodge together also held more than two-thirds of Southern's stock; correct?

A. Yes.

Q. If you could turn to the next tab,

Tab R, which is Joint Exhibit 15. And if you could turn to the second page of this document. The fourth paragraph on this page says, "Taking into account that the Special Committee of disinterested Directors of [Southern Peru] did recommend to the Board of Directors of [Southern Peru] the approval of the Transaction and the board consequently voted in favor of it, we kindly propose that [Phelps Dodge], together with AMC, express their current intent, and [Phelps Dodge] and AMC do hereby express their current intent, to submit their proxies to vote in favor of the Transaction . ." And then it goes on from there. Correct?

A. Correct.

Q. This paragraph is different from the paragraph that we looked at in Joint Exhibit 14; correct?

A. The one pertaining to Phelps? Yes.

Q. This paragraph doesn't say anything about the special committee withdrawing or modifying its recommendation; right?

A. Um-hum.

Q. And this was the final agreement that was signed with Phelps Dodge; correct?

A. It was.

Q. So if the special committee did withdraw its recommendation, Phelps Dodge was still committed to vote in favor of the transaction; correct?

A. Correct.

Q. So as of the date of this agreement, December 22nd, 2004, if Grupo wanted the transaction to be approved, it would be approved; correct?

A. Correct.

Q. And if Grupo did not want the transaction to be approved, it would not be approved; correct?

A. Yes.

Q. So it was entirely up to Grupo whether the transaction went forward or not; correct?

A. Um-hum.

Q. Yes?

A. Yes.

MR. ZAGAR: I have no further questions. Excuse me. Just give me a moment.

No further questions. Thank you.

THE WITNESS: Thank you.

REDIRECT EXAMINATION

BY MS. KOROT:

Q. Mr. Ortega, if you keep the binder, the big binder in front of you, if you could turn back to Tab R, which is Joint exhibit 015.

A. Yes.

Q. What is the date of this letter?

A. December 22, 2004.

Q. And as of December 2004, wasn't Phelps Dodge aware of the terms of the transaction?

A. As of this date?

Q. Um-hum.

A. Well, the transaction had been approved by the board.

Q. Was a preliminary proxy statement circulated at that point?

A. I don't recall. I don't recall. It's long ago, but I'm sure that they knew about the transaction, of course.

Q. And so Phelps Dodge willingly agreed to the terms set forth in this letter based on their understanding of the merger; right?

A. Yes.

Q. Let's go back to your small binder, the one that I gave you. And Tab 4 is the proxy statement which is JX 129.

A. Yes.

Q. Okay. If you could turn to Page 133 of this document. I'm looking at the page numbers up at the top this time, not down at the bottom.

A. Charter.

Q. Right. "CHARTER AMENDMENTS." And to what extent did the provisions set forth under "ARTICLE EIGHT, SPECIAL NOMINATING COMMITTEE" exist in SPCC's charter prior to the merger transaction?

A. They did not exist.

Q. If you can flip a few pages to page 136 to "ARTICLE NINE."

A. Yes.

Q. To what extent did "ARTICLE NINE, AFFILIATED TRANSACTION REVIEW," to what extent did that provision exist in SPCC's charter prior to the merger transaction?

A. They did not exist, to the best of my knowledge.

MS. KOROT: Thank you, Mr. Ortega. No further questions.

THE WITNESS: Thank you.

THE COURT: The witness may step down. You may step down, sir.

THE WITNESS: Thank you, Your Honor.

THE COURT: Are you watching the game tonight?

THE WITNESS: Yes.

THE COURT: So we're done for the day? We'll come back tomorrow morning.

MR. STONE: Yes, Your Honor.

(Court adjourned at 10:20 a.m.)

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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
Thursday, June 23, 2011
9:00 a.m.

- - -

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

- - -

TRIAL TRANSCRIPT - VOLUME III

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
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In-House Counsel for Grupo Mexico

- - -

THE CLERK: Chancellor Leo E. Strine, Jr. presiding.

(Applause.)

THE COURT: Thank you, everyone. That is very nice. Does that mean you waive all appeals? It's not that good.

Okay. Good morning.

MS. KOROT: Good morning.

THE COURT: You may continue.

MS. KOROT: Thank you. Your Honor, the defendants call Mr. Raul Jacob.

THE WITNESS: Good morning.

THE COURT: Good morning.

RAUL JACOB, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KOROT:

Q. Good morning, Mr. Jacob.

A. Good morning.

Q. Can you please summarize your education for the Court?

A. Yes. I studied economics in the Universidad del Pacifico in Peru. And after a few years of work, I took undergrad -- graduate work at

the University of Texas at Austin where I obtained a Master's degree in economics and a Ph.D. candidacy in economics as well.

Q. Can you summarize your employment history after your Ph.D. candidacy?

A. Well, I returned back to Peru after I finished my graduate work, and I started working for a mining institute created by the Mining Society of Peru. It was an economic research entity. I worked there as a technical secretary.

And after that, I worked for about a year for the entrepreneurial association of private companies in Peru. That's the top entrepreneurial association of Peru that comprises all the business different associations.

After that, I worked for the local subsidiary of Abbott Industries. And I worked as treasurer in Abbott. And then I joined Southern Peru in 1992.

Q. Have you ever taught any classes?

A. Yes. I have taught several courses in economics as well as finance at the Universidad del Pacifico at the undergraduate as well as graduate schools, both schools at the university. And

recently, I'm teaching at Gerens, which is a mining specialist graduate work entity in Peru where I teach financial management for mining companies.

Q. Thank you. And you said you're currently employed at Southern Copper Corporation. When did you join Southern Copper Corporation?

A. 1992.

Q. And what positions have you held at Southern Copper Corporation?

A. When I joined the company in 1992, I was in charge of short-term financial planning for the company, basically, cash flow forecasts, short-term cash flow forecasts. After two or three years of work, I was appointed to run the treasury, besides this short-term work that I mentioned.

And by 1999, I was promoted, in my work as treasurer of the company, and was promoted as financial planning and short-term and long-term manager for the company. And in the year 2005, I was performing these duties, and in 2005, I add to these responsibilities the investor relations, head of investor relations for the company.

Q. And around the time period 2004 to 2005, what was your role as head of investor

relations?

A. I was basically in charge of preparing the quarterly press release that the companies used to market as well as organizing and conducting the conference calls of the company's assets quarterly, as well as participating in the investor relations conferences or conferences organized by investment banks, representing the company in those conferences.

Q. And you mentioned that you conducted short-term and long-term planning for Southern Copper Corporation. What exactly does that entail?

A. Short-term responsibilities refer to the preparation of the annual plan. This is a financial forecast that uses all the available information. We coordinate the process of producing the budgets for -- the dollar budgets of the company and cost budgets as well as preparing the plan.

In 2004, these responsibilities were related only to Southern Peru. In 2005, to these responsibilities was added to prepare -- to coordinate the preparation of the corporate plan, which includes Minera Mexico's information after we merge.

That's -- for the long term, in 2004, basically was the long-term financial forecast that

the company prepared for Southern Peru. And after the company merged, I have been involved in preparing the long-term forecast for the new entity, Southern Copper.

Q. To what extent did you prepare what-if forecasts or sensitivity analyses?

A. Well, that's something that we do several times through the year. We look at different sensitivities. For instance, if there is a change in copper prices, what prices should we -- what would be the effect of say a cent increase in the copper price or a dollar increase in the molybdenum price, which is our main by-product.

Besides these, we do some other valuations. For instance, we do financial valuations of those certain businesses. On an ongoing basis, we buy copper concentrates from third parties, and in order to be sure that we're doing a good business on that, we have to check on the costs that it will have for us, the commercial terms that we will be buying those concentrates, and the commercial terms that we will have if we sell the refined material after we transform it in our smelter and refinery, so, several different initiatives that require sensitivity

analyses.

For instance, another one, if there is a change in the royalties that we pay, because there is a lot that has been discussed in Congress, we do an analysis of what may be the impact on our financial results of that kind of a situation.

Q. And how does the price of copper affect the financial forecasts that you prepare?

A. Well, a significant part of our revenues come from copper, a little bit -- or close to 70 percent of our revenues. So whatever affects the copper price, it is certainly important for our estimates.

Q. And when you prepare long-term and short-term financial forecasts, how do you determine what copper price to use?

A. We usually receive guidance from the senior management of the company on what copper price we use for our estimates.

Q. And do you know how senior management comes up with the copper price estimates that it asks you to use?

A. Well, they follow the market, obviously, and they have their own views on what is

going on at the market. Besides that, they meet regularly with our commercial team.

We are a company that sells refined copper, so we sell directly to industrial customers in a significant portion of our sales. So we have a firsthand idea of what is going on with the economy and with the copper demand and supply. So our commercial team feeds them with some information, and they have also their own views on the market as well.

Q. And if you were asked to perform one of these what-if analyses, for instance, if SPCC was interested in acquiring a copper mine and asked you to perform a financial valuation of that mine, how would you determine what copper price to use in that estimate?

A. Well, as I said, we usually take the senior management guidance on this. But in the case as the one you indicated, we usually require -- or hire a financial advisor, and usually a financial advisor has their own ideas on what prices to use. Could be, for instance, forward curves prices or the market consensus, besides our senior management view on the market.

Q. Mr. Jacob, you should have a binder in

front of you that says, "SUPPORTING EXHIBITS FOR RAUL JACOB." And if you turn to Tab 1 of that binder, there is a 10-K for Southern Copper Corporation that was filed on March 16th, 2005 for the period December 31st, 2004, which is marked JX 128. Do you have that document?

A. Yes.

Q. Are you familiar with this document?

A. Yes.

Q. Okay. If you could turn to Page A12, there is a section in between two charts titled, "ORE RESERVES." Do you see that?

A. Yes.

Q. What information is set forth in this information titled "ORE RESERVES"?

A. It refers to the proven ore reserves that the company had as of December 31st, 2004. Ore reserves are basically, in simple words, it's how much metal or how much mineral is there that we can -- from which we can extract metal at a profit.

And in order to develop these, if you will allow me to explain it, what the company does is it identifies in the mineral deposit what we call economic blocks. One economic block, it's a cubic

shape portion of the deposit that has a width of 10 meters, a depth of 10 meters, and a height of 15 meters.

Through this program, that is an expensive program for a company, you obtain samples of this mineral deposit. So, you know, you have samples for each of the economic blocks. And you analyze these samples and conclude how much metal is in that specific economic block.

Now, at the same time, you do know where it is located, so you have an idea of how much it will cost you to take that out from the mineral deposit and send it to your own concentrator for milling and concentrating, as well as your smelter and refinery, for obtaining refined copper and some other metals.

So you have the mineral content, you have the cost that will specifically -- that economic block will cost you to get the metal out of it, and you have to have an estimate of the revenues that you will get from getting that metal out, which is why you use the copper price in this case.

Q. And looking at the chart on Page A12, what is the copper price assumption that is used in

the proven and probable ore reserve calculation?

A. Well, the copper price, it's 93.9 cents. And that refers to a three-year average price for the COMEX market for copper prices. The SEC requires mining companies to use these prices, these three-year averages, on an ongoing basis in order to determine the reserve base of the company.

And the purpose of this was to have a similar base for all mining companies to compare reserves so investors will know what's the specific copper content, in this case, of the reserve from each company on a similar basis.

Q. And how long has Southern Copper Corporation been using this three-year trailing average that the SEC requires to determine its proven and probable ore reserves?

A. The SEC indicated that we have to use it in 2003, so we're using it since 2003.

Q. And apart from calculating the proven and probable ore reserves for purposes of the 10-K, for what purpose does SPCC use the three-year trailing average price of copper?

A. Well, we use it for certain accounting adjustments to our books. At the time of this 10-K,

we used it to capitalize a portion of the stripping that we do on the mine. The stripping is the mineral that you take out in order to reach one of these mineral economic blocks that I mentioned. And in order to capitalize a portion of that work, we have to use the stripping ratio that comes out from this specific computation.

We also use it for the amortization of certain expenses done at the operation, at the deposit in this case. For instance, the program of reserve exploration that we need in our pit, in our own deposit, it has been capitalized, and we amortize it on the base of the expected life of the operations considering this three-year average.

Q. Other than what you just discussed, does SPCC use a three-year trailing average for copper prices for any other purpose?

A. Not that I can think.

Q. If you can turn to Page A14.

A. Mm-hmm.

Q. And there are two charts here. In the middle of the two charts, there is a paragraph that states, "For purposes of long-term planning, SPCC uses metal prices that are believed to be reflective of the

full price cycle of the metal market. The company uses these prices in preparing ore reserve estimates for use in its business plans. For this purpose, SPCC uses a 90 cents copper price ...." Do you see that?

A. Yes.

Q. What are the business plans referenced in this paragraph?

A. These reserve estimates are the one that the company uses for all its long-term production plants. These plants are basically quantitative plants where we indicate how much mineral we're going to take out of the mineral deposit, what kind of ore grade it has, what copper content it has, what kind of recovery can we get at our concentrator of that metal, and how much of that is going to be smelted, refined, et cetera.

It's basically a plan of production where we indicate several different information about the production for the company. The plan has a short-term portion, that is the one that we use for preparing the financial forecast, and a long-term production plan for long-term financial planning.

We used 90 cents in that time as a reference because it was -- we have two

characteristics. It was a conservative price that would assure us to get all the metal that is contained in this reserve base and make a profit on that. And at the same time, at that time, it took the cyclicality that we see in the mining business.

In that paragraph, it is also mentioned that the average price for copper in the prior ten years was 93.1 cents, which was the price that we -- that reflected a full copper price cycle at that time.

This was a conservative price that we used for preparing our production plans because we want to be sure that the metal that we get out from these economic blocks that I mentioned in our reserves will be at a profit.

Q. And why doesn't Southern Copper Corporation or SPCC in 2004 use the three-year trailing average or the market price for estimating or preparing its ore reserve estimates in its production plans?

A. Because of the cyclicality that I mentioned. If you use the three-year, even the three-year average has significant changes from one year to another. And if you prepare a long-term

mining plan using, for instance, 93 cents one year and then the next year, the three-year average or the market price, it's significantly higher or lower than that, that will produce a different plan because some portions of the mineral deposit will or will not be available at a profit.

So we have to be consistent, and that's why we make a decision on one price to use, which is a conservative price, 90 cents in this case. And from that price we compute a reserve estimation and that reserve is used for preparing all the production plans for the company.

Q. Generally speaking, how does the price of copper affect SPCC's proven and probable reserve calculation or estimation?

A. For prices in the range that we had in 2004, if you have a higher or lower price for copper or some other metals, that will affect the size of the mineral deposit that can be extracted at a profit. So that was for that specific price. But for instance, if we were at much higher prices, it may be the case that you have a price where even a higher price will not let you get more copper out of the mineral deposit because at a certain lower price, you already took out

all the metal that was in the mineral deposit.

Q. And to what extent does SPCC use this 90-cent per pound copper price that's referenced here on Page A14 in preparing the financial forecast, the long-term and short-term financial forecast that we discussed earlier?

A. The 90 cents was used primarily for preparing production plans and running our operations. It was not used for financial forecasts.

Q. Why not?

A. Well, because it was first a conservative price; secondly, it was also a price that was not necessarily reflecting what the market situation was at that time. For financial forecasts, what we use -- I mentioned already, we receive some guidance on what prices to use from our senior management but, basically, depending on the case, we were looking at different pricing scenarios for our financial forecasting.

Q. And changing gears a little bit, I want to talk about this litigation. Are you familiar with the merger of SPCC and Minera?

A. Yes, I am.

Q. And what role if any did you have in

the process leading up to that merger?

A. Well, in 2004, I was in charge of financial planning at Southern Peru. And I provided some of the information that was used for the transaction. The financial forecast, basically.

Q. What information did you provide?

A. The financial forecast.

Q. And in providing those financial forecasts, did you use a copper price assumption?

A. Yes.

Q. And do you recall what that price, copper price assumption, was?

A. It varied through the year. At the beginning of the year, I believe that we used about 90 cents for long-term copper forecast. Then a dollar, $1.10. It was changing through the year as we were looking at different parts of the economic cycle.

Q. And why did that number change?

A. Basically, at that time, the market was coming out from a surplus. We were seeing a much higher demand for copper. And as we moved on into 2004, we saw much higher market prices. The average for 2004, the average price was about $1.30. And that number certainly was not the price that we had at the

very beginning.

So through the year, we were -- the expectation regarding the market was changing, and we basically accommodated our forecast at the new view on the market as we moved on into the year.

Q. And Mr. Jacob, if you had been asked at the time to prepare a discounted cash flow analysis of SPCC, what copper price assumption would you have used?

A. Well, I would probably go with the market consensus at that time that was a price much higher than 90 cents that we used at the beginning of the year. That is not a specific area where I work, but I would believe that a price that represents what the market was trending long-term at that time would be a most reasonable price to use.

Q. To what extent would you consider the forward curve or the market, the spot price?

A. If it were a short-term valuation, I would certainly have to use what the market -- where the market was at that time. If it was a long-term valuation, the forward curve will give us for sure important information that we have to consider in our valuation, as well as the market consensus at that

time.

MS. KOROT: Thank you, Mr. Jacob. Pass the witness.

CROSS-EXAMINATION

BY MR. MONTEJO:

Q. Good morning, Mr. Jacob.

This isn't the first time that you testified in trial about whether or not 90 cents is a conservative or reasonable copper price to use for Southern Copper's planning; correct?

A. Well, I testified for the ASARCO process in the past, and I received some questions on how the company estimates its copper reserves at that time.

Q. And you testified today here a couple times that 90 cents was a conservative number; correct?

A. Yes.

Q. At the ASARCO trial, do you remember the date, what year that ASARCO trial took place in?

A. I think it was in 2008 that I testified.

Q. And do you recall whether or not you said 90 cents was a conservative price then?

A. I don't recall.
Q. Okay. There should be a witness binder with your name on it. And if you turn to Tab 9, which is Joint Exhibit 92.
A. Okay.
Q. Mr. Jacob, you recall we took your deposition last week?
A. Yes.
Q. Do you remember this document being put in front of you?
A. Not now, but go ahead.
Q. Okay. If you turn to Page 160 -- and I apologize to the Court. Because of the stamp on the top, it's the farthest number to the right, Page 160.
THE COURT: It says "24 of 41" up at the top.
MR. MONTEJO: Yes, "24 of 41," Your Honor; that's correct.
THE COURT: Thank you.
BY MR. MONTEJO:
Q. This page starts a direct examination for you as the witness; is that right?
A. Yes.
Q. And if you turn to Page 189, you were

asked a question by Mr. Sawers. He states, "And in fact, at your deposition, you testified that a 90-cent long-term price that SPCC uses was indeed a conservative price, right?"

And you respond, "No. I think that it was a reasonable -- it was reasonable for the company not to change its reserve base at that point in time, because the price of -- the market prices do not provide information to do such a change at that point in time. In that sense, the company was prudent regarding the 90-cent reserve estimation."

Correct?

A. Yes.

Q. Okay. Now, Mr. Sawers goes on to point out that that's not what you said at your deposition; correct? And I'll direct you to Line 11 through 13 of the following page.

A. Mm-hmm.

Q. So in your mind, what is the difference between reasonable and conservative when it comes to long-term copper prices?

A. The context of these two -- let me explain it. The 90 cents at that time was a price that reflected the economic cycle of the last ten

years. If you -- at that time, we had the prior year or two years before 2004, copper prices, at about 70 cents per pound. And we were seeing an increase in the market, over a dollar in 2004.

At that time, for estimating the reserve base, it was reasonable to maintain the 90 cents. "At that time," I mean 2004. It was reasonable to maintain the 90 cents for reserve estimations even though for evaluating transactions or doing some other reviews of a forecast, 90 cents may be a conservative price at that time.

So that's the sense that -- when I am saying that this 90 cents is a conservative price or was a conservative price, I meant for general purposes of doing or reviewing our business forecast. But for reserve estimates, it was a reasonable price to use at that time. And it was also used for several companies in the market at that time as well.

Q. Right. And counsel pointed out to you the 2004 10-K?

A. Yes.

Q. If you turn to, I guess, the new binder in front of you, Tab 2, we can look at the same page, A14. And Tab 2 is Joint Exhibit 128, for the

record.

A. Same A14?

Q. A14. Halfway through the page, it states, "For purposes of long-term planning, SPCC uses metal prices that are believed to be reflective of the full price cycle of the metal market." Correct?

A. That's what it says.

Q. And that's a true statement; right?

A. It's what it says, yes.

THE COURT: Well, it's what it says or it's a true statement?

THE WITNESS: Well, I think it was a true statement at that time for the company to say that.

THE COURT: No hedging? What I mean is, you went and said this is what it said. And then -- so you're saying you think it was a true statement at that time it was made?

THE WITNESS: Yes.

THE COURT: And you support the statement as being true?

THE WITNESS: Yes, in the context of the reserve estimates.

BY MR. MONTEJO:

Q. Just to flip back to the second sentence -- or the third sentence, I'm sorry, of that same paragraph, it says, "For this purpose, SPCC uses a 90 cents copper price and a price of $4.50 for molybdenum." Correct?

A. Yes.

Q. And that's a true statement too; correct?

A. Yes.

Q. Using those long-term metal price assumptions on that same page, Southern Copper states its estimated reserves; correct? That's in the chart at the bottom of A14?

A. That's correct.

Q. And based on those long-term price assumptions, metal price assumptions, you see sulfide ore reserves for the combined Toquepala and Cuajone mines is 1.6917 billion tons. Correct?

A. That's correct.

Q. That amount of estimated reserves changes for Southern Copper if those metal price assumptions are changed; correct?

A. Yes.

Q. And we know that because if you turn

to Page A12, the base of this model at the bottom of A12 states, "Southern Copper's estimated reserves using three-year average metal prices." Right?

A. Yes.

Q. And for copper, that's 93.9 cents; correct?

A. Yes.

Q. And for molybdenum, that's $8.42; correct?

A. Yes.

Q. And using those price assumptions, the combined sulfide ore reserves for Southern Copper for Toquepala and Cuajone is 2.777 billion tons; correct?

A. Yes.

Q. That same chart also provides estimates for Southern Copper's reserves if those metal price assumptions are increased by 20 percent; right?

A. Yes.

Q. And at a 20-percent increase to the three-year average metal prices in 2004, which for copper is $1.12 -- approximately $1.12; correct?

A. Yes.

Q. And approximately $10.11 for

molybdenum; correct?

A. Yes.

Q. Southern Copper sulfide ore reserves more than double from the estimates stated using 90 cents for copper and $4.50 per pound for molybdenum; correct?

A. Let me review the chart.

Q. Sure. The charts are on Page A12 and A14.

A. For sulfide ore reserves, they double using these prices. For leachable reserves, they don't. And you have the line before the end of the chart that has 2 billion 670,538 tons of mineral, of leachable mineral. That is not two times what you have in Page A14 for leachable material that are 1 billion 732,229 for leachable material.

Q. But leachable ore reserve is more expensive to process, isn't it?

A. No. No.

Q. At what ore grade do you use leachable materials?

A. Leachable material is used for a different process that is actually in general terms less expensive than conventional mining. Leachable

material, it's a material that has an ore reserve that is relatively low in copper content, and it's composed by oxides while sulfide reserves are composed by sulfurs.

The oxides are processed using a process that was developed in the 1970's which is solvent extraction or electrowinning, or SX/EW. So they are less expensive in general terms when you compare at the same operation leaching production of copper with conventional mining production of copper.

Q. These estimates that are stated in the 2004 10-K, they're based on declarations made for, at least, the Cuajone mine in 1998; correct?

A. For Cuajone, yes, there was a declaration to the SEC in 1998.

Q. And for Toquepala, it's based on declinations made in 1999; is that correct?

A. That's correct.

Q. It's true that Southern Copper also used 90 cents per pound for long-term planning in 2005; correct?

A. Well, I don't recall specifically if we used that for one of our runs, but as I said, we were using several prices at that time.

Q. You can turn to Tab 3, which is JX 137. The document is Southern Copper's 2005 10-K, is it not?

A. Yes, it is.

Q. You're familiar with this document as head of investment relations for Southern Copper?

A. As head of investor relations, I am, yes.

Q. Okay. If you can turn to Page 41. It states, second to last paragraph, "For purposes of our long-term planning, our management uses metal price assumptions of $0.90 per pound for copper and $4.50 per pound for molybdenum. These prices are intended to approximate average prices over the long term. Our management uses these price assumptions, as it believes these prices reflect the full price cycle of the metals market." Do you see that?

A. Mm-hmm.

Q. And that's a true statement; correct?

A. It's a true statement and it refers to ore reserve estimations. And 90 cents are used for ore reserve estimation and for purposes of preparing our long-term plans that are referred -- for ore reserves, excuse me, as a production plan.

Q. Well, this sentence, the first sentence that I read to you, says, "For purposes of our long-term planning, our management uses metals price assumptions of $0.90 per pound for copper and $4.50 per pound for molybdenum." Is that sentence true?

A. It is true, and it's part of the ore reserve estimation.

Q. Is the sentence as stated true? Is there a qualification in there that it's only for ore reserves?

A. I understand that being under the header that says "ore reserves," this refers to ore reserve estimation.

Q. So this is what the company was telling the market, that for long-term planning, it was using 90 cents per pound for copper; correct?

A. Yes.

Q. Okay. Southern Copper continued to use 90 cents per pound for copper for long-term planning until December 31st, 2007; correct?

A. Yes, for purposes of ore reserve estimation.

Q. If you can turn to Tab 5 of your

witness binder, which is JX 143. Tab 5 is Southern Copper's 2007 10-K; correct?

A. That's correct.

Q. And you're familiar with this document?

A. Yes.

Q. If you can please turn to Page 66. The first full paragraph states, "For planning purposes our management uses long-term metals price assumptions for copper and molybdenum. These prices are intended to approximate average prices over the long-term.

"Starting December 31st, 2007 these price assumptions were changed to $1.20 per pound for copper and $9.00 per pound for molybdenum. Average metal prices over the last 10- to 15-year periods, and the continued positive outlook for these metals have led us to reapprise our view of prices."

Do you see that?

A. Yes.

Q. And that was a true statement when it was made in 2007?

A. Yes.

Q. Or, I'm sorry, I guess the document

was filed with the SEC February 29th, 2008; correct?

A. Well, it refers to the year 2007.

Q. Yes, thank you. That is what I meant.

When the company determined to reapprise its view of prices for price assumptions for copper and molybdenum, what was the average price for those metals that year, in 2007? Do you know?

A. No, not that I recall at this moment.

Q. Okay. Well, on Page 11 of the 2007 10-K, this is JX 143, on Page 11 for 2007, according to COMEX, the average market price for copper was $3.22; correct?

A. That's correct.

Q. And according to the London Metal Exchange, it was $3.23; correct?

A. Yes.

Q. And if you look down, there was another chart just below that one where prices for molybdenum are listed.

A. Mm-hmm.

Q. In 2007, the average price for molybdenum is $29.91; correct?

A. Yes.

Q. In 2004 and 2005, Southern Copper was

incurring capital expenditures for its exploration program for Southern Peru copper mines; correct?

A. Yes.

Q. The result of that exploration program was certified by Mintec in 2006; correct?

A. Yes.

Q. And Mintec is an independent international mining consultant; right?

A. That's correct.

Q. And prior to that, Southern Copper's reserve had not been certified since 1998 and 1999; correct?

A. Yes.

Q. In 2006, Mintec certified that the ore reserves in Toquepala increased by 83 percent; correct?

A. Well, I can't recall now, but the percentage seems the correct one.

Q. Okay. If you can flip your binder to Tab 4, JX 141. This is an 8-K filed by Southern Copper on December 7th, 2006; correct?

A. Yes.

Q. If you flip to Exhibit 99.1 to that 8-K, that's a press release from Southern Copper dated

December 7th, 2006; correct?

A. Yes.

Q. It says, the title is, "Southern Copper Corporation Reports Increase in copper resources in its Toquepala and Cuajone mines in Peru." Correct?

A. Yes.

Q. And it states, the first sentence, "Southern Copper Corporation is pleased to announce that as a result of an intensive 4 year program of continuing exploration inside and outside pit limits and surrounding areas of our Toquepala and Cuajone mines in Peru, the ore reserves have increased by 83 percent in Toquepala ...." Do you see that?

A. Yes.

Q. And that's a true statement; correct?

A. Yes.

Q. And that increase, that 83 percent, that was determined using 90-cents-per-pound copper price; correct?

A. Well, it says here that the company used 90 cents per pound and $5 for molybdenum for estimating these reserves.

Q. But the 83 percent wasn't a result of

increasing the long-term copper price assumption to $1.29 or something like that; correct?

A. No. The company used 90 cents for this reserve estimation.

Q. And Mintec certified that the life of the mine in Toquepala extended 23 years; isn't that right?

A. That, I don't know.

Q. Well, let's read the second sentence of the press release. "The metal content has increased by 61 percent in Toquepala and 22 percent in Cuajone, extending 23 years or 85 percent the life of the Toquepala mine and three years or 9 percent of the life of the Cuajone mine." Do you see that?

A. Yes.

Q. And that's a true statement; correct?

A. Yes.

Q. But in 2004, Goldman never sat down with you to talk about the capital expenditures that were in your forecast, did they?

A. Well, I report my financial runs to my boss at the time, and I understand that this was delivered to Goldman, but I don't remember that I had direct talks with the Goldman people regarding our

financial forecasts.

Q. So my question to you is: Goldman Sachs never sat you down and talked to you about the capital expenditures that were set forth in your forecast; correct?

A. Not that I recall.

Q. And in fact, you have no idea whether Goldman Sachs even received the information that you provided to your boss; correct?

A. Not direct information on that matter.

MR. MONTEJO: No further questions, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. KOROT:

Q. Mr. Jacob, we looked at your ASARCO -- your transcript from the ASARCO litigation which is behind Tab 9 in the binder that Mr. Montejo gave you. Wasn't this transaction around 1999, the transaction at issue in the ASARCO litigation?

A. I'm sorry?

Q. Do you recall when the transaction that was at issue in the ASARCO litigation took place, the purchase of ASARCO by Grupo Mexico?

A. It was in 2003.
Q. Was the purchase in 2003?
A. I'm sorry. The purchase of ASARCO by Grupo Mexico, 1999.
Q. And the testimony that you gave in that litigation concerned the time period dealing with that transaction; correct?
A. I think it was related to the spinning off of Southern from ASARCO, passing from being the property of ASARCO to being a property of AMC.
Q. Do you remember what time period that was?
A. That happened in 2003.
Q. Okay. And at that time, copper prices were generally lower than 90 cents a pound; correct?
A. Yes.
Q. We also looked at the document behind Tab 5, which is the 10-K that Southern Copper Corporation filed on February 29, 2008 after the period ending December 31st, 2007. It's JX 143.
A. Mm-hmm.
Q. And Mr. Montejo asked you questions about the first paragraph of Page 66 of that document.
A. Yes.

Q. Now, if you flip back two pages, what is the heading of that section?

A. "Ore Reserves."

Q. So that paragraph then Mr. Montejo asked you about is under the heading "Ore Reserves." Is that correct?

A. Yes, that's correct.

Q. Okay. If you could turn to Tab 4 in the binder, this is the 8-K that you looked at with Mr. Montejo.

A. Okay.

Q. We looked at the Exhibit 99.1.

A. Yes.

Q. And this discusses increases in ore reserves as of the end of 2006?

A. Yes.

Q. To what extent did SPCC know about these increases in ore reserves in or around 2004?

A. We didn't have any information about that.

MS. KOROT: Thank you.

THE COURT: You're welcome.

MR. MONTEJO: One further question if I may, Your Honor.

THE COURT: Mm-hmm.

RECROSS-EXAMINATION

BY MR. MONTEJO:

Q. In the ASARCO litigation, the question as to 90-cent long-term copper price, that went towards the appropriate long-term copper price to use in a DCF, didn't it?

A. Could you be more specific, please?

Q. The long-term copper price that you were being asked about in the ASARCO litigation related to the long-term copper price to use in a discounted cash flow analysis; isn't that right?

A. I think that the questions were related to how do we use prices for reserve determination in the ASARCO litigation.

MR. MONTEJO: Thank you.

THE COURT: Anything further?

MS. KOROT: One second.

REDIRECT EXAMINATION

BY MS. KOROT:

Q. Turn back to Tab 9 in the binder, please. This is the -- you looked at Page 12 of 41? Look at Page 12 of 31 and 13 of 31 in the transcript.

A. 12 of 31?

Q. It's difficult to make out the page numbers. They're on the upper right-hand corner.

A. Page 189.

Q. Yes. Here's the section you're being asked about, the 90-cent long-term copper price. And if you turn the page to 190, the question is, "So you felt that 90 cents was a reasonable price."

And your answer you gave was, "For reserve estimations, yes."

When you were talking about long-term copper prices at your deposition here, were you talking about reserve estimates?

A. In this case, I think I meant reserve estimates, yes.

MS. KOROT: Thank you.

MR. MONTEJO: No questions, Your Honor.

THE COURT: Thank you, sir, you may step down.

Next witness.

THE WITNESS: Thank you.

MR. BROWN: Plaintiff calls Dan Beaulne.

DANIEL B. BEAULNE, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Good morning, Mr. Beauline. Could you please summarize your information for the Court?

A. I have a bachelor of commerce from the University of Toronto, and I have some professional designations as well.

Q. Could you summarize those for us?

A. I'm a chartered accountant, a chartered business evaluator, and a chartered financial analyst.

Q. What does it mean to be a chartered business evaluator?

A. Well, for a chartered business evaluator, you have to have five years of professional experience. You have to go through an intense testing and training program, which I completed while I was in Canada.

Q. And could you summarize your work history following your education for us?

A. Currently, I am a managing director with Duff & Phelps, which is an independent financial

advisory firm. I've been there since 2005. From 2002 through 2005, I was with Standard & Poor's corporate value consulting. And when I was at Duff & Phelps, what I'm doing now is business valuations and fairness opinions for transactions, solvency opinions, litigation testimony, expert witness testimony, portfolio valuations.

And when I -- at Standard & Poor's corporate value consulting, I did pretty much the same type of work except for we didn't do solvency opinions at Standard & Poor's.

From 1999 through 2002, I was at Ernst & Young in corporate finance in Dallas. And I was a senior manager in the corporate finance doing business valuations for purchase price allocations for various other purposes as well as working on litigation disputes.

Q. Now, is there a particular industry sector or type of company that you focus on in your valuation work?

A. I specialize in energy and mining companies.

Q. Okay. And have you done many valuations of energy and mining companies?

A. Yes. Throughout my career, and prior to 1999, I worked for ten years in Canada, and I worked for various financial consulting firms doing similar type of work to what I'm doing right now. And over that 20-year period, I've done a significant -- 70, 80 percent of my work in energy and mining.

Specifically in mining, I've valued base metal companies, precious metal companies, limestone mines, coal mines, potash mines, all various types of mines. And specifically, I've done work with copper mines, copper mining companies, where copper is the primary metal, and then several mining companies where copper is a by-product or secondary metal.

Q. Now, we retained you in this case to do something; correct?

A. That's correct.

Q. And what did -- what were you retained to do?

A. To determine the fair number of shares that Southern Peru copper should have issued for the acquisition of 99.15 percent of Minera Mexico.

Q. And did you prepare a report setting forth your opinions in that regard?

A. Yes.

Q. And will you turn to Tab 1 in the book in front of you?

A. I'm there.

Q. And what is this document? Actually, this is Tab 1 in the book. We marked it JX 47. Why don't you tell us what it is.

A. It is my expert report prepared as of March 16, 2010, in this matter.

Q. Okay. Why don't we start by can you summarize for us generally how you went about your task?

A. Well, the way I looked at this from a financial perspective, Southern Peru is the acquirer and Minera Mexico is the target company. And I determined or developed a valuation for Minera Mexico and then determined how many shares of Southern Peru should be issued in order to acquire Minera Mexico.

Q. Okay. Now, let's go into a little more detail. You said you started with your valuation -- or one component of it was a valuation of Minera Mexico. Can you summarize how you went about doing that valuation?

A. Yes. When you do a valuation for a target company, there's three main approaches to value

that you look at.

One is the or could be a market approach based on similar transactions. One other approach could be a market approach based upon guideline public companies. And another approach could be the discounted cash flow approach.

So I looked at those three approaches initially and determined that there were no similar transactions that would have been reliable to use for this analysis, so I focused my valuation on looking at both a discounted cash flow and a guideline company comparable approach.

Q. Okay. And would you -- let's start with the discounted cash flow valuation. Could you lead the Court through how you did that here?

A. Yes. Well, first I had to determine -- I received the projections that were used by Goldman Sachs in development of the fairness opinion that they rendered in this case. And what I needed to do first was determine what method I was going to use for the discounted cash flow.

So I'm doing a going concern for looking at a target company. You look at it from the perspective of going concern valuation. And I -- in

many valuations for discounted cash flow, you do a discrete period and then you do a terminal value. But for mining companies, like, for example if I do an oil and gas exploration company, I'll do a discrete period and do a terminal value.

But what's common for mining companies is that you do a life-of-mine study for the various mines that they have, because there is not an expectation that the resources that they have in place now will be -- they'll find, like, large resources again. So that's all the valuations that I've done in mining companies, I've done life-of-mine analysis.

And then I also needed to determine -- the cash flow projections that were provided did not include inflation. So I was doing it -- you know, I was going to take the uninflated cash flows and utilize a real discount rate in my analysis.

And then also I did it on an unlevered basis, which doesn't -- if I subtract debt at the end of my valuation versus incorporating it into the cash flows.

So that's the methodology I determined, and that was consistent with the methodology that Goldman Sachs utilized.

So the first component that I looked at was the production schedule or the production forecast. And in order to get comfortable with that, I looked at the various -- what happened in this instance was the -- which is common in a lot of sell side -- where companies are being sold, you bring in an independent mining consultant to do a life-of-mine plan in order to maximize your production schedule.

So for Cananea, Mintec was brought in to do a life-of-mine analysis. It looked at various alternatives, looked at multiple alternatives to maximize or optimize the production of the mine. And then for the La Caridad, Winters & Dorsey was brought in to do a similar life-of-mine analysis in early 2004.

So I looked through the historical information, looked through the mine studies, and looked at the production forecast that was provided.

And also Anderson & Schwab was brought in not to prepare a life-of-mine study, but to check the projections and see if there is any need to adjust them. And so I looked at the reports and the work that was done by Anderson & Schwab.

So based on my analysis of that

information, I was comfortable that the production forecast used for Minera Mexico was reasonable and was reliable for purposes of preparing a valuation.

So the next thing I looked at in order to determine the revenue was -- and there's been discussion about this -- what's the appropriate metal prices to use. So I'll go through the process that I used for copper, but for the other metals it was a similar process.

So for copper, in the 2004 time frame, it was trading on COMEX on a liquid basis for around an 18-month period. So for the first very short period, I looked at the traded price for copper. And I believed that in 2004, for 2005, the forecast or forwards were around $1.20, so I utilized that for copper.

After, for 2006 and forward, I looked at -- and this is common -- I looked at market analysts' estimates for what copper was going to be for both -- and this is on a real basis -- for 2006, 2007, and then long-term, for the life of the mine.

And this is the generally accepted common way that you do valuations of mining companies, is you determine what's the appropriate long-term

price to use, and then you put that in your model. And the way that it works is that you have, in the short run, you're going to have supply and demand and differences, but then the expectation is in the long run, you reach an equilibrium.

I looked at what market analysts, Goldman Sachs, UBS, Royal Bank of Canada, various analysts were predicting that the long-term outlook for copper was. And this is the same thing that Goldman Sachs did in preparing their analysis. And the average of the analysts or market view was 91 cents and the median was 90 cents.

Then I also looked at -- so analysts go through -- because at the time, through 2003, the three-year average price was approximately 76 cents for copper and then there was various reasons for that. And when prices goes down, some companies will curtail production if their operating costs are too high.

And in Freeport-McMoRan, they had one of their Grasberg mines that had shut in, so then there was less supply in the market. So as prices go up, there is an expectation that when prices go up, more supply is going to come into the market, and

there is a prediction of what the long-term price is going to be.

And when analysts publish their long-term outlook, they also look at what various company views are. Because the public companies announce to the market what their view is for long-term pricing.

And Southern Peru, for example, was using in their business planning 90 cents. And there is actually, in one of Goldman Sachs' presentations in July 2004, they go into the various competitors, the major players in the market. And it's Phelps Dodge, long-term outlook, 90 cents. Freeport-McMoRan, long-term outlook, 85 cents. Placer Dome, long-term outlook, 85 cents. Grupo Mexico, long-term outlook, 90 cents. Southern Peru, long-term outlook, 90 cents.

So companies, analysts, everyone at the time seemed to be thinking that the appropriate long-term price for copper was 90 cents. Therefore -- and then when Goldman did their analysis in their base case, used long-term copper price of 90 cents, that was presented in the proxy and public information.

So therefore, I felt it was appropriate in my analysis to use a long-term copper

price of 90 cents. So that gets -- and that's -- the copper price is a benchmark price. There is adjustments to it, but everyone is thinking of it either on the COMEX or London Metal Exchange, what the benchmark long-term copper price is. And then from there, that gives you revenue.

And then for the operating expenses, capital expenditures and other items, I looked through the historical information. I looked at the reports from Anderson & Schwab and looked at, you know, the forecasts from Goldman Sachs, and got comfortable with the forecasts for the costs and various other items.

So therefore, I came up with a long-term cash flow forecast. And a portion of that forecast also includes when you're going to close the mines. So I looked at, you know, when various operations of the business were going to close, and then developed a long-term forecast for the company.

The next thing that I did in the discounted cash flow was to determine the appropriate discount rate to use. And I will refer to my report for that. It will just be a second to find it.

So on my report, which is Exhibit 2, Page 109, is the development of the discount rate.

And the method I used was a traditional capital asset pricing model, which is the same method that Goldman Sachs used.

I determined -- I viewed Minera Mexico as a pure play mining and processing company, so I looked at companies of similar size that were also pure play mining and processing copper companies. And my list I came up with: Antofagasta, Grupo Mexico, Phelps Dodge, and Southern Peru Copper Corporation.

My list -- and Goldman Sachs went through the same process. However, Goldman Sachs also included Freeport-McMoRan in their sample.

And in my opinion, Freeport-McMoRan had a significant amount of gold revenue. Even though it was a by-product to their copper production, the price between gold and copper are so significant that I didn't feel it was relevant to include Freeport-McMoRan or other companies that had a significant amount of precious metals as comparables, so I didn't include Freeport-McMoRan.

So as far as companies used for the CAPM, they were the same as Goldman Sachs except that they also included Freeport-McMoRan.

And then for determining my betas, I

looked at global Barra betas. And at the time, I was always using Barra to determine what was the appropriate beta. I believe Goldman Sachs used adjusted Bloomberg betas. Overall, even though there was one different comparable, the beta that I had versus what Goldman had were very similar.

And for the other components of the CAPM, for the risk-free rate, I used 4.8 percent, which is the 20-year government bond rate. I felt it was appropriate to use a longer term risk-free rate. I always use the 23-year rate in my valuations. Goldman Sachs used the ten-year rate, which was I believe 4.2 percent, for the cost of debt.

And for the capital structure, I used the average capital structure of my comparable companies, which was similar to the method that Goldman Sachs used.

And then for the cost of debt, I looked at the average rating of the comparable companies, which was DD, and utilized that cost of debt in my analysis.

Goldman Sachs I believe used Minera's actual cost of debt on their -- I believe they have public debt or they had a yield for Minera. But since

I was doing an optimal capital structure for an industry capital structure, I felt it was more appropriate to use an average industry cost of debt.

And then for the equity risk premium, at the time, in 2004, 2005, for domestic companies, I was utilizing an equity risk premium of 5 percent. And then for foreign companies, I was using an equity risk premium of 4 percent. So for this analysis, since it was a foreign company, I used a 4 percent equity risk premium.

And then for the country risk premium, I utilized the publication or a published country risk premium from Dr. Damodaran. And, basically, Dr. Damodaran looks at sovereign default spreads on the debt of the respective countries and then adds an adjustment to take into account that you're doing it for an equity purpose, not looking at the debt.

And Goldman used a slightly different approach. However, using sovereign debt adjustments, they came up with a pretty close or pretty similar country risk premium.

Just to step back, one of the differences between my analysis and Goldman Sachs' is that Goldman Sachs utilized a 6 percent equity risk

premium where I had a 4 percent equity risk premium. They didn't indicate their source, but it was probably some kind of corporate standard that they were using.

For the long-term inflation rate, I -- and so I have to come up with a nominal discount rate or weighted average cost of capital and then subtract off an inflation rate to come up with a net real discount rate. And I just do straight subtraction because I'm rounding my numbers.

So I can do a more detailed calculation, but I determined that my rounded weighted average cost of capital was 9 percent, and I subtracted off an inflation rate of 2-1/2 percent to come up with a real discount rate of 6-1/2 percent.

And the source I used for the inflation rate was a survey prepared by the Federal Reserve Bank of Philadelphia. And they survey a number of financial analysts such as Goldman and Morgan Stanley and corporate participants and other participants in the market to determine a view for long-term inflation. And that view hadn't changed since the late 90s of using 2-1/2 percent.

I believe in Goldman's, Goldman Sachs' discount rate, they were utilizing a 2-percent

inflation rate, but they didn't have a source. So Goldman Sachs ended up with a higher discount rate in their base case than I did. And it was primarily the result of using a higher equity risk premium and primarily using, you know, a higher equity risk premium and a lower long-term inflation rate.

So from there, if you want to turn to Page 103, which is the conclusion of the summation of all the discounted cash flow analyses, and the resulting enterprise value I came up with for Minera Mexico was $2.784 billion. So that's the overview of the discounted cash flow approach.

Q. Okay. And did you -- I think you testified that you applied another valuation approach also.

A. Yes.

Q. And could you lead us through that, your analysis on that?

A. Yes. Whether you do a discounted cash flow approach, where applicable, it's always good to check it against the market. And because there is -- when you do a market approach, there are some deficiencies.

When you do a discounted cash flow,

you're doing a lot of forecasts into the future. You're making a lot of assumptions; and you want to check it against the market. For all the -- I can't remember a company valuation that I did where I couldn't find market comparables.

And in this situation, you have peer play copper and mining companies that are followed by analysts. And it's debatable, but many people feel that in the markets, people look at the -- place more weight on a market approach versus a discounted cash flow, but I weigh them equally in my analysis. I don't feel in this case that there is one that's better than the other.

The advantage of the market approach is that you're able to tie -- you look at -- and I looked at 2004, which is the valuation I did. I did two valuations: One as of the fairness opinion date of October 21, 2004; and then I did one as of April 1st, 2005, the closing date.

So for the April 1st, 2005, I used the actual 2004 results and then the estimated 2005. And for October 2004, since it was almost near the end of the year, I used the year-end estimated 2004 and the estimated 2005. And the metrics that I looked at

were -- I'll point to the exhibit that I calculated that on.

If you go to Exhibit 4, which is on Page 111 -- I'm sorry -- yes -- lists the comparable companies I listed earlier. And the metrics that I looked at, which is common in this industry, is to look at both EBITDA and then EBIT or operating income. And I looked at that both for 2004 and 2005 and the resulting multiples, and I calculated the mean and the median. And then I selected one for each of these columns in order to apply to Minera Mexico.

So for example, you know, for 2004, estimated EBITDA, the range is 4.26 to 4.8. The mean is 4.54. The median is 4.55. I selected 4.55. So most cases, there is a pretty tight range, and the mean and median were very close together.

So if you go to the prior page, 110 is the application to the operating metrics of those selected multiples. And the range there, the range of enterprise value calculated is approximately 2.7 billion to 3.2 billion. And then the median of those four approaches is 2.831 billion. So that's what I did for the market or guideline company approach.

Q. So what was your valuation conclusion with respect to Minera Mexico?

A. If you turn to Page 42 of my report, there is a summary of, on the one side, it has the income approach conclusion of 2.78 -- approximately 2.8 billion, and then the market approach conclusion of approximately 2.8 billion, and then my average or median of those two approaches is 2.808 billion. And then I added cash and subtracted debt to come up with an equity value of 1.854 billion.

Q. Okay. And then what did you do next? The valuation of Minera Mexico was only one of the components you described.

A. Right. So then what I determined, since Southern Peru is on the -- from a financial perspective, is the buyer, and they're issuing shares as part of an acquisition -- and I have dealt with many companies of this size doing similar transactions and studied the methods that they go through.

It's very common practice to, you know, just look at your stock price and say, Well, this is the consideration that I'm giving up, and this is the consideration that -- because you have a publicly traded company. You have an exact

comparable. It's a reliable and accurate way to determine what the value of the shares are.

And then so I was focusing initially on this is the value of the shares. Because the negotiations between two parties, you're talking consideration given up. There is not normally, that I've ever seen, a negotiation round, What's the value of the publicly traded shares that you're receiving? So I felt that the stock price is an appropriate methodology.

And then I also looked at various factors to see if there was any reason why I shouldn't utilize the stock price. And the factors I looked at were what exchange is it traded on? It was traded on the New York Stock Exchange, so there was no reason to doubt that's a good factor to say that the stock price is representative of fair market value.

I looked at the size of the company. When you have a market capitalization, you have -- some companies are very small, you know, might have a market cap of 20 million, 30 million, 40 million, so you have to take that into account. In this instance, the market capitalization is 3.5 billion, approximately, so there is no reason not to think that

the share price is not representative of fair market value.

I looked at the fact that they were required to report under SEC quarterly, annual, and special event filings.

I also looked at the trading volume of the stock. Prior to closing, the average weekly trading volume was approximately 1.8 percent. Prior to the fairness opinion date, it was 1.3 percent. There was no -- based on that trading volume, there was no reason for me to think that the fair market value -- the value of the stock is not representative -- the trading price of the stock is not representative of fair market value.

So, therefore, I determined that it's appropriate to use the stock price as being representative of the fair market value of the shares being used as consideration in the acquisition.

Q. Let me ask you, you said 1.8 percent. That's 1.8 percent of the total outstanding shares or just the public float?

A. Of total outstanding shares.

Q. So it would be -- the trading volume would be a much greater percentage or was a much

greater percentage of the shares that were -- the non-Grupo Mexico and Phelps Dodge and Cerro shares. Correct?

A. Correct. And then also I considered that this is on pure -- the capital structure of the company was pretty simple. There is a very small amount of debt. I think they actually had more cash than they had debt, so it was pretty much a pure equity play. There were no other complex financial instruments to take into account in looking at the value of the equity.

Q. Okay. From there, what did you do next?

A. Well, if you turn to Page 44 -- and when I did this calculation, I also adjusted for the share ownership. And then there was a special dividend that was going to be declared of $1.25, so I subtracted that off the share price.

So my concluded enterprise value or equity value of Minera is 1.845 billion multiplied by the share ownership of Grupo Mexico; and then I divided that by the share price net of the special dividend to determine the appropriate number of shares that should have been issued, and determined that to

be 41 million shares.

THE COURT: Why don't we do this. I should have mentioned before, because of the short day, we're going to take our break a little early. We're going to take it right now and come back promptly at 10:45. I should have given you more notice.

(A recess was taken.)

BY MR. BROWN:

Q. Okay, Mr. Beaulne. So we've been through your report, did you review the defendants expert report in this case?

A. Yes.

Q. Can you summarize how his approach differed from yours?

A. Dr. Schwartz prepared a stand-alone valuation of Minera Mexico that was almost identical to what I did except that, for the discount rate, instead of using -- you know, for his beta's -- instead of using the pure play copper mining processing companies, he utilized a basket of various metals, gold, silver, uranium, whatever. But the overall, except for the discount rate, his analysis of Minera Mexico was almost identical to mine. His conclusion was off by -- I can't remember the exact number -- but within $50 million, I believe.

The main difference is that instead of determining the appropriate consideration for the acquisition, instead of using the publicly traded share price times the number of shares, he developed a discounted cash flow analysis for Southern Peru, came up with a conclusion and looked at the exchange ratios

to determine whether -- how many shares should have been issued as part of the strategy.

Q. So in your opinion, was his analysis appropriate?

A. No.

Q. Can you explain in more detail why you think that?

A. For a number of reasons. The first one is, if you have a discounted cash flow, which like his discounted cash flow conclusion for Southern Peru was approximately $25 a share, and if you have a publicly traded price is around $46 a share, so if you're utilizing only a discounted cash flow and ignoring the market and not trying to reconcile the difference between your discounted cash flow and the market, that's inappropriate.

Q. And then, from the consideration that's received, Grupo Mexico is receiving shares in a publicly traded company. It's an accurate method to determine what the consideration is.

Also, he indicates that his approach is an apples-to-apples approach. However, he's utilizing one set of projections for Minera that was developed under a robust normal sell-side methodology,

where analysts were brought in, Mintec or mining consultants were brought in, Mintec and Winters and Dorsey. They, you know, ran valuations, maximized the various ways to utilize the cash flows, looked at various things. Anderson & Schwab came in and knocked some of those down, and that would be a normal sale side to do it. You put together your best set of projections of how you think the company's going to operate in the future, and the buyer comes in and you go through your assumptions and some of them get knocked down. Anderson & Schwab kind of played the role of going in and kind of knocking down some of the projections that were utilized by -- in this kind of maximized life-of-mine plan.

On the Southern side, you know, I looked at those projections. And on Southern there was no consultants brought in to do any life-of-mine plan. The life-of-mine plan was based on -- there's a lot of talk earlier as it related to counting reserves or SEC reported reserves. The life-of-mine plan for the sulfite ore reserves was based on the SEC reported reserves. That's not an appropriate methodology to develop a long-term projection for a company.

When you do SEC reporting, you get an

independent source to come in and certify your reserves. So if you don't call someone in to do it, you don't get them certified. You get the reserves reported by the SEC. The process -- you know, even Anderson & Schwab didn't knock down any projections because they were very conservative.

Anderson & Schwab commented there could be optimization plans you can look at. There's also -- you know, Southern Peru has a great location for the Ilo smelter refinery, which is port side, which could be run -- expanded as a merchant. That wasn't considered. There's a lot of things that weren't considered in preparation of the projections. Even for -- as earlier testimony indicated -- that, you know, when Mintec came in later, you know, the reserves went way up.

So, from a perspective of looking at the projections for a company, you don't just look at, you know, their accounting reserves aren't the same as -- the expectation is, as the company operates in the future, they're going to prove up more reserves and they're going to continue to operate.

When Mintec came in in 2006 and certified the reserves, they were not -- there were

the same mines that were there -- Toquepala and Cuajone. It was the same mines, it's just that they weren't certified. It's not the same process.

If you're going through one company and you're comparing the projection and saying I'm going to make these the best normal way I sell the company, and then the only way you're relying on it is looking at, you know, lower case scenario for the other company not trying to do kind of an optimization case. That's not an appropriate way to compare two discounted cash flow analysis. That's not how it happened in the third-party strategy.

Then another comment I have on Dr. Schwartz's analysis is that he also -- that's the first thing he did. So he did an evaluation of Minera, came up with approximately 1.8 billion, then he came up with a value for Southern Peru of approximately 2 billion, compared those two numbers, and then his opinion appears to be, if you -- the reason his method is correct is that if you increase copper prices then both companies -- the relative share -- relative share exchange is reasonable. It's still correct under all these higher copper prices.

A couple problems with that. First

is, the market expectations -- everyone knows that you're not able to. Like commodity prices are going to fluctuate. In a strategy, if a third-party buyer, Phelps Dodge or anyone else coming in to buy this company, they're not going to use $1.30 copper price to buy the company. You know, all the market analysts, any advisor you get is not going to say, yeah, go buy this company, assume $1.30 long-term copper price. That's not appropriate to try to run these sensitivities to prove, you know, one model is correct because, if you increase prices, they both stay the same. Of course they will. They're both copper companies. They're both going to move up when you increase pricing. That's no way of proving it.

Also, when you increase prices, you also have to change the reserves and the amount of reserves you can get out changed based on the long-term price. So it's inconsistent to increase prices without changing your production profile. That's not something you can do easily. You have to run a whole new computer software, life-of-mine plan. He didn't do that. He increased the price and kept the production the same.

And based on, you know -- and based

on, you know, the information in the prospectus, for example, when at the end of 2004, when the reserves were done for both Minera Mexico and Southern Peru using higher -- like the three-year average copper prices, three year average moly, and that was put in the prospectus that was given to potential investors and compared the two reserves for the companies, it appeared that Southern Peru's reserves go up significantly more; where they're almost equal if you're using three-year average pricing versus if you were using lower pricing.

So therefore, you can't just assume that that price increases not only changed -- they change the production profile of each company, not only -- they don't change each company equally. So that was overall, you know, my comments related to his report.

Q. Did Minera Mexico have better reserves than Southern Peru?

A. No.

Q. Can you explain that?

A. Southern Peru had higher quality reserves. The average copper content per pound of rock was higher in Southern Peru. So they have better

reserves.

And then they also have more moly content per reserve -- significantly more. At that time moly prices were going up astronomically. They have more moly. And moly's a byproduct. When you're going to extract copper, when you're looking at your operating costs, you look at what's the price of moly that you're going to get out and that reduces your operating cost. That's an important factor to consider.

So Southern Peru had better moly, better quality overall reserves. And then they had better location because their reserves were close to the Ilo smelter which was port side. From that basis, my opinion is that Southern Peru had better reserves.

Q. Now, between October 21st, 2004, when the strategy was approved, and April 1st, 2005, when it closed, what happened to the stock price of Southern Peru?

A. It went up by approximately 22 percent.

Q. Now, does that fact suggest that this strategy was fair?

A. No.

Q. Can you explain your view of that?

A. Southern Peru had higher quality reserves. The average copper content per pound of rock was higher in Southern Peru. So they have better reserves.

And then they also have more moly content per reserve -- significantly more. At that time moly prices were going up astronomically. They have more moly and moly's a buy product. When you're going to extract copper, when you're looking what's your operating costs, you look at what's the price of moly that you're going to get out and that reduces your operating cost. That's an important factor to consider.

So Southern Peru had better moly, better quality overall reserves. And then they had better location because their reserves were close to Ilo smelter which was port side. From that basis my opinion is that Southern Peru had better reserves.

Q. Now, between October 21st, 2004, when the transaction was approved and April 1st, 2005, when it closed, what happened to the stock price of Southern Peru?

A. It went up by approximately

22 percent.

Q. Now, does that fact suggest that this transaction was fair?

A. No.

Q. Can you explain your view of that?

A. Well, if you look at all comparable companies I mentioned earlier, Antofagasta, Grupo Mexico, Phelps Dodge and Southern Copper, obviously, the other three also went up pretty significantly. Grupo went up by 28 percent. Antofagasta went up by 25 percent over that same period, and Phelps Dodge went up by approximately 18 percent. On average, you know, that was slightly below the average of the other three companies. So it's mainly because the increases were -- copper prices were increasing, moly prices were increasing, the values of those companies were increasing similarly amongst each other.

Q. Okay. So there's nothing in that market price where you can separate out what the market was thinking about this transaction from what they were thinking -- how they were approaching values of pure play copper companies all together; correct?

A. Correct.

THE COURT: Well, there's nothing in

this record. You're saying it's -- it wasn't academically possible to do that?

THE WITNESS: That's correct.

THE COURT: You couldn't do an event study? My friend, Professor Babchock couldn't have figured out how to isolate these variables?

THE WITNESS: I think it would be very difficult. I would have to look at the study. But to say, you know, so many different factors, you'd have to isolate the impact of copper, moly, and the other production announcements for the companies would be very difficult to do.

BY MR. BROWN:

Q. You saw -- in this case Goldman Sachs did an analysis and presented a fairness opinion as of October 21st, 2004?

A. Yes.

Q. Was there a reason -- would -- was there a reason here to update that analysis as of the closing date?

A. Yes.

Q. What is that? Can you explain that?

A. Well, there was significant volatility over that period in copper prices and in moly prices.

And if you look at -- for example, the earnings for Minera Mexico for 2004 were expected to be, I think, in the Goldman analysis EBITDA 622 million. And then for the actual -- for the end of the year, which would have been available before closing, came in at around 671 million.

For Southern Peru, the estimates from Goldman were approximately EBITDA 733 million. Southern Peru came in at over a billion, like a billion four million.

So clearly Southern Peru was outperforming over that period -- in that fourth quarter would have been advisable to go back and understand why, look at the models. Goldman's model, for example, was -- their equity value for Southern Peru was a billion and a half. And you have in 2004 a loan, a billion dollars worth of EBITDA. So you kind of question whether the validity of that discounted cash flow where you have that one and a half times relationship.

Similarly with Dr. Schwartz, who's 2 billion, you're having a billion dollars of EBITDA in 2004. The outlook for 2005 prices are going to be higher than 2004. Everything is going really good.

So how were you using this model as your sole check for -- this is in relation to Dr. Schwartz -- your sole check for determining that the relative value is appropriate. It doesn't seem to make sense to me.

Q. Your report attaches a long list of documents that you reviewed?

A. Yes.

Q. And did you review the depositions and other -- the rest of the record in this case?

A. Yes.

Q. Was there -- was the special committee presented with a stand-alone rationale for paying $3.1 billion for Minera Mexico?

A. Not that I had seen.

Q. Is there any basis for anyone to believe that in the M&A market someone else would have paid $3.1 billion for Minera Mexico?

A. Absolutely not.

Q. Why is that?

A. Well, a third party buy coming into this situation -- if you were to use that as a hypothetical, looking at Minera Mexico, where they brought in my consultants, optimized their long-term plan, prepared a set of projections, and you have a

discount rate and you're coming up with a value of 1.8 billion, and then you look at comparable public companies and you're trading right along that line -- the EBITDA multiple, everything's the same -- I don't see how -- what rationale anyone would have for paying 3.1 equity -- 3.1 billion equity for Minera Mexico.

MR. BROWN: Okay. Thank you. I have no further questions.

MR. HENKIN: Your Honor, do you want me to proceed?

THE COURT: I want you all to decide. It's really not -- I'm comfortable taking five minutes. I'm comfortable proceeding, if everybody else is comfortable. It's really -- so what I'm saying is, I'm deferring to our reporters and you all about what your wishes are.

MR. HENKIN: I'm happy to proceed, Your Honor.

MR. BROWN: It's up to the reporter.

CROSS-EXAMINATION

BY MR. BROWN:

Q. Good morning, Mr. Beaulne. You were speaking just now about reasons that you thought Goldman Sachs should have updated its fairness opinion

before the closing of this transaction?

A. Yes.

Q. Could you show me where in your report is that discussed?

A. That's not in my report.

Q. Okay -- I want to go backwards a little bit with some of the things you discussed. You talked about SPCC's stock price performance between October 2004 and April of 2005, and you tried to draw some distinctions between how it performed and how other copper companies performed. Where is that analysis in your report?

A. I did valuations as of both dates. So the underlying stock prices were part of my analysis.

Q. Did you do an event study comparing SPCC's stock price performance to the price performance of any other copper or any other mining companies in that period of time?

A. No. The question -- I did not. The question just related to percentage change in those companies. That's how I answered it.

Q. You didn't do an event study?

A. Correct.

Q. You didn't do an event study comparing

SPCC's price, or any other mining stock price to changes in the price of copper?

A. That's correct.

Q. You didn't try to correlate the changes of any mine company's stock price with the price of copper?

A. Correct.

Q. It sounded like your disagreement with the cash flow forecasts that were prepared for SPCC and used by the special committee and Goldman Sachs and by Professor Schwartz is that they didn't take into account a reserve increase that was announced in 2006. Is that correct?

A. That's not correct.

Q. What was wrong about my statement?

A. What I was saying is that the -- when you do a forecast such as that, you do not just rely on the reported proven and probable reserves that are part of the SEC reporting, which were certified in 1998 and 1999. And then as confirmation posts, when an actual certification was done, then became evident that there was more reserves.

As part of a normal process, companies prove out the reserves from an accounting perspective.

But you have an expectation, when you're doing a forecast, that the company will prove out their reserves over time.

Q. You're not aware of any evidence that you've seen in the record that SPCC or anybody else knew that the accounting -- that the ore reserves were going to increase in the peruvian mines in 2006, do you?

A. Not specifically. No.

Q. You have got no training in geology, do you?

A. No.

Q. And you're not an engineer, are you?

A. No.

Q. You don't have any professional training about regarding evaluating life of mine plans, do you?

A. Not professional training, no.

Q. You're also not an expert in security market operations or market structure?

A. That's correct.

Q. And isn't it also true -- I know Mr. Brown asked you some questions about assignments you've done over the years. Isn't it also true that

you never valued a copper company in the context of a live M&A transaction?

A. I couldn't recall specifically if I had or not.

Q. So sitting here today, you can't remember ever trying to value a copper company in a live M&A transaction?

A. I know I valued copper companies. And then, as part of acquisitions, whether the acquisition had already been announced or closed before I was doing it, I can't recall specifically.

Q. But you don't ever recall giving a fairness opinion, for example, with regard to the valuation of a copper company in connection with a live M&A transaction?

A. That's correct.

Q. And you've also never tried to value a copper company in the context of a litigation before?

A. That's correct.

Q. Have you ever met, spoken with, or otherwise communicated with any plaintiffs in this case?

A. No.

Q. And who is currently lead plaintiff?

A. Is it -- I'm not sure the legal structure. As a derivative action, I'm not sure who the lead plaintiff is.

Q. Whoever the lead plaintiff is, do you know if he or she or it has read the report that you submitted in this case?

A. I don't know.

Q. You intended your report, which is JX 47, which you've got in the binder in front of you, you intended it to be a complete summary of the opinions that you were going to offer in this case; right?

A. That was my opinions as of March 16th, 2010.

Q. You haven't issued an updated or amended report since then, have you?

A. No, I haven't.

Q. Okay. And your report didn't contain any DCF analyses of SPCC; is that correct?

A. That's correct.

Q. Your report didn't contain any opinion about the process the special committee followed in this case; correct?

A. That's correct.

Q. And you're not offering any opinions about the process the special committee followed in this case; right?

A. That's correct.

Q. And you haven't offered either in your report, or today, any opinions about a DCF value of SPCC at any time; isn't that right?

A. That's correct.

Q. And your report didn't contain any criticism or analysis of any of the cash flow projections that the special committee and its advisors used for either Minera or SPCC; right?

A. The comments I made earlier related to the rebuttal of Dr. --

Q. I was asking about your report.

A. My report was done March 16th, 2010, prior to Dr. Schwartz's report.

Q. That's not what I asked you. I asked you if your report contained any criticisms or analyses of any of the cash flow projections that the special committee or its advisors used for SPCC or Minera?

A. That's not contained in my report.

Q. You had access to all those cash flow

projections; right?

A. Yes.

Q. In fact, the reason that your report didn't contain any analysis of the cash flow projections for SPCC is because that wasn't part of your assignment that you got from plaintiff's counsel, correct?

A. No.

Q. It was not part of your assignment?

A. My assignment was to determine the fair number of shares that should be issued for the acquisition of Minera Mexico.

Q. So your assignment was to do a DCF of Minera and divide that by the stock price of SPCC?

A. I was given no guidance on what approach to use.

Q. Were you asked to conduct any analyses of the cash flow projections that the special committee and its advisors used for SPCC?

A. I wasn't given specific guidance. My answer would be no.

Q. Were you told not to do any analysis of the cash flow projections that the special committee and its advisors used for SPCC?

A. Sir, can you repeat that?

Q. And you weren't directed -- strike that.

You did -- in the end, you didn't do any analysis of the cash flow projections that the special committee and its advisors used for SPCC; isn't that right?

A. In the end meaning --

Q. That resulted in your report.

A. That's correct.

Q. And in preparing your report, you didn't analyze whether the rising copper price in 2004 was implicitly incorporated into SPCC's stock price, did you?

A. No.

Q. And you weren't offering any opinions about what happens to the price of a publicly traded company when it announces that its going to acquire another company in a stock-for-stock merge, did you?

A. No.

Q. You would agree with me that there are different political risks associated with investments in different countries; right?

A. Yes.

Q. And in particular, there were different political risk profiles for Peru and Mexico in 2004?

A. Yes.

Q. Sort of more particularly than that, would you agree that Mexico was considered an investment grade country in 2004, whereas Peru was not?

A. I don't recall specifically the ratings right now.

Q. Now, I think you talked on direct about the primary difference between your DCF of Minera and the DCF of Minera that the special committee and its advisors used being the discount rate; is that correct?

A. As it related to my discounted cash flow?

Q. Correct.

A. That was -- there was small differences, but the primary difference was the discount rate.

Q. You didn't adjust the cash flows that were used in the DCF; correct?

A. Except for the short-term cash flows,

not the long-term cash flows.

Q. When you say the "short-term" ones, you mean you added the stub period for 2004?

A. I adjusted -- well, for the period where there was metal prices from analysts' views for 2005, six, and I believe seven, I adjusted for that as well.

Q. So other than that, in performing your DCF of Minera, you relied on the cash flow projections that the special committee and its advisors had used?

A. That's correct.

Q. And do you believe that the adjustments that both Goldman Sachs and Anderson & Schwab had made to Minera's financial projections were reasonable?

A. Yes.

Q. And I think you spoke before that you agree that there is uncertainty around estimates of long-term copper prices?

A. If you're preparing the estimate for -- you know, for purposes of valuation, there -- there's -- every one is going to have different estimates. The normal way is to use the market consensus view.

Q. Okay. You spoke a lot during your direct examination about analysts and their long-term estimates of copper prices.

What do analysts mean when they say long-term in the forecast that you were talking about?

A. They -- my discussions with analysts over the years is that, when they're referring to long-term, it's when the prices reach long-term equilibrium. And for purposes of valuation, that's the appropriate number to use in life-of-mine valuations.

Q. So do they all mean the same thing when they talk about long-term prices -- all these analysts you're talking about?

A. For the most part, my understanding is that they do.

Q. And what do they mean? Does that mean five years, ten years, 50 years, something else?

A. It means for, you know, an indefinite period of time.

Q. You talked about -- you indicated that means when prices reach equilibrium. Copper prices have been cyclical for decades. Where's the equilibrium? When did copper prices reach

equilibrium?

A. That's the way the analysts look at it. They're looking at when is the appropriate -- it's -- the expectation of when it's going to reach equilibrium, not that it's going to exactly occur. That's the appropriate way to -- you know -- to forecast for the long-term price.

Q. And these analysts that you're talking about, they are, or they think they are experts on commodity pricing, I assume?

A. Well, the analysts, as well as the companies -- you know, Southern Copper, Phelps Dodge, you know, Freeport-McMoRan -- they also publish what they're using for long-term prices. When the analysts are determining what they feel the appropriate long-term outlook for copper is, they're also incorporating both their own supply and demand calculations and what companies' views are for long-term prices.

Q. But you're not sitting in this court claiming to be an expert on commodity pricing or commodity price behaviors, are you?

A. No.

Q. You agree with me that all else being

equal, an increase in the long-term price of copper generally increases the value of a copper company; right?

A. Yes.

Q. And in your report, when what you did -- correct me in I'm wrong on this -- is you chose a long-term price to use for copper and then you derived a DCF for Minera based on that. But you didn't consider during that process what values might arise for Minera from using different assumptions for the long-term copper price; correct?

A. That's correct.

When I looked at the various analysts, and they're all very close to 90, and then, even in February 2005 Phelps Dodge came out and reaffirmed their view that they're using a long-term outlook price of 90, looked at what Southern Peru was announcing to the market as 90, I felt that I didn't need to sensitize. If I'm doing something, like a solvency opinion, I'll run a downside scenario and say stress test the cash flows and see what will happen, if you're doing forecasts for financing for a bank or something like that.

But when I'm doing a valuation, I'm

giving an opinion, I look at the available information and determine what's the appropriate mental price and include that in my opinion.

Q. Now, I noticed in your report there aren't any valuations of Minera at long-term copper prices other than 90 per pound. Isn't it true that Duff & Phelps didn't run -- did run DCF analyses for Minera at long-term copper prices other than 90 a pound?

A. I don't recall.

Q. Okay. If you would turn in the binder that you have to Tab 7.

You'll see the copy of the transcript of your deposition. Do you have that?

A. Yes.

Q. And if you would turn to page 93, please, and specifically look at line five. I asked you, "Were any of the sensitivity analyses that we've just been talking about produced to the defendants?"

And we had been talking about DCF's of Minera at prices other than 90 per pound and your answer was, "No. As part of my analysis I look at different rates but I concluded on one price forecast and used that in my analysis."

Does that refresh your recollection about the fact that Duff & Phelps had run DCFs with other numbers?

A. There's a difference between looking at a forecast -- the models had sensitivities where you could toggle various copper prices. I looked at that as it related to the cash flow forecasts, but that's not necessarily a discounted cash flow, if I don't have my discount rate in there. I looked at the sensitivity of the cash flows to various prices.

When -- you're question, as it related to discounted cash flow conclusions, I don't recall looking at it from that perspective.

Q. Maybe I can give you some help with the next question and answer on that same page.

I asked you, "And when you say you looked at different rates, what does that mean, that you looked at them. Does it mean, for example, that you determined what the valuation would be for Minera based on those rates?"

And your answer was, "I may have done that as part of my analysis, looked, yeah, what the value -- what the cash flows would look like under different rates. But I concluded on one rate and just

used that in my concluded analysis."

Does that refresh your recollection, Mr. Beaulne?

A. It says I may have. I don't know definitively. I just didn't remember if I looked at conclusions at different rates.

Q. Sitting here today, you still don't remember whether at any point in your analysis you looked at DCF valuations of Minera using long-term copper prices other than 90 per pound?

A. I don't recall the other conclusions of using anything other than 90 per pound.

Q. But you acknowledged that they were -- the DCFs were run at the other prices?

A. I can't -- I don't recall. I know the models that were provided from Goldman had sensitivities where you toggled different prices. And when I looked at that, I don't recall in having my discount rate and coming up with a conclusion. I just don't recall specifically the conclusions were under those scenarios.

Q. If I'm understanding correctly what you're saying, you're saying to do what we have just been talking about, it would be a matter of adjusting

two numbers in a spreadsheet, one for the discount rate you wanted to use and the other for the long-term copper price?

A. It depends how much you want to sensitize it. Because if you increase the price too significantly, that changes your production forecast because of the amount of reserves you're going to get out. It's not as simple as you're describing it.

Q. Putting that to the side, would you agree if you were to -- you would agree with me that if you were to run a DCF analysis of Minera, using a long-term copper price higher than 90 per pound, you would get a larger value than you would at 90 per pound?

A. The result of that, the model would increase, yes.

Q. Okay. In connection with the analysis that you did in your report, when you were using SPCC prices, you only cared what the stock price was, not why it was what it was; correct?

A. That's correct.

Q. And you would agree with me that somebody can have an opinion of fair market value that is different from a company's publicly traded stock

price; right?

A. Yeah, because one's an opinion and one is a fact. You can have a difference between an opinion an a fact.

Q. The difference we were talking about could be caused by commodity price uncertainty?

A. The difference -- I'm not following you.

Q. In the opinion of fair market value versus the stock price.

A. Well, any time -- it's difficult to answer that question because somebody can have an opinion of fair market value. Whether I agree with it -- I don't know the assumptions underlying the opinion. That is different than the stock price. It's a difficult question to answer.

Q. Okay. Well, we can go back to your deposition, if you're having trouble, and, in particular, we can look at Pages 218 through 219. And, in particular, if you start at Line 23 on Page 218, this was after some colloquy. And the question was reread to you then as well.

"Question: Can there be a difference between an opinion of value and a company's stock

price that might be caused by commodity price uncertainty?

"Answer: And the commodity price uncertainty is in the stock price or in the fair market opinion."

And I said, "The fair market value."

And you said, "Opinion?"

And I said, "Yes."

Then you said, "Well, someone can have an opinion of fair market value than is different than the publicly traded stock price. And you're asking me if that difference can be caused by commodity price uncertainty?"

I said, "Yes."

And you say, "Okay, yes."

Do you agree with that?

A. Given that summary, yes.

Q. Okay.

You would also agree with me, the assets of a holding company can be worth more on an individual basis than they are as part of a holding company; right?

A. That could be the case. It could be the opposite. So on a case-by-case basis.

Q. All else being equal, thin liquidity could be detrimental to public stockholders of a company; right?

A. Yes.

Q. And you also agree that using a DCF model is a reasonable way to value a company?

A. Yes.

Q. You could have done a DCF of SPCC on your own, couldn't you?

A. I could have prepared a DCF. Whether I would have used it in part of my analysis or come up with an appropriate conclusion, I'm not sure.

Q. You could have done a DCF analysis using the materials available to you of SPCC; right?

A. I could have commenced doing a DCF analysis. Whether I would have felt it was reliable to use it as an opinion is another matter.

Q. If you look at your report, JX 47, and, in particular, pages 48 through 50, you'll see it talks about you observed that the DCF value that Goldman Sachs derived for SPCC was below SPCC's market capitalization. In fact, that was something that you talked about in your direct.

A. Forty-eight through 50 of my report?

Q. Your report. I'm sorry.
A. I was in the transcript.
Q. JX 47.
A. Yes.
Q. You talked in your direct that the DCF that Goldman calculated for SPCC was below its market capitalization?
A. Yes.
Q. Okay. You didn't do anything to try to determine why the DCF value for SPCC was below its market capitalization; right?
A. Correct.
Q. If you look at Section 3.1 of your report and particularly the second and third sentences on Page 12 -- and the first one -- the second and third sentences on Page 12. The first one says, "Metals prices on the whole finished 2004 up almost 25 percent, due to low inventories and strong demand, most notably from China. However, increased mine operations were expected to bring more product to market in the second half of 2005 and to help ease prices."

Then if you flip over to Page 16 of your report, you'll see that it's the last full

sentence there says, "Copper prices continued to rise in 2004 averaging $1.29 per pound and closing the year all the $1.49 per pound."

You see that?

A. Yes.

Q. Okay. You made those statements in your report. But isn't it true that you didn't factor those statements into your analysis or your conclusions about the value of SPCC?

A. Well, my value for SPCC is determined by the stock price of SPCC. I didn't need to incorporate that analysis in using the stock price for my analysis.

Q. And the point of my question, though, is that you didn't examine how those sentences had an impact on the stock price of SPCC, did you?

A. No.

Q. Okay. And isn't it also true that you didn't try to incorporate the facts that you were trying to set forth in those sentences into your valuation of Minera as well?

A. Well, you're talking about which valuation of Minera? In my report I have one as of October 21st, 2004, and one as of April 1st, 2005. So

when I did the update for April 1st, 2005, I used an updated copper forecast for Minera for 2005 that was significantly higher. I think it was $1.45. And in my 2005 forecast for Minera, as of October 2004, was $1.21. So the increase in the short-term copper prices was incorporated into my closing date valuation as of April 1st, 2005.

Q. But you didn't update your long-term copper price that you used in -- as of a closing data analysis, did you?

A. Yes, I did. I increased it to 95.

Q. That was based not on the market price movement but on the fact that the analysts' forecasts had changed in that period, correct?

A. That was part of the reason.

Q. What else was part of the reason?

A. I don't.

Q. In your report it states that the only reason you adjusted the long-term copper price was because the analysts had adjusted their views.

A. Correct.

Q. You said that was part of the reason. In fact, there was nothing else?

A. Right. There was -- that's correct.

Q. Okay.

I want to talk about your comparable companies analysis for a minute. If you look at Page 38 of your report and specifically Section 7.1.1, you discuss the -- your selection of guideline companies there. And you say that you identified a set of publicly traded companies based primarily on industry classifications that were similar to Minera as of the fairness opinion date and the closing date?

A. Yes.

Q. You list the companies that you identified. And those companies are Antofagasta, Grupo Mexico, Phelps Dodge, and SPCC; correct?

A. Yes.

Q. Isn't it true that Phelps Dodge was a shareholder of SPCC at the time of this transaction?

A. Yes. A small -- you know, Phelps Dodge had a market capitalization -- I can't remember exactly what it was -- of about nine billion. They had, as a percentage of their investment, they had an investment in Southern Copper, yes.

Q. You didn't try to test how Phelps Dodge's investment in SPCC would impact the beta for Phelps Dodge, did you?

A. The percentage of their overall market cap was so small that I didn't feel it was necessary.

Q. That's not what I asked you. I asked you if you tested?

A. I did not do a test.

Q. Okay. Isn't it also true that Grupo Mexico was also a shareholder of SPCC at the time of this transaction?

A. That's correct.

Q. You also didn't test how Grupo Mexico's beta would be impacted by the fact that it was a shareholder of SPCC, did you?

A. But I was doing my valuation for Minera. I don't understand your question.

Q. Maybe I misstated my question. Grupo was also a holder of SPCC. Yes?

A. Yes.

Q. Okay. And SPCC was another one of your supposedly comparable companies?

A. Yes.

Q. And did you test how their two betas were related?

A. No.

Q. You engaged in what you called a

quality review before issuing your report. Isn't that right?

A. Yes.

Q. And before I took your deposition, you didn't think there was anything in your report that needed to be corrected, did you?

A. That's correct.

Q. You performed in this same section, Section 7 of your report, what you called a screen to find companies to use to report as your comparables?

A. Yes.

Q. And one of the purposes of the screen was to keep in companies that were primarily involved in mining and processing copper; correct?

A. Yes.

Q. Isn't it true that your screen omitted at least one company that was primarily involved in mining copper in 2004: Ivanhoe?

A. That's an incorrect statement because, as I stated in my working papers I provided, when I was doing the selection, I was looking at the annual reports as of 2003. When you presented in my deposition Ivanhoe's financial statements for 2004, if you read the footnotes and if you looked at the actual

2003 financials, the 2004 do not include the discontinued operations from a sale of their iron ore business.

So in 2003, when I was doing my screening as of those annual reports, Ivanhoe primarily was iron ore versus copper.

Q. If you wouldn't mind, Mr. Beaulne, picking from the rack next to you Volume II of the joint exhibits and, particularly, open it to JX 50, please.

It should be on the top rack and should say, "Volume II of VI." In particular, open it to JX 50, which is the annual report for Ivanhoe, financial statements, December 31st, 2004, and 2003.

A. Okay.

Q. And open it to Page 4, please.

A. Okay.

Q. And under, "CORPORATE STRATEGY AND OUTLOOK." Read the first two sentences there into the record.

A. "Ivanhoe Mines Ltd. is an international mining company currently focused on exploring and developing a major discovery of copper and gold at its Oyu Tolgoi (Turquoise Hill) project in

Southern Mongolia (The 'Oyu Tolgoi Project')."

How many sentences do you want me to read?

Q. First two.

A. "Ivanhoe Mines' operations also include the extraction of copper from a 50% joint venture interest in the Monywa Copper Project in Myanmar."

Q. If you would turn to Page 106, the same document, please, which has the selected financial information regarding the company. I'd like you to just look at that and tell me, in 2003 and 2004, does it contain any revenue from a source other than copper?

A. What you're not understanding is it's an accounting convention. When you sell a business, it's a discontinued operation and you're not going back into that business. When you report future years, that you do not show the results from that discontinued operation. So if you -- when I was going through this screen, I was looking at the 2003 financials. If you look at the 2003 financials, it will indicate that a majority of the revenue was noncopper.

Q. So you're telling me you looked at the wrong financials for Ivanhoe?

A. I did my selection for October 21st, 2004. These are the 2004 financial statements that were issued after my first valuation date. I didn't look at the wrong financials. My selection criteria was looking at the 2003 annual reports.

Q. Okay. And so look at the revenue results for 2003 and 2004 that are in this annual report and tell me if they show revenue from anything other than copper?

A. They do not. But your answer is somewhat misleading in that it's not shown there because of the discontinued operations. They had revenue from other sources, but it's an accounting convention. When you sell a business, you're not going to continue in the future, you do not report the top line revenue on comparable years.

Q. So it's your testimony that Ivanhoe had up through 2003 some revenue from something other than copper, but then going forward it was not showing revenue for anything other than copper?

A. Well, that's what is indicated in their 2004 financial, yes.

Q. And you excluded Ivanhoe from your screen?

A. I would have excluded it anyway because it's a development. A number of various reasons, but I would never have -- they didn't have -- their mine primarily was development anyway. I -- there's a screen process I went through, then there was a final selection process that I had. When you're asking me questions -- did it meet this criteria? --this never would have met my final selection criteria.

Part of my final selection criteria, I did analysts' reports and what others were thinking in pure play copper and mining process. Even this selection, that's one component of it which you're misleading as far as your questions. I wouldn't have selected it as a comparable.

Q. What was the market cap of Ivanhoe in October of 2004?

A. I can't recall specifically. But I know it was, I think, in excess of 1 billion.

Q. I just want to make sure I understand your comparable companies exercise. The whole point of it was to find companies to use to value Minera --

right? --or to assist you in valuing Minera?

A. Yes.

Q. And one of the companies that you selected as a comparable was in fact SPCC; correct?

A. Yes.

Q. So you believe that Minera and SPCC were comparable for valuation purposes as separate companies; correct?

A. For purposes of looking at EBITDA and then blending the Southern Copper with the other comparable companies, I felt that Southern Copper was a similar company for purposes of applying an EBITDA multiple to the metric of Minera Mexico.

Q. Now, two of the companies that you listed that you used as your comparables were NYSE listed. One of them was listed in Mexico and one of them was listed in London. Isn't that right?

A. Yes.

Q. You know that there's a concept called a listing premium, meaning that on certain exchanges the company might have a better listing versus than on other exchanges; correct?

A. That may be the case. But I've never seen anyone adjust a market approach for a listing

premium.

Q. Okay. So what you're saying is, you didn't do that here?

A. Correct.

Q. Okay. But you understand that the concept of a market premium exists?

A. It's possible. I don't know if it exists or not. I've never seen anyone, in any valuation I've reviewed or looked at or heard of, where you take a comparable company, say Antofagasta -- I think it might have been at some point on the FTSE 100 -- saying because they're on a limited stock exchange I'm going to adjust their multiple. I've never seen that done.

Q. Okay. Would you agree with me that a life-of-mine plan is different than a financial projection?

A. Well, a life of mine -- when you use the term "financial projection," what are you referring to?

Q. What is the life-of-mine plan used for?

A. It could be used for how you're going -- how you're going to develop the mine.

Q. So you would agree, it's essentially used for production planning; right?

A. That's one thing it's used for.

Q. Can you think of anything else they're used for?

A. Well, it could be used for a basis of preparing a financial projection.

Q. Okay. But do you know whether plans are used internally by mine companies for valuation purposes?

A. They're used in the process of developing valuations.

Q. Are they used internally by mining companies for their own valuation purposes?

A. Their own purpose? I'm not following you on that.

Q. Strike that. You would agree with me that what you described as your market approach is based on when you calculate multiples. That's based on historical results, whereas a DCF valuation of a company is based on anticipated future cash flows and expenses?

A. Well, it's part of my market approach. I'm looking at estimated 2004 and estimated 2005. So

there's a projection component of the market approach.

Q. It's a short-term projection, though; correct?

A. Yes.

Q. Whereas DCF is based on a long-term cash flow and expense projections?

A. That's why I reconciled the two. I do one approach where I'm taking into account the long-term cash flow forecasts, which isn't tied to the market, and then I do the market approach that is looking at more reliable data, as far as you have actual information, and one year forecast is easier to predict and compare the two approaches.

Q. In this transaction SPCC was buying control of Minera, wasn't it? Buying 99.15-ish percent?

A. You want me to assume that there wasn't already control as from the Grupo level?

Q. Well, let me ask you to put it in your own words. What was SPCC buying in this transaction?

A. SPCC was buying 99 percent of Minera Mexico.

Q. You would agree with me that was a control position for Minera Mexico?

A. Yes, as far as transferring. So you have SPCC was now going to be the controlling shareholder of Minera Mexico. Correct.

Q. After you derived your market multiples and applied them to Minera to come up with your estimate for the value of Minera based on your market approach, did you add a premium to that?

A. No. I didn't feel it was appropriate because, when you add premiums, from a controlling basis you need to look at a few factors: one is, you want to have some similar transactions where you've evidenced premiums. And then, for certain industries, based on whether there's a need for control or a benefit for control, in this situation here, like if you look at the transaction, Anderson & Schwab said there wasn't any synergies. You have to look at a number of different factors. For this purpose I felt there was no reason to add a premium for control.

Q. Have you done any analysis of whether SPCC's shareholders benefitted from the transaction at issue in this case?

A. No.

Q. I'd like to look at another document with you. If you could take from the stack -- from

the cart, please, the binder with JX 103 in it, please.

A. Okay.

Q. If you look at JX 103, you will see that it's an e-mail from someone at Goldman Sachs to the special committee and its advisors on July 7th. And it includes a memo from Goldman Sachs, which is the three pages following the e-mail. It includes a presentation deck from Goldman Sachs which runs on after that, and then it includes some materials sent by UBS.

Do you see that? You can just read the cover e-mail. It says, "We are also attaching a copy of 'Discussion Materials' sent by UBS as well as a memorandum with observations."

That's in the cover e-mail?

A. Yes.

Q. So you see all of those things?

A. Yes.

Q. Okay. If you would, turn to the page that is Bates stamp SP COMM 006945, please. Are you with me?

A. Yes.

Q. Okay. You'll see that that page at

the top is headed "Price/NAV Analysis." And it states at the top, "Copper producers are trading at a 30% premium to DCF values; SPCC is trading at a higher premium based on management model results."

Do you see that?

A. Yes.

Q. Then it has a table showing comparisons of DCF values for a number of copper companies and that includes, by the way, Antofagasta and Phelps Dodge. Those were two of your comparable companies with their market prices. Do you see that?

A. The table just --

Q. Just below the header.

A. Yes, I see it.

Q. Okay. It also has a set of entries lower down in the next section for Freeport-McMoRan which you didn't include as a comparable in your report. Do you see that?

A. Yes.

Q. My question for you is, is there anything in your report that contradicts in any way the calculations that are set forth in this chart on Page 6945?

A. Well, it's not --

Q. You didn't do any analysis in your report that addresses these same issues, did you?

A. It's not an appropriate valuation -- generally accepted valuation method -- to take a multiple of a discounted cash flow. I don't know the analysts, what their basis for net asset value is, how they're determining -- sometimes net asset value they only go ten years. You don't know what the other assumptions are. You don't know if they're optimizing it. It's just -- and I've -- in cases where people have even presented valuations to the Securities and Exchange Commission, they will not allow you to present a valuation where you're using a multiple of a DCF. So that is their approach that is completely incorrect.

Q. Okay.

Turn to the next page that's Bates stamped SP COMM 006946.

A. Yes.

Q. Do you see at the -- toward the bottom of that page it talks about two analysts reports, one by Santander and one by RBC Capital Markets that report DCF per share prices for SPCC of $20 per share, and 21.60 per share, respectively?

A. I see that, yes.

Q. Okay. In fact, those are two analysts' reports that you reviewed or considered as part of your report, aren't they?

A. They may be -- I reviewed a lot -- considered a lot of analysts' reports.

Q. If you have any doubt about it, you can look at 96 of your report and you'll see those two analysts' reports listed in your list of materials considered?

A. I believe you.

Q. Okay. But in contrast to that, this document that we've just been looking at, which I will tell you starts on page -- Bates Page 6924 in JX 103 and runs through Bates Page 6950, that document isn't listed in the list of documents considered in connection with your report. I'll represent that to you because I've looked through the list.

A. Okay.

Q. Interestingly, though, the document immediately before it, the Goldman Sachs presentation deck is listed in your report, and that's listed under SP COMM 6858 through 6923 on Page 79 of your report. Why is it that you were given a copy of the

Goldman Sachs deck but not the UBS deck that are part of JX 103, both of them?

A. I don't recall the specifics. I received a lot of documents.

Q. I know you received a lot of documents. The list of documents you considered was quite long. I'm asking you why you got one part of JX 103 but not the very following part of JX 103?

A. I don't know.

Q. Who made that decision?

A. I don't know.

Q. Was it somebody at Duff & Phelps or somebody at plaintiff's counsel?

A. The document -- you know, I don't know why the document we -- we -- we didn't receive it or why it's not on the list. I just don't know.

Q. If you look at the very first page of JX 103 that's Bates stamped SP COMM 6854, you'll notice it was marked as a single exhibit during the depositions in this case. Do you know it was broken up when it was given to you?

A. I don't know the reason for that not being included in my report as a document considered.

THE COURT: Are we done with this

subject?

MR. HENKIN: Yes, Your Honor.

THE COURT: We're going to break and come back tomorrow morning.

(Court adjourned at 12:00 p.m.)

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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
Friday, June 24, 2011
9:07 a.m.

- - -

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

- - -

TRIAL TRANSCRIPT - VOLUME IV

- - -

CHANCERY COURT REPORTERS
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- - -

THE COURT: Good morning, everyone.

MR. HENKIN: Good morning, Your Honor.

THE COURT: You may proceed.

DANIEL S. BROWN, resumed.

CONTINUED CROSS-EXAMINATION

BY MR. HENKIN:

Q. Good morning, Mr. Beaulne.

A. Good morning.

Q. I'd like to ask you, between the time we adjourned yesterday and this morning, did you speak to any of plaintiff's counsel about your testimony or about the case in general?

A. No.

Q. If you would, please, I've put some binders in front of you, on the desk in front of you. If you would take Volume II, please, and turn to JX 67, please.

A. Okay.

Q. If you look at the first page, you'll see that this is a retainer letter for Anderson & Schwab. And I'd like you to turn to the page that's Bates stamped SP COMM 018538.

A. Okay.

Q. And if you look at the section

captioned "OUR UNDERSTANDING OF THE ASSIGNMENT," please look at the fourth bullet point there, the one that says, "The Committee also plans to hire a metals and mining consultant primarily to assist Goldman Sachs in conducting a detailed operational due diligence of the assets involved in the Proposal."

And it continues, "The Consultant will particularly focus on the feasibility of the projections for each company based on the mining infrastructure and asset quality of each company."

Do you see that?

A. Yes.

Q. And then if you turn to the next section, immediately following that bullet point titled "ASSETS TO BE EVALUATED," you'll see that section continues onto the next page and the page following, 18540. And it starts with "Grupo Mexico" and it talks about the Minera Mexico assets. And then on the next page, 18539, it has a section that continues to 18540 that talks about Southern Peru Copper Corporation.

Do you see that?

A. Yes.

Q. I looked at the documents considered

list in your report, but I didn't see this document, JX 67, listed in there. Had you seen it before today?

A. I can't recall if I had or not.

Q. Did you consider this document in forming the opinions that you expressed in your report or in your direct testimony yesterday or in any of your testimony yesterday?

A. No.

Q. Okay. You can put that volume aside.

MR. HENKIN: Your Honor, at this point, I'd like to show Mr. Beaulne a document that's not in any of the exhibit binders. May I approach and pass out copies to the Court and counsel?

THE COURT: Sure.

MR. HENKIN: Thank you.

BY MR. HENKIN:

Q. Mr. Beaulne, I've handed you a document that has been marked DX 2, and it is a fax or set of faxes from Anderson & Schwab Bates stamped AS0001016 through 1029, and I'd like us to focus on the letter that's in that fax which starts on Page 1020 at the bottom. And if you look, you'll see this is a wrap-up letter that Anderson & Schwab did dated October 21, 2004.

And it starts out by saying, "The purpose of this letter is to confirm to you" -- and it's directed to Goldman Sachs -- "certain of the work that has been done by Anderson & Schwab for the special committee of disinterested directors of SPCC."

Do you see that?

A. Yes.

Q. And if you turn to the very next page, do you see in the middle of the page, it states, "SPCC mines and facilities visited were:" and then it lists SPCC mines?

A. Yes.

Q. And do you see in the next section it says that, "Specific areas of A&S's focus were:" the first bullet point is, "Geological model, mineralogy ore types, grade variations, structure, hardness, etc."?

A. Yes.

Q. And the next point is "Methodology of ore reserves and resources." Do you see that?

A. I'm sorry. What page are you on?

Q. 1021.

A. The next bullet?

Q. The next bullet.

A. Yes.
Q. You see that?
A. Yes.
Q. You see the fourth bullet point in that section talks about "Future mining and processing plans in comparison to historical costs, grades, recoveries, production."
A. Yes.
Q. Okay. And then if you turn to the page that's Bates stamped 1023, do you see that there is a multiple-paragraph discussion of what A&S did to analyze geology, reserves and mine plans? I won't read it into the record, but it goes on for quite a few paragraphs and it's captioned "Geology, Reserves and Mine Plans."
A. Yes.
Q. And if you turn to the page that's stamped 1024, do you see the first bullet point that says, "Generally, A&S considers that mine planning was satisfactory for the purpose of valuing both companies"?
A. Yes.
Q. And we talked before that this was sent to the special committee and its advisors. Did

you consider this document, DX 2, in forming any of the opinions you've expressed in this case, whether in your report or in testifying?

A. Yes.

Q. How so?

A. Well, I looked at all the A&S documents, and based on my review of the documents and the work that they did, they weren't provided with independent mining optimization plans to maximize the output from the various mines at Southern Peru.

Q. Nevertheless, they considered the materials that they had adequate to value both companies; isn't that correct?

A. That may be correct in that statement. However, they did note -- and I can't remember the exact document, but they did note that optimization plans could have been done for Southern Peru and they were not done.

Q. Okay. And you say that you've looked at all of the Anderson & Schwab documents but you can't remember whether you looked at JX 67, which was also an Anderson & Schwab document.

A. I just didn't recall looking at it. I looked at all the Anderson & Schwab documents. I

didn't memorize all the engagement letters and everything that was in there.

Q. How do you know you looked at all the Anderson & Schwab documents?

A. Because I recall looking at it. But I received them in mid-2009.

Q. No, you may have misunderstood my question. How do you know you looked at all of them?

A. Well, as listed in my report, I received a large production from Anderson & Schwab, so I looked at all those documents.

Q. And did you insure that that production was everything that was produced by Anderson & Schwab?

A. That was my understanding.

Q. How was that your understanding? Who told that to you?

A. That was just my understanding. I can't recall who told it to me, but my understanding was that I received the entire production from Anderson & Schwab.

Q. Well, let's try it again. Did someone tell you you've got everything from Anderson & Schwab?

A. At one point, I believe someone did,

but I don't recall specifically who told me that.

Q. So someone said to you specifically, We have produced to you or we have sent to you every single document that was produced by Anderson & Schwab in this case?

A. I don't know if it was that specific, but my understanding was that I had the entire Anderson & Schwab production.

THE COURT: Let me just ask you, did you say to the lawyers you were working with, "I want the entire production and I'll determine what's most important in my work," or were you relying on them to cull the production down and send you what they thought was pertinent?

THE WITNESS: My understanding of how it transpired was for Goldman Sachs and Anderson & Schwab, I requested and received the entire production. I don't know, you know, specifically the conversation -- that was my understanding and request.

THE COURT: Your request was to receive the entire production as it came from the sources and then for you to make the relevancy determination based on your review of the whole production?

THE WITNESS: Yes.

BY MR. HENKIN:

Q. Mr. Beaulne, if you'd pick up Volume VI of the binders that are in front of you, please. And turn to JX 162, please.

A. Yes.

Q. And if you look at that document, you'll see it's notes of a meeting in Miami on June 11th, 2004, which the attendees were the special committee members, Goldman Sachs, Latham & Watkins, the Mijares firm, and Anderson & Schwab?

A. Yes.

Q. And if you'll turn to the page that's Bates stamped 12691 at the bottom, and it's the -- what I'd like you to look at is the last bullet point that follows a series that precedes a series of dashes. The bullet point states, "Using several different measures, GS placed an equity value of $1.3 to 1.7 billion on MM."

Do you see that?

A. Yes.

Q. And the first dash after that states "MM used $1.00 per pound copper prices and $4.90 per pound molybdenum prices throughout the model as

opposed to GS's $0.85 per pound for copper and $2.50 per pound as molybdenum for long-term prices. This difference in price creates $1 billion of value in the [Minera Mexico] model."

Do you see that?

A. Yes.

Q. Did you consider this document in forming any of the opinions you've expressed in your case, in this case?

A. Not that I recall.

Q. All right. You can put that document aside.

We've been talking about some of the discussions of what Anderson & Schwab did, and now I want to talk about what you did. You didn't -- isn't it true that you didn't review the SPCC financial projections as they were adjusted by Goldman Sachs and Anderson & Schwab in any detail? In other words, that wasn't part of your work assignment in this case?

A. I didn't have a specific work assignment. My assignment was to determine the fairness of the -- my initial assignment was to determine the initial shares that should be issued by SPCC to acquire Minera Mexico. Then I was asked to do

a rebuttal of Dr. Schwartz's report. So what is your question? I wasn't given direction -- that was my two directions I received.

Q. Did you review in detail the SPCC financial projections as they were adjusted by Goldman Sachs and Anderson & Schwab? That's the question.

A. Yes. As part of my rebuttal to Dr. Schwartz, I looked at the SPCC projections.

Q. Okay. Isn't it true that you don't know one way or the other whether what Anderson & Schwab did with regard to the SPCC projections was right or wrong?

A. My understanding is the only adjustment they made to SPCC was to -- as far as the revenue and the operating costs, they didn't make any adjustments upwards or downwards; and then for the environmental capital expenditures, they made an adjustment on the environmental retrofit.

Q. You didn't listen to my question. Do you have a view one way or the other whether what Anderson & Schwab did with respect to the SPCC projections the committee used was right or wrong?

A. Well, you asked me specifically about the adjustments. So as it relates to the forecast,

they didn't make any adjustments. So what you're saying, is it correct not to make any adjustments? Is that your question?

Q. Is it correct -- do you believe they should have made other adjustments?

A. Well, they were provided with a forecast, and it would be impossible for them to make an upward adjustment without having someone come in independent and do a new mine optimization plan.

Q. And they didn't indicate they felt -- there is nowhere in the record that you're aware of where Anderson & Schwab indicated that they were dissatisfied or anything or any other criticism with the final results that the special committee used?

A. There was a recommendation that a mine optimization plan should have been done. As far as your words where they said they were dissatisfied, I didn't see anything in the record specifically in that regard.

Q. In your direct testimony, you asserted that SPCC used 90 cents per pound as the long-term copper price for internal planning. Do you recall that?

A. Yes.

Q. Would you take Volume III? It should be right there. And specifically turn to JX 102, please.

A. Okay.

Q. And specifically, I'd like you to turn to Page 18, please.

A. Okay.

Q. In the middle of that page, under "Valuation," the third bullet point says, "Company copper price assumption of U.S. $1 per pound and moly of 4.9 per pound through the life of mine. Sensitivities performed to copper and moly prices."

Do you see that?

A. Yes.

Q. And then if you turn to JX 106, please.

A. Okay.

Q. And also turn to Page 18 of that document, please.

A. Okay.

Q. And in the middle of that page, the second bullet under "Methodology," the last sentence of that section, of that bullet point, reads, "Original copper price assumption of U.S. $1.00 per

pound and molybdenum at U.S. $4.9 per pound fixed through the life of mine were provided by SPCC management."

Do you see that?

A. Yes.

Q. Did you consider either of these documents when you asserted that SPCC had used 90 cents a pound for long-term planning?

A. I was referring to their assertion in their public 10-K filing.

THE COURT: So the answer would be no?

THE WITNESS: No.

MR. HENKIN: Thank you, Your Honor.

Pass the witness.

MR. BROWN: No further questions, Your Honor.

THE COURT: Thank you, sir. You may step down.

Next witness.

MR. HENKIN: Your Honor, the AMC defendants call Eduardo Schwartz.

EDUARDO SCHWARTZ, having been duly affirmed, was examined and testified as follows:

MR. HENKIN: May I?

THE COURT: You may.

If I said, "You may not," what would we do?

MR. HENKIN: I just -- I probably would appeal, Your Honor.

THE COURT: It's a procedural issue. It's quite tempting. You know, just to put off the pain for a while, you know, I'll make you take an interlocutory appeal, come back, do it after the summer when I get inevitably reversed for, "What do you mean 'you may not'?"

DIRECT EXAMINATION

BY MR. HENKIN:

Q. Dr. Schwartz, would you please give the Court a brief summary of your educational background?

A. I have an engineering degree from the University of Chile and have a Master's and a Ph.D. in finance from the University of British Columbia in Canada.

Q. And your degree from the University of Chile, is that similar to a U.S. four-year degree?

A. No, it's a six-year degree. At that time, engineering in Chile was six years.

Q. Would you please give the Court a brief summary of your employment since you received your Ph.D.?

A. After receiving my Ph.D., I taught at the University of British Columbia for ten years; and I have been teaching now at the UCLA, University of California in Los Angeles, for the last 25 years.

Q. And if you would turn -- there should be a binder of documents for you, probably it's over on the right there, that says, "SUPPORTING EXHIBITS FOR EDUARDO S. SCHWARTZ," and if you would turn to Tab 3 in that binder, please tell the Court what that document is.

A. This is my CV.

Q. And is that -- when you say your CV, is that your most current CV?

A. Yes, I believe it is.

Q. Is it accurate?

A. Yes.

Q. Would you please summarize for the Court the primary areas in which you teach and conduct research in connection with your position at UCLA?

A. Well, I teach investment classes. I teach corporate finance classes. I teach evaluation.

That's my main areas of teaching.

And in research, I have done research in a lot of areas, including the stochastic behavior of commodity prices, the evaluation of natural resource investments, and the real option approach to valuation.

Q. In connection with your research and teaching, do you contribute regularly to any scholarly publications?

A. Yes, I do.

Q. Which ones, for example?

A. Well, I publish in most of the main journals, like the *Journal of Finance*, the *Journal of Financial Economics*, the *Review of Financial Studies*.

Q. And have you been an editor or associate editor for any journals?

A. I've been an associate editor of over 12 journals.

THE COURT: Is that because you just can't keep a job?

THE WITNESS: Yes. Well, I have been for a long time in the profession.

BY MR. HENKIN:

Q. If you would turn to Pages 4 through

13 of your CV, so that's Tab 3, JX 49, is that a list of all the articles and papers that you've published?

A. Yes.

Q. Now, do any of those papers relate to valuing natural resources and commodities?

A. Yes.

Q. About how many of them?

A. Between all these areas, commodities, valuation of natural resources, real options, I have over 20 papers, I believe.

Q. Have you ever worked on actually valuing mines?

A. Yes.

Q. For example, have you ever worked with a company called Codelco?

A. Yes, I did.

Q. Would you please tell the Court what Codelco is?

A. Codelco is a very large copper mining company in Chile. I believe at that time, it was the largest copper company in the world and I believe it still is.

Q. And what did you do with Codelco?

A. I helped them value copper mines.

Q. And have you ever worked with a company called Crown Investments Corp. of Saskatchewan?

A. Yes, I did.

Q. And what did you do with them?

A. I helped them value uranium mines.

Q. Have you ever worked with a company called Aberford Resources?

A. Yes, I did.

Q. What did you do with Aberford Resources?

A. I helped them value gold mines.

Q. And have you ever worked with a company called British Petroleum?

A. Yes, I did.

Q. What did you do at BP?

A. I helped them develop a framework to develop gold mines.

THE COURT: Were they actually British Petroleum?

THE WITNESS: I went to London.

THE COURT: Were they actually British Petroleum? I know there is some sensitivity --

BY MR. HENKIN:

Q. I think the Judge is asking was it actually called "BP" or was it another name?

A. I think it was 1986, or something like that.

THE COURT: So the "B" might have stood for something then.

THE WITNESS: Yes.

BY MR. HENKIN:

Q. Dr. Schwartz, do any of the courses that you teach or have taught relate to valuation techniques?

A. Most of the courses that I teach relate to valuation or financial assets or real assets.

Q. And last question about your background. Do you have any experience actually working in the mining industry?

A. Yes, I do.

Q. Can you describe that for the Court, please?

A. After getting my engineering degree and working a few years in Chile, I was hired by an iron ore company, and I worked for four years.

Q. What was the name of that company?

A. The company was named Compania Minera Santa Barbara.

Q. And did Minera Santa Barbara have mines other than iron ore mines?

A. Their main metal was iron ore but they also had some underground copper mines.

Q. If you would turn to Binder II in the exhibit in front of you, which is JX 48. And can you identify that document for the Court, please?

A. Yes. This is the expert report that I wrote for this case.

Q. And does that report contain a summary of your opinions relating to this case?

A. Yes.

Q. And is that summary on Pages 2 and 3?

A. Yes.

Q. Okay. Would you summarize for the Court your understanding of the transaction that's at issue in this case?

A. My understanding is that it was an exchange of shares from Southern Peru and a subsidiary of Grupo Mexico, which entailed practically the whole -- all of the assets of Minera Mexico.

Q. So it was a stock-for-stock merger?

A. A stock-for-stock merger.
Q. And what did SPCC receive in the transaction?
A. Essentially all the assets of Minera Mexico, I think 99.15 shares of Minera Mexico.
Q. And what did AMC receive in the transaction?
A. 67.2 million shares of SPCC.
Q. Did you come to a conclusion about whether that transaction was fair to SPCC?
A. Yes, I did.
Q. What is that conclusion?
A. My conclusion was the transaction was fair to SPCC.
Q. Let's talk about your methodology. How did you determine that the merger was fair to SPCC?
A. Well, I believe that the most reliable way of determining the appropriate exchange of shares in this case was to do a relative valuation, which essentially is valuing both of these companies using the same methodology and the same assumptions.
These were very similar companies. These were both mining companies in which over

80 percent of the revenue came from the sale of copper, both of them. And the value of mining companies is basically related to the amount of reserves they had. And in this case, the reserves of these two companies were very similar. If any, the reserves of Minera were higher than the reserves of SPCC.

So if you take -- first, this is a very big picture. You are comparing here two mines that are very similar in terms of their production or their reserves. Naturally, we have to do a more detailed analysis because we have to analyze when those reserves were extracted, at what cost, and so forth. So that's why I did a discounted cash flow analysis. But if you take the big picture, they were very, very similar companies.

Q. And I think you may have misspoken a moment ago when you were talking about comparing mines. You mean mining companies?

A. Mining companies. I'm sorry.

Q. Stop on the similarity a moment. I think this is what you were talking about as a big picture. Have you created a chart that describes the similarities that you were just describing?

A. Yes, I did.

Q. And if you turn to Tab 6 in your binder, is that the chart that you created?

A. Yes.

MR. HENKIN: And Your Honor, this is Defendants' Demonstrative Exhibit 1.

BY MR. HENKIN:

Q. Would you explain to the Court what Defendants' Demonstrative Exhibit 1 shows?

A. It shows the reserves for different metals for both SPCC and Minera Mexico. And here you can see that if you look at copper alone, Minera Mexico has slightly higher reserves. But then if you consider, for example, precious metals, gold, for example, the reserves of Minera Mexico were eight to ten times larger than SPCC. Silver, they are 50 percent larger. Minera Mexico has zinc and lead, and SPCC had a little more of molybdenum. So this is a big picture, the fact that we are comparing here similar mining companies.

Q. And where were Minera Mexico's assets located?

A. Well, Minera's assets were located in Mexico and SPCC's assets were located in Peru.

Q. Was Mexico considered an investment grade country as of 2004?

A. Yes.

Q. What about Peru?

A. No.

Q. Is there uncertainty in predicting long-term metal prices?

A. There is tremendous uncertainty in predicting metal prices.

Q. Can you give the Court an example related to this case of that type of uncertainty?

A. Well, in the date of the transaction, October of 2004, the average of the analysts' predictions for the long-term copper price was 90 cents. That was the average. Today, seven years later, which is a long term from that point of view, the price is over $4. And the predictions at that time were 90 cents. That shows you that it's practically impossible to predict future copper prices.

Q. How does the relative valuation method that you used address that sort of uncertainty?

A. Since I am using the same methodology and the same assumptions, in particular, the same

assumptions for metal prices or copper prices, in particular, for both companies, they share consideration -- the values of the companies are very dependent on the copper price, very dependent. But the share consideration is not because both companies move up or down with the increase or decrease in the price of copper.

In this case, Minera Mexico was more sensitive to the price of copper. When we increase the price of copper, the value, the present value of Minera Mexico went higher than the other, but still, the relative valuation was such that the transaction was fair at any range of reasonable copper prices.

Q. Reasonable long-term copper prices?

A. I'm sorry. Reasonable long-term copper prices. I always refer to long-term copper price. I'm sorry.

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.

Q. So after you applied the assumptions that you used to both Minera and SPCC, what did you find about the transaction in terms of its fairness?

A. I found that the transaction was fair. And let me see. I thought the exchange was 67.6 million shares, I believe. I have it in my report. And since they were paying 67.2, I concluded that the transaction was fair.

Q. If you had been asked by the special committee in 2004 to advise them what methodology to use in evaluating this transaction, what would you have advised?

A. I would have recommended a very similar methodology as the one I used.

Q. Would you have relied on multiples analyses?

A. Well, when you have so much data, you have cash flows for the life of the mines, you have 60 years or 50 years, why should you use a multiples methodology that uses one year? I don't have anything against multiples methodologies, but in this case, where you have so much more data to rely on, an opinion using multiples didn't seem to me to be the best way to go.

In particular, looking at the cash flows of these companies, you can see that they change a lot from year-to-year, depending on the mine plans, how much they are extracting.

And as Mr. Palomino mentioned on Monday, given the mine plans of these two companies, for the first few years, the cash flows from SPCC were higher, but the plans were that after, I don't know how many, three or four years, the cash flows for Minera would be higher.

So I know that investment banks like to use multiples, but I believe that if we have the better data, I think the discounted cash flow approach taking all the date available is the superior method.

Q. Did you derive a value for SPCC itself using a DCF at 90 cents per pound for copper?

A. Yes. Using the same assumption that I had for Minera Mexico, I valued SPCC. That's a way I got to determine what was the amount of shares that should be traded.

Q. And what value, what absolute value did the DCF of SPCC arrive at compared to its observed market capitalization?

A. Using a 90 cents long-term price of

copper, I obtained a value, a market capitalization, for SPCC substantially lower than the market price.

Q. And is that similar to what Goldman Sachs' analysis showed?

A. Yes.

Q. Did you try to determine why the DCF value for SPCC was lower than its observed market price?

A. Yes.

Q. And as part of that analysis, what variables did you consider might be in play?

A. Well, in a discounted cash flow analysis, as the name says, there are two main elements: One are the cash flows, and the other is the discount rate.

The cash flows in this case are composed of the following: First, we have the amount of mineral, copper, molybdenum. Second, we have the price of those metals. The product of those two gives you the revenues of these companies. Then you have to subtract the operating costs and the investment costs, and that gives you the cash flows.

The discount rate, there is a methodology to get the discount rate that Mr. Beaulne

went into in great detail yesterday. Although I have some disagreement with the method that he used and with the method that Goldman Sachs used, I give it more or less an interval value, given that it didn't make very much difference in my analysis whether I used a 6-1/2 percent discount rate, a 7 percent discount rate, or a 8-1/2 discount rate, like Goldman Sachs.

So in my analysis, I took for the production -- which is an important part of the analysis -- the production schedule for both mines, the data obtained from Goldman Sachs as modified by Anderson & Schwab. I got that data for both companies and I made my analysis based on that.

So the only thing remaining here is the copper price. And I mentioned copper, but I'm also referring to gold prices, silver prices, molybdenum prices, and the other metals that these companies produce. So I concentrated on copper prices, the long-term copper prices, as I said, because most of the revenue of both companies comes from the sales of copper.

I don't know I answered everything you want.

Q. It does.

What did you conclude about the long-term metal prices used in the DCF model for SPCC?

A. I concluded that SPCC stock was trading at the long-term copper price higher than the 90 cents used in the analysis.

Q. And were you able to determine an implied long-term copper price from that?

A. The implied long-term copper price at which SPCC was trading in the market was $1.30.

Q. So is it fair to say that, in your view, the market was impounding a higher long-term copper price than sell-side analysts were predicting at the time for SPCC?

THE COURT: So your conclusion on that is that you could find no other rational economic reason for the market valuation of Southern Peru?

THE WITNESS: I could -- well --

THE COURT: I mean, the only way -- what I'm saying is the only way you could see why it was economically rational for the market to be attributing that price to Southern Peru, was that some input to the cash flow model --

THE WITNESS: That's correct.

THE COURT: -- was higher, and the only -- it wasn't that the market thought there was some -- they had a concession in some obscure nation where they were going to get the exclusive resources. It had to be, frankly, the resources they controlled were going to have a higher long-term value.

THE WITNESS: Yes. Let me say that I took copper only, and I assume that the other metals stayed fixed. In reality, all of them are moving up.

THE COURT: What you're saying is, it could have been a combination of not just copper, being the primary one --

THE WITNESS: All the others.

THE COURT: -- but a more optimistic valuation about the long-term demands for these resources.

THE WITNESS: Gold and -- yeah, that's my view. My view was that --

THE COURT: I'm entirely in gold. It's still a very small reserve, though.

BY MR. HENKIN:

Q. Dr. Schwartz, assuming what you were just discussing about the implied higher long-term metals prices, is there any reason not to apply those

same implied long-term metals prices to valuing Minera Mexico in a DCF?

A. I don't think there is any reason, and I did that in my analysis. But let me tell you that, given that my analysis is a relative valuation, whether I make the analysis with 90 cents, with $1.00, with $1.10, with $1.20 or $1.30, I still get that the transaction is fair, that the number of shares that they exchanged was fair to SPCC.

Q. Now, when you were doing your relative valuation, how important was it to generate an equity value for SPCC that matched its observed market capitalization?

A. For what I did, it was not necessary, because I was interested in determining the number of shares that SPCC should pay for the shares of MM, Minera Mexico. So for my purposes, it wasn't. And since everybody had used 90 cents in their initial analysis, I also used 90 to start.

But when I did -- I mentioned that I was doing this only to -- as a starting point, and that that would require a more detailed analysis, which I did later on in the report.

Q. And that's what we were just talking

about, essentially, about calibrating the DCF?

A. That's correct. I calibrated the DCF to the market price of the SPCC shares.

Q. Now, if you used the higher price, let's take $1.30 per pound, in the relative valuation model, how many shares did your analysis show should have been exchanged for Minera?

A. My analysis showed that if you use $1.30, since the price of Minera Mexico was more sensitive to metal prices than SPCC, the fair exchange of shares would have been 80 million shares, approximately 80 million shares.

Q. Now, you were mentioning testimony by Mr. Palomino earlier. Were you -- do you recall Mr. Palomino's testimony that the special committee recognized that it had greater leverage by negotiating at a 90-cent-per-pound long-term copper price than it would have had negotiating the transaction at a higher long-term copper price?

A. Yes, I do remember that he mentioned that.

Q. Is that testimony consistent with your opinions?

A. This is consistent with my opinion.

Q. If you would please look at in your binder Tab 4, which is JX 103. Do you have that?

A. Yes.

Q. And specifically, turn to the page Bates stamped SP COMM 006945, please.

A. I'm sorry. What number?

Q. 006945. It's close to the end. It's the page with a very small number 20 on it also.

A. Okay.

Q. And if it helps --

A. 692 --

Q. 45.

A. I'm sorry.

THE COURT: You're welcome to help the witness.

THE WITNESS: I got it. I'm sorry.

BY MR. HENKIN:

Q. It's the one with the "Price/NAV" at the top.

A. Yes.

Q. And if you would look at the table in the middle of the page on the left-hand side captioned, "Implied Share Price Sensitivity Excluding Royalties," the one under "Copper Price."

A. Yes.

Q. What does that table show about the relationship between the market price of SPCC and the implied long-term copper price?

A. This shows the metrics of estimated discounted cash flow prices for SPCC using different assumptions of weighted average cost of capital and different assumptions of copper, long-term copper prices, starting from 80 cents to $1.10.

Q. And how is it expressed? Is it expressed in a market capitalization --

A. No. In share prices.

Q. And what does it show about the share prices that result for SPCC in that range of copper prices and discount rates?

A. You can see that all those prices in the table are lower than the price at which SPCC was trading, which at that time which was 40.2, $40.20, which means that these discounted cash flow prices were using a copper price which was lower than the copper price implied by the stock price of SPCC.

Q. Now, look at the chart at the top of the page. That's captioned "Trading Comparables (8 percent real discount rate)."

A. Yes.

Q. What does that chart show about the implied long-term copper prices the market was using for companies other than SPCC?

A. These were calculations of stock prices of other copper companies which were obtained using discounted cash flow methods, using prices -- I believe 90 cents, but I don't remember for sure.

And essentially, what it says is all other companies, they obtained prices here, discounted cash flow prices, which were below the market prices. Which tells me that the prices that were used by analysts to value not only SPCC but all the other companies, the long-term copper prices they were using were all below the implied copper prices at which those companies were trading.

Q. So in other words, the market was valuing other copper companies using a higher long-term copper price than 90 cents a pound?

A. In the market, yes.

Q. Did you examine the correlation between SPCC's stock price and the LME copper prices?

A. Yes, I did.

Q. And did you prepare a demonstrative

discussing that, a demonstrative exhibit?

A. I remember it was over 50 percent but I --

Q. If you turn to Tab 7 in your binder.

A. Okay. Yeah. This is the table, yes, correct.

MR. HENKIN: And Your Honor, this is Defendant's Demonstrative Exhibit 2.

BY MR. HENKIN:

Q. Dr. Schwartz, would you please explain to the Court what this shows and how it was created?

A. Well, this is a table that gives the correlation of the return on SPCC and the percent changes in copper prices for different maturities for the spot price and for different maturities of the forwards.

And you can see all these correlations in the table except the last one are above 50 percent, which means that copper prices and stock prices of SPCC move pretty much -- they have a -- it's a very high correlation, at least 50 percent, which in these kinds of things is very high.

Q. Let's talk now about a slightly different topic. So I'd like to talk about the

valuation approaches that Mr. Beaulne used. Aside from opining on the fairness of the merger, were you also asked to critique Mr. Beaulne's report?

A. Yes, I did.

Q. And could you please explain the method that Mr. Beaulne used to compare the value of Minera to the value of SPCC?

A. Well, he used a discounted cash flow approach with a 90 cents long-term price of copper to value Minera Mexico; and then he took the market price of SPCC at that time to determine the market capitalization of SPCC; and then he made the comparison with these two values.

Q. Do you agree with that approach?

A. No, I don't.

Q. Why not?

A. Because he's using different assumptions and different methodology to value these two mines that are very similar. I think you need to use the same approach. If you use a discounted cash flow method with an assumption of 90 cents per pound long-term of copper prices, you should use the same thing to value SPCC.

Q. What equity values would Mr. Beaulne's

DCF methodology have produced for SPCC if he had actually applied that methodology to SPCC?

A. He would have also gotten substantially lower market capitalization for SPCC.

Q. Would you turn to your report again, so Tab 2 in the binder, JX 48, and particularly Exhibit 6 to your report.

A. Yes.

Q. And could you explain to the Court what calculation is shown in Exhibit 6 to your report?

A. Well, this is a calculation of the equity value of SPCC using the assumptions that Mr. Beaulne used in his report, using his discount rate, and using 90 cents long-term copper price. And I, as it says here, I got to $2.1 billion for the equity of SPCC.

Q. And about what percentage of SPCC's observed market capitalization was that at the time?

A. I believe it was about 58 percent.

MR. HENKIN: A moment, Your Honor?

THE COURT: Mm-hmm.

MR. HENKIN: Pass the witness, Your Honor.

CROSS-EXAMINATION

BY MR. BROWN:

Q. Good morning, sir.

A. Good morning.

Q. How many -- can you estimate about how many companies you've valued in your career?

A. I remember maybe five. I don't remember, but let's say five. You mean mining companies?

Q. No. Any companies, all companies. How many business valuations have you conducted in your career?

A. I don't remember.

Q. Thousands?

A. No.

Q. Hundreds?

A. No. Dozens, maybe.

Q. Dozens?

A. Maybe, yes.

Q. So in terms of doing business valuation, you've valued a couple dozen companies?

A. Yeah, maybe. It may be one dozen. I don't remember. I honestly don't remember. I'd have to look at my vitae and start trying to find out.

Q. And you don't remember ever having done a relative valuation analysis before similar to the one you did here; correct?

A. Correct.

Q. Now, in preparing your report in this case, you didn't create a single document; right?

A. What do you mean by that? I did this report. That was the document I created.

Q. Didn't you tell me at your deposition that in connection with preparing your report, you, yourself, didn't create any documents?

A. What do you mean by that?

Q. I mean, didn't you tell me at your deposition --

A. You mean that the calculations were done by the consulting firm Cornerstone under my instructions? Is that what is your meaning? Or what is the issue? I don't understand the issue that you're raising.

Q. Why don't you turn to Tab 8 in the larger book that should be in front of you.

A. This one here? Which one? This is the larger one? Thank you. Tab 8, yeah.

Q. And is this your deposition?

A. I believe so, yes.
Q. Could you turn to Page 57?
A. 57 in the small numbers, you mean?
Q. Yes.
A. Okay. Yes.
Q. Page 57 of the deposition. And I direct your attention to Line 7, where I asked you a question.

"So you had no pieces of paper at all that you maintained or used during this assignment?"

"Answer: I had the depositions that they sent me and --"

Then I interrupted.

"Question: Okay. I'm sorry. And I didn't mean to interrupt. If I'm interrupting --"

You answered, "Go ahead."

And then I asked the question:

"We'll get to the documents they sent you, but I meant things that you created."

"Answer: I didn't create anything."

A. Okay. I understand.
Q. Did I ask you those questions?
A. Yes, I understand the question.
Q. Did you give your answer at the

deposition?

A. Yes, I understand the question.

The analysis was done at the offices of Cornerstone, which is a financial economic consultant, under my instruction, so I was telling them what to do and they did the calculations. I didn't do the calculations myself.

Q. And you didn't create a single handwritten note in connection with your assignment; right?

A. No.

Q. And you didn't make one keystroke into a computer in connection with your assignment; correct?

A. Well, I wrote the report on the -- yes, I wrote the report.

Q. Didn't you tell me at your deposition that you didn't type anything into a computer in connection with your assignment?

A. No, if I said that, I misspoke. I had the report on the web and I wrote in that report.

Q. Let's turn back to Page 57. Right after the end of the last question, at Line 21, I asked you a question.

"You didn't type anything into a computer, ever --

"Answer: No. No."

And then.

"Question: In connection with this?

"Answer: No."

A. I understood the calculations. I think I said later on about the report, that I did write the report on the web.

Q. So the way you went about doing this was -- well, who is Cornerstone? You mentioned Cornerstone.

A. Cornerstone is a consulting -- financial and economic consulting firm that provides support for this type of thing.

Q. And so they actually drafted your report?

A. No.

Q. They didn't?

A. No.

Q. How did it get drafted if you didn't type it?

A. There was a website, and I wrote in the website. And they made comments, and I corrected

them. And I got the calculations of the valuations and I told them, Include these, do that, do that other calculation. Increase the discount rate you're doing here. Calculate the discounted cash flows using 90 cents. Calculate them using $1.10, $1.20, $1.30. Do the calculations using Mr. Beaulne's information. Do a calculation of the number of shares that you get when you use 90 cents as a long-term rate. Compute the number of shares you get when you do $1.30, the number of shares. Please provide a graph. What would be the different market prices of these companies when you start changing the copper price? Make a graph. What would be the different prices you get for these companies when you change the discount rate?

In other words, I was giving instructions to them. I can go through every one of the graphs you have here, but I was giving instructions to them how to do it. But I did -- what I meant and I mean now, I did not do the actual calculations.

Q. Okay. And did you have any conversations in connection with your assignment with anybody other than the lawyers, any representatives of Southern Peru or Grupo Mexico?

A. I believe that when my report was ready, I had a phone conversation in which I informed them of my report.

Q. And that was you spoke to the general counsel, Mr. Ortega. Is that correct?

A. Yes, I believe that.

Q. And that was the only conversation, was after your report was finished?

A. Yes. Yes.

Q. Now, I think, just to get a starting point here, the defense counsel went over with you the fact that you prepared -- in connection with your analysis, you did a discounted cash flow valuation of Southern Peru and a discounted cash flow valuation of Minera Mexico. Correct?

A. Correct.

Q. And the equity values you came up with using those methodologies were 1.7 billion for Minera Mexico and about 2 billion for Southern Peru; correct?

A. I would have to look at my report because I don't remember the figures. I assume you are correct about that, but I need to look at the report.

Q. Sure.

A. I have problems remembering so many figures. At my age, I need to look at things. Where is my report?

Q. It's Exhibit 2, in the same book that your deposition was in. And your report --

A. That's Exhibit 1, I believe?

Q. Following your CV --

A. Yes.

Q. -- there is a chart, Exhibit 1.

A. Yes, correct. Yes.

Q. Do you see that?

A. Almost 2 billion for SPCC and 1.7 billion for Minera Mexico. That's what it says here, yeah.

Q. And it's your position that the values you came up with here for Minera Mexico and Southern Peru can only be compared to each other and do not have any meaning in a different context; correct?

A. These, as I said many times before, these values were computed using a long-term copper price of 90 cents per pound. And for the purpose of my analysis, it was enough to get a relative valuation, because if I get the price of one relative to the other, I can get the exchange rate between

them.

So for the purpose of my valuation, what I was retained to do, to determine if the share consideration was fair, this was enough for me to do to get to a conclusion.

But as I said before, given that the market price of SPCC was much higher than the $2 billion that I got here, it was implying -- that market price was implying a long-term copper price of $1.30. I also did the calculation of the value of Minera Mexico using the $1.30, and I still got that the consideration was fair.

The advantage of a relative valuation methodology is that the exchange of shares is not so sensitive to the assumptions that you make about the copper price. And as I said before in direct examination, it's practically impossible to make accurate assumptions about what the long-term prices of copper would be at any point in time.

Q. Okay. I want to get to that in detail in a second, but I just want to get this one issue clear first.

If I wanted to determine what the stand-alone value of Minera Mexico was, not its value

relative to Southern Peru, as of October 21, 2004, I couldn't use your report to determine that; correct?

A. Yes, you could.

Q. How would I do that?

A. Well, I have the discounted cash flow valuation of Minera Mexico. I have the data for SPCC, which is a market value. And I've been telling you a few times that the market, the stock price, the stock of SPCC is trading in the market at an implied copper price of $1.30. So I could use that copper price of $1.30 to price Minera Mexico, and I did that.

I didn't do it for determining the stand-alone value of Minera Mexico, but I did it to demonstrate that if I use $1.30, it gives me the market price of SPCC and it gives me a market price of Minera Mexico which still makes the transaction fair.

And I do have the data somewhere in my report if you want --

Q. You have no opinion as to the value of Minera Mexico on a stand-alone basis; correct?

A. Well, I was not -- I was not retained to establish the market value of Minera Mexico. But if you ask me to do that -- I didn't do it, but if I was asked to do it, I will have to do more detail. I

would do a discounted cash flow analysis. And I would take the market prices of traded companies. I would take probably more than SPCC. Here, I only had the data for SPCC. I would take other companies, and I would imply how the market is pricing those companies, and I would use that to value Minera Mexico.

So I do have an opinion in the sense that if $1.30 is pricing correctly SPCC, if I do the analysis of Minera Mexico, I would get to a value which is about $3 billion as well.

Q. Right, but you have no opinion as to the value of Minera Mexico on a stand-alone basis; correct?

A. I just explained to you that I do.

Q. Okay.

A. I do.

Q. Would you turn to Page 30 of your deposition again at Tab 8 in the book that I handed -- the book you have in front of you?

A. The other one? Okay. Tab 8?

Q. Tab 8.

A. Okay.

Q. And that's your deposition; right?

A. Yes.

Q. And if you turn to Page 30 of your deposition --

A. Yes.

Q. -- starting on Line 6, I asked you a question.

"You have no opinion about the value of Minera Mexico other than its value in relation to Southern Peru?"

And then Mr. Henkin said, "Objection to the form. Asked and answered and misstates his prior testimony."

And you gave an answer: "To have an opinion on that I would have to have a personal judgment about what would be the copper prices in the -- for the next 50 years. Okay?

"Question: Okay.

"Answer: I --"

Then another question. "And you don't have that?

"Answer: No."

Did you -- did I ask you those questions and did you give those answers at your deposition?

A. Yes. Now, let me say what I -- my

analysis. I explained to you then and I explained to you now that what I was asked to do is to do what is the number of shares that should be exchanged. I was not asked to determine the market price of Minera Mexico.

And you insisted for a long time on that, and you said, What happens if the Judge asks you, "What is your opinion about it?" It must be in this record. And I said I would have to think about it. So I thought about it. That's why now I can tell you that if I had to do it -- it's in my report, so I'm not telling you anything new.

The only thing that I didn't do -- you see, I'm telling you that the stock price of SPCC is being traded with an implied price, long-term copper price, of $1.30. What I didn't do is an analysis that your expert did, is whether the price of SPCC was trading -- I know it was trading on the New York Stock Exchange, but 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.

If you would have asked -- if I would have been asked to value Minera Mexico as a

stand-alone, I would have done a more thorough job about it. That's the spirit in which I told you that I -- but given the assumptions that I have in this report here, in my report, I do report a value of Minera Mexico, assuming a price, a long-term price of copper, of $1.30, which is the price implied by the stock price and market capitalization of SPCC.

Q. Okay. So when you redid your analysis using $1.30, did you change the production amounts for Minera Mexico, amount of copper production for Minera Mexico and Southern Copper?

A. No, I didn't.

Q. So you assumed that the copper price would -- the difference in copper prices of 90 cents to $1.30, but the companies wouldn't change their production?

A. Yes, I did that.

Q. Now, isn't it correct that a company's copper reserves are a function of a long-term copper price assumption?

A. Let me explain that to you. When --

Q. If you could answer yes or no, and then explain it to the extent you want, that would be appreciated.

A. Maybe. I have to explain. Otherwise I won't be able to tell you.

It is correct that when the copper price goes up, some of the mine blocks that had too low-grade ore before -- because the cutoff rate could have been .3 percent of copper, and below that, you throw them away. If the copper price is higher, those blocks are going to be incorporated into the reserves. So the reserves of a mine, when the price goes up, increases.

At the same time that the reserve increases, the average ore grade goes down, because now you are considering as part of the reserves a mineral that has a grade below what you had before. That's the essence. Now a grade with .2 percent of copper becomes economically profitable.

THE COURT: Just so I understand what you're saying is the price goes to $1.30. If you have huge grade reserves that are easy to pick off, then your margin of profitability just shoots up in a big way.

THE WITNESS: Yes.

THE COURT: But if you're already graded at that kind of thing, your reserves don't go

up. If you're a more typical company, though, you have additional resources where the extraction of the quality you need to bring to market is more expensive.

Because the price went from 90 cents per whatever to $1.30, you can now profitably mine that, but it still doesn't have the same marginal profit as the higher quality reserves. And as a result, you just don't get -- it doesn't penny for penny translate into magical profitability.

THE WITNESS: Correct, sir. It's even more than that, because when you are using low -- the average grade goes down of the mine because now you have more reserves at a lower grade. So when you start sending that mineral to the plant, that means that you're sending mineral that on average has a lower grade.

THE COURT: That's what I'm saying, which is for whatever reason, you know, ultimately, what you have to bring to market is a marketable quality mineral.

THE WITNESS: Sure.

THE COURT: And same thing could be true of oil, when they used to do the horizontal drilling and take the straw sideways and stuff like

that.

The point is, you've got to get to that point where you bring the marketable product, and there are various production costs that come along with that. And when the value of the overall -- the value of the resulting product goes up on the market, that means you can exploit more marginal reserves.

THE WITNESS: Right.

THE COURT: And if there are extraction or other kinds of costs that come with that, you'll bear them, but the marginal profitability for exploiting them is never going to be as good as the highest quality reserves where the extraction and the other costs are the easiest to achieve. Right?

THE WITNESS: Correct. And also, if you are sending lower grade ore to the plant and the plant can only handle 60 tons per day, that means that the output will go down. Because now you are sending ore --

So it's true that in the long-term, you get more mineral, and it's true that the value of the mine went up, the reserves, but immediately, if you want to start exploiting that immediately, your cash flows go down. They go down because you have a

lower grade ore now, and they go down because, as you said, the costs of extractions are higher.

So mining companies are very reluctant to change their mining plans when the copper price changes unless they can make the investments necessary to increase production.

I was talking to Raul yesterday and asked him, How much would this cost for you to increase a plant --

THE COURT: Who is Raul?

THE WITNESS: Raul Jacob, the person from SPCC that was here yesterday.

THE COURT: I don't want you to get into that. You can ask Mr. Stone and the team, but you may be all earning yourselves supplemental time in the deposition room.

THE WITNESS: But let me tell you my opinion. The investments and the time required to increase the capacity of the plants is very high and it requires a long-term planning. And therefore, mining companies are very reluctant to change their plans.

So I don't think that my assumption, that if I change the price from 90 to $1.30 and I

assume that the mine plans remain constant, is very problematic, especially because if the price goes up, both companies will have the reserves increase in value. So given that both cash flows are affected by the price and both reserves are affected by the price, I didn't feel that that was necessary.

THE COURT: Yeah, but isn't that just -- I apologize to Mr. Brown for interrupting. That depends very much, doesn't it, on your assumption of what the next level of grade of reserves is?

THE WITNESS: Yes.

THE COURT: And the relative access to them. I mean, if you had one company, for example, one, say, oil company, and there are certain levels of reserves, and the long-term price for oil jumped enormously, and one company had access to a huge reservoir of more marginal reserves under a smaller price than another, if that sustainable -- that huge increase became sustainable, the relative value of the one company might increase enormously in comparison to the other. Right?

THE WITNESS: That's correct, Your Honor. This is --

THE COURT: Sorry, Mr. Brown.

Back to Mr. Brown. I'm just trying to understand the witness's testimony.

BY MR. BROWN:

Q. Did you do an analysis of -- well, let me approach it a different way. The amount of a copper company's copper reserves is a material fact to its shareholders; right?

A. The amount of mineral.

Q. The copper company's copper reserves, knowing what the reserves are is a material fact, a fact that a reasonable investor would consider important in deciding what to do with his investment; correct?

A. I said at the beginning that the reserves are the most important factor in a mining company.

Q. Okay. And Southern Copper's 2004 10-K disclosed the amount of its reserves, its copper reserves, using a 90-cent copper price; right?

A. That's what I heard, yes. I think it's correct, yeah. I didn't see the 10-Ks but I looked at it, but you're right. If you increase the copper prices, you increase the reserves.

Q. Okay. Well, so why don't you turn to

Tab 4 in the book that's in front of you. Okay. And if you turn to Page A4, this is the 2004 10-K for Southern Peru; correct?

A. Yes.

Q. And if you turn to Page A14.

A. I'm sorry. A14. Yes.

Q. Does the chart there in the center, can you determine -- what is that chart there in the center? Do you know?

A. It says "The following production information is provided:" for Toquepala and Cuajone.

Q. The sentence right before the chart in the middle says, "SPCC's ore reserves as of December 31st, 2004, calculated based upon the 90 cents copper price is as follows:" and it sets it out.

A. I'm sorry, the last sentence before --

Q. There is a paragraph in the middle of the Page A14. Do you see that?

A. Yes.

Q. And the last sentence of that paragraph says, "SPCC's ore reserves as of December 31st, 2004, calculated based upon the 90 cents copper price is as follows:" Do you see

that?

A. Yes. Yes. Thank you.

Q. How do I -- do you know how I determine how many tons of copper are actually in the reserves from this chart?

A. Doesn't it say at the end 1.7? How do you determine -- I don't understand your question. Why don't you point me to a figure.

Q. I'm asking you --

A. Yes.

Q. -- do you know how to determine --

A. Yes.

Q. -- tons of copper reserve?

A. Yes.

Q. The actual tons of copper reserve from the information in this chart?

A. I know how they do it.

Q. How do they do it?

A. They -- with the 90 cents copper price, mining consultants do a mine plan. And they look at the life of the mine, and they see what is the economically feasible amount of mineral that they can take from the mine. And they determine what's called a cutoff rate, the low grade, or below which they are

going to throw away the mineral. They say if there is any mineral below .2 of copper, we're going to put it on the side.

So once they have the mine plan, they determine how much mineral that part that is economically feasible will involve, how much -- what's the ore grade, what's the -- when they're going to take it out. And they develop what's called a mine plan that gives them the amount of production per year, and then they add it all, and then that's the amount of the reserves, and then the present value.

Q. I understand what you just said, but my question is can you determine from this chart copper reserves in tons that Southern Peru has using the 90 cents copper price?

A. I don't remember how to read this table so I have to study it if you want me to do this. Let me see.

Well, as far as I can read from this table, it says that the total sulfide ore reserves in thousands of tons for the combined mines is 1.691 -- 700, that would be millions, so 1.7 million tons of sulfide ore copper; and the total leach reserves were 1.789, so almost 1.8 million tons of reserves. That's

how I read this table.

Q. But those numbers are in billions. So don't you have to multiply the average grade by the sulfide ore reserves and the average grade for the leachable ore reserves to get actual tons of copper?

A. Yes. Yes.

Q. And if you turn back -- and so if you it that you would get --

A. Yeah, you would get it.

Q. You would get it. So if you turn back to Page A12 in the document --

A. Yes.

Q. And by the way, that information on Page A14 is for Southern Peru's two open pit copper mines; right?

A. Yes.

Q. And if you turn back to Page A12 --

A. Yes.

Q. There is a similar calculation using a 93-cent long-term copper price. Do you see that?

A. Yes.

Q. And there is another calculation using a dollar 12.7 copper price?

A. I don't see it.

Q. On the right side of the chart, at the top it says, "sensitivity to 20 percent change in metal prices." And then the price below that?

A. Sensitivity to metal prices, with 20 percent up and down, yes, I see it now.

Q. So they show what the copper reserves would be at 1.12 and at 75 cents. Do you see that?

A. Yes.

Q. Now, if I told you that I did these calculations and Southern's Copper reserves in tons went from 13 million tons using 90 cents to 28 million tons using the higher price, would that surprise you?

A. Did you take into account that the grade went -- in one case, the grade is .236, and when the price goes down, the grade is 1.87? Do you take that into account?

Q. Yes.

A. In other words --

Q. I think I did it the way you agreed we would do it, which is multiply the cutoff grade by the total ore reserves, both sulfide and leachable material.

A. So you take the finer ore --

Q. Anyway, let me just ask you this: Did you do an analysis of exactly what effect an increase in long-term copper prices would have on the actual copper reserves for Southern and Minera Mexico?

A. No.

Q. And if it changed them not in relation to each other, that would change the relative values of the companies; correct?

A. If they change in different proportions, yes.

Q. So if they were -- if at 90 cents, the total copper reserves for Southern and Minera were different, and at $1.30 or a higher price, they're the same, the relative values of the companies would change significantly; right?

A. Significantly -- they could change. I don't know. I haven't done the analysis so I cannot tell you, but they could change.

Q. Okay. So just to make it clear, though, they would change; right? I mean, if the reserves are different at 90 cents and the ratio of those reserves at $1.30 changes, the relative values would change -- wouldn't necessarily change; right? Because a copper company's value is largely a function

of its copper reserves.

A. You're assuming that the proportions are different, but I have no evidence of that so I --

Q. But you didn't check; right?

A. I didn't check. I told you I used the data provided by Goldman, modified by -- that's the only thing --

Q. I understand, but you also said you also re-ran your model using $1.30. And I'm saying wouldn't it be appropriately if you're going to change the price to look at what the effect of that change in long-term price assumption would be on the actual reserves of the companies?

A. Only if they change their mine plan. Only if they start changing how much they take per year. And I -- you need a mining consultant to determine how those production changes -- I wasn't able -- I didn't have the data, and I wasn't able to do it.

So if they change the mine plan, in other words, if they decide, as we talked just a few minutes ago, if they decide to change operations of the mine, in other words, change the mine plan, then it could change. But if they decided to keep the mine

plan and simply they are getting more money for the same production per year, I didn't need to do that. And that's what I did in my analysis.

Q. But if Southern's copper reserves went from, let's say, 13 million tons to 28 million tons, wouldn't -- they would certainly change their mining plan, wouldn't they? Their reserves have doubled.

A. I don't know how much their reserves would change in those cases. I'm not a mining engineer, geologist, to be able to tell you how the mine plan would change.

Q. So you don't think -- you're here giving expert testimony on valuing a copper company; right? And let's say there's at Southern Peru -- just assume in their mines they had 13 million tons of copper reserves. Okay? Can you assume that?

And let's say there was a change in long-term pricing assumptions, and they now had, the way they calculate reserves, that is, copper that can be taken out of the ground at a profit, the reserves doubled. You don't think they would change their production plan?

A. As I said before, mining companies are very reluctant to change their mining plans. If they

changed their mining plans and they made the investments necessary to take out the mineral and the mineral doubled, as you say, then the value would be different.

Q. It would be different?

A. But all those assumptions, I don't have any information about those assumptions, so --

Q. I understand, but you're here telling us, you know, how you think a copper company should be evaluated. And I'm asking you directly, if Southern Peru's copper reserves, that means the copper they can take out of the ground at a profit, doubled, they wouldn't take more copper out of the ground, when they know they can make a profit on it?

A. In the long-term, they would take more.

Q. Okay. And Minera Mexico would do the same thing; right?

A. Correct.

Q. And so, again, if their reserves are changing in -- not proportionately to each other, the relative values of the companies change?

A. If they are not proportional, the relative value would change, under the assumptions

that the reserves of one increase more than the reserves of the other.

Q. Now, to do a discounted cash flow valuation, obviously, you have to have a set of projections to start with; right?

A. Yes.

Q. And where did you get the projections you used for Southern Peru?

A. I got the Excel file from Goldman Sachs as modified by Anderson & Schwab, and that's the data that I used to value both Minera Mexico and SPCC.

Q. And just as a -- I think it's obvious, but as an academic matter, if the projections you used for discounted cash flow valuation are unrealistic, then the value you get from a discounted cash flow valuation using them would be unreliable. Right?

A. Correct.

Q. Did you do anything to determine whether the projections you used to do a discounted cash flow valuation of Southern Peru were realistic?

A. No.

Q. And when were those projections created? Do you know?

A. I believe the projections were given

in October 21st, 2004.

Q. And do you know when those projections were created?

A. No.

Q. And do you know who created them?

A. Well, I believe that it was created by Goldman Sachs, with adjustments made by Anderson & Schwab.

Q. Okay. Southern Peru significantly outperformed its projections for 2004; correct?

A. Correct.

Q. And Minera Mexico did not; correct?

A. Correct.

Q. Now, the projections you used to value Southern Peru were based on mine reserve certifications from 1998 and 1999; correct?

A. I used the data that was provided to me by Goldman Sachs as modified or adjusted by A&S. I don't know -- I don't have evidence of the other things.

Q. Okay. So you don't know whether the Southern Peru projections you used were based on reserve certifications, mining reserve certifications from 1998 for one of Southern Peru's mines and 1999

for the other?

A. I used the data provided by Goldman Sachs as modified. That's the only thing that I used. I didn't analyze how the data was created.

Q. And do you know -- well, were the Minera Mexico projections you used based on reserve certifications from 2004?

A. I used the data provided by Goldman Sachs as modified by A&S, and I didn't analyze where that data was obtained, which was the same data used by Mr. Beaulne's analysis.

Q. Okay. In the financial community, isn't it generally accepted that you, where possible, want to apply different valuation methodologies or multiple valuation methodologies to cross-check a valuation?

A. Some people do that, yes.

Q. Isn't that the generally accepted approach in the financial community?

A. Okay. Yes. Right. Yes.

MR. BROWN: Can I have one minute, Your Honor?

THE COURT: Yes.

MR. BROWN: We have no further

questions, Your Honor.

MR. HENKIN: No further questions, Your Honor.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you.

MR. STONE: Your Honor, I think that's all of the witnesses. And we do have a number of joint exhibits. There are some objections to them, and we propose that those be dealt with in the briefing.

THE COURT: Sure.

MR. STONE: To the extent anyone cares about them.

THE COURT: I assume these are objections that you've all agreed somehow to work out. It's sort of awkward dealing with objections if they're not dealt with during trial in terms of people being able to overcome them. Or are they things where you've stipulated to the authenticity of documents and you have some other objection?

MR. STONE: It's not those types of objections. They're primarily relevance objections, Your Honor. They've got some postdated valuation

materials and other types of things that we say are not admissible for that reason.

THE COURT: Okay. Although I will note in that regard, several of the witnesses have lapsed into "this turned out well" --

MR. STONE: Understood; and we assumed that Your Honor would take that for what it's worth.

THE COURT: The extent to which you can take into account what actually happened in the world is something that I -- is, you know, one of the not fully worked-out mysteries of our law.

MR. BROWN: Your Honor, can we take a short break? We I don't think have decided whether we want to ask to re-call Mr. Beaulne to rebut anything, to address anything.

THE COURT: Certainly. We were going to take our break at quarter of anyway. Why don't we do this. Why don't we take a break.

It will be very short anyway?

MR. BROWN: It would be just a few questions.

THE COURT: What I was going to suggest is that we do the following: We take a break until 11:15; that you also talk about a proposed

briefing schedule so that we can deal with -- if Mr. Beaulne is going to get up on the stand, he can do that. We can talk about a briefing schedule, get that set. And I may have some thoughts for you going into a post-trial argument that we can do off the record.

But this will give you basically a half hour to kind of talk with each other and think about what the dates are. I would like to keep it as tight as possible and act like we're in trial. And I do think a post-trial argument would probably be helpful, given some of the valuation disputes and stuff. And I'm sure you -- I would assume you would want the opportunity to put them in context.

MR. STONE: Yes, Your Honor.

Your Honor, we certainly recognize you made certain statements at the pretrial conference about the briefing schedule. I just would like some guidance on what the parameters are.

THE COURT: I would like it as tight as possible, recognizing that you have teams who are much larger than my team. My team changes. And I'm not one -- you know, I'm a very open person about the realities of life. I have a very able person who works with me. He has studied up on the case, and he

is the sole person who will help me. You have very talented groups, very large, much larger than mine.

I don't want you to ruin anybody's holiday, but I also see no reason -- you've been very economical -- why you couldn't work on ruining yourselves and getting -- I see no reason why you couldn't say, We're going to have everything in by noon on Friday, July 1st. We're going to have short, you know, post-trial briefs.

What I am going to ask you -- and this was -- think about it with each other, and we'll have a conversation when we come back. But I want you to submit -- if you're going to tell me that everything has been established methodology or all that kind of stuff, submit compendiums that have comments from, you know, have actual sources that are objective sources.

To some extent, neither expert's report is fully satisfactory. And I don't know that I blame either of the experts. Although I will say experts can be experts by being a little bit more aggressive about saying, "I'm not going to limit myself necessarily to what I'm told."

I don't know that that's what happened but, you know, frankly, there are gaps on both sides

where people are accused of saying -- accused is a strong word, but that's the way the briefs are written -- of blinding themselves to key components of the analysis.

But what I'm saying is sometimes you're going to have pain as a lawyer. Every one of you has worked long nights. I've done it. I see no reason -- what if you said noon on July 1st? We're not going to ruin anyone's July 4th weekend, and we're going to get all the briefs done. Would you work long this weekend? Yeah, but you've been getting daily transcript. You wrote your pre-trial briefs. There is no reason they have to be 80 pages long. But you know, everybody has testified.

So what I'm thinking is talk about it, and then we can have the argument, and then I can roll out of this and write. You have a fairly big value gap which, as I said, is odd for such a smoothly run trial, given that billions separate you. So --

MR. BROWN: Can I ask Your Honor, are you contemplating simultaneous briefs or sequential briefs?

THE COURT: Simultaneous.

MR. BROWN: We would --

THE COURT: You can have your choice, but if you wish your choice, you will move fast.

I have another view of this, and this could be wrong. There is only a certain amount of actual hours you will spend on anything. And you can do them contiguously or you can push them out. I can give you two weeks for your opening brief.

And then if you agree, we can have our friends at Courtroom Connect do a reality TV show on a post-trial brief experiment. My sense is if we did that reality TV show, you would spend very few additional hours if we gave you two weeks over what you would do if we did it in a tighter time frame. It's just that when we did it in a tighter time frame, you would devote yourself pretty much entirely to getting this done and then you would move on. You might spend some additional hours because, frankly, it gets wasteful.

That's why, when I work, I want to roll out of a post-trial argument and write the opinion, because I know if I put it down, as fascinating as long-term reserves are of mines, if I put this down for five weeks, I'm going to have some relearning to do. Even though I get *Copper Investors'*

Monthly and all the other leading publications of people obsessed with copper.

So why don't you -- I have a son whose nickname when he was little was Benny-Penny, but as he's gotten older, he wanted something cooler, so he has a hip-hop nickname where we call him Small Coin. He's trying to go on tour with 50 Cent.

So think about it from that perspective. But what I don't want is don't tell me, if I set 10 days or 20 days, you're going to be working on it the whole 10 days. It also doesn't have to be 80 pages. And so if you want to go first, have them answer, that's fine, but then you need to move up when you're willing to do it, and you need to pick the weekend you wish to have destroyed.

What I was suggesting from a personal level for your families and all is maybe it's this weekend you wish to have destroyed; that you get something in say end of business Tuesday. Right? Which means -- you know, honestly, you don't really have to kill Saturday and Sunday. You're smart teams. Get it in Tuesday, get your reply in Friday, and then go have your July 4th weekend and you're done. That was my humane thing realizing there is never going to

be a situation where it's easy to be a corporate litigator, but that's not what we all signed up for.

If you do wish to do a three-brief sequence, that's where you have to think about it, because if what you're saying is, What I'd like to do is I'd like my friends not to enjoy their July 4th weekend, that's more problematic.

So let's come back at 11:20, now that we've spent most of the time we were going to talk later on this, and think about it, and think about whether you're going to do your rebuttal, and then we'll finish up.

MR. STONE: Thank you, Your Honor.

(Recess taken.)

MR. BROWN: So we're done, Your Honor. We're not going to re-call Mr. Beaulne.

MR. STONE: Your Honor, Mr. Brown and I have spoken, and what we've come up with for a briefing schedule is a 30-page brief to be filed by noon next Friday.

THE COURT: Okay.

MR. STONE: And then followed by a 10-page reply the following week, say Wednesday.

THE COURT: Okay. So let me just --

MR. STONE: I'm sorry. They're reminding me. That's the week of the Fourth of July, so we said Friday for the reply as well, so the 8th.

THE COURT: Okay. Let me just ask you a serious question here. One, why do you need -- I agree, I don't want to screw up anyone's Fourth of July, but, I mean, what are we doing here? I mean, I ask that seriously.

Which is I don't want to be -- we're at June 24th now. You're talking about 30 pages. Why can't it at least be Thursday and Thursday? And then we figure out some date, you know, maybe the 13th or the 14th, where we can have a post-trial argument.

MR. STONE: Your Honor, frankly --

THE COURT: And also, why --

MR. STONE: -- we're fine with having --

THE COURT: Seriously, I really don't understand what the magic is about next Friday and, you know, why it takes -- I mean, let's go off the record now.

(Discussion held off the record.)

THE COURT: Have a good weekend. Give me a briefing schedule Monday. Call Ms. Boulden this

afternoon, get the post-trial argument date. It's been a pleasure to be with you. I appreciate you also dealing with the scheduling vicissitudes this week. Have a good one.

(Court adjourned at 11:54 a.m.)

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CERTIFICATE

We, DIANE MCGRELLIS, JEANNE CAHILL and LORRAINE MARINO, Official Court Reporters for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 493 contain a true and correct transcription of the proceedings as stenographically reported by us at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF we have hereunto set our hand this 24th day of June, 2011.

/s/ Diane McGrellis

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

AMC DEFENDANTS' POST-TRIAL OPENING BRIEF

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PRELIMINARY STATEMENT

Not surprisingly, despite Plaintiff's rhetoric and bold claims, the six and one-half year intermittent odyssey that was this case ended in an anti-climactic four-day trial that, far from establishing any director misfeasance, only served to reinforce what has been apparent from Day One: The merger of Minera Mexico ("Minera") and Southern Peru Copper Corporation ("SPCC") (the "Merger") was entirely fair and in fact tremendously beneficial to SPCC and its shareholders.[1] From the Plaintiff's side, this case ended in a complete failure of proof. Specifically, Plaintiff failed to explain why the four concededly independent, intelligent, and successful businessmen who made up the Special Committee would have any motive to short change the public stockholders one cent, much less $6 billion.

The trial established that the Merger was the result of a diligent, robust, and fair process. Immediately after learning about the Merger, SPCC's board established a committee of independent and disinterested directors, comprised of highly qualified and competent professionals. The Special Committee understood its mandate and hired top notch financial, legal, and mining advisors to assist it in fulfilling its duties. The terms of the Merger were negotiated by the Special Committee and its advisors over an eight month period, during which time the Special Committee secured significant concessions for SPCC and its minority stockholders. After careful consideration, the Special Committee recommended the Merger to SPCC's board of directors, which subsequently approved it. The fairness of the Merger was confirmed by the overwhelming approval of the holders of SPCC's outstanding stock and the market's reaction to the Merger.

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[1] The Theriault Trust recognized the benefits the Merger offered, twice buying *additional* SPCC shares after the Merger was announced and before signing on to a complaint in this consolidated action (JX-2 at TT00025, TT00032), and former plaintiff Sousa voted for the Merger after the Proxy Statement was filed (DX-1).

At trial, Plaintiff abandoned almost every argument relating to the Special Committee's process that had been made while this case languished on the Court's docket, instead focusing only on the consideration SPCC paid for Minera. Specifically, Plaintiff focused on the fact that if, in calculating an appropriate exchange ratio, one uses Minera's DCF value using a $0.90/pound long-term copper price and SPCC's observed market capitalization, the resulting implied consideration is lower than the 67.2 million shares paid by SPCC. Plaintiff's talismanic reliance on SPCC's stock price misses the forest for the trees. The "test for fairness is not a bifurcated one as between fair dealing and price"[2] and a strong record of a fair process is indicative of fair price.[3] Here, the Special Committee's thorough process ensured not just that SPCC paid a fair price for Minera, but also that the deal the Special Committee ultimately recommended was beneficial to SPCC and its shareholders. The Special Committee closely examined both companies, focusing on what drove their values (*e.g.*, location, ore reserves, cost structures, and metal prices) and used the results of these analyses as leverage to secure benefits and protections for SPCC and its shareholders. After considering many methodologies and a great deal of company-specific information, the Special Committee reasonably concluded that the economic terms of this specific Merger involving these specific companies were best assessed by comparing SPCC and Minera on a relative basis, using the same methodology and assumptions. As Messrs. Handelsman and Palomino expressed at trial, the Special Committee is proud of the job they did. The Merger was the result of a robust and diligent process that increased SPCC's value and benefitted all shareholders of SPCC.

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2 *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

3 *S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co.*, 2011 WL 863007, at *16 (Del. Ch. Mar. 9, 2011).

In short, the trial established that there is no record evidence that the AMC Defendants breached any fiduciary duty in approving the Merger; rather, the overwhelming evidence supports the conclusion that the Merger was fair to SPCC and its shareholders.

STATEMENT OF FACTS

For a full statement of the facts, the AMC Defendants respectfully refer the Court to the AMC Defendants' Pretrial Opening Brief and the parties' Joint Pretrial Stipulation and Order.[4] The AMC Defendants believe that all relevant facts have been established and will incorporate relevant citations into the argument below as necessary to refer to the evidence presented at trial.

ARGUMENT

I. THE MERGER WAS ENTIRELY FAIR

A. Legal Standard

Entire fairness examines the process leading to the consummation of a transaction and the price.[5] An analysis of fair dealing considers when the transaction was timed; how it was initiated, structured, negotiated, and disclosed to the directors; and how the approvals of the directors and the stockholders were obtained.[6] Fair price involves questions of "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."[7] But the overall test is not bifurcated as between fair dealing and

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4 D.I 239, 249. The facts set forth in the AMC Defendants' Pretrial Brief were established through the trial testimony of Messrs. Handelsman, Palomino, and Ortega and through the deposition testimony of the other directors as well as the stipulated facts in the Joint Pretrial Stipulation and Order.

5 *See Weinberger*, 457 A.2d at 711.

6 *See Emerald Partners v. Berlin*, 787 A.2d 85, 97 (Del. 2001).

7 *Weinberger,* 457 A.2d at 711.

price: "All aspects of the issue must be examined as a whole since the question is one of entire fairness."[8] Importantly, the entire fairness analysis does not require perfection on the part of the board of directors.[9]

In transactions subject to entire fairness review, the burden of proof shifts to the plaintiff if the defendants are able to demonstrate that the transaction was approved by "an independent committee of directors or an informed majority of the minority shareholders."[10] Here, there is no question that the Merger was evaluated and recommended by an independent, informed, and fully functioning committee of disinterested directors. Indeed, Plaintiff did not even try to present evidence to the contrary at trial. Accordingly, it is Plaintiff's burden to prove that the Merger was not entirely fair. Plaintiff has not satisfied that burden.

B. **The Process Was Fair**

To determine whether the process surrounding a transaction is fair, Delaware Courts consider (1) the board's composition and independence, (2) the extent to which the board was accurately informed about the transaction, (3) the timing, structure and negotiation of the transaction, and (4) how board approval was obtained.[11] All of these factors weigh in favor of finding that the burden has been shifted to Plaintiff and a determination that the Merger was the product of a fair process.

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8 *Id.*

9 *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1178 (1995) ("A finding of perfection is not a *sine qua non* in an entire fairness analysis.") (emphasis added).

10 *See Kahn v. Lynch Commc'ns Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994), *aff'd,* 669 A.2d 79 (Del. 1995); *In re Tele-Commuc'ns, Inc. S'holders Litig*., 2005 WL 3642727, at *8 (Del. Ch. Jan. 10, 2006); *In re Cysive, Inc. S'holders Litig*., 836 A.2d 531, 534 (Del. Ch. 2003); *accord In re Cox Radio, Inc. S'holders Litig*., 2010 WL 1806616, at *13 (Del. Ch. May 6, 2010) ("To shift [the entire fairness] burden to the Appraisal Objectors, Defendants must demonstrate that the Special Committee 'was truly independent, fully informed, and had the freedom to negotiate at arm's length.'").

11 *Kahn v. Lynch Commc'ns Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995).

1. The Special Committee Was Independent And Qualified

To establish that a director lacks independence, a plaintiff must "create a reasonable doubt that a director is not so 'beholden' to an interested director ... that his or her 'discretion would be sterilized.'"[12] Similarly, to establish that a director is interested in a transaction, a plaintiff must show that the director "was on both sides of a transaction or received a benefit not received by the shareholders."[13] At trial, Plaintiff not only failed to adduce evidence to suggest any Special Committee member met these standards, he did not even try. None of the Special Committee members had any affiliation with Grupo Mexico or any of its affiliates (other than SPCC) or had any financial interest in the Merger.[14] The members of the Special Committee, moreover, were highly qualified and sophisticated professionals who had extensive transactional experience.[15] The Special Committee was therefore well-positioned to negotiate and evaluate the merits of the proposed Merger.

Any argument by Plaintiff that Mr. Handelsman lacked independence because of his affiliation with Cerro Trading Co. ("Cerro") is legally insufficient. The record is bereft of any evidence that Mr. Handelsman or Cerro received personal benefits that were not equally

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12 *See Hallmark*, 2011 WL 863007, at *9 (internal quotations omitted); *Beam v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004). To create such a reasonable doubt, a plaintiff "must plead facts that would support the inference that because of the nature of a relationship or additional circumstances ... the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director." *Hallmark*, 2011 WL 863007, at *9 (internal quotations omitted).

13 *Continuing Creditors' Comm. of Star Telecomms, Inc. v. Edgecomb*, 385 F. Supp. 2d 449, 460 (D. Del. 2004); *see also Cede & Co. v. Technicolor*, 634 A.2d 345, 361 (Del. 1993).

14 Trial Tr., vol. I, 11:3-12:21 (Palomino), 140:6-9, 142:12-24 (Handelsman); Trial Tr., vol. II, 239:24-243:9 (Ortega); JX-129 at 16; Larrea Dep. 43:7-20, 44:2-4, 44:22-45:1, 46:18-21; Perezalonso Dep. 16:2-16:10.

15 Joint Pretrial Stip. & Order ¶¶ 16-19; JX-150; JX-151; JX-152; Trial Tr., vol. I, 4:15-8:20 (Palomino), 135:19-138:10 (Handelsman); Ruiz Dep. 16:5-17. Here again, Plaintiff did not even try to present contrary evidence.

shared by SPCC and its minority shareholders. That is because the interests of Mr. Handelsman, as a member of the Special Committee, and Cerro were aligned in that both parties wanted to ensure that SPCC was getting the best deal it could on Minera. The registration rights that Cerro received were also advantageous to SPCC's minority shareholders because they ensured that Cerro's shares would be sold in an orderly fashion, thereby minimizing any impact on the price of SPCC stock that could have resulted from a sale of a large block of SPCC shares into the market.[16] Moreover, the registration rights agreement between Cerro and Grupo Mexico, which provided that Cerro would vote in accordance with the Special Committee's recommendation, ensured that Grupo Mexico could not use Cerro's vote to force the Merger.[17] Ultimately, any argument that Mr. Handelsman was conflicted defies common sense: If the Merger was as badly mispriced as Plaintiff argues, it would have caused substantial damage to the value of Cerro's SPCC stock.[18] Not only did that not happen, but Plaintiff offered no evidence that would even allow someone to speculate as to why Cerro (or anyone else) would have taken such a risk.

2. **The Special Committee Was Fully Informed**

The Special Committee was thorough and diligent, meeting formally on at least 20 occasions and informally on many other occasions over a period of more than eight months.[19] The Special Committee also retained—after interviewing numerous candidates[20]—independent,

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16 Trial Tr., vol. I, 67:20-69:24 (Palomino), 184:5-185:2 (Handelsman).

17 JX-12; JX-129 at 26; Trial Tr., vol. I, 182:7-183:17 (Handelsman).

18 Trial Tr., vol. I, 71:16-72:15 (Palomino).

19 Joint Pretrial Stip. & Order ¶¶ 23-46; Trial Tr., vol. I, 19:3-21 (Palomino), 149:9-150:10 (Handelsman).

20 Trial Tr., vol. I, 146:9-12 (Handelsman) (Special Committee considered Lehman Brothers, Credit Suisse First Boston, JPMorgan, Goldman Sachs, and Merrill Lynch); *id.* at 145:3-8 (Handelsman) (Special Committee considered Latham & Watkins, Cleary Gottlieb, Paul Weiss, and Sullivan & Cromwell).

highly skilled, and reputable legal, financial, and mining advisors to assist it in fulfilling its duties.[21] Specifically, the Special Committee retained Latham & Watkins as its U.S. legal counsel, Mijares, Angoitia, Cortes y Fuentes SC as its Mexican legal counsel, Goldman Sachs as its financial advisor, and Anderson & Schwab ("A&S") as its mining advisor.[22] At the direction of the Special Committee, the advisors engaged in legal, financial, and operational due diligence of both companies, extensively analyzed the proposed Merger, provided expert opinion for the matters in which they were qualified, and helped the Special Committee negotiate the proposed Merger.[23] The Special Committee relied on the professional advice provided by its advisors throughout the evaluation process.[24] The intensive process engaged in by the Special Committee and its advisors evidences the Special Committee's diligence.[25]

3. The Special Committee Negotiated At Arm's Length For The Benefit Of SPCC's Minority Stockholders

The Special Committee was given a clear mandate from the SPCC Board to negotiate the Merger at arm's length.[26] The resolutions forming the Special Committee provided

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21 *See Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130, 1147 (Del. Ch. 2006) ("[S]pecial committee members should have access to knowledgeable and independent advisors, including legal and financial advisors.").

22 Joint Pretrial Stip. & Order ¶¶ 20-22; JX-63; JX-67; Trial Tr., vol. I, 15:4-18:7 (Palomino), 144:16-148:14 (Handelsman); Trial Tr., vol. II, 247:19-248:17 (Ortega); Ruiz Dep. 26:21-28:23.

23 Joint Pretrial Stip. & Order ¶¶ 23-46; Trial Tr., vol. I, 18:8-19:2, 28:14-30:12 (Palomino), 153:1-10 (Handelsman); Trial Tr., vol. II, 247:19-248:17 (Ortega).

24 Trial Tr., vol. I, 18:8-19:2 (Palomino). A board's reliance on expert advice not only "evidence[s] good faith in the overall fairness of the process" but can protect a board from challenges that it breached its duty of care. 8 Del. C. § 141(e); *see also Cinerama, Inc. v. Technicolor, Inc*., 663 A.2d 1134, 1142 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995).

25 Joint Pretrial Stip. & Order ¶¶ 23-46; JX-129 at 16-39; Ruiz Dep. 168:17-169:2.

26 *Gesoff*, 902 A.2d at 1146 (holding that a special committee "should be given a clear mandate setting out its powers and responsibilities in negotiating the interested

that the Special Committee shall "evaluate the Transaction in such manner as the Special Committee deems to be desirable and in the best interests of the stockholders of the corporation" and should "advis[e] both the Audit Committee and the Board regarding the same."[27] As demonstrated at trial, the Special Committee understood its mandate and understood that it had the power and authority to reject any offer it thought was not fair to SPCC and its minority shareholders.[28] The Special Committee members not only understood that their role was to represent SPCC's minority shareholders and that they should evaluate the proposed Merger from the minority shareholders' perspective,[29] but Mr. Palomino was recommended to be a director and a member of the Special Committee by certain minority shareholders because they believed he could best represent their interests in connection with the proposed Merger.[30]

The Special Committee also had and used the critical power to say "no:" As Mr. Palomino testified at trial, after months of negotiations, the Special Committee informed Mr.

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transaction").

27 JX-16.

28 *See Hallmark*, 2011 WL 863007, at *12 (finding that the special committee interpreted its mandate broadly to include the power to consider the transaction, negotiate its terms, and recommend or reject the transaction); *see also* Trial Tr., vol. I, 12:22-15:5 (Palomino)("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 143:1-144:12 (Handelsman)("'[E]valuate' meant just that. That was that the committee was to educate itself and determine whether they believed that the proposed transaction was a good or a 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 it wanted to negotiate in the face of a no, it could do so."), *id.* at 193:16-194:18 (Handelsman).

29 Trial Tr., vol. I, 100:23-101:8, 106:3-14 (Palomino); Perezalonso Dep. 21:23-22:14; Ruiz Dep. 38:2-38:19.

30 *See* Trial Tr., vol. I, 9:8-11:17 (Palomino).

Larrea personally that it would not recommend the transaction due to "substantial differences" between the views of the Special Committee and those of Grupo Mexico, thus prompting Grupo Mexico to significantly reduce the proposed consideration.[31]

In embracing its mandate, the Special Committee negotiated key terms of the Merger that directly benefited SPCC stockholders:

- The Special Committee negotiated that Minera's net debt at closing would not exceed $1 billion—a 23% reduction in net debt.[32]
- The Special Committee negotiated a transaction dividend to SPCC stockholders of $100 million to be distributed prior to the closing of the Merger (in addition to SPCC's regular quarterly dividend)[33] and indemnification by AMC for certain pre-closing environmental matters and conditions of Minera.[34]
- The Special Committee negotiated significant corporate governance protections designed to protect minority shareholders post-Merger.[35]
- The Special Committee negotiated away from a proposed floating exchange ratio to a fixed ratio and negotiated down (by roughly 7%) the number of shares to be exchanged for Minera.[36]

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31 Trial Tr., vol. I, 59:2-61:13 (Palomino).

32 Trial Tr., vol. I, 75:23-76:18; 83:16 (Palomino), 172:11-173:4, 175:10-16 (Handelsman); JX-129 at 25.

33 *See* Trial Tr., vol. I, 176:15-177:5 (Handelsman) (explaining that Cerro got $15 or $16 million dollars from the special dividend that it would not have had and the individual shareholders got their pro rata share); Trial Tr., vol. I, 83:14-84:16 (Palomino); Pretrial Stip. & Order ¶ 43.

34 Pretrial Stip. & Order ¶ 43; JX-129 at 24-25.

35 Pretrial Stip. & Order ¶ 51, JX-129 at 24-26; Trial Tr. vol. I, 76:19-77:11 (Palomino); 173:5-23 (Handelsman). These corporate governance provisions included (i) proportional representation of minority stockholders on SPCC's board, (ii) a requirement that independent directors meet the NYSE independence requirements and be nominated by a special nominating committee, (iii) a requirement that the audit committee review certain related-party transactions in advance of their consummation; and (iv) a requirement that SPCC remain listed on the NYSE for a least five years. JX-129 at 21. Any contention that these provisions were meaningless or favored Grupo Mexico is without merit. These protections enhanced SPCC's minority stockholders' position in dealing with Grupo Mexico after the Merger.

36 Pretrial Stip. & Order ¶¶ 13, 50; Trial Tr., vol. I, 62:19-64:9 (Palomino), 117:23-119:8

- The Special Committee negotiated a super-majority voting requirement of 66⅔% and then secured a commitment from Cerro to vote its 14.2% interest only in accordance with the Special Committee's recommendation, guaranteeing that Grupo Mexico could not use Cerro's vote to force the Merger.[37]

Plaintiff offered no evidence to dispute any of these points.

To support his contention that the Special Committee did not negotiate at arm's length, Plaintiff argues that the Merger consideration the Special Committee recommended was the same as Grupo Mexico's initial proposal. But that argument is incorrect. Grupo Mexico's initial proposal would have resulted in the issuance of approximately 72 million shares of SPCC stock based on a floating exchange ratio, whereas the transaction that the Special Committee recommended in October 2004 resulted in the issuance of 67.2 million shares on the basis of a fixed exchange ratio.[38] In addition, as set forth above, the Special Committee secured significant benefits that were not part of Grupo Mexico's initial proposal.[39] That the market value of the SPCC shares under Grupo Mexico's original proposal was roughly equal to the market value of the SPCC shares issued in connection with the Merger is happenstance. To protect against fluctuations in the price of SPCC stock (which could have been detrimental to SPCC in connection with the proposed Merger), the Special Committee negotiated a fixed exchange ratio months before the transaction closed, so the Special Committee (and Grupo Mexico) had no way of knowing that the market value of the shares issued would be $3.1 billion.[40] All this reflects is

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(Palomino); 166:7-10 (Handelsman).

37 Joint Pretrial Stip. & Order ¶ 45; Trial Tr., vol. I, 174:7-19 (Handelsman).

38 JX-129 at 16, 26; JX-108 at AMC0019912.

39 The Special Committee also considered whether to use cash as consideration as opposed to stock but determined that stock was preferable. Trial Tr., vol. I, 232:10-224:15 (Handelsman); *id.* at 127:11-128:2 (Palomino).

40 In addition, there is no dispute that the timing of the Merger was in the Special Committee's hands and proceeded on a schedule set by the Special Committee.

that, looked at in terms of assets in the ground and the costs to extract and sell them, Minera's enterprise value was equal to or greater than SPCC's.[41]

4. The Merger Was Approved By SPCCs Fully-Informed Minority Shareholders

That the overwhelming majority of SPCC's fully informed shareholders voted to approve the Merger, and that those stockholders were fully informed, further confirm that the Special Committee's process was fair. The Merger was approved by the holders of more than 90% of the outstanding stock of SPCC, including by Sousa, one of the three original plaintiffs (and he cast that vote *after* his complaint was filed and *after* the Proxy Statement was filed).[42] Removing the holders of the Class A Common Stock (AMC, Cerro, and Phelps Dodge) from the equation, of the common shares that were voted, approximately 98% were voted *for* the Merger.[43]

C. The Price Was Fair

Given the undisputed evidence that the Merger was approved by an independent and disinterested Special Committee as a result of a fair process, Plaintiff bears the burden of showing that the Merger was unfair.[44] Plaintiff cannot prove that the financial terms of the Merger, which were the result an active and effective process, were unfair to SPCC and its minority shareholders.

Fair price "relates to the economic and financial considerations of the proposed [transaction], including all relevant factors: assets, market value, earnings, future prospects, and

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41 JX-48 ¶¶ 36-43; Trial Tr., vol. IV, 435:8-20 (Schwartz); Def. Demonstrative Ex. 1 (showing that Minera's forecast production for nearly all metals was higher than SPCC's).

42 Joint Pretrial Stip. & Order ¶ 54; JX-130; DX-1.

43 JX-131 at 25.

44 *Hallmark,* 2011 WL 863007, at *10.

any other elements that affect the intrinsic or inherent value of a company's stock."[45] Importantly, fair price does *not* mean "the highest price financeable or the highest price the fiduciary could afford to pay," it means "a price that is one that a reasonable seller, under all the circumstances, would regard as within a range of fair value."[46]

Plaintiff's only support for his contention that the Merger consideration was unfair is his expert's opinion that Minera's DCF value should have been divided by SPCC's stock price instead of compared to SPCC's DCF value. According to Plaintiff, SPCC should have issued 41 million shares for Minera as opposed to 67.2 million shares; Plaintiff thus claims that SPCC overpaid by an astonishing *64%*. Plaintiff's theory ignores the record and the factors that drove SPCC's and Minera's values. The Special Committee and its advisors closely examined SPCC and Minera over a long period and reasonably concluded that the Merger was fair to SPCC because SPCC received as much or more than what it paid for Minera.

1. **Minera Mexico Was Worth What SPCC Paid For It, If Not More**

Under Delaware law, value can be determined "by any techniques or methods which are generally considered acceptable in the financial community."[47] Consistent with this principle, and as demonstrated at trial, the Special Committee and its financial, mining, and legal advisors spent eight months evaluating and analyzing the fairness of the evolving terms of the proposed Merger. Goldman Sachs presented the Special Committee with various valuation analyses based on the information it gathered from the extensive due diligence it conducted in

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45 *Weinberger*, 457 A.2d at 711.

46 *Cinerama,* 663 A.2d at 1143 (Del. Ch. 1994), *Kahn v. Tremont*, 1996 WL 145452, at *1 (Del. Ch. Mar. 21, 1996) ("A fair price is a price that is within a range that reasonable men and women with access to relevant information might accept."), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997).

47 *Weinberger,* 457 A.2d at 712-13.

conjunction with A&S.[48] After months of analysis, Goldman Sachs and the Special Committee decided the best way to analyze the proposed Merger was by comparing the values of Minera Mexico and SPCC using the same methodology and assumptions.

Well before deciding to proceed in that way, however, Goldman Sachs performed a number of preliminary analyses of Minera to estimate its value. These analyses included a DCF analysis, sum-of-the-parts analysis, contribution analysis, comparable companies analysis, and ore reserve analysis.[49] The results of these preliminary analyses suggested that Minera's value was generally lower, and in some cases substantially lower, than Grupo Mexico's initial indication of Minera's equity value of $3.1 billion.[50] As a result, the Special Committee engaged in extensive negotiations with Grupo Mexico concerning the terms of the Merger[51] and the Special Committee's advisors engaged in extensive discussions with Grupo Mexico's advisor (UBS) concerning Minera's value.[52] At the same time, the Special Committee's advisors continued their due diligence and refined their analyses by probing and challenging the management representations regarding both companies' assets[53] and running analyses using

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48 A&S was retained to conduct a detailed operational due diligence of the Minera and SPCC mining assets involved in the proposed Merger. JX-67 at SP COMM 018538. A&S visited the operations of Minera and SPCC, discussed operations and future plans with the management of each company, modified the financial models provided to Goldman Sachs by the respective management based on the diligence performed, and reported their findings to the Special Committee. *See* JX-113 at SP COMM 003326; DX-2; JX-162 (discussing A&S's changes to each company's economic model).

49 JX-101; JX-102; Trial Tr., vol. I, 156:6-22 (Handelsman).

50 Trial Tr., vol. I, 156:23-157:7 (Handelsman); *id.* at 42:6-14 (Palomino).

51 JX-129 at 20-21.

52 *Id.*; Sanchez Dep. 109:6-18; see also Trial Tr., vol. I, 61:17-62:18 (Palomino) (explaining that the Special Committee's and Grupo Mexico's advisors spoke continually); 154:17-155:2 (Handelsman) (same).

53 A&S believed that management's representations relating to Minera's assets should be adjusted and proposed using assumptions Goldman Sachs then incorporated into its

different assumptions and methodologies. The effect of these preliminary analyses of Minera is fully disclosed in the Proxy:

> Following discussion [of Goldman Sachs' June 11, 2004 Presentation], the members of the special committee agreed that representatives of the special committee should meet with Mr. Larrea and inform him that the special committee had received a preliminary report from its advisors and that there were substantial differences between the views of the special committee and Grupo Mexico regarding Grupo Mexico's term sheet. The parties agreed to ask their respective financial advisors to meet and discuss the respective views of the special committee and Grupo Mexico with regard to the appropriate valuation of Minera Mexico. ... Throughout June and July, representatives of Goldman Sachs spoke with representatives of UBS on numerous occasions to discuss the respective views of the special committee and Grupo Mexico with respect to valuation issues ... . Also during this period, from time to time Mr. Ruiz and other members of the special committee spoke with Mr. Larrea about the respective views of the special committee and Grupo Mexico with respect to the valuations of Minera Mexico and [SPCC].[54]

During this time, the Special Committee also asked Goldman Sachs to perform a DCF analysis of SPCC to try to explain why these two very similar companies (with similar earning patterns and reserves) seemingly had such dissimilar values.[55] On June 23, 2004, Goldman Sachs presented the Special Committee with its DCF analysis of SPCC.[56] Goldman Sachs used similar assumptions in its DCF analysis of SPCC that it used for its DCF analysis of Minera and performed similar sensitivity analyses for copper prices, molybdenum prices,

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analyses and presentations to the Special Committee. *See, e.g.*, JX 101 at SP COMM 003369. Critically, Plaintiff does not challenge in any way the assumptions the Special Committee ultimately used and in fact adopted those assumptions. Trial Tr., vol. III, 377:12-16; 375:4-10 (Beaulne) (testifying that he did no analysis of the cash flow projections that the Special Committee and its advisors used for SPCC).

54 JX-129 at 20-21.

55 Trial Tr., vol. I, 158:1-6 (Handelsman).

56 JX-102 at SP COMM 006979-82.

discount rates, and ore milled.[57] That analysis yielded a value that was closer to the DCF value of Minera but (under certain assumptions) significantly lower than SPCC's observed market value.[58] As Mr. Handelsman explained at trial, that analysis of SPCC "gave some clarity" to Goldman Sachs' preliminary analyses of Minera "and showed that [the Special Committee's] initial reaction that these were two very similar companies in very similar businesses with pretty similar earnings patterns ... were far more comparable than they were on the valuation of the stock, the public stock of one, and the discounted cash flow analysis or cash-producing power of the other."[59]

The Special Committee and its advisors then endeavored to determine why Minera's DCF value was lower than SPCC's stock price and whether it was appropriate to compare the DCF values of these companies to determine the appropriate number of shares to pay for Minera. It arrived at two conclusions, neither of which Plaintiff even tries to challenge.

a. **Minera Was Worth More As Part Of A Public Company**

As Messrs. Handelsman and Palomino explained at trial, although Minera had significant ore reserves and tremendous earning potential, Minera was embedded within a large Mexican conglomerate (Grupo Mexico).[60] Unlike SPCC (a U.S. company listed on the New York Stock Exchange), Minera was unlisted, subject to Mexican accounting standards, and had

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57 *Id.* Goldman Sachs also presented its findings based on two different scenarios, one of which incorporated changes to normalize ore grades. JX-102 at SP COMM 006976. Goldman Sachs and the Special Committee did this because they had access to geological data suggesting that SPCC's ore grades were going down and Wall Street analysts were not fully taking into account the reduction in ore grades. Trial Tr., vol. I, 45:1-46:2 (Palomino).

58 JX-102 at SP COMM 006979-82.

59 Trial Tr., vol. I, 159:12-20 (Handelsman).

60 Plaintiff concedes that (i) assets of conglomerates can be worth more separately than together and (ii) different markets can have different listing premia. *See* Trial Tr., vol. III, 386:18-24; 398:19-399:4 (Beaulne).

virtually no regulatory oversight. Moreover, because of Grupo Mexico's troubles with ASARCO, which subsequently filed for bankruptcy, Minera had significant capital constraints.[61] But as part of the Merger, Minera's assets would become part of a U.S. listed company, subject to U.S. accounting standards and SEC and NYSE regulations, and protected by corporate governance provisions. This process would unlock substantial value that was not adequately captured in Goldman Sachs' preliminary valuations of Minera.[62]

b. SPCC Was Trading Based On A Long-Term Copper Price Higher Than $0.90/Pound

In an effort to reconcile the difference between SPCC's DCF value and its market capitalization, the Special Committee's and Grupo Mexico's advisors conducted an analysis that suggested that copper companies were generally trading at a premium, and SPCC was trading at the highest premium. Specifically, in a presentation that was shared with the Special Committee on July 7, 2004, UBS showed that copper companies such as Antofagasta, Phelps Dodge, and SPCC (which Plaintiff's expert contends were sufficiently comparable to Minera to be used as the basis of a multiples analysis to price Minera) were trading at a premium to their DCF values.[63] As Mr. Palomino and Dr. Schwartz explained, the reasonable explanation for that phenomenon is that the market was changing and metal prices were dramatically increasing.[64] In addition, with respect to SPCC specifically, the market was estimating higher ore grades and

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61 Trial Tr., vol. I, 219:3-18 (Handelsman).

62 Trial Tr., vol. I, 38:13-23 (Palomino) (explaining that the proposed Merger was intended to create substantial value and you have to "give proper credit to the creation of value that w[as] expected to take place"); Trial Tr., vol. I, 219:11-14 (Handelsman) (explaining that the main premise of the proposed Merger was to "use the fisc of Southern Peru and its pristine balance sheet to develop the mining assets of Minera").

63 JX-103 at SP COMM 006945. Plaintiff has offered no evidence to contradict this analysis.

64 Trial Tr., vol. I, 48:5-49:16 (Palomino); Trial Tr., vol. IV, 442:19-443:18; 447:13-21 (Schwartz); JX-48 at ¶¶ 47-51; JX-23.

copper reserves for SPCC than SPCC's internal projections and due diligence was showing.[65] Indeed, even market analysts who covered SPCC while the proposed Merger was being negotiated derived values for SPCC that were roughly one-half its observed market price at the time.[66]

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After a thorough analysis and discussion, Goldman Sachs and the Special Committee concluded that the most appropriate way to assess the fairness of the proposed Merger was to compare SPCC and Minera on a relative basis. On July 8, 2004, Goldman Sachs presented its first relative valuation of the two companies.[67] As explained at trial, among the chief reasons the Special Committee used a relative valuation was that it allowed SPCC and Minera to be compared using the same set of assumptions, *i.e.*, an apples-to-apples comparison.[68] Therefore, even if copper prices fluctuated, the value of each company relative to each other (and as part of the merged entity) could be reasonably estimated.

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65 Trial Tr., vol. I, 48:5-49:16 (Palomino).

66 *See* JX-103 at SP COMM 006946.

67 JX-103 at SP COMM 006896-98.

68 Trial Tr., vol. I, 49:6-16 (Palomino). Mr. Palomino also explained that he routinely used relative discounted cash flow valuations while at Merrill Lynch to compare similar companies or companies within the same sector for purposes of determining which stock to recommend. *Id.* at 58:14-24; *see also* Sanchez Dep. 39:18-24 ("If you merge companies, obviously what is most relevant is not to look at absolute values of each company, but what the exchange ratio in those two companies look like. So at the end of the day, what you need to do is basically put apples to apples comparisons and look at basically what is the implied exchange ratio."). Nor is this methodology unusual in current transactions. *See* Northeast Utilities, Registration/Proxy Statement (Form S-4), at 75 (Nov. 22, 2010); UAL Corporation, Registration/Proxy Statement (Form S-4), at 70-71 (June 25, 2010). The Court can take judicial notice of the public filings for those transactions. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006) (recognizing that a court may take judicial notice of the contents of SEC filings).

Moreover, the Special Committee understood that using a conservative long-term copper price of $0.90/pound in comparing Minera and SPCC would be beneficial to SPCC.[69] Because Minera had larger reserves and a higher cost structure, increases in the long-term copper price would increase the value of both companies, but Minera's value would increase at a higher rate.[70]

As set forth in Goldman Sachs' October 21, 2004 presentation to the Special Committee, a relative valuation of these two companies confirmed that the negotiated price of 67.2 million shares for Minera was fair.[71]

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69 The Special Committee decided to negotiate based on a long-term copper price of $0.90/lb despite the fact that SPCC's and Minera's internal projections used a long-term copper price of $1.00/lb. JX 106 at SP COMM 004917; SP COMM 004919. Plaintiff's contention that SPCC used a $0.90/lb long-term copper price for internal planning is wrong. As Mr. Jacob explained at trial, SPCC used a $0.90/lb long-term copper price for purposes of preparing ore reserve estimates for use in its business plans (*i.e.*, production plans or life-of-mine plans). SPCC did not use that price for purposes of conducting financial forecasts or estimates because the long-term copper price used for ore reserve calculations is a conservative price that does not necessarily reflect the market price or current market estimates relating to copper. Trial Tr., vol. III, 303:21-305:15; 307:2-19 (Jacob). Plaintiff's fundamental misunderstanding of this issue is underscored by the fact that his expert did not even consider the long-term price of copper that either SPCC or Minera was using in the projections they provided to the Special Committee. Trial Tr., vol. IV, 423:20-425:12 (Beaulne).

70 Trial Tr., vol. I, 40:10-41:13 (Palomino) (explaining the Special Committee made the strategic decision to use a conservative long-term copper price because it would be more beneficial to SPCC and its minority stockholders); *see also* Trial Tr., vol. IV, 445:13-24 (Schwartz) (confirming that negotiating based on a lower long-term copper price was advantageous to SPCC); JX-48 at ¶¶ 44-45.

71 JX-106 at SP COMM 004923-25; *see also* Trial Tr., vol. I, 92:11-23 (Palomino) (explaining that the middle value of Goldman Sachs' relative valuation was 69.2 million shares, higher than what the Special Committee negotiated and SPCC ultimately paid); Trial Tr., vol. I, 220:13-221:11 (Handelsman) (explaining that he knew the value of what SPCC was getting and it was worth what SPCC paid for it).

2. A Relative Valuation Of Minera And SPCC Did Not Hide SPCC's Value

Plaintiff's argument that a relative valuation of SPCC and Minera hid SPCC's market value from the Special Committee was conclusively refuted at trial. Messrs. Handelsman and Palomino explained in detail that the Special Committee was well aware of SPCC's stock price during its evaluation of the Merger and the fact that Goldman Sachs' DCF value of SPCC was lower than its observed market capitalization.[72] Indeed, Mr. Handelsman explained that it was the Special Committee's idea in the first instance to perform a DCF analysis of SPCC so that the committee could better understand what was driving the valuations of the two companies.[73] The Special Committee also understood that SPCC's market price was not key to evaluating Minera and SPCC on a relative basis.[74]

3. Independent Evidence Confirms That The Merger Price Was Fair

The economic fairness of the Merger was confirmed by SPCC's minority shareholders (including named plaintiffs in this case) and the market.

SPCC's Minority Stockholders Thought The Merger Was Fair. Over 90% of the outstanding capital stock of the Company voted on a fully informed basis to approve the Merger, including the shares voted by former plaintiff Sousa.[75]

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72 Trial Tr., vol. I, 47:9-48:4 (Palomino) ("Well, it came up in the discussion [with Goldman Sachs], of course, because we knew what the market value was and the discounted cash flow numbers tended to be, again, depending on the assumptions, but they tended to be somewhat lower."); Trial Tr., vol. I, 158:19-159:2 (Handelsman); *see also* JX-101 SP COMM 00341; JX-102 SP COMM 006922; JX-103 at SP COMM 006865; JX-105 at SP COMM 006787.

73 *See* Trial Tr., vol. I, 157:21-158:6 (Handelsman).

74 *See* Trial Tr., vol. I, 54:21-55:13 (Palomino) ("What the market value of one of [the company's] is not relevant to this analysis").

75 JX-161; DX-1. Plaintiff purportedly objects to JX-161, which is a record from Broadridge Financial Solutions, Inc. ("Broadridge") showing that Plaintiff Sousa voted

The Theriault Trust Thought the Merger Was Fair. The first thing the Theriault Trust did after the Merger was announced was to buy more shares of SPCC stock. And then it purchased several hundred *more* shares on December 13, 2004, shortly before the Lemon Bay complaint was filed (and made a sizable profit doing so).[76] And the Theriault Trust bought more shares again on May 17, 2005, shortly after the Merger was overwhelmingly approved by SPCC's shareholders and closed.[77] The Theriault Trust even continued to purchase shares of SPCC stock well into discovery in this action.[78] That is not the behavior of someone who thought the Merger was unfair.

The Market Thought The Merger Was Fair. The market reactions at various relevant times confirmed that (i) the market initially treated the proposed Merger like most stock-for-stock mergers when information about it began to enter the market but (ii) reacted positively when additional information became available. As this Court has noted, the stock price of an acquiring company generally drops when it announces that it intends to merge with another company.[79] Here, SPCC's stock price declined around the time the proposed Merger was first

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for the Merger on the bases of (i) relevance, (ii) authenticity, and (iii) hearsay. Relevant evidence, as defined under Rule 401, is "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." The fact that Plaintiff Sousa voted in favor of the Merger he previously claimed was unfair is unquestionably relevant. With respect to Plaintiff's authenticity and hearsay objections, the AMC Defendants obtained an affidavit from Broadridge conclusively authenticating the document and certifying that it is a business record. *See* DX-1. The AMC Defendants provided this affidavit to Plaintiff's counsel prior to the trial and requested that Plaintiff withdraw his objection. Plaintiff declined. Given that the document is relevant and a certified business record there is no reason to exclude it from evidence.

76 JX-2 at TT00025 & TT00032.

77 JX-3 at TT00048.

78 JX-6 at TT00096.

79 *See Global GT LP v. Golden Telecom, Inc*., C.A. No. 3698-VCS, slip op. at 22 (Del. Ch. Apr. 23, 2010); *see also* Matthew Tagliani, THE PRACTICAL GUIDE TO WALL STREET,

announced and when the Merger Agreement was announced just over eight months later.[80] But for the two days after the Proxy was released on February 25, 2005 — the first time SPCC and Minera's financials were presented together — SPCC's stock price increased.[81] The market thus thought that the Merger was fair.

And if the Merger had been unfair to SPCC, then SPCC would have underperformed other copper companies after the Merger. In particular, one would have expected SPCC to underperform the companies Plaintiff's expert used as comparables to try to value Minera, but instead, exactly the opposite happened. As Mr. Handelsman testified[82] and the chart below shows, SPCC far outperformed Antofagasta, Phelps Dodge, and Freeport McMoran after the Merger.

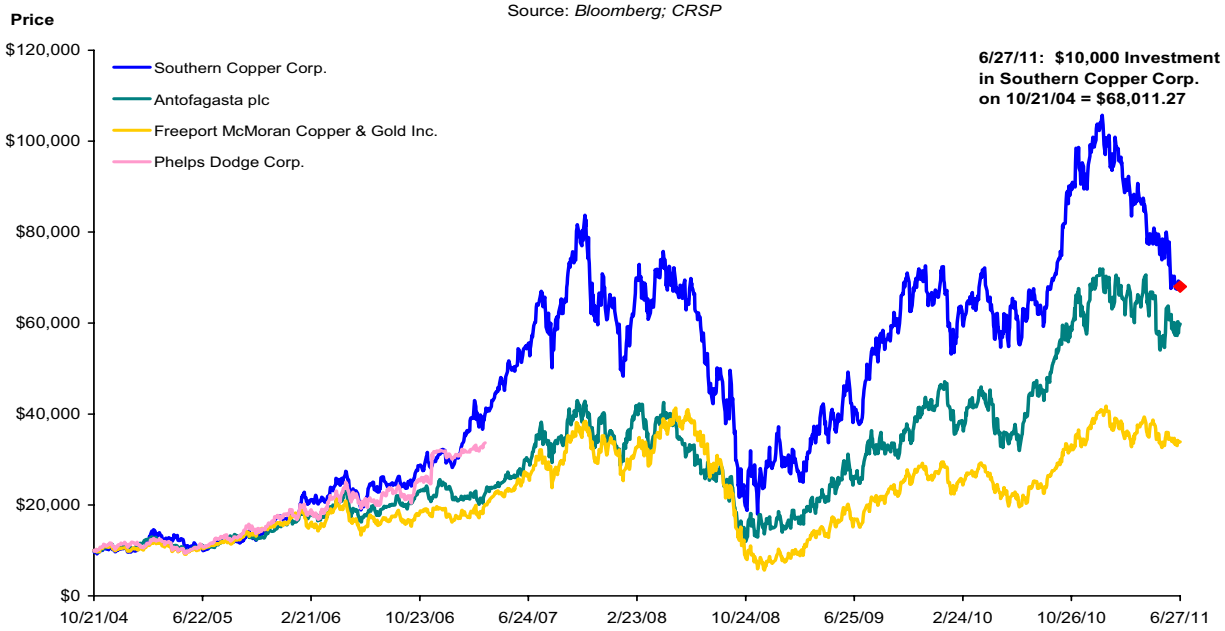
EQUITIES AND DERIVATIVES, 62, (John Wiley & Sons 2009) ("The most common reaction to news of an acquisition is that the shares of the acquiring company drop in price as investors factor in the costs of the transaction into the valuation of the company … .").

80 *See* JX-18.

81 *See id.*

82 Trial Tr., vol. I, 180:6-181:7 (Handelsman).

Investment Return in Southern Copper Corp. and Selected Comparable Companies
10/21/04 – 6/27/11
Source: *Bloomberg; CRSP*



Note: All stock prices have been adjusted for splits and dividends as of 10/21/04. Each company's stock returns are applied to a hypothetical investment of $10,000 on 10/21/04. Phelps Dodge Corp. was acquired by Freeport McMoran Copper & Gold Inc. on 3/20/07.

4. Professor Schwartz Confirmed The Merger Price Was Fair

Professor Schwartz's analysis and testimony at trial also confirmed that the Merger price was fair. Professor Schwartz, an internationally recognized expert on commodity pricing and valuation,[83] explained that the methodology the Special Committee used to assess the fairness of the Merger and to determine the number of shares to be exchanged in the Merger was precisely the methodology he would have used if given the same task.[84] Because SPCC and Minera were very similar companies (both were mining companies with similar revenues and

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83 JX-49; Trial Tr., vol. IV, 427:14-432:6 (Schwartz) (describing experience).

84 Trial Tr., vol. IV, 438:9-14 (Schwartz) ("Q. If you had been asked by the special committee in 2005 to advise them what methodology to use in evaluating this transaction, what would you have advised? A. I would have recommended a very similar methodology as the one I used."). Moreover, a relative valuation is a well-accepted valuation technique. Attached hereto is a compendium of authorities confirming that a relative valuation is recognized and accepted methodology.

reserves and their values are driven by the same external source — the price of copper),[85] Professor Schwartz determined that the most reliable way to compare the value of these companies was to conduct a relative valuation of their assets using the same assumptions and methodologies for both companies.[86] A relative valuation based on the DCF values of SPCC and Minera using the same assumptions uniformly shows that the Merger was fair to SPCC and its stockholders. Specifically, a relative valuation confirms that at $0.90/lb, the long-term price of copper used by the Special Committee and Beaulne, the Merger was entirely fair.[87] In fact, as with Goldman Sachs' analysis, Professor Schwartz's relative valuation using a long-term copper price of $0.90/pound shows that *more* than 67.2 million shares could have been exchanged for Minera, thus confirming that the Merger was fair.[88]

Professor Schwartz also explained that as part of his analysis, he analyzed why the DCF value of SPCC was lower than its observed market price by conducting a sensitivity analysis that focused on the two main inputs into a DCF analysis — cash flows and discount rates. Professor Schwartz determined that given the primary variables that impact the value of copper companies (*e.g.,* copper price), it was likely that the market was using a long-term copper price higher than $0.90/lb to price SPCC toward the end of 2004.[89] That is precisely what the

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85 *See* Defendants' Demonstrative Ex. 1.

86 Trial Tr., vol. IV, 433:18-22 (Schwartz).

87 Trial Tr., vol. IV, 438:1-8 (Schwartz); JX-48 at Ex. 1; *see also* Trial Tr., vol. I, 91:12-92:23 (Palomino) (explaining that the middle value of Goldman Sachs' relative valuation was 69.2 million shares, higher than what SPCC ultimately paid for Minera). Like Beaulne, Professor Schwartz used the data and projections used by Goldman Sachs, as modified by A&S. Trial Tr., vol. IV, 483:8-11 (Schwartz); Trial Tr., vol. III, 377:8-11; 387:13-17 (Beaulne).

88 JX-48, Ex. 1; *see also* Trial Tr., vol. I, 92:11-23 (Palomino).

89 Trial Tr., vol. IV, 440:10-442:6 (Schwartz); *see also* JX-47 at 12-13 (conceding that copper prices are significantly responsible for the value of a copper company). This, of course, makes sense given that copper prices rose steadily and significantly throughout

Special Committee addressed in July 2004.[90] In fact, Professor Schwartz's analysis suggested that the market was implying a long-term copper price as high as $1.30.[91] Notably, if a long-term copper price of $1.30 is also used as an input in Minera's DCF analysis, the number of SPCC shares to be exchanged increases to 80.6 million shares.[92]

Plaintiff's argument that it is inappropriate to raise the long-term price of copper in a DCF model to $1.30 without modifying the reserves and changing each company's production profile misses the point and is based on speculation. Professor Schwartz did not opine that any particular long-term copper price was definitively responsible for the price at which SPCC traded at any time. Rather, Professor Schwartz conducted sensitivity analyses (unlike Beaulne) which suggested that the market was using a long-term price of copper higher than $0.90 per pound. And that is entirely consistent with the other evidence the Special Committee had access to when it did its work.[93]

5. **Beaulne's Opinions Are Flawed And Unreliable**

Beaulne failed to conduct any analysis of what was driving the values of either Minera or SPCC. Rather, Beaulne relied blindly on the SPCC's stock price — he did not care why it was what it was. The flaws in Beaulne's methodology are underscored by the fact that he

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2004. *See* JX-23.

90 *See* JX-103.

91 Trial Tr., vol. IV, 442:7-443:18 (Schwartz); JX-48 at ¶¶ 47-51.

92 JX-48 at ¶ 43 & Ex. 2.

93 *See* JX-103. Indeed, Plaintiff offers no suggestion that the market, in valuing other copper companies above their DCF valuations, did anything like what Plaintiff suggests here with respect to changing reserve estimates. And that makes sense given the uncontested evidence that increases in reserves resulting from increasing copper prices do not translate dollar for dollar into increases in the value of copper companies, because such increases must be incorporated into the production schedule and often require significant capital expenditures to exploit. See Trial Tr., vol. IV. 466:17-470:23(Schwartz).

assigns an astonishingly low value to the assets that made up more than half of the reserves of the merged company.

a. Beaulne Ignores The Correlation Between The Value Of SPCC And Minera

Beaulne took Minera's value derived from a DCF analysis, multiplied that number by Grupo Mexico's share ownership in Minera and then divided by SPCC's share price, net of the $100 million special dividend that the Special Committee negotiated.[94] Beaulne concluded that pursuant to that mechanical analysis, SPCC should have issued 41 million shares for Minera.[95] Beaulne's opinion lacks any meaningful consideration of the factors that drove the values of these companies (and in the case of SPCC, its stock price) or an understanding of the rationale behind the proposed Merger.

Beaulne was clear that the only thing he cared about was what SPCC's stock price was, not what was driving it.[96] And although he knew that Goldman Sachs' DCF value of SPCC was below its observed market capitalization, he did nothing to try to determine the reasons for the disparity despite conceding that fair market value may not always match a company's publicly traded stock price.[97] Similarly, although Beaulne acknowledged that higher copper

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94 Trial Tr., vol. III, 352:12-353:1 (Beaulne).

95 *Id.*

96 Trial Tr., vol. III, 384:17-20 (Beaulne) ("Q. Okay. In connection with the analysis that you did in your report, when you were using SPCC prices, you only cared what the stock price was, not why it was what it was, correct? A. That's correct."). Beaulne also admitted that he did not conduct any analysis as to whether the rising copper price in 2004 was implicitly incorporated into SPCC's stock price. *Id.* at 375:11-15.

97 Trial Tr., vol. III, 384:22-385:386:24 (Beaulne). Beaulne also conceded that he could have prepared a DCF analysis of SPCC on his own and that a DCF model is a reasonable way to value a company. *Id.* at 388:5-12; 387:5-10; *see also id.* at 373:5-8 (admitting that he is not offering any opinions about a DCF value of SPCC at any time).

Although Beaulne criticizes Professor Schwartz for failing to reconcile the difference between SPCC's DCF value and SPCC's market price, Beaulne made no attempt to

prices would increase the value of Minera, he did not consider what values might arise for Minera from using different assumptions for the long-term price of copper.[98] Beaulne's failure to conduct any analysis of what drove each company's value is particularly notable given that he thought SPCC was sufficiently comparable to Minera to use it to value Minera.[99]

b. Beaulne's "Market Approach" Is Based On Inadequate Comparables

Beaulne's "market approach" or multiples analysis is unreliable because, among other things, three of his four comparable companies are interrelated. The list of comparable companies that Beaulne included were: Antofagasta, Grupo Mexico, Phelps Dodge, and SPCC.[100] As Beaulne conceded, Phelps Dodge was a shareholder of SPCC at the time of the Merger and Grupo Mexico was a shareholder of SPCC and Minera.[101] Despite these

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reconcile these values. Trial Tr., vol. III, 355:3-16 (Beaulne). And his criticism of Professor Schwartz is wrong. Professor Schwartz did consider the differences in value and concluded, as did the Special Committee, that it was likely that the market was using a higher implied long-term price for copper than $0.90/lb. JX-48 ¶¶ 47-51.

98 Trial Tr., vol. III, 380:5-12 (Beaulne).

99 JX 47 at 39; Trial Tr., vol. III, 397:22-398:2 (Beaulne) ("Q. I just want to make sure I understand your comparable companies exercise. The whole point of it was to find companies to use to value Minera – right? – or to assist you in valuing Minera? A. Yes. Q. And one of the companies that you selected as a comparable was in fact SPCC; correct? A. Yes."). In the end, the flaws in Beaulne's opinion are not surprising given his lack of relevant experience. He is not an expert in geology, engineering, securities market operations, market structure, commodity pricing, or evaluating life of mine plans. Trial Tr., vol. III, 370:10-21; 379:20-23 (Beaulne). Beaulne also admitted that he has never given a fairness opinion in connection with the valuation of a copper company in the context of a live M&A transaction or tried to value a copper company in the context of a litigation before. Trial Tr., vol. III, 371:5-19 (Beaulne).

100 Trial Tr., vol. III, 342:8-9; JX-47 at 39 (Beaulne).

101 Trial Tr., vol. III, 391:15-21; 392:6-9 (Beaulne); JX-48 at ¶¶ 65-66.

relationships, Beaulne did not test whether the fact that these companies were interrelated would impact the betas for the comparable companies.[102]

Nor did Beaulne properly do his multiples analysis. As Delaware law makes clear, when doing an analysis of the type Beaulne attempted, an expert should add a premium in the range of 30% to the result for the company being valued.[103] On cross-examination, Beaulne admitted that he did not do that.[104] Adding the required premium here would increase Beaulne's multiples-derived value for Minera to at least $3.6 billion, further showing that the Merger price was in fact fair and further demonstrating that Plaintiff cannot show that it was unfair.

II. PLAINTIFF IS AN INADEQUATE FIDUCIARY REPRESENTATIVE

Plaintiff's claims also fail because they cannot be squared with his utter lack of familiarity with the case or his lack of interest in pursuing this case:

- As the Court knows, Plaintiff was entirely absent from the trial.
- Plaintiff played what can best be called games during discovery, and to this day has not produced full and complete purchase and sale records for the Theriault Trust.[105]

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102 Trial Tr., vol. III, 391:22-392:5; 392:10-23 (Beaulne); *see also* JX-48 ¶¶ 60-68.

103 *See generally Lane v. Cancer Treatment Centers of Am., Inc*., 2004 WL 1752847, at *35 (Del. Ch. July 30, 2004) (explaining that a comparable companies analysis "suffers from an inherent minority discount" and to "determine 'the intrinsic worth of a corporation on a going concern basis,' a premium must be added to adjust for the minority discount;" also noting that "this Court has tended to apply a control premium on the order of 30%"); *Doft & Co. v. Travelocity.com Inc*., 2004 WL 1152338, at *11 (Del. Ch. May 21, 2004) (Delaware courts "consistently use a 30% adjustment").

104 Trial Tr., vol. III, 402:4-18 (Beaulne); *compare Borruso v. Commc'ns Telesystems Int'l*, 753 A.2d 451, 459 n.11 (Del. Ch. 1999) ("[I]t is more appropriate to apply the 30% control premium . . . in order to eliminate the inherent minority discount than to make no adjustment at all.").

105 JX 7 (TT00119) through JX 9 are all redacted copies of account statements that show only month-end positions. Plaintiff produced no evidence regarding actual purchases and sales after December 2008, and thus the Court would be justified in concluding that Plaintiff has not presented sufficient evidence that the Theriault Trust maintained the necessary continuous ownership of SPCC stock. In addition, Plaintiff produced account

- During the trial, Beaulne could not even name the Plaintiff.[106]

Plaintiff's inaction and lack of participation is inconsistent with the obligations of an adequate fiduciary representative.

CONCLUSION

For the reasons set forth herein, the AMC Defendants respectfully request that the Court enter judgment in favor of the AMC Defendants and dismiss Plaintiff's claim with prejudice.

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statements for late 2010 through 2011 during the course of the trial. The only reason this happened was because Plaintiff proposed including an account statement from May 2011 on the Joint Exhibit List that had never been produced.

Given the way this case has been litigated, the current record is as consistent with continuous ownership as it is with the Theriault Trust having sold down its position in SPCC at some point. Because Plaintiff has the burden of proof with respect to continuous ownership, he loses in equipoise.

106 Trial Tr., vol. III, 371:20-372:4 (Beaulne) ("Q. Have you ever met, spoken with, or otherwise communicated with any plaintiffs in this case? A. No. Q. And who is currently lead plaintiff? A. Is it – I'm not sure the legal structure. As a derivative action, I'm not sure who the lead plaintiff is. Q. Whoever the lead plaintiff is, do you know if he or she or it has read the report that submitted in this case? A. I don't know.").

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

PLAINTIFF'S POST-TRIAL OPENING BRIEF

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Cases

GLOSSARY OF TERMS

A&S	Anderson & Schwab, Inc.
AMC	Americas Mining Corporation
Beaulne	Daniel Beaulne, Plaintiff's financial expert
Cerro	Cerro Trading Company, Inc.
DCF	Discounted cash flow
German Larrea	German Larrea Mota-Velasco, Chairman and Chief Executive Officer of Grupo
Goldman	Goldman, Sachs & Co.
Grupo or Grupo Mexico	Grupo Mexico, S.A.B. de C.V.
Handelsman	Harold S. Handelsman, member of the Special Committee
JX	Joint Trial Exhibit
Minera	Minera Mexico, S.A. de C.V.
Mintec	Mintec, Inc.
Ortega	Armando Ortega Gómez
Palomino	Luis Miguel Palomino Bonilla, member of the Special Committee
Phelps Dodge	Phelps Dodge Corporation
Proxy	Southern's definitive proxy statement soliciting stockholder approval of the Transaction, filed with the U.S. Securities and Exchange Commission on February 25, 2004
Schwartz	Professor Eduardo S. Schwartz, Defendants' financial expert
Southern, Southern Peru, or the Company	Southern Peru Copper Corporation (now known as Southern Copper Corporation)
Special Committee or Committee	The committee of Southern directors established to evaluate the Transaction
Transaction	The acquisition by Southern of AMC's 99.15% equity interest in Minera in exchange for approximately 67.2 million shares of Southern common stock pursuant to the terms of an Agreement and Plan of Merger dated October 21, 2004
UBS	UBS Investment Bank
Winters	Winters, Dorsey & Company, LLC

INTRODUCTION

The evidence presented at trial demonstrates that the Transaction was not entirely fair to Southern Peru. Southern bought Minera for $3.7 billion in Southern stock. No credible evidence was presented at trial that demonstrates that Minera was worth anywhere close to that amount. On this basis alone, Plaintiff is entitled to judgment. See Section I.

The process by which the Transaction was approved did not simulate arm's-length negotiations and thus does not shift the burden of demonstrating unfairness to Plaintiff. Grupo Mexico proposed that it receive $3.1 billion in Southern Peru stock; the Special Committee agreed to give Grupo exactly that. The only price term that the Special Committee negotiated was a fixed, collarless exchange ratio that ended up paying Grupo 14.5 million more shares than it even asked for. Grupo tied the Special Committee's hands from the outset, limiting its authority and access to reliable information. After concluding that Minera's stand-alone value was merely half of what Grupo wanted for it, the Committee found "comfort" in a relative DCF valuation methodology without ever determining that the underlying bases for this methodology were valid. The "concessions" supposedly wrung from Grupo were of no benefit to Southern. Grupo also timed and structured its dealings with Cerro and Phelps Dodge to ensure that after the Transaction was approved by the Special Committee the shareholder vote would be locked up. Such a process does not shift the burden to Plaintiff. See Section II.

AMC falls far short of meeting its burden of demonstrating entire fairness. No Grupo witness was called to explain why the Transaction price was fair. No Goldman witness explained why reliance on a relative DCF analysis that valued Southern at half its market price was appropriate, or whether Goldman had ever relied on such an analysis before or since. The witnesses who did testify provided wildly inconsistent renditions not only of what they thought,

but of what they did, and these recollections are further contradicted by the documentary record. See Section III.

In light of the size of the Transaction, the effect of AMC's breach of fiduciary duty was enormous. The Transaction was negotiated at the beginning of a rise in copper prices that benefited all copper companies, including both Southern and Grupo. Grupo caused the Company to overpay by 24.7 million shares of Company stock, and this stock has greatly increased in value in the years since. AMC cannot be permitted to use hindsight to prevent it from being held accountable for its conduct, however, just as if the copper mining industry had stagnated since 2004 Plaintiff could not have pointed to that fact as proof that the Transaction was unfair.[1] Plaintiff seeks an equitable remedy that compensates the Company for the increase in Southern's value that was diverted from Southern's minority shareholders to Grupo. See Section IV.

Judgment should be entered on behalf of Plaintiff.

[1] See Gentile v. Rossette, 2010 WL 2171613, *2 (Del. Ch.) (the court must consider fair price and process without the benefit of hindsight).

ARGUMENT

I. THE ACQUISITION PRICE WAS UNFAIR TO SOUTHERN

"The test of entire fairness is an exacting one."[2] Entire fairness requires "the transaction itself to be objectively fair, independent of the board's belief."[3] To make this determination, the Court must compare (i) the value of what was given by Southern and (ii) the value of what Southern received in return.[4] Where a single stockholder controls both sides of an acquisition and where "the merger price is found to be unfair, it would be difficult, if not impossible, for the merger to be found 'entirely fair' even if the process leading up the merger involved fair dealing."[5] Given Grupo's control of both Southern and Minera, price is the dominant factor in the entire fairness analysis, outweighing any process issues.[6] This leads "to the result that where the merger price is found not to be fair, that finding establishes, *ipso facto*, the unfairness of the merger, thereby obviating the need for any analysis of the process oriented issues."[7]

There is no credible evidence that the value of what Southern gave up in the Transaction – 67.2 million Southern shares used as the "currency" in the Transaction – was anything less

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[2] T. Rowe Price Recovery Fund, L.P. v. Rubin, 770 A.2d 536, 554 (Del. Ch. 2000).

[3] Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995).

[4] Associated Imports, Inc. v. v. ASG Indus., Inc., 1984 WL 19833, *14-18 (Del. Ch.), aff'd sub nom., Hubbard v. Assoc. Imports, Inc., 497 A.2d 787 (Del. 1985).

[5] In re Emerging Commc'ns, Inc., S'holders Litig., 2004 WL 1305745 at *28 (Del. Ch.) (dicta) (Jacobs, J., sitting by designation).

[6] Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1140 (Del. Ch. 1994), aff'd 663 A.2d 1156 (Del. 1995) (where the acquisition partner has voting control of the enterprise, such as in a parent-sub merger, "price is a dominant concern").

[7] Id; see also Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) ("All aspects of the issue must be examined as a whole since the question is one of entire fairness. However, in a non-fraudulent transaction we recognize that price may be the preponderant consideration outweighing other features of the merger"); Reis v. Hazelett Strip-Casting Corp., 2011 WL 303207 at *12 n.10 (Del.Ch.) ("Numerous decisions recite [Weinberger's] now-canonical formulation").

than what those shares traded for on the New York Stock Exchange.[8] Those 67.2 million Southern shares were worth $3.1 billion on the day the Transaction was approved[9] by the defendants, and $3.7 billion on the day the Transaction closed.[10] Grupo valued the shares it received in the Transaction at market price,[11] and that is how the Court should value the shares. This is consistent with Delaware law.[12] Public markets for stock, particularly a stock that is widely traded on the New York Stock Exchange and followed by multiple analysts, offer a ready and reliable value that this Court should use in accessing the fair market value of what Southern gave up in the Transaction.[13] However, there is no credible evidence to support a $3.1 billion equity value for Minera, let alone the $3.7 billion price Southern actually paid in the Transaction.

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[8] Trial Tr. 221:12-19 (Handelsman – Cross) ("THE COURT: Okay. 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. THE WITNESS: No."); id. 349:14-351:18 (Beaulne – Direct) (explaining relevant factors that lead to conclusion that the trading price of Southern stock was representative of fair market value); id. 222:16-19 (Handelsman – Cross) ("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."); id. 187:8-11 (Handelsman – Direct) (testifying that Cerro (and Phelps Dodge, see JX 135) sold its shares at market price); see also, ASARCO LLC v. Americas Mining Corp., 396 B.R. 278, 342 (S.D. Tex. 2008) ("AMC's expert, Dr. Pirrong, contends that the market price the day of the transaction is the best method for valuing a company in an efficient market"); id. ("Dr. Pirrong contends that SPCC was traded in a semi-strong market, meaning that publicly available information, including past stock prices, is quickly incorporated in the current price.")

[9] JX 18 at 7 (67.2 x $45.92 = $3.086 billion).

[10] JX 18 at 5 (67.2 x $55.89 = $3.756 billion).

[11] JX 108 at AMC0019912; JX 156 at SP COMM 007078; JX 129 at 22; see, also, JX 115 at AMC0019883; JX 107 at SPCOMM006674.

[12] Market price is the benchmark of what the Company could have received from the sale of its stock in arm's-length negotiation with disinterested, independent third-parties. See Union Illinois v. Korte, 2001 WL 1526303, *7 n.14 (Del. Ch.) ("the amount which the company could have received from the sale of its stock, absent unfair dealing, is the fair market value.")

[13] See, e.g., Associated Imports, 1984 WL 19833; In re Tri-Star Pictures, Inc. Litig., 634 A.2d 319 (Del. 1993) (recognizing damage to corporation from over-issuing stock to controlling stockholder to acquire assets is the market value of over-issued stock); Applebaum v. Avaya, Inc., 805 A.2d 209 (Del. Ch. 2002), aff'd, 812 A.2d 880 (Del. 2002) (deciding on summary judgment that average market price for common stock as quoted on the New York Stock Exchange in the ten days leading up to the transaction equaled fair value); Kahn v. Tremont Corp., 1996 WL 145452, *9 (Del. Ch.), rev'd on other grounds, 694

A. Defendants Have Not Proven Fair Price

Defendants' evidence of fair price is not credible. Prof. Schwartz's relative DCF valuation analysis ignores: (i) whether his DCF valuations of Southern and Minera were comparable in the first instance;[14] and (ii) how a change in the assumed long-term copper price would alter the operation and value of each of Minera and Southern on an individual basis.[15] Prof. Schwartz has never before valued a company using such an approach.[16] Prof. Schwartz also admitted at trial that he would have done a more thorough job had he actually been asked by Defendants to value Minera.[17] In sum, Prof. Schwartz's ad-hoc opinion of Minera's value is fundamentally flawed, and cannot prove that the Transaction price was fair.

1. Professor Schwartz Did Not Value Minera and Southern Using The Same Assumptions

Prof. Schwartz testified that he valued Minera and Southern using the same assumptions.[18] What he meant was that he compared the two companies using the same long-

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A.2d 422 (Del. 1997) ("Thus generally the market price of that stock presents a fair measure of the value of the stock at the time the contract to purchase and sell was agreed upon."). In re Loral Space and Commcn's Inc., 2008 WL 4293781, *30 n.150 (Del. Ch.) ("one has to be extremely cautious about substituting an imprecise estimate for a market tested price").

[14] In addition to Plaintiff's argument below, Plaintiff also argues at length in its Pre-Trial Opening and Answering Brief that Prof. Schwartz failed to test the reliability of his Southern DCF value using alternative valuation methodologies. Prof. Schwartz admitted at trial that using multiple valuation techniques to test the reliability of a valuation conclusion is generally accepted in the financial community. Trial Tr. 483:18-20 (Schwartz – Cross).

[15] Prof. Schwartz also disregarded other metal prices (such as molybdenum) which he admitted at trial were in reality all rising. Trial Tr. 443:10-13 (Schwartz – Direct); see also JX 143 at 11 (average price for molybdenum in 2003: $5.32; average price for molybdenum in 2004: $15.95; average price for molybdenum in 2005: $31.05).

[16] Trial Tr. 453:1-4 (Schwartz – Cross) ("Q. And you don't remember ever having done a relative valuation analysis before similar to the one you did here; correct? A. Correct.").

[17] Trial Tr. 464:23-465:2 (Schwartz – Cross). Prior to trial Prof. Schwartz had no idea how he would value Minera. Schwartz Dep. Tr. 115:15-21; see also, Pl.'s Pre-Trial Opening Br. at 37-41.

[18] Trial Tr. 433:18-22 (Schwartz – Direct).

term copper price.[19] However, Prof. Schwartz's relative valuation methodology was nothing more than the DCF value for Minera compared to the DCF value for Southern.[20] "There is no magic to this."[21] Consequently, the DCF values are only as reliable as the projected cash flows they use.[22] But Prof. Schwartz ignored the most fundamental component of the projected cash flows for a mining company: how the reserves for each company were determined. As Prof. Schwartz admitted, "reserves are the most important factor in a mining company."[23]

Prof. Schwartz may be right that in the "big picture" Minera and Southern are similar mining companies, but his relative valuation approach was hardly an "apples-to-apples" comparison. For Minera, Prof. Schwartz (and Goldman) relied on projections that were developed in a robust sell-side scenario.[24] Grupo was motivated to put Minera's best face on and did so. Grupo engaged two mining engineering firms, Winters and Mintec, to reassess Minera's reserves and optimize Minera's life-of-mine plans and operations.[25] When A&S knocked down the most aggressive aspects of Winters's and Mintec's work on Minera, Mintec again revised and adjusted its analyses to produce an alternative life-of-mine plan ("Alternative 3") that added approximately $240 million in incremental value to Minera.[26]

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[19] Trial Tr. 439:17-18 (Schwartz – Direct) ("Yes. Using the same assumption that I had for Minera Mexico, I valued SPCC.")

[20] Trial Tr. 437:20-24 (Schwartz - Direct).

[21] Trial Tr. 437:21 (Schwartz – Direct).

[22] Trial Tr. 128:19-129:4 (Palomino – Cross), 440:16-22 (Schwartz – Direct).

[23] Trial Tr. 471:14-16 (Schwartz – Cross).

[24] Trial Tr. 355:21-356:14 (Beaulne – Direct).

[25] Id.; JX 116 at SP COMM 001497.

[26] JX 103 at 26 (Goldman July 8 Presentation) ("New optimization plan for Cananea ('Alternative 3') recently developed by GM and Mintec was not included in 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 protential adjustments by A&S, using a 8.76% real discount rate as per MM management"); compare

In contrast, for Southern, Prof. Schwartz (and Goldman) used production plans and projections based on life-of-mine plans that had not been reassessed since 1998 and 1999,[27] and the same reserves reported by Southern in its 2003 10-K.[28] A&S advised the Special Committee that there was expansion potential at both Toquepala and Cuajone and that optimization plans (like those conducted for Minera) could be conducted for Southern,[29] but the Special Committee declined to follow A&S's advice. However, after the Transaction closed, Southern engaged Mintec to certify the results of an exploration program that had begun in 2002.[30] Mintec certified that ore reserves at Toquepala increased 83%[31] and that the life of Toquepala increased 23 years,[32] extending the life of Toquepala to 2055.[33] Not surprisingly, Southern outperformed its 2004 and 2005 projections by a substantial margin.[34] Southern beat its 2004 projected EBITDA by 37%, and its 2005 projections by 135%. In contrast, Minera's projected

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JX106 at 16 (Goldman October 21 Presentation) ("Projections include new optimization plan for Cananea ('Alternative 3') developed by Grupo and Mintec").

[27] Trial Tr. 318:11-18 (Jacob – Cross); see also JX 128 at A14 (2004 10-K) ("Reserves calculated as mentioned above were declared and filed with the Securities and Exchange Commission in 1998 for the Cuajone mine and in 1999 for Toquepala mine."); JX 123 at 19 (2003 10-K) (same).

[28] Compare JX 123 at 9 (reporting life-of-mine reserves for Toquepala and Cuajone of 619 million tons and 1,123 million tons of sulfide ore, respectively) and JX 26 at GS-SPCC 085558-62, sum of Line 7 (using input of 619 million tons of sulfide ore at Toquepala) and GS-SPCC 085558-62, sum of Line 41 (using input of 1,123 million tons of sulfide ore at Cuajone).

[29] JX 75 at SP COMM 006957 ("There is expansion potential at both Toquepala and Cuajone. If time permits, the conceptual studies should be expanded, similar to Alternative 3 at Cananea. There is no doubt optimization that can be done to the current thinking that will add value at lower expenditures.").

[30] JX 141.

[31] JX 141; Trial Tr. 324:8-325:4 (Jacob – Cross).

[32] JX 141; Trial Tr. 325:9-17 (Jacob – Cross).

[33] See JX 26 at GS-SPCC 085561 (projecting Toquepala life to 2032).

[34] Compare JX 106 at SP COMM 004926 with JX 20.

performance for 2004 was dead-on.[35] Prof. Schwartz neither examined nor explained these discrepancies.[36]

2. Prof. Schwartz's "Calibration" Using A Materially Higher Copper Price Is Invalid

Prof. Schwartz reconciled the massive difference between Southern's market price and his DCF value for Southern by testifying that the market must have been using a long-term copper price of $1.30.[37] There is no evidence in the record to support a long-term copper price of $1.30.[38] But Prof. Schwartz was unconcerned with the reality of the actual outlook for copper prices in 2004. He simply "calibrated" his relative DCF valuation of Southern and Minera by holding all things constant and solving for a higher long-term copper price.[39] He did this without any regard for how a substantial increase of the long-term copper price would alter the

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[35] Compare JX 106 at SP COMM 004926 with JX 20.

[36] Trial Tr. 481:18-21 (Schwartz – Cross). Neither did Goldman. See Pl.'s Pre-Trial Opening Br. at 11-17.

[37] Trial Tr. 462:7-10 (Schwartz – Cross).

[38] The market consensus during the time was a long-term copper price of $0.90 per pound. Goldman's review of Wall Street Research indicated projected long-term copper prices from five different analysts in a range of $0.85-$1.00 per pound. JX 106 at 28. Goldman relied on the median long-term copper price of $0.90 per pound in rendering its fairness opinion. JX 129 at 34 ("The Forecasts reflected per pound copper prices of $1.20 in 2005, $1.08 in 2006, $1.00 in 2007 and $.90 thereafter and per pound molybdenum prices of $5.50 in 2005 and $3.50 thereafter, based on average forecasts published by selected Wall Street research analysts."). The Special Committee determined that $0.90 per pound was the most appropriate long-term copper price to use to value Minera. Palomino Dep. Tr. 191:16-20 ("What we did is we used the copper price that was what we believed the right copper price or the best copper price to use for a long term forecast as would be necessary in this transaction.").

Even Southern relied on a long-term copper price of $0.90 per pound for its internal long-term planning. See, e.g., JX 128 at A-14 (2004 10-K) ("For purposes of long-term planning, SPCC uses metal prices that are believed to be reflective of the full price cycle of the metal market. . . . For this purpose SPCC uses a 90 cents copper price . . .."); JX 137 at 41 (2005 10-K) ("For purposes of our long-term planning, our management uses metals price assumptions of $0.90 per pound for copper and $4.50 per pound for molybdenum. These prices are intended to approximate average prices over the long term. ***Our management uses these price assumptions, as it believes these prices reflect the full price cycle of the metals market***.") (emphasis added).

[39] As Prof. Schwartz explains, his long-term copper price "is derived by solving for the long-term copper price while holding SPCC's equity value (with real WACC of 6.74%) to be equal to its market capitalization." JX 48 at Exhibit 4.

operations and valuations of Southern and Minera. Prof. Schwartz did not think that his methodology was "very problematic, especially because if the price goes up, both companies will have the reserves increase in value."[40] Yet Prof. Schwartz did nothing to test how much each company's reserves may increase in value at a higher long-term copper price.[41] Prof. Schwartz admits that the relative values of the companies could change, but he could not say how because he did not do the analysis.[42]

Copper reserves are calculated based upon the amount of copper that can be taken out of the ground at a profit.[43] When the long-term copper price assumption is increased, more copper can be pulled out of the ground at a profit. Accordingly, in the long-term (which is what the life-of-mine plan is based on), copper companies will take more copper out of the ground.[44] Southern's SEC filings reveal that Southern was far more sensitive to increases in copper prices than Minera, and that rising copper prices "don't change each company equally."[45] Southern's 2005 10-K demonstrates that when copper prices increased from $0.90 to $1.261 per pound, Southern's copper reserves increased by 116% (from 13,112 thousand tons[46] to 28,314 thousand tons[47]) while Minera's increased by only 44% (from 20,325 thousand tons[48] to 29,220 thousand

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[40] Id. 469:23-470:4 (Schwartz – Cross).

[41] Trial Tr. 477:1-5 (Schwartz – Cross) ("Did you do an analysis of exactly what effect an increase in long-term copper prices would have on the actual copper reserves for Southern and Minera Mexico? A. No.")

[42] Trial Tr. 477:16-18 (Schwartz – Cross) ("I don't know. I haven't done the analysis so I cannot tell you, but they could change.")

[43] See JX 128 at A12.

[44] Trial Tr. 480:8-16 (Schwartz – Cross).

[45] Trial Tr. 360:12-15 (Beaulne – Direct).

[46] See JX 137 at 44 (copper contained in ore reserves = 6,880 and 6,232 thousand tons for Cuajone and Toquepala, respectively).

[47] See JX 137 at 42 (copper contained in ore reserves = 10, 924 and 17,390 thousand tons for Cuajone and Toquepala, respectively).

tons[49]). Prof. Schwartz's assumption that a 45% increase in long-term copper prices ($0.90 to $1.30) would not change the relative values of the companies is unsupportable.[50]

B. Plaintiff Has Proven Minera Was Not Worth the Price Southern Paid

Minera's equity value on October 21, 2004 was no more than $1.854 billion.[51] This value was determined using two valuation methodologies, each yielding substantially similar values.[52] Defendants attack Mr. Beaulne's valuation of Minera by suggesting that the market was generally valuing copper companies at a premium to their DCF values, and, in Southern's case, theorize that the market implied 45% higher long-term metal prices than assumed in Mr. Beaulne's analyses. The argument has no credible basis in fact. Mr. Beaulne's comparable company analysis disproves the theory entirely. But even if the market was valuing copper companies at a premium to their DCF values, there is no evidence to support a conclusion that Grupo could have sold Minera in the market at a 70% premium to its DCF value.

1. Mr. Beaulne's Market Approach Refutes a Conclusion That in the Market Minera Was Worth 70% More Than Its DCF Value

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[48] See JX 137 at 44 (copper contained in ore reserves = 16,700 and 3,625 thousand tons for Cananea and La Caridad, respectively).

[49] See JX 137 at 44 (copper contained in ore reserves = 21,961 and 7,259 thousand tons for Cananea and La Caridad, respectively).

[50] Defendants' repeated testimony that Minera is more sensitive to increases in the long-term copper price is also unsupportable. See, e.g., Trial Tr. 40:10-41:8 (Palomino – Direct); 437:8-9 (Schwartz – Direct). Minera is more sensitive to a change in long-term copper prices when changes in reserves are ignored, but Mr. Palomino could not recall at trial whether Minera was more sensitive to copper prices when one took into account the increase in reserves that would result from an increase in the long-term copper price assumption. Trial Tr. 126:17-21 (Palomino – Cross). And of course, Prof. Schwartz did not consider the point. Trial Tr. 477:1-18 (Schwartz – Cross).

[51] JX 47 at 42; JX 48 at Exhibit 1. This value is also supported by Goldman's DCF and Goldman's "contribution analysis" when performed using generally accepted valuation methodologies. See Pl.'s Pre-Trial Opening Br. at 34-37.

[52] The reliability of Mr. Beaulne's valuation of Minera has been argued at length in Plaintiff's Pre-Trial Opening and Answering Briefs. Nonetheless, attached hereto as Exhibit A is Ivanhoe Mines Ltd.'s Financial Statements for periods ended December 31, 2003 and 2002. As Mr. Beaulne testified at trial, page 66 states that in 2003 nearly 75% of Ivanhoe's revenue was attributable to its Iron Ore Division. There were no errors made in Mr. Beaulne's comparable company analysis.

Prof. Schwartz admitted that he was not retained to establish a market value of Minera.[53] But he testified that if he had, he "would take the market prices of traded companies . . . and [he] would imply how the market is pricing those companies, and [he] would use that to value Minera Mexico."[54] That is precisely what Mr. Beaulne did. Mr. Beaulne compared 2004 and 2005 EBIT and EBITDA, which are common metrics used in the financial community to value copper companies, of four comparable companies.[55] For both 2004 and 2005, and for both EBIT and EBITDA, the median and mean multiples are very close together.[56] Mr. Beaulne selected the median multiple and applied it to Minera. The purpose of this valuation methodology is to "summarize how the investing public values one dollar of earnings in a given industry."[57] Under Mr. Beaulne's market approach analysis, Minera's median equity value was $1.8775 billion on October 21, 2004, only $47 million more than its DCF value.[58] To the extent the market was anticipating higher copper prices in valuing copper companies, that assumption would be embedded in how the investing public valued one dollar of earnings of a copper company, and is part of Mr. Beaulne's comparable company analysis. Defendants have offered no evidence to the contrary, or that Goldman, Prof. Schwartz, or anyone else valued Minera at 70% more than its DCF value.

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[53] Trial Tr. 461:21-22 (Schwartz – Cross).

[54] Trial Tr. 462:2-6 (Schwartz – Cross).

[55] Trial Tr. 348:5-7 (Beaulne – Direct); JX 47 at Exhibit 4. Defendants cannot credibly dispute the comparability of Mr. Beaulne's selected companies. The Proxy states that each of these companies is comparable. See JX 129 at 33 (listing Southern, Grupo, Antofagasta and Phelps Dodge and stating "[a]lthough none of the selected companies are directly comparable to our company, the companies included were chosen by Goldman Sachs because they are publicly traded companies with operations that for purposes of analysis may be considered similar to our company.")

[56] Trial Tr. 348:15-16 (Beaulne – Direct); JX 47 at Exhibit 4.

[57] Taylor v. American Specialty Retailing Group, Inc., 2003 WL 21753752, at *8 (Del. Ch.).

[58] JX 47 at 41-42.

2. There Is No Evidence Showing That Grupo Could Sell Minera Into The Market At A 70% Premium To Minera's DCF Value

Defendants point to a single page in a single document to suggest that the market was valuing copper companies in 2004 at a 30% premium to their net asset value.[59] The page was prepared by UBS – Grupo's banker – during negotiations with Goldman. The passage is hearsay within hearsay, yet Defendants proffer it as if it is competent expert evidence. Notably, Prof. Schwartz neither relied on nor mentioned the document in his report. As Mr. Beaulne testified:

> I don't know the analysts, what their basis for net asset value is, how they're determining -- sometimes net asset value they only go ten years. You don't know if they're optimizing it. It's just -- and I've -- in cases where people have even presented valuations to the Securities and Exchange Commission, they will not allow you to present a valuation where you're using a multiple of a DCF. So that is their approach that is completely incorrect.[60]

Indeed, as this Court is well aware, the DCF "value is a value of the entity itself."[61] Applying a premium to a DCF is not a generally accepted valuation methodology.[62]

Regardless, the data on the page hardly supports UBS's conclusion. Three copper producers are listed. Only two were comparable to Southern: Antofagasta and Phelps Dodge.[63] The management case indicates that these two companies traded at 1.1x their net asset value. How exactly net asset value was determined for these companies is unknown,[64] except that the low case used a constant copper price of $0.85/lb, the average case used a copper price of $1.00/lb for 2004-2006 and $0.85/lb. thereafter, and the management case used a constant copper

[59] JX 103 at SP COMM 006945.

[60] Trial Tr. 405:3-15 (Beaulne – Cross).

[61] In re Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1013 (Del. Ch. 2005).

[62] Id.

[63] The market capitalization of AVR Resources was under $500 million. JX 103 at SP COMM 006945.

[64] Trial Tr. 405:3-15 (Beaulne – Cross).

price of $1.00/lb.[65] No case used a long-term (or even an short-term[66]) copper price of $1.30/lb. This is not surprising. At the time, no copper company used a long-term copper price of $1.30/lb,[67] and nine out of ten analysts projected long-term copper prices of $1.00/lb or less.[68] If Southern disclosed to the market that it actually valued Minera using a $1.30/lb long-term copper price, rather than the $0.90/lb stated in the Proxy,[69] the market would have crucified Southern. The market would have also crucified Southern if it was disclosed that Minera was actually valued at 6.3x to 6.5x 2005E EBITDA,[70] rather than at 5.6x 2005E EBITDA as stated in the roadshow.[71]

The state of Minera's operations in 2004 is also relevant to whether Grupo could have obtained a premium for Minera in the public M&A market. Defendants compare Minera and Southern as if they had similar operations. Nothing is further from reality. Southern was a well-oiled, money-making machine. Despite three years of depressed copper prices ending in 2003,

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[65] JX 103 at SP COMM 006945, SP COMM 006929.

[66] Mr. Beaulne made more sensitive assumptions to account for higher short-term copper prices in his analysis of Minera. In his October 21, 2004 valuation, Mr. Beaulne assumed copper prices of $1.25/lb. for 2004, $1.21/lb. in 2005, $1.08/lb. in 2006, $1.00/lb. in 2007, and $0.90/lb. thereafter. JX 47 at 25. In his April 1, 2005 valuation, Mr. Beaulne assumed copper prices of $1.45/lb. in 2005, $1.20/lb. in 2006, $1.10/lb. in 2007, and $0.95/lb. thereafter.

[67] JX 103 at SP COMM 006878 (Phelps Dodge: $0.90/lb.; Codelco: $0.91/lb.; Grupo Mexico: $0.90/lb.; Southern: $0.90/lb.; Freeport: $0.85/lb.; Placer Dome: $0.85/lb.); see also id. at SP COMM 006929 (Aur Resources: $0.95/lb.; Antofagasta: $0.88/lb.) Even more telling, Southern did not increase the copper price it used for long-term planning until December 31, 2007. JX 143 at 66. By then copper prices had averaged more than $0.90/lb. for four years in a row. JX 143 at 11.

[68] JX 103 at SP COMM 006877. And of those nine analysts, seven projected long-term copper prices of $0.90/lb. or less.

[69] PX 129 at 34 ("The Forecasts reflected per pound copper prices of $1.20 in 2005, $1.08 in 2006, $1.00 in 2007 and $.90 thereafter . . .").

[70] JX 106 at 24.

[71] JX 107 at SP COMM 006674 ("Transaction estimated enterprise value of US$4.1 billion – implied MM EV/EBITDA 2005E multiple of 5.6x").

Southern continued to turn a profit.[72] Minera was decimated. "[S]uppliers were repossessing trucks in the mines."[73] "There were large pieces of equipment that were parked because they were broken down and there weren't spare parts to repair them."[74] The life-of-mine plans optimized by Winters and Mintec were forward-looking and required significant capital expenditure to execute. As Handelsman testified, "the whole premise of this transaction was to use the fisc of Southern Peru and its pristine balance sheet to develop the mining assets of Minera Mexico."[75] There is no basis to assume Grupo would have obtained a premium to Minera's valuation in the public M&A market. There is simply no evidence that the price Southern paid for Minera was fair.

II. THERE IS INSUFFICIENT EVIDENCE OF ARM'S-LENGTH DEALING TO SHIFT THE BURDEN TO PLAINTIFF

Defendants do not get a burden shift because of the "mere existence of an independent special committee."[76] Rather, to shift the burden "the majority shareholder must not dictate the terms of the merger" and "the special committee must have real bargaining power that it can exercise with the majority shareholder on an arms length basis."[77] "[T]he committee must act with informed diligence, and seek the best result available for its constituents, given the facts at hand."[78] Defendants have not proven that the Transaction was negotiated by an effective Special Committee. The fairness burden thus remains with Defendants.

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[72] See ASARCO, 396 B.R. at 307 ("Even in the midst of this prolonged copper price downturn, the SPCC operations remained profitable—this being another indication of the quality of the Peruvian operation.")

[73] Trial Tr. 98:16-19 (Palomino – Direct).

[74] Parker Dep. Tr. 50:2-22.

[75] Trial Tr. 219:11-15 (Handelsman – Cross); see also JX 115 at AMC 19903 (Grupo can "untap the true value of MM through multiple migration").

[76] Rabkin v. Olin Corp., 1990 WL 47648, *6 (Del. Ch.).

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

[78] Gesoff v. IIC Indus., 902 A.2d 1130, 1148 (Del. Ch. 2006).

A. Grupo Dictated the Terms

On February 3, 2004, Grupo proposed that Southern "***acquire*** Minera Mexico from AMC" in exchange for $3.1 billion in Southern stock.[79] On October 21, 2004, the Special Committee approved the Transaction and gave Grupo exactly that.[80]

B. The Special Committee's Inexplicable Shift to a Fixed Exchange Ratio Was Disastrous

Grupo's May 7, 2004 term sheet demanded $3.1 billion in Southern stock, calculated on a floating exchange ratio.[81] Rather than accept Grupo's proposal and take advantage of Southern's increasing stock price,[82] the Special Committee "negotiated" to fix the number of shares issued in the Transaction. The Special Committee had no basis for doing so. Issuing a floating number of shares would be detrimental to Southern only if its stock price declined, but with rising copper prices neither the Special Committee nor Southern believed this would happen.[83] Had the Special Committee simply accepted the floating exchange ratio proposed by Grupo, Southern

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[79] JX 108 at AMC0019912 (emphasis added). In response to the Special Committee's request for clarification, Grupo made a similar proposal on May 7, 2004. See JX 156 at SP COMM 7078; see also, Sanchez Dep. Tr. At 31, 35, 132-33 (Southern bought Minera). Defendants never referred to the Transaction as a "merger of equals" until they were defending it in this litigation.

[80] Trial Tr. at 274:16-19 (Ortega – Cross) ("Grupo was asking for $3.1 billion worth of stock, and in the end it got $3.1 billion worth of stock."); JX 106 at SP COMM 004900 ("MM Implied Consideration" is $3.119 billion); Handelsman Trial Tr. at 201:23-202:5 ("Q: The 67.2 million shares that were being given to Grupo Mexico in exchange for Minera, how much were they worth? A: I think at the time that the deal was approved by the board, they were worth about $3.1 billion, and I think at the time the transaction closed they were worth about $3.6 billion.").

[81] JX 156 at SP COMM 007078.

[82] Trial Tr. at 49:4-5 (Palomino – Cross) ("the market was probably getting ahead of itself basically because of copper price assumptions").

[83] See Handelsman Dep. Tr. at 100:24-101:1; Trial Tr. at 312:22-313:4 (Jacob – Cross) (discussing rising copper prices in 2004).

would have issued 14.5 million fewer shares in the Transaction.[84] Instead, the Special Committee demanded a fixed-share exchange ratio, to which Grupo gladly accepted.

C. The Special Committee Adopted Relative Valuation Without a Valid Basis For Doing So

On June 23, 2004, Goldman presented the Special Committee with its discounted cash flow analysis of Southern.[85] Although neither the June 23 Special Committee meeting minutes nor the June 23 Goldman presentation contain any reference to relative valuation,[86] the results of the Southern DCF analysis purportedly were a revelation. As Handelsman described it:

> [I]nitially, when we thought that the value of Southern Peru was its market value and the value of Minera Mexico was its discounted cash flow value…, those were very different numbers.
>
> The numbers became less different and more understandable … on a basis of their relative value as opposed to value determined by stock price on one side and DCF on the other.[87]
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> * * *
>
> When you used the discounted cash flow analysis metric against market price, it didn't look like the right price. When you looked at the companies on this basis, it was a lot closer to the asked and seemed to make sense.[88]

The Special Committee's professed epiphany that relative valuation was the proper method to value Minera was unreasonable and led to an unfair result. Rather than being "comforted by the fact that the DCF analysis of Minera Mexico and the DCF analysis of SPCC were not as different as the discounted cash flow analysis of Minera Mexico and the market

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[84] Southern's average closing price between and including February 25, 2005 and March 24, 2005 was $59.75 per share. JX 18 at 5.

[85] JX 102, at 22-24.

[86] See generally JX 89 and JX 102. The minutes, however, contain nearly a full page of redactions on the grounds of privilege.

[87] Trial Tr. at 159:24-160:13 (Handelsman – Direct).

[88] Trial Tr. at 162:11-15 (Handelsman – Direct).

value of Southern Peru,"[89] that fact should have caused the Special Committee to ask more questions. Is Southern's DCF value reliable? How were the inputs determined? Did the companies react similarly to fluctuating metal prices? Should we pay for Minera with cash instead of stock?[90] If the Southern DCF analysis is showing a lower value, how can we best leverage our stock currency? If the Special Committee investigated these issues, it would have discovered that:

- Southern's Projections Were Stale And Unreliable: As discussed in section I.A.1, supra, Southern continuously exceeded management forecasts throughout 2004, while Minera's projections were spot-on. Grupo supplied the data for both Minera and Southern,[91] and Ortega, who was advising German Larrea on the Transaction,[92] controlled the data room.[93] Under these conditions, the Special Committee's reliance on relative DCF analyses for Minera and Southern was plainly imprudent.

- The Special Committee Had No Basis to Believe (Wrongly) That Minera Benefited More From an Increase in the Long-Term Copper Price: The Special Committee and Defendants assert that "Minera Mexico's value increased more when the price of copper went up than Southern Peru Copper's value."[94] As discussed in section I.A.2., supra, this assertion is demonstrably incorrect. Goldman did not present any analysis to the Special Committee demonstrating the effect of fluctuating copper prices on the reserves and values of Southern and Minera,[95] and the Special Committee never had any basis to conclude that a

[89] Trial Tr. at 159:6-10 (Handelsman Direct).

[90] Handelsman's testimony at trial regarding borrowing to pay cash for Minera misses the mark. Trial Tr. 223:10-224:15 (Handelsman – Redirect). Southern could have raised the cash in the equity markets. See Trial Tr. 222:16-19 (Handelsman – Cross) ("Oh, I think there would have been a robust market for Southern Peru Copper in the copper industry at or better than the price it traded at."). This would have also created the "liquidity" value the Special Committee claimed to be concerned about.

[91] See JX 106 at SP COMM 004917, 4919; Trial Tr. at 261:21-262:2 (Ortega – Cross) (Southern data room materials came from Grupo); Sanchez Dep. Tr. at 77-78 (same).

[92] Ortega Trial Tr. at 259:1-6 (Ortega – Cross).

[93] Trial Tr. at 259:22-24 (Ortega – Cross).

[94] Trial Tr. at 80:11-13 (Palomino – Direct); id. at 54:8-13.

[95] See generally JXs 96-98, 100-106.

> higher long-term copper price favored Minera. In fact, higher copper prices benefited Southern significantly in relation to Minera.[96]

There is no evidence that the Special Committee asked these questions, and there is no evidence in the record from which the Special Committee could have concluded that reliance on a relative DCF valuation was prudent or reasonable. Instead, the Special Committee "was comforted" that relative valuation "seemed to make sense" merely because it provided an excuse for claiming that the value of Minera "was a lot closer" to Grupo's asking price than Minera's DCF value showed.[97]

D. The Special Committee Squandered Southern's Superior Multiple

Prior to the Transaction, Southern traded at a higher multiple than Grupo.[98] Grupo believed that "the inherent value of MM is not fully reflected in Grupo Mexico's share price."[99] Thus, Grupo proposed the Transaction in order to "Untap the true value of MM through multiple migration,"[100] which would have a "positive effect on [Grupo's] share price" because "investors will value SPCC and MM assets at the same multiple."[101] By valuing Minera as if it were

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[96] Southern's SEC filings list reserves in Southern's Peruvian and Mexican mines at $0.90/lb and at $1.26/lb. See JX 132 at 42 and 44. Southern's Peruvian mines have 13,112 thousand tons of copper at $0.90/lb and 28,314 thousand tons of copper at $1.26/lb. Id. Southern's Mexican mines have 20,324 thousand tons of copper at $0.90/lb and 29,220 thousand tons of copper at $1.26/lb. Id. An increase in copper prices drastically increases Southern's reserves relative to Minera's reserves.

[97] Trial Tr. at 162:14-15 (Handelsman Direct).

[98] See, e.g., JX 106 at SP COMM 004913.

[99] JX 115 at AMC0019986.

[100] JX 115 at AMC00199903. See, also, id. at AMC0019886.

[101] Id. at AMC0019886. See also Trial Tr. at 271:18-22 (Ortega – Cross) ("Q: So in this presentation UBS was advising Grupo's board that migrating Minera's assets to Southern's multiple would be beneficial to Grupo Mexico; correct? A: Correct.").

already part of Southern and trading at Southern's multiple, the Special Committee gave all of Minera's "untapped" value to Grupo.[102]

E. The "Concessions" The Special Committee Purportedly Obtained Were Meaningless

Contrary to Defendants' contention, the Special Committee obtained no significant "concessions" from Grupo during the course of evaluating the Transaction.[103]

- Capping Minera's Debt: Handelsman's testimony that the Special Committee was telling Grupo to "Pay down some of your debt, fellows" is simply contradicted by the facts.[104] Minera was contractually obligated to reduce its debt in the event copper prices exceeded $0.88 per pound,[105] which occurred on October 15, 2003.[106] Moreover, Grupo had planned to refinance Minera's debt since before the Transaction was proposed.[107] The Special Committee knew as early as April 2004 that Minera's debt would be reduced to $754 million by the end of 2006,[108] "whether or not this [Transaction] happens."[109] In fact, Minera's $1 billion debt cap was ***lower*** than the Special Committee's $1.105 billion demand,[110] proving it was in no way a "concession" by Grupo.

- The Special Dividend: Just like the cap on Minera's debt, the $100 million special dividend was nothing more than a tool to "[b]ridge the difference between what [Grupo] wanted and what [the Special Committee was] willing to pay."[111] As a result

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[102] See Ruiz Depo. Tr. at 51:24-52:7. As discussed at section I.A.1., supra, Southern's projections were not optimized, which resulted in higher implied Southern EBITDA multiples, and thus a higher implied Minera equity value.

[103] See JX 129 at 24-25 (purported "concessions" made by Grupo include capping Minera's debt, agreeing to pay a $100 million special dividend, and adoption of corporate governance terms).

[104] Trial Tr. at 173:1-4 (Handelsman – Direct).

[105] JX 125 at 55 ("when the prices of copper, zinc and silver exceed $0.88 per pound, $0.485 per pound, and $5.00 per ounce, respectively, 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"). Minera was also obligated to pay 100% of any net working surplus capital that exceeded $240 million towards its debt. Id.

[106] JX 23 at 11.

[107] Trial Tr. at 275:6-9 (Ortega – Cross) ("Q: So even before proposing the transaction to sell Minera, Grupo had already planned to refinance Minera's debt; correct? A: Um-hum.").

[108] See JX 101 at SP COMM 003443; JX 102 at SP COMM 003344.

[109] JX 74 at SP COMM 010050.

[110] See JX 160 at SP COMM 010491.

[111] Trial Tr. at 128:8-9 (Palomino – Cross).

of the special dividend, Grupo received both $54 million in cash and the number of shares it wanted in the Transaction.

- Corporate Governance Provisions: Defendants contend that Southern and its stockholders benefited from certain corporate governance terms "negotiated" by the Special Committee.[112] These governance terms were worthless and did nothing to alleviate the unfairness of the Transaction.[113]

F. Grupo Controlled the Outcome of the Transaction

1. The Shareholder Vote Was Locked Up

The Proxy states that on October 5, 2004, German Larrea and Handelsman agreed that "if the parties reached agreement with respect to the terms of the proposed transaction, both Grupo Mexico and Cerro would indicate their intention to vote in favor of the transaction."[114] German Larrea's October 13, 2004 draft voting agreement[115] sent to Mr. Handelsman sought to memorialize this agreement. The evidence, despite Mr. Handelsman's denials,[116] thus suggests a *quid pro quo* exchange of Cerro's vote in favor of the Transaction for Cerro's long-sought[117] registration rights.

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[112] This Court recognizes that such concessions are "cheap and easy to give." In re Emerson Radio S'holder Derivative Litig., 2011 WL 1135006, *5 (Del. Ch.); Campbell v. The Talbots, Inc., Del. Ch., C.A. No. 5199-VCS, Settlement Hearing Tr. (Dec. 20, 2010) at 18 ("I would hardly say that this would be the first time that this Court has inqured as to the actual benefit of the supposed therapeutic change and has questioned the value of therapeutic changes, to the extent that the company was already listed under an exchange and the exchange rules for the company already required that corporate governance provision."); see also Pl.'s Pre-Trial Answering Br. at 21-23.

[113] For example, the Special Committee "negotiated" for a Board committee to review related party transactions in excess of $10 million, which "Southern's audit committee was already thoroughly reviewing," Trial Tr. at 278:6-10 (Ortega – Cross), and every related party transaction between 2002 and 2004 was below that $10 million threshold. Trial Tr. at 279:5-280:9 (Ortega – Cross).

[114] JX 129 at 25. At this meeting the Special Committee and German Larrea also finalized most of the substantive terms of the Transaction. Id.

[115] JX 52.

[116] Handelsman testified at trial that he "never would have agreed to that" and that "there were not" other Cerro representatives discussing registration rights with German Larrea. Trial Tr. at 204:15, 205:12-18 (Handelsman – Cross).

[117] JX 30.

Having agreed to the material terms of the Transaction on October 5, 2004,[118] the parties' October 8, 2004 agreement that approval of the Transaction would be subject to a two-thirds super-majority vote[119] ensured the Transaction would be approved, and was hardly a substitute for a true majority of the minority vote provision.[120] Furthermore, as of December 22, 2004, Phelps Dodge's agreement to vote in favor of the Transaction was irrevocable,[121] so even if the Special Committee had changed its recommendation pre-closing in light of the Company's rising stock price and superior performance, the Special Committee could not have "vetoed" the Transaction.[122] As Ortega conceded, "it was entirely up to Grupo whether the transaction went forward or not."[123]

2. The Special Committee Lacked the Power to Negotiate

The Special Committee's mandate made clear that the Special Committee possessed only the power to "evaluate" the Transaction.[124] Accordingly, the Special Committee "did not try to make our own proposals to Grupo Mexico," and only "negotiate[d] with them in the sense of telling them what it is that we don't agree with."[125]

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[118] JX 129 at 25; Trial Tr. at 208:20-24 (Handelsman – Cross).

[119] JX 129 at 25.

[120] See In re John Q. Hammons Hotels Inc. S'holder Litig., 2009 WL 3165613, *12 (Del. Ch.) (a majority of the minority provision "must provide[] the stockholders [the] important opportunity to approve or disapprove of the work of the special committee and to stop a transaction they believe is not in their best interests.").

[121] JX 15 at AMC0024877.

[122] See contra Palomino Dep. Tr. at 96:16-22.

[123] Trial Tr. 286:15-19 (Ortega – Cross) ("Q: So it was entirely up to Grupo whether the transaction went forward or not; correct? A: Um-hum. Q: Yes? A: Yes.").

[124] JX 16 at SP COMM 000441.

[125] Trial Tr. at 14:10-19 (Palomino – Direct); see also Trial Tr. at 143:19-144:12 (Handelsman – Direct) (Grupo could decide whether it wanted to "negotiate in the face of a no.").

G. There Was Not a Fully Informed Vote on the Transaction

As detailed in Plaintiff's opening and answering pre-trial briefs, the proxy statement issued in connection with the vote on the Transaction was materially misleading and omitted material information.[126] Consequently, the stockholder vote was not informed.[127]

III. THE EVIDENCE IS INSUFFICIENT TO MEET DEFENDANTS' BURDEN OF PROVING ENTIRE FAIRNESS

A. No Grupo Witness Testified

Despite being the controlling stockholder and sole corporate defendant, Grupo offered no trial testimony to demonstrate that the Transaction was fair.[128] Grupo asserts that Minera's equity value was $3.1 billion, yet neither Grupo nor UBS testified to support this claim.

B. No Goldman Sachs Witness Testified

Defendants also presented no evidence at trial from the Special Committee's financial advisor.[129] Their absence leaves unanswered two critical questions: why Goldman adopted its relative DCF valuation approach, and whether Goldman had ever exclusively relied on relative DCF valuation before. Sanchez's deposition testimony that "more than absolute values, what matters is relative valuations"[130] was entirely inconsistent with his testimony that "[i]f you are buying a company, there is only one DCF value to do, which is the company that you are

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[126] See Pl's. Pre-Trial Opening Br. at 25-28, 46-47; Pl's. Pre-Trial Ans. Br. at 23-24.

[127] See Weinberger, 457 A.2d at 712; Emerging Commc'ns., 2004 WL 1305745, at *37-38 (stockholder vote uninformed where, among other things, financial projections and valuation information withheld from stockholders).

[128] Defendant Ortega testified that he was merely an "interlocutor between [Grupo] and the special committee." Trial. Tr. at 247:19-22 (Ortega – Direct).

[129] Martin Sanchez, the Goldman witness deposed by Plaintiff, "refused" to appear at trial. In re Southern Peru Copper Corp. S'holder Deriv. Litig., Consol. C.A. No. 961-VCS, Tr. (Jun. 15, 2011) at 5:6-10. Alternative Goldman witnesses either also refused to appear at trial, or were not able to appear until weeks after the scheduled conclusion of trial.

[130] Sanchez Dep. Tr. 41:25-42:3.

buying."[131] Further, absent any evidence that Goldman has ever before relied solely upon a relative DCF analysis to support the fairness of an acquisition,[132] the Court should infer that Goldman never has.[133]

C. Witness Testimony is Inconsistent With the Special Committee's Claimed Reliance on Relative Valuation

Palomino testified that he thought relative valuation "was a good methodology"[134] that is "used all the time"[135] and that "the relative discounted cash flow analysis is one that [he] would tend to attach more importance to, typically."[136] Likewise, Handelsman testified that "the appropriate measurement" in evaluating the Transaction was "what that relative DCF valuation meant in terms of give and get at that point and using that methodology."[137] Much of Palomino and Handelsman's other testimony, however, is inconsistent with their professed reliance on relative valuation.

As discussed above, one of the fundamental (yet patently wrong) assumptions underlying the Special Committee's relative valuation method was that "the higher the price used for copper, the more advantageous the situation would be for Minera Mexico."[138] This is purportedly because "the reserves of Minera Mexico were proportionately larger than those of

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[131] Id. at 41:14-16.

[132] Goldman's counsel precluded Sanchez from testifying about how or why Goldman chose its relative DCF approach. Sanchez Dep. Tr. at 43:21-44:2, 44:6-22, 45:22-24.

[133] Emerging Commc'ns, 2004 WL 130575, at *25 (where defendants' financial advisor did not testify, "the only logical inference -- and the inference this Court has drawn -- is that Houlihan's testimony would have been unfavorable to the defendants' position.").

[134] Trial Tr. at 55:17 (Palomino – Direct).

[135] Trial Tr. at 58:17-18 (Palomino – Direct).

[136] Trial Tr. at 58:21-23 (Palomino – Direct).

[137] Trial Tr. at 201:18-22 (Handelsman – Cross).

[138] Trial Tr. 40:18-20 (Palomino – Direct); see also id. at 41:11-13.

Southern Peru."[139] While Palomino knows that "higher [copper] prices would tend to increase reserves and lower prices would tend to decrease them,"[140] he testified "I don't recall" whether Minera was "more sensitive [than Southern] when you consider expanding reserves that could be resultant from rising copper prices."[141] Palomino's inability to recall whether one of the fundamental premises of the relative valuation method was true severely undermines the credibility of his reliance on relative valuation.

Handelsman's testimony regarding the proposed collar on Southern's stock price further calls into question the Special Committee's purported reliance on relative valuation. Handelsman testified that the Special Committee proposed the collar because

> the stock of one company could go down and, therefore, the person who is the recipient of that stock isn't getting as much as they thought they would; or the stock of the issuer, Southern Copper, could go up, and then Grupo Mexico would get a lot more than it was asking for.[142]

This statement is entirely inconsistent with Defendants' position at trial. Handelsman admitted that the value received by Grupo in the Transaction was directly related to the value of Southern's stock price, not the "relative values" of the companies. Handelsman's clumsy attempt to explain why the Special Committee abandoned the collar[143] does nothing to change the fact that Handelsman plainly had reason to doubt his "feeling that a relative value of the two companies made sense" irrespective of Southern's stock price.

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[139] Trial Tr. at 86:16-17 (Palomino – Direct).

[140] Trial Tr. at 125:19-21 (Palomino – Cross).

[141] Trial Tr. at 126:17-21 (Palomino – Cross).

[142] Trial Tr. at 171:22-172:7 (Handelsman – Direct).

[143] Trial Tr. at 175:1-9 (Handelsman – Direct) ("I thought the collar had some meaning, but I thought that it was less important because I believed -- based upon 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, 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 would certainly have been better to have the collar.").

Handelsman further admitted that the $100 million special dividend "decreased, at least for the moment, the value of Southern stock by having Southern use some of its cash to pay the special dividend."[144] Hence, Handelsman testified the intended effect of the special dividend was that "***the value of the specie being used in the merger went down***. . . ."[145] Handelsman's testimony confirms that throughout his evaluation of the Transaction he understood that the value Southern was paying to acquire Minera was not a function of the relative valuation of the companies, but rather a function of the market value of Southern's stock.

D. Witness Descriptions of the Price "Negotiations" are Inconsistent with the Documentary Record

The Special Committee members testified that they "extensively" negotiated with Grupo Mexico to get the best price for the Transaction.[146] Ortega agreed, stating that "it was a very active, a very active negotiation."[147] At trial, the Special Committee members testified how they tactically responded to Grupo's offers and brought the negotiations to a successful result. The witnesses' testimony regarding their "negotiations" with Grupo, however, was materially inconsistent, both internally and with the documentary record.

Handelsman and Palomino both testified that Grupo's initial $3.1 billion valuation of Minera[148] was "too high,"[149] but they were not surprised because it was Grupo's "initial

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[144] Trial Tr. at 176:3-5 (Handelsman – Direct).

[145] Trial Tr. at 176:8-10 (Handelsman – Direct) (emphasis added).

[146] Trial Tr. at 14:7-15:3 (Palomino – Direct); id. at 143:19-144:12 (Handelsman – Direct).

[147] Trial Tr. at 250:8-9 (Ortega – Direct).

[148] JX 156 at SP COMM 007078. The prior two proposals, on February 3, 2004 and March 25, 2004, each also demanded a number of Southern shares that equaled $3.1 billion at Southern's market price. See JX 108 at AMC0019912-13; JX 155 at SP COMM 001626.

[149] Trial Tr. at 42:9-14 (Palomino – Direct); see also Trial Tr. at 156:23-157:7 (Handelsman – Direct) ("the value of Minera Mexico was substantially less than the asked price of Grupo Mexico by a substantial margin").

proposal."[150] Following Goldman's June 11 confirmation that Grupo overvalued Minera by $1.4 billion,[151] the Special Committee regarded the gulf over the "valuation of Minera Mexico" as "substantial."[152] Sometime thereafter, the Special Committee directed Goldman to run a DCF valuation of Southern. Goldman's June 23 DCF value of Southern was between $1.7 and $2.9 billion,[153] which purportedly "comforted" Handelsman[154] because he realized then that "we weren't paying double for the company."[155] On July 8, 2004, Goldman for the first time presented the two companies' relative DCF values as a proposed method of valuing Minera in the Transaction.[156]

Shortly after hearing Goldman's July 8, 2004 presentation, however, the Committee instructed Goldman to present UBS with a counter-proposal that was neither discussed during the trial, nor disclosed in the Proxy,[157] nor described in any document produced by Defendants, Southern, or the Special Committee. On July 12, 2004, Goldman and UBS met to discuss a counter-proposal from the Special Committee under which the Company would issue 52 million shares to Grupo in exchange for Minera.[158] Goldman presented the proposal not by comparing the two companies' DCF values, as would be consistent with the relative valuation method, but by comparing their 2004 EBITDA multiples.[159] This counter-proposal entirely contradicts the

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[150] Trial Tr. at 36:2-9 (Palomino – Direct).

[151] JX 101 at SP COMM 3381.

[152] JX 88 at SP COMM 17997.

[153] JX 102 at SP COMM 6978.

[154] Trial Tr. at 159:7 (Handelsman – Direct).

[155] Trial Tr. at 162:19-20 (Handelsman – Direct).

[156] Compare JX 103 at SP COMM 6896-98 with JX 96, 97, 98, 100, 101, 102.

[157] See JX 119.

[158] JX 119 at UBS—SCC 5597.

[159] JX 119 at UBS—SCC 5599.

Special Committee's professed belief as of June 23, 2004 that Southern and Minera should be compared on a relative DCF basis.[160]

Although the Proxy contains no reference to the Special Committee's 52 million share counter-proposal, it does reference Grupo's 80 million share response to it, which was purportedly made between "late July and early August."[161] Other than the Proxy, however, Defendants have produced no documentary evidence that Grupo ever made such a proposal. Defendants have also failed to produce Special Committee minutes for their supposed August 5 and 25 meetings during this important period.

The Special Committee members each testified to their vehement responses to Grupo's 80 million share proposal. Palomino testified that in response to the proposal, he and Ruiz met with Mr. Larrea, and told him that "if the proposal was not, you know, changed substantially, we could not reach an agreement."[162] He recounted their dramatic meeting with Mr. Larrea, which ended with Mr. Larrea bowing to the pressure and "call[ing them] back" to "present something that was acceptable."[163] Handelsman, who was not present for the standoff, described the 80 million share proposal as a "substantially higher ask than the original one," especially since the "stock price of SPCC had gone up." As a result of this "significant overreach," Handelsman said, the parties were at an "impasse."[164]

In fact, however, the 80 million share proposal was hardly "substantially higher" than the prior proposal. The market value of 80 million Southern shares at that time simply equaled $3.1

[160] Trial Tr. at 159:3-160:13 (Handelsman – Direct).

[161] JX 129 at 22.

[162] Trial Tr. at 60-61 (Palomino – Direct).

[163] Trial Tr. at 61:1-4 (Palomino – Direct).

[164] Trial Tr. at 163-64 (Handelsman – Direct).

billion.[165] Curiously, Handelsman's statement that the Company's stock price had "gone up" begs the question "since when?", as the last documented offer (on May 7, 2004) had been on a floating exchange ratio.[166] According to defendants, Grupo's next offer – the result of the parties' "extraordinary effort to come to an agreement"[167] – was for the Company to issue 67 million shares for Minera. Again, the 67 million shares were worth $3.1 billion.[168] Palomino nonetheless testified that "it must have been an extraordinary effort for Mr. Larrea to accept reducing a proposal."[169]

Palomino stated that at 67 million shares, "it basically brought numbers to within a stone's throw of what we thought was reasonable."[170] Instead of throwing the stone, however, the Committee simply dropped it. The Special Committee's counter-proposal on September 23, 2004 was for 64 million shares, which were then worth $3.00 billion.[171] The remaining $100 million valuation gap, moreover, was hardly closed by hard-nosed negotiations; it was "bridged" by agreeing to a $100 million transaction dividend that principally benefited Grupo.[172]

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[165] Compare JX 129 ("in excess of 80 million shares" demanded in "late July and early August") with JX 18 at 8-9 (average stock price between July 20, 2004 Special Committee meeting and August 21, 2004 proposal is $38.28 per share). $38.28/share x 80 million shares = $3.1 billion.

[166] JX 156 at SP COMM 7078.

[167] JX 157 at SP COMM 10486.

[168] See JX 158 at SP COMM 14582-83; see also JX 18 at 8 (SPCC stock closed at $45.72 on September 7, 2004). $45.72/share x 67 million shares = $3.1 billion.

[169] Trial Tr. at 63:21-64:4 (Palomino – Direct).

[170] Trial Tr. at 64:5-9 (Palomino – Direct). Handelsman agreed: the 67 million share proposal "while a bit higher than – was in the realm of reason based on Goldman's valuation of the relative value of the two companies." Trial Tr. at 164:16-23 (Handelsman – Direct).

[171] Compare JX 159 at AMC 27542 (64,000,000 million [sic] shares) with JX 18 at 8 (SPCC stock closed at $46.90 on September 22, 2004). $46.90/share x 64 million shares = $3.00 billion.

[172] See section II.E., supra.

The Proxy states that at an October 5, 2004 meeting between Grupo, the Special Committee, and Cerro, the price negotiations, including the special dividend, concluded, and Cerro agreed to support the Transaction.[173] Handelsman oddly cannot remember this meeting,[174] and further insisted that he "never would have agreed to that" on behalf of Cerro.[175] But he conceded that the Special Committee, "taking Cerro out of the picture," had agreed to all of those terms on October 5, 2004.[176] One would be hard-pressed to believe that Mr. Handelsman would have agreed to a final price term without approval from the Pritzkers (his "client"[177]), or that the Pritzkers would have agreed to support a final deal without assurances regarding their long-sought rights offering.[178] Handelsman's protestations and memory lapses aside, the evidence strongly suggests that AMC bought deal certainty from Cerro more than two weeks before the Committee approved the Transaction.[179] In the end, while the witnesses insisted that they engaged in "extensive" negotiations[180] geared towards "get[ting] to the right price,"[181] the record establishes that the Special Committee simply rationalized Grupo's price, ultimately accepting Grupo's initial offer only on far less advantageous terms.

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[173] JX 129 at 25.

[174] Trial Tr. at 203:5-19 (Handelsman – Cross).

[175] Trial Tr. at 204:14-205:4 (Handelsman – Cross). Mr. Handelsman further stated that he was the only one negotiating with Mr. Larrea on behalf of the Pritzkers. Id. at 205:12-16.

[176] Trial Tr. at 207:8-12 (Handelsman – Cross).

[177] Trial Tr. at 139:10-16 (Handelsman – Direct) (part of Mr. Handelsman's "mandate" was to "protect the Pritkzer interests"); id. at 176:24 (referring to Pritzkers at his "client").

[178] See Trial Tr. at 168:7-8 (Handelsman – Direct) ("both we and Phelps Dodge wanted to get out"); see also JX 30.

[179] See section II.F.1., supra.

[180] Trial Tr. at 14:7-15:3 (Palomino – Direct); Trial Tr. at 143:19-144:12 (Handelsman – Direct).

[181] Trial Tr. at 162:6-11 (Handelsman – Direct).

IV. PLAINTIFF IS ENTITLED TO RECISSORY RELIEF AND/OR DAMAGES

The Court has broad discretion to "fashion any form of equitable and monetary relief as may be appropriate."[182] Southern overpaid by at least 24.7 million Southern shares to acquire Minera in the Transaction.[183] Plaintiff asks that AMC be ordered to return these shares, and all benefits flowing therefrom, to Southern.[184]

CONCLUSION

For the foregoing reasons, judgment should be entered in plaintiff's favor.

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[182] Weinberger, 457 A.2d at 714.

[183] JX 47.

[184] Southern affected a 2-for-1 stock split on October 3, 2006 and a 3-for-1 stock split on July 10, 2008. In addition, $60.20 in dividends have been paid on each of the 24.7 million Southern shares issued in excess of Minera's fair value (adjusted for stock splits). JX 28; see also, Pl.'s Pre-Trial Opening Br. at 47-49.

CERTIFICATE OF SERVICE

I, Marcus E. Montejo, do hereby certify on this 1st day of July, 2011, that I caused a copy of Plaintiff's Post-Trial Opening Brief to be served via eFiling through LexisNexis File and Serve to counsel for the parties as follows:

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

AMC DEFENDANTS' POST-TRIAL ANSWERING BRIEF

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PRELIMINARY STATEMENT[1]

Plaintiff's post-trial brief is full of yet more new theories Plaintiff did not previously advance and ignores the trial record. Plaintiff's theories, new or old, do not explain why the Merger — recommended by the Special Committee, overwhelmingly approved by SPCC's stockholders, and favorably received by the market — was unfair to SPCC or its minority stockholders or why the Special Committee would have knowingly misled anyone about the Merger. The record shows the Merger was not just fair, it was a good deal for SPCC.

ARGUMENT

I. PLAINTIFF MISSTATES THE ENTIRE FAIRNESS STANDARD

Plaintiff purports to quote *Cinerama, Inc. v. Technicolor, Inc*., for the proposition that "[w]here the merger price is found not to be fair, that finding establishes, *ipso facto*, the unfairness of the merger, thereby obviating the need for any analysis of the process oriented issues." *See*PPTB at 3.*Cinerama* says no such thing. Plaintiff's quotation actually comes from *In reEmerging Commc'ns, Inc. S'holdersLitig*., 2004 WL 1305745 (Del.Ch. June 4, 2004), and is taken entirely out of context. *Emerging* questioned whether a fair dealing analysis was required given the Court's determination that the price was not fair. But the Court stated that because the Supreme Court had not decided this issue, "a fair dealing analysis isrequired." 2004 WL 1305745, at *28.*Emerging* rejected the argument that unfair price *ipso facto* means the transaction was not fair. As this Court recently stated, "[a] strong record of fair dealing can influence the fair price inquiry, reinforcing the unitary nature of the entire fairness test." *Muoio& Co. LLC v. Hallmark Entm'tInvs., Co.,* 2011 WL 863007, at *16 (Del.Ch. Mar. 9, 2011).

[1] Capitalized terms not defined herein have the meanings set forth in the AMC Defendants' Post-Trial Opening Brief ("DPTB"). Citations to Plaintiff's Post-Trial Opening Brief are in the form "PPTB."

II. THE PROCESS WAS FAIR

Plaintiff's attempt to minimize the significance of a fair process in an entire fairness case is not surprising given the strong record here of a fair and extensive Special Committee process. The Special Committee and its advisors met formally on at least 20 occasions and informally on many other occasions over more than eight months.[2]

Plaintiff's Post-Trial Opening Brief confirms that he has abandoned any argument relating to the Special Committee's composition and independence. Instead, Plaintiff argues that the Special Committee failed to negotiate at arm's length. The record, however, provides no support for the proposition that the Special Committee was ineffectual. Instead, the evidence established that the Special Committee took its mandate seriously and negotiated the best deal available for SPCC and its minority stockholders. The burden has thus shifted to Plaintiff.

A. GrupoMexico Did Not Dictate The Terms Of The Merger

Plaintiff's contention that Grupo Mexico dictated the terms of the Merger is not supported by the record. That the value assigned to MineraMexico's equity under GrupoMexico's original proposal turned out to be roughly equal to the market value of the SPCC shares ultimately issued in connection with the Merger is happenstance. *See*DPTB 10-11. Neither the Special Committee nor GrupoMexico had any way of knowing that the "market value" of the number of shares ultimately issued would be $3.7 billion when the Merger closed; nor does Plaintiff claim otherwise. Plaintiff also ignores the facts that (i) the Merger resulted in the issuance of five million fewer shares than GrupoMexico's initial proposal (*see*JX-108 at AMC0019912) and (ii) the number of SPCC shares to be issued was not the only term of the Merger.

[2]Joint Pretrial Stip. & Order ("JPSO") ¶¶ 23-46; Trial Tr. ("Tr.") 19:3-21 (Palomino), 149:9-150:10 (Handelsman).

B. **The Special Committee Secured Important Concessions**

As Messrs. Handelsman and Palomino explained at trial, the Special Committee's approach was essentially to cause GrupoMexico to bid against itself until it proposed terms that were generally acceptable to the Special Committee.[3] This is exactly what happened, and the process allowed the Special Committee to secure important concessions for SPCC and its minority stockholders. Plaintiff's attempt to minimize the value of these concessions fails. When viewed in the context of the entire transaction, these concessions were meaningful and ensured that SPCC and its minority stockholders were getting the best deal available.[4]

- Fixed-Exchange Ratio**.** Grupo Mexico's initial proposal—based on the 20 day average price of SPCC stock prior to the closing—was a nonstarter because the Special Committee could not predict changes in SPCC's stock price, especially considering the historic volatility of the copper market and SPCC's trading price.[5] To alleviate that risk, the Special Committee and its advisors negotiated a fixed exchange ratio, which better protected SPCC's shareholders because SPCC and Minera were similar companies that would be affected by market conditions in similar ways, and it therefore represented the fundamental value of both companies.[6] Plaintiff's assertion that the Special Committee "had no basis" for negotiating a fixed exchange ratio is unsupported.
- Capping Minera's Net Debt. The Special Committee successfully negotiated a $1 billion cap on Minera's net debt.[7] This was a direct benefit to SPCC because it reduced the debt SPCC assumed by $300 million.[8] Plaintiff's contention that the Special Committee knew as early as April 2004 that Minera's net debt would be reduced to $754 million by the end of 2006 is not supported by the record and beside the point. *First*, Plaintiff cites two charts setting forth Minera's projected net debt under certain assumptions. These projections are not the same as a contractual

[3]Tr. 14:7-23 (Palomino); 143:13-144:12 (Handelsman).

[4]JX-129 at 28-29 (listing factors considered by Special Committee).

[5]Tr. 155:3-21 (Handelsman); Tr. 117:23-119:8 (Palomino); Ruiz Dep. 148:14-149:15. That Plaintiff now suggests that the Special Committee knew that SPCC's stock price would increase underscores the desperation of Plaintiff's "evolving" arguments.

[6]Tr. 117:23-119:8 (Palomino); Sanchez Dep. 117:12-118:14; 119:19-120:18.

[7]Tr. 83:14-84:16 (Palomino); Tr. 172:11-173:4, 175:10-16 (Handelsman).

[8]Tr. 75:23-76:18 (Palomino).

obligation to limit debt.[9] *Second*, even if Minera would have been obligated to pay down debt if certain events came to pass *later*, the point is that the Special Committee bargained for a separate cap on Minera's debt *prior to the Merger's closing*.

- The Special Dividend. The Special Committee secured a $100 million special dividend to be paid to all SPCC shareholders on a *pro-rata* basis prior to the Merger. Plaintiff ignores the fact that 45.8% of the special dividend was paid to shareholders other than GrupoMexico and that those payments were significant.[10]
- Corporate Governance Protections. The Special Committee negotiated important post-Merger corporate governance protections for SPCC and its minority shareholders. Plaintiff's contention that these provisions were meaningless is belied by the record.[11]
- Super-Majority Voting Requirement. The Special Committee also negotiated a super-majority voting requirement and then secured a commitment from Cerro to vote its 14.2% interest only in accordance with the Special Committee's recommendation.[12] Plaintiff's assertion that Grupo Mexico locked up the shareholder vote before the Merger was approved by the Special Committee misstates the record. The Special Committee had already settled on the 67.2 million share price when it considered Cerro's voting obligations and it specifically required that Cerro's vote be tied to the Special Committee's ultimate recommendation.[13] And Phelps Dodge agreed to vote in accordance with the Special Committee's recommendation *after* the Special Committee and Board had approved the Merger and SPCC had issued a preliminary proxy statement.[14]

III. THE MERGER PRICE WAS FAIR

A. Minera Was Worth At Least 67.2 Million Shares Of SPCC

Plaintiff argues that the Special Committee did not have a valid basis to use a relative valuation because it did not ask whether (i) SPCC's DCF value was reliable, (ii) how the inputs were determined, (iii) whether the companies reacted similarly to fluctuating metal prices,

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[9] *See* PPTB 19 n.108. (Plaintiff's record citations are incorrect. The correct cites are JX-100 at SP COMM 003443 and JX-101 at SP COMM 003344.) In all events, whether GrupoMexico planned to refinance Minera's debt is irrelevant, because refinancing does not necessarily change the outstanding principal.

[10] *See* JX-129 at 25; Tr. 176:15-177:5 (Handelsman).

[11] JX-129 at 133 (amendments to SPCC's charter).

[12] JPSO ¶ 45; Tr. 174:7-19 (Handelsman).

[13] JX-12; JX-129 at 26; Tr. 182:7-183:17, 186:10-187:4 (Handelsman).

[14] *See* JX-163; JX-129 at 10, 27.

and (iv) whether it should pay for Minera with cash or stock. This new argument is both entirely speculative and contradicted by the trial record.

- SPCC's DCF Value Was Reliable. The Special Committee engaged A&S to review and analyze Minera and SPCC's projections. A&S did this, made adjustments as necessary, and those adjustments were incorporated into Goldman Sachs' analyses.[15] Plaintiff's new argument that the data A&S used was unreliable because Mr. Ortega supplied the data for both Minera and SPCC is baseless. There is no evidence that Mr. Ortega or anyone else did anything to affect the reliability of *any* data.[16] In addition, that SPCC exceeded management's forecasts in a later year was not something anyone could have known at the time (nor does Plaintiff cite evidence suggesting otherwise).
- The Special Committee Understood The Inputs. Plaintiff's new argument that the Special Committee did not know how the inputs in the DCF analyses of Minera and SPCC were determined is not supported by the record.[17] Similar inputs were used for both Minera and SPCC. As Mr. Palomino explained, the whole purpose of a relative valuation is to value the two companies using the same methodology and assumptions.[18]
- Minera Was More Sensitive To Copper Price. Plaintiff's new argument that "the Special Committee never had any basis to conclude that a higher long-term copper price favored Minera" is baseless. The Special Committee members and Goldman Sachs explained that because of Minera's higher cost structure, it was more sensitive to copper prices than SPCC.[19] Plaintiff cites *no* contrary evidence.
- The Special Committee Considered Paying For Minera With Cash. Plaintiff's new argument that the Special Committee never considered paying cash for Minera is contradicted by the evidence *Plaintiff* adduced. Plaintiff's counsel asked Mr. Palomino and Mr. Handelsman whether the Special Committee considered using cash or some combination of cash and stock as consideration for the Merger, and both testified that the Special Committee did exactly that.[20]

As the record shows, the Special Committee and its highly qualified advisors

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[15] *See* JX-67 at SP COMM 018538-018540; DX-2; JX-106 at SP COMM 004917; 004919.

[16] Tr. 248:11-17 (Ortega); *see also* Parker Dep. 99:12-16.

[17] *See* Ruiz Dep. 201:13-17 (explaining that Goldman Sachs explained the inputs).

[18] Tr. 53:18-54:20 (Palomino); *see alsoid.* at 58:14-24 (explaining that a relative valuation is an accepted valuation methodology for valuing similar companies).

[19] Tr. 40:10-41:9 (Palomino); Ruiz Dep. 190:3-191:20; Sanchez Dep. 122:9-123:101. For this reason (and others), the Special Committee decided to use $0.90/pound in the underlying DCF analyses of Minera and SPCC. *See* Tr. 40:10-41:13 (Palomino). Professor Schwartz explained that this decision increased the Special Committee's negotiating leverage (JX-48 ¶¶ 44-45).

[20] Tr. 127:3-128:2 (Palomino); *id* at 202:13-15; 223:10-224:14 (Handelsman).

conducted various analyses and engaged in numerous discussions before determining to value SPCC and Minera on a relative basis. That decision was the result of a thoughtful and thorough process. The Special Committee knew what a relative valuation was and how it worked, and determined that it was the methodology best suited for negotiating and evaluating the proposed Merger.[21] Plaintiff has adduced *no* contrary evidence. A relative valuation of Minera and SPCC showed that the issuance of 67.2 million shares of SPCC for Minera was fair.[22]

B. Beaulne's Analyses Are Flawed And Unreliable

Beaulne did no analysis of what drove SPCC's stock price and/or why Goldman Sachs' DCF value for SPCC was below its market capitalization, nor did he do his own DCF analysis of SPCC despite admitting that he could have done so, (Tr. 384:17-21; 388:9-12 (Beaulne)). Now that he has been confronted with evidence that copper companies generally traded above their DCF values in 2004 (JX-103), Plaintiff argues that the evidence is inadmissible. *See*PPTB at 12. This argument fails for two reasons:

- Plaintiff *twice* waived any objection to JX-103, first when *Plaintiff* himself added it to the exhibit list and again when his counsel failed to object to it at trial.[23]

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[21] Plaintiff's argument that Mr. Handelsman's testimony regarding the proposed collar on SPCC's stock price "calls into question" the Special Committee's reliance on a relative valuation makes no sense. Mr. Handelsman explained that with a relative valuation, minor copper price fluctuations would generally affect Minera and SPCC's values similarly and because the chance that something might affect either company's value differently was slim, proceeding without a collar was a chance the Special Committee thought was appropriate to take. Tr. 174:20-175:9 (Handelsman); *see also*Palomino Dep. 73:8-75:5; Sanchez Dep. 117:12-118:14; 199:19-120:18. Plaintiff cites no evidence that calls that decision by experienced directors and their advisors into question.

[22] JX-106 at SP COMM 004923-25; Tr. 9 91:12-92:23 (Palomino).

[23] *SeeCobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *23 (Del.Ch. July 20, 2007). In any event, Plaintiff's contention that "[a]pplying a premium to a DCF is not a generally accepted valuation methodology" (PPTB at 12) misapprehends JX-103. JX-103 shows that one of the inputs in the DCF analyses for all the copper companies it discusses has to be different from the assumptions to explain the copper companies' market prices. The most likely candidate, as Professor Schwartz explained, is the long-term copper price assumption.

- JX-103 was presented to and considered by the Special Committee as part of its work relating to the proposed Merger. It is therefore admissible evidence regarding the fairness of the process,[24] and it confirms the testimony of the Special Committee members about how they conducted their work relating to the proposed Merger.

Finally, Plaintiff's contention that Beaulne's opinion refutes JX-103 is wrong. There is not a single word in Beaulne's report trying to explain the difference between the public market price and DCF valuation of *any* copper company.[25]

C. Plaintiff's Attacks On Professor Schwartz's Analysis Are Wrong

Plaintiff argues that Professor Schwartz ignored (i) whether DCF valuations of SPCC and Minera were comparable in the first instance and (ii) how a change in the assumed long-term copper price would alter the operation and value of Minera and Southern on an individual basis. *See*PPTB at 5. Both arguments fail.

1. Professor Schwartz Used The Same Assumptions To Value Minera And SPCC

Plaintiff argues that Professor Schwartz did not value Minera and SPCC using the same set of assumptions because Professor Schwartz "used production plans and projections [for SPCC] based on life-of-mine plans that had not been reassessed since 1998 and 1999." PPTB at 7. This argument is nonsensical. SPCC's projections were reviewed and adjusted by A&S.[26] And Beaulne conceded that he was not aware of any evidence in the record that, at the time of Merger, SPCC's ore reserves were going to increase.[27]

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[24] *SeeCole v. Kershaw*, 2000 WL 1336724, at *3 (Del.Ch. Sept. 5, 2000).

[25] This is not surprising, given two undisputed facts. *First*, Beaulne never tried to explain the difference between SPCC's DCF valuation and its observed market price (Tr. 388:9-12 (Beaulne)), let alone trying to do this for companies other than SPCC. *Second*, someone broke up JX-103 before one part of it was given to Beaulne. *See* JX-47 at 79 (showing that Beaulne was given SP COMM 6858-6923, whereas JX-103 consists of SP COMM 6854-6950). And in trying to criticize JX-103 Beaulne admitted he knew nothing about it. (Tr. 405:3-15 (Beaulne)).

[26] *See* DX-2 at AS0001021, 0001023, & 0001024.

[27] Tr. 370:4-9; *see also*Tr. 422:4:8 (Beaulne).

2. Professor Schwartz Did Not "Solve" For A Long Term Copper Price

Plaintiff misstates Professor Schwartz's analysis. Professor Schwartz confirmed that the Merger was fair at $0.90/pound but performed sensitivity analyses to confirm his analysis. *See* JX-48 ¶¶ 25-26 &Ex. 1. Using his sensitivity analyses, Professor Schwartz demonstrated that, given the primary variables that impact the value of copper companies, it was likely that the market was using a long-term copper price higher than $0.90/pound to price SPCC toward the end of 2004 (JX-48 ¶¶ 47-51) and that the Merger was also fair at higher prices. Like JX-103, Professor Schwartz's analysis provided an explanation for the difference between SPCC's market price and its DCF value, something Beaulne never even tried to explain.

In any event, Plaintiff concedes that there is a substantial difference between a DCF valuation of SPCC using a $0.90/pound long-term copper price and SPCC's observed market price during 2004, yet Plaintiff does not claim that the market was somehow implying larger reserve sizes for any publicly traded copper companies.[28] And at the end of the day Plaintiff's argument that ore reserves increase as copper prices increase is much ado about nothing: Although Plaintiff points to one of SPCC's SEC filings to try to show that at $1.26/pound SPCC's copper reserves increased more than Minera's on a percentage basis in one specific year, Plaintiff ignores that the result of those projected increases was that Minera still had larger copper reserves than SPCC. *See* PPTB at 9, 18 n.96. And the end result of this analysis is even worse for Plaintiff — as the chart attached as Exhibit A shows, with only one *de minimis* exception, for every year since the Merger SPCC has reported that the Minera mines' copper reserves were larger than the SPCC mines' copper reserves at *both* lower and higher

[28] It is not surprising that Beaulne says nothing about this in his report, because he is not an engineer or a geologist and has no expertise in evaluating, let alone adjusting, life of mine plans.

copper prices.[29] Both before and after the Merger, using higher and lower copper price assumptions, Minera has had larger reserves than SPCC.

IV. PLAINTIFF IS NOT ENTITLED TO AN ADVERSE INFERENCE WITH RESPECT TO GOLDMAN SACHS

Plaintiff's argument (PPTB at 22-23) that the absence of a Goldman Sachs witness left "critical" questions unanswered is nonsense. Plaintiff had an opportunity to question Mr. Sanchez—who was a member of the Goldman Sachs team that advised the Special Committee but has not been a Goldman Sachs employee for many years—at his deposition. Goldman Sachs' counsel expressly permitted Plaintiff to ask Mr. Sanchez how Goldman Sachs decided what to do regarding the Merger (Sanchez Dep. 43:6-22), and Plaintiff *again* misquotes Mr. Sanchez's testimony — the same testimony he misquoted in his pretrial briefing — to try to create an issue where none exists.

Plaintiff's reliance on *Emerging* for the proposition that the Court should infer that Goldman Sachs never conducted a relative valuation is without merit. In *Emerging*, the only reason the Court inferred that the expert's testimony would be unfavorable was because the defendants never explained their failure to call their expert at trial. *See*2004 WL 1305745, at *25. That is not the case here. When the AMC Defendants arranged for a senior Goldman Sachs banker who was involved in Goldman Sachs' representation of the Special Committee to testify at trial, Plaintiff objected. Absent Plaintiff's objection, the AMC Defendants would have called a Goldman Sachs witness. In any event, the record here is replete with evidence showing what Goldman Sachs did and why.

[29] The sole exception is 2007, in which the reported reserves were 2.9% less for the Minera mines at the long-term price but 11.8% higher for the Minera mines at the higher assumed copper price. For *every* year since the Merger, Minera has had larger copper reserves than SPCC when the copper price was assumed to increase.

V. PLAINTIFF IS NOT ENTITLED TO DAMAGES

The AMC Defendants did not breach their fiduciary duties and are therefore not liable for any damages. But even if Plaintiff could establish a breach (he cannot), any damages would only be a fraction of what Plaintiff seeks.[30] A plaintiff waives the right to seek rescissory damages when he permits a case to languish after its initial filing.[31] And Plaintiff should not be awarded compound prejudgment interest in light of his dilatory prosecution.[32]

VI. THE AMC DEFENDANTS WIN ON ALL DISPUTED EVIDENTIARY ISSUES

JX-27 and JX-28 are irrelevant, constitute improper summaries, and contain improper expert opinion. Neither was disclosed in Beaulne's report, both are outside the scope of his report, and Plaintiff offered neither at trial. JX-149 is also irrelevant and is inadmissible hearsay.[33] Plaintiff's objections to the admissibility of JX-161 and DX-1 are meritless for the reasons discussed previously. *See*DPTB at 19 n.75.

CONCLUSION

The AMC Defendants respectfully request that the Court enter judgment in favor of the AMC Defendants and dismiss Plaintiff's claim with prejudice.

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[30] Plaintiff claims to seek "an equitable remedy that compensates the Company for the increase in Southern's value that was diverted from Southern's minority shareholders to Grupo." PPTB at 2. But Plaintiff has offered no evidence that any value was "diverted" from SPCC's minority shareholders. In fact, Beaulne admitted that he had not done "any analysis of whether SPCC's shareholders benefited from the transaction at issue in this case." Tr. 402:19-22 (Beaulne).

[31] *SeeRyan v. Tad's Enters., Inc.*, 709 A.2d 682, 698 (Del. Ch. 1996). It would be unfair to allow Plaintiff to benefit from increases in SPCC's stock price that occurred during the period of his long delay. *See id.* at 699.

[32] *SeeMetro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 782 (Del. Ch. 1966); *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 909 (Del Ch. 1999); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 476 (Del. 1992); *see also Weinberger v. UOP, Inc.*, 517 A.2d 653, 657 (Del. Ch. 1986) (Delaware law disfavors compounding interest).

[33] *See In re Acceptance Ins. Cos., Inc. Sec. Litig.*, 352 F. Supp. 2d 940, 950 (D. Neb. 2004), *aff'd*, 423 F.3d 899 (8th Cir. 2005). Nor did Plaintiff ever seek to rely on this document at trial or otherwise.

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July 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2011, I electronically filed and caused to be served by LexisNexis File and Serve a copy of the foregoing AMC DEFENDANTS' **POST-TRIAL ANSWERING BRIEF** on the following counsel of record:

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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

PLAINTIFF'S POST-TRIAL ANSWERING BRIEF

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I. INTRODUCTION

Defendants' post-trial argument proceeds from false premises. Plaintiff's alleged failure to "***explain why*** … ***the Special Committee would have any motive*** to short change the public stockholders" is described by Defendants as "***a complete failure of proof***."[1] The Special Committee is not on trial; its motive is not at issue.[2] Defendants can call the trial "anti-climactic," but the Special Committee members need not crumble and confess their sins on the stand for this conflicted Transaction to be deemed unfair. The fairness of the Transaction is judged on the results the Special Committee achieved, not on how "proud" the members are "of the job they did."[3] The overwhelming evidence is that the Special Committee did very little, and the little it did do caused Southern to pay much more for Minera than Grupo even asked (and far more than Plaintiff has proven Minera is worth). This puts this case in stark contrast to any other self-interested transaction held to be entirely fair by this Court.[4] Indeed, Defendants can neither shift nor meet their burden of proving entire fairness. Judgment should be entered for Plaintiff.

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[1] AMC Defs.' Post-Trial Opening Br. ("DOB") at 1. Emphasis is added and internal citations are omitted unless otherwise indicated.

[2] The Special Committee Defendants were dismissed under 102(b)(7). "Considerations of [their] motive are irrelevant." Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

[3] Id. at 2; see also Trial Tr. 106:13-14 (Palomino – Direct).

[4] See, e.g., S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co., 2011 WL 863007 (Del. Ch.) (where the special committee forced Hallmark to "bid against itself" and obtained a "major economic concession"); In re John Q. Hammons Hotels Inc. S'holder Litig., 2011 WL 227634 (Del. Ch.) (where special committee obtained an 85% increase over controlling stockholder's initial offer); In re Cysive, Inc. S'holders Litig., 836 A.2d 531, 556 (Del. Ch. 2003) ("The committee bargained hard with Snowbird, holding out to get a higher price and ensuring that the committee retained the flexibility to accept a higher bid."); Emerald Partners v. Berlin, 2001 WL 115340 (Del. Ch.) (where the non-affiliated directors negotiated down controlling stockholder's initial proposal for an exchange ratio that would have given him May common shares representing up to $105 million of value, to a ratio that gave the controlling stockholder shares worth $28.6 million; "***Although the non-affiliated directors agreed with Mr. Hall that the merger promised to benefit all May stockholders from a business standpoint, those directors acted steadfastly to assure that May's minority would not pay any more than the lowest price, or agree to any nonmonetary terms but the most favorable, that could realistically be negotiated***.") (emphasis added). (cont'd).

II. ARGUMENT

A. Defendants' Reliance On An Ineffective Special Committee Cannot Survive The Exacting Scrutiny Of Entire Fairness

Defendants' false arguments concerning the Special Committee process cannot withstand the exacting scrutiny required under entire fairness and do not warrant a burden shift.

1. False: The Special Committee Had a "Clear Mandate" to Negotiate

Defendants can only describe the Special Committee's mandate as "clear"[5] by ignoring key documents and trial testimony.[6] The Special Committee's charter provides that it only had the power to "evaluate" Grupo's proposal.[7] Both Palomino and Handelsman testified that they had no power to make counter-offers.[8] Defendants also falsely compare their mandate to that in Hallmark, where the committee was authorized to "negotiate," as well as to "take such further action" as it "deems appropriate."[9] Moreover, in Hallmark, unlike here, the entire transaction was subject to the committee's "favorable recommendation."[10]

2. False: The Special Committee Was "Fully Informed"

That the Special Committee hired blue-chip advisors[11] does not mean that its members were "fully informed." In fact, the Special Committee was never advised on critical issues.

Here, the utter absence of ***any*** negotiation over the economic terms of the Transaction is not the "strong record of a fair process" that can be "indicative of fair price." DOB at 2. Completely contrary to the records established in cases such as Hallmark and Emerald Partners, here Defendants do not even try to claim that the Transaction represented the "best deal possible." Rather, they emphasize that "the entire fairness analysis does not require perfection on the part of the board of directors." DOB at 4.

[5] DOB at 7 ("The Special Committee was given a clear mandate from the SPCC Board to negotiate the Merger at arm's length.").

[6] Pl.'s Post-Trial Opening Br. ("POB") at 21.

[7] JX 58 at AMC0025427A-28A.

[8] Trial Tr. 14:10-19 (Palomino – Direct); id. at 143:19-144:12 (Handelsman – Direct).

[9] Hallmark, 2011 WL 863007, at *13.

[10] Id. at *5

[11] DOB at 7 ("The Special Committee relied on the professional advice provided by advisors throughout the evaluation process.").

Defendants claim that the Special Committee decided "the best way to analyze the proposed Merger was by comparing the values of [the companies] using the same methodology and assumptions."[12] But this decision was made without any understanding or appreciation for the differences in how the DCFs for Minera and Southern were prepared or how the values of the two companies changed relative to one another when the price of copper (and other metal prices) changed. Indeed, the decision was made even before Goldman presented any relative DCF analysis to the Special Committee.[13]

Goldman and A&S ***never*** advised the Special Committee that (i) Minera was worth $3.1 billion; (ii) Minera could be acquired at, or would trade at, a massive premium to its DCF value if it was a public company; or (iii) Southern's stock should be valued at a discount to its market value.[14] And the Special Committee ignored, among other things, Goldman's advice that Minera was in fact worth much less than $3.1 billion[15] and A&S's advice that Southern's financial plans could (and should) be optimized to account for expansion potential.[16] Goldman also did not present any analysis to the Special Committee demonstrating the effect of fluctuating copper prices on the reserves and values of Southern and Minera,[17] and the Special Committee never had any basis to conclude (as they asserted at trial) that a higher long-term copper price favored

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[12] DOB at 13.

[13] POB at 25-26.

[14] Trial Tr. 221:23-222:19 (Handelsman – Cross) (responding to the Court's comment that there are "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," Handelsman stated that "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.").

[15] JX 103 at SP COMM 006885.

[16] JX 75 at SP COMM 006957.

[17] See generally JXs 96-98, 100-106.

Minera.[18] Southern's SEC filings plainly demonstrate that higher copper prices benefited Southern more than Minera.[19]

3. False: Defendants' Description of the "Negotiations"

The trial proved the fallacy of Defendants' repeated argument that the Special Committee "negotiated down (by roughly 7%) the number of shares to be exchanged for Minera."[20] Moreover, the other "negotiated key terms" were hardly that.[21]

> Claim: Plaintiff argues that the Merger consideration the Special Committee recommended was the same as Grupo Mexico's initial proposal. But that argument is incorrect.[22]

The Record: Grupo initially and consistently demanded that it receive $3.1 billion in Southern stock in exchange for Minera and the Special Committee approved the Transaction and gave Grupo exactly that.[23] While a Grupo witness could have been called to testify that these

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[18] DOB at 18 ("Because Minera had larger reserves and a higher cost structure, increases in the long-term copper price would increase the value of both companies, but Minera's value would increase at a higher rate."). Further contrary to testimony at trial, the Special Committee members never received advice that a $0.90/lb long-term copper price was "conservative." DOB at 18, n.69 ("[T]he long-term copper price used for ore reserve calculations is a conservative price that does not necessarily reflect the market price of current market estimates relating to copper."). Rather, Southern states unequivocally in its SEC filings that the long-term copper price it uses to determine its reserves is the price that it believes reflects "the full price cycle of the metal market," and the record demonstrates that $0.90/lb was the market consensus for long-term copper prices at the time. JX 128 at A-14 (2004 10-K); POB at 8-10.

[19] POB at 9-10.

[20] Compare DOB at 9 with AMC Defs. Pre-Trial Opening Brief at 20 ("DPTOB").

[21] Compare DOB at 9-10 with POB at 19 (Minera was contractually obligated to reduce its debt "whether or not this Transaction happens"); id. at 19-20 ($100 million special dividend gave Grupo $54 million in cash and increased the number of shares issued to Grupo); id. at 20, n.113 (Audit Committee already reviewed related party transactions); id. at 20-21 (2/3 voting requirement and voting agreements with Cerro and Phelps Dodge locked up the Transaction); Pl.'s Pre-Trial Opening Br. at 19-20 (Transaction eliminated dual-class equity structure that had given minority stockholders the right to elect two directors to the Board).

[22] DOB at 10.

[23] POB at 15. See, also, Handelsman Dep. Tr. 111:1-11 ("Q: 4.3 billion enterprise value, 3.147 billion equity value, maybe there were slight differences between, you know, things, but that was basically the same numbers that they [Grupo] had been proposing all along, correct? A. Substantially so.").

facts amount to "happenstance,"[24] this bald assertion by Defendants' lawyers defies both the evidence and common sense.

> Claim: Grupo Mexico's initial proposal would have resulted in the issuance of approximately 72 million shares of SPCC stock based on a floating exchange ratio, whereas the transaction that the Special Committee recommended in October 2004 resulted in the issuance of 67.2 million shares on the basis of a fixed exchange ratio.[25]

The Record: Grupo's first "proper term sheet" contemplated the issuance of a number of Southern shares based on a trailing 20-day average closing price.[26] Had the Special Committee accepted this proposal, Southern would have issued 52.7 million shares in the Transaction.[27] In fact, had the Special Committee accepted ***any*** of Grupo's floating exchange proposals, the Company would have avoided paying an additional $600 million in value between the merger agreement and closing of the Transaction.

> Claim: the Special Committee negotiated a fixed exchange ratio months before the transaction closed, so the Special Committee (and Grupo Mexico) had no way of knowing that the market value of the shares issued would be $3.1 billion.[28]

The Record: Each demand by Grupo equated to $3.1 billion, both before and after the switch from floating to fixed exchange ratio. Grupo's agreeing to use a fixed exchange ratio did not alter Grupo's demand for $3.1 billion in Southern shares.[29] Again, a Grupo witness could have testified that Grupo was not solely focused on the market value of the shares it received, but for their lawyers instead to pretend that the share value randomly landed on $3.1 billion on

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[24] DOB at 10.

[25] DOB at 10.

[26] Trial Tr. 27:15-21 (Palomino – Direct) (discussing May 7, 2004 term sheet); JX 156.

[27] POB at 15-16.

[28] DOB at 10.

[29] See POB at 27-28.

October 21, 2004 is ridiculous. In fact, Southern and the Special Committee expected the value to be ***higher*** than $3.1 billion,[30] and of course, Grupo always had the right to vote against the Transaction if the market proved them wrong.[31]

4. False: The Market Reacted Positively To The Transaction

Defendants grasp at straws by repeating their false rendition of the market's reaction to the Transaction. Once again, Defendants do not let the facts get in the way of a good story.[32]

> Claim: after the Proxy was released on February 25, 2005 – the first time SPCC and Minera's financials were presented together – SPCC's stock price increased.[33]

The Record: Defendants' statement was false when first made, and is still false. The market was capable of compiling pro forma financials on October 21, 2004[34] and November 22, 2004.[35] Southern's stock declined following both dates.[36]

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In sum, Defendants' tale of how fabulous a job the Special Committee did in "negotiating at arm's length" with Grupo fails. Defendants' story is entirely unsupported by the

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[30] Handelsman Dep. Tr. 100:24-101:1; Trial Tr. 312:22-313:4 (Jacob - Cross).

[31] POB at 20-21.

[32] Defendants' persistence on this point, see, e.g., DPTOB at 36, is not proof.

[33] DOB at 21.

[34] Minera's financial results had been publicly filed with the SEC since 2002. Pl.'s Pre-Trial Answering Br. at 12 & n.56.

[35] The Preliminary Proxy filed with the SEC on November 22, 2004 and Southern's November road-show materials both included the same pro forma financials for Southern and Minera that Defendants claim were first presented on February 25, 2005. Pls. Pre-Trial Opening Br. at 25-28.

[36] JX 18.

record. The Special Committee had more than a billion dollars of leverage and failed to use it.[37] The record does not prove fair process and does not warrant a burden shift.

B. Plaintiff Has Proven That Minera Was Not Worth What Southern Paid[38]

While Plaintiff is criticized for his "talismanic reliance on SPCC's stock price," Southern stock was the "specie being used in the merger,"[39] and its value was thus what Southern paid in the Transaction. By contrast, Defendants repeat "relative valuation" as if it wards off evil spirits, but have totally failed to explain why $3.1 billion was a fair price for Southern to pay for Minera, or how a relative DCF valuation could have fairly been relied upon as an ***exclusive*** methodology for evaluating this conflicted transaction. No Grupo witness or Goldman witness was called to

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[37] In re Loral Space and Commc'n, Inc., 2008 WL 4293781, at *25 (Del. Ch.) (discussing failure of special committee to negotiate with controlling stockholder).

[38] Defendants' belated post-trial proffer of "evidence" also does not prove the Transaction price was fair. Defendants submit (1) a chart of the stock movements of "comparable" companies from October 21, 2004 to the present, and (2) two examples of public company mergers that relied in part on relative valuation, ostensibly to prove that the Transaction was fair. DOB at 20-22. First, Defendants' chart demonstrates only that Southern's stock did not outperform its competitors from October 21, 2004 through April 1, 2005, and later outperformed the comparable companies after Mintec certified a 83% expansion to Southern's reserves. Second, Defendants' evidence that a relative DCF analysis is not "unusual in current transactions" is not only hearsay, but entirely distinguishable.

Defendants reliance on In re Gen. Motors (Hughes) S'holder Litig., 897 A.2d 162 (Del. 2006) as authority for this Court to take judicial notice of their untimely proffer of SEC filings is misguided. Defendants are not offering the SEC filings as evidence of what has been disclosed to stockholders. Defendants are offering the SEC filings as evidence as to the sufficiency of the scope of advice received by the Special Committee and to support their claim that a relative DCF valuation is not "unusual in current transactions." DOB at 17, n.68.

Regardless, the SEC filings provide no support that boards rely on DCFs that value their companies at a fraction of their market capitalization or ride solo on the wings of relative valuation. In the United/Continental transaction, Continental was the target company. Continental's shares are valued at $22.68 per share, see UAL Corporation, Registration/Proxy Statement (Form S-4), at 2 (June 25, 2010), the mid-point of the DCF range of value for the company ($16 to $28 per share). Id. at 70. In the Northeast Utilities/NStar transaction, NStar's financial advisors used numerous analyses—including comparable companies and precedent transactions—to zero in on an exchange ratio, see Northeast Utilities, Registration/Proxy Statement (Form S-4), at 72-78 (Nov. 22, 2010), which Goldman and the Special Committee did not do here.

[39] Trial Tr. at 176:9 (Handelsman – Direct).

answer either of these questions, and under generally accepted valuation principles, the price paid was unfair.

The supposed "two conclusions"[40] of the Special Committee fail to prove that Minera was worth the price Southern paid. First, that Minera may be worth more as part of a NYSE company than a Mexican conglomerate does not prove that the price Southern paid for Minera was fair. According to Goldman's Illustrative Look-Through Analysis of GM, Minera's equity value was no more than $912 million.[41] Southern paid $3.7 billion for Minera, a value that implied a premium to Southern's own trading EBITDA multiple.[42] There is nothing in the record that proves (or even discusses) that migrating Minera to a NYSE company would unlock $2.788 billion of value. Regardless, by valuing Minera at an even higher multiple than Southern was trading, Grupo received more than the entirety of whatever value was "untapped" through "multiple migration."[43]

Second, there is nothing in the record to support a conclusion that Southern was trading at a huge premium to its DCF value. Even in the material cobbled together by UBS from unknown sources, Phelps Dodge and Antofagasta were only trading marginally above net asset value.[44] A properly-functioning Special Committee would have more reasonably concluded that Southern's DCF model was flawed, particularly considering that: (i) Southern's data came from Grupo[45]; (ii) the production plans and projections were based on (a) life-of-mine plans that had not been

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[40] DOB at 15-16 ("Minera Was Worth More As Part Of A Public Company" and "SPCC Was Trading Based On A Long-Term Copper Price Higher Than $0.90/Pound").

[41] JX 103 at SP COMM 006889.

[42] See Pl.'s Pre-Trial Opening Br. at 35-37 (6.3x to 6.5x 2005E EBITDA v. 5.5x 2005E EBITDA).

[43] POB at 18-19; see also Ruiz Dep. at 51:24-52:7.

[44] POB at 12; JX 103 at SP COMM 006945.

[45] POB at 17.

reassessed since 1998 and 1999,[46] and (b) the same reserves reported by Southern in its 2003 10-K[47]; (iii) A&S advised that Southern's mine plans could be optimized,[48] but they were not; (iv) Southern beat its 2004 projected EBITDA by 37% and its 2005 projections by 135% while Minera's projected performance for 2004 was dead-on;[49] and (v) the market also expected Southern to out-perform management (Grupo) forecasts.[50]

Mr. Beaulne's multiples analysis proves Minera was not worth the price Southern paid. Even if a 30% control premium were applied to Mr. Beaulne's multiples analysis[51] (a premium that defendants offer no expert testimony, nor any evidence at all, to support[52]), the implied equity value is still far below the price Southern paid for Minera. For October 21, 2004, the implied equity value would be $2.3 billion[53] and for April 1, 2005, the implied equity value for

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[46] POB at 7.

[47] POB at 7, n.28.

[48] JX 75 at SP COMM 006957.

[49] Compare JX 106 at SP COMM 004926 with JX 20.

[50] Pl.'s Pretrial Opening Br. at 16-17.

[51] See DOB at 27.

[52] Contrary to Defendants' claim, Mr. Beaulne's multiples analysis is not improper just because he did not apply a control premium. See, e.g., Shannon P. Pratt, et al., Valuing a Business at 357 (4th ed.) ("Valuation analysts who use the guideline public-company valuation method and then automatically tack on a percentage 'control premium' . . . had better reconsider their methodology."); id. at 359 ("Each company that an analyst is valuing must be carefully analyzed to estimate the amount of an appropriate control premium, or even whether any premium is warranted at all. The actual answer may well be a discount from what we commonly call the "public traded equivalent value.'"). Mr. Beaulne considered a control premium and concluded that applying a control premium here was inappropriate. Trial Tr. 402:8-18 (Beaulne – Cross).

[53] (Enterprise value ($2.831 billion) less debt ($1 billion)) x (1.3) = $2.381 billion. JX 47 at 41.

Minera would be $2.9 billion.[54] Thus, even if an unsubstantiated control premium as large as 30% were applied, Southern still overpaid for Minera by at least $700 million.[55]

In sum, Defendants have not proven that the Transaction was entirely fair.[56]

CONCLUSION

For the foregoing reasons, judgment should be entered in Plaintiff's favor.

PRICKETT, JONES & ELLIOTT, P.A.

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[54] (Enterprise value ($3.253 billion) less debt ($1 billion)) x (1.3) = $2.929 billion. JX 47 at 41.

[55] Defendants wrongly apply a control premium to Minera's enterprise value rather than its equity value. DOB at 27; see also id. at 10-11 ("All this reflects is that, look at in terms of assets in the ground and the costs to extract and sell them, ***Minera's enterprise value*** was equal to or greater than SPCC's.") (emphasis added).

[56] Defendants continue their "attack the plaintiff" argument but offer no evidence to show "a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders." Emerald Partners v. Berlin, 564 A.2d 670, 674 (Del. Ch. 1989). Defendants did not even call Plaintiff as a trial witness. Defendants make-weight claim that account statements were withheld is also baseless. As this Court is well aware, under Rule 26(e) "[a] party who has responded to a request for discovery with a response that is complete when made is under no duty to supplement the response to include information thereafter acquired, except" in circumstances set forth in Rule 26(e)(1)-(3). None of those circumstances arose until defendants made a supplemental request (Rule 26(e)(3)) on June 16, 2011. Notwithstanding the fact that the defendants request did not afford plaintiff the 30 days allowed to respond to document requests under Rule 34 before trial, Plaintiff made a complete response to Defendants' untimely request on June 22, 2011. There is no basis for the Court to conclude Plaintiff does not satisfy the continuous ownership requirement.

CERTIFICATE OF SERVICE

I, Marcus E. Montejo, do hereby certify on this 8th day of July, 2011, that I caused a copy of Plaintiff's Post-Trial Answering Brief to be served via eFiling through LexisNexis File and Serve to counsel for the parties as follows:

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWAR

IN RE SOUTHERN PERU COPPER CORPORATION : Consolidated

SHAREHOLDER DERIVATIVE LITIGATION : Civil Action
: No. 961-VCS

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, July 12, 2011
10:02 a.m.

- - -

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

- - -

POST-TRIAL ARGUMENT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
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THE COURT: Good morning, everyone.

MR. BROWN: Good morning, Chancellor.

MR. STONE: Good morning, Chancellor.

MR. BROWN: Good morning, Your Honor. I am kind of assuming we are dispensing with the introductions, since we have been through this.

THE COURT: Sure, unless someone has had an identity change or, you know, feels --

MR. BROWN: Your Honor, this is the time set by the Court for the post-trial argument in this case following trial and pretrial and post-trial briefing. We are now ready to have our final argument and get the decision.

I will just sort of get right into it, Your Honor. Obviously, it is an entire fairness case. The issues are price and process. With respect, you know, price always does seem to be a big issue in these type of cases, and I do think here there is a preliminary question, issue. Whether it is a legal issue, an expert issue or factual issue, I am not entirely sure. But, I mean, to me the real question, the starting point is how do you evaluate whether a transaction like the one at issue here is economically fair.

And so what is the transaction? I mean, the transaction is a large New York Stock Exchange company issuing shares of its common stock to its controlling shareholder to acquire a business owned by the controlling shareholder. And so how do you determine whether that was a fair deal?

And there is sort of three methodologies that are argued or floating around. One is ours, which I consider to be sort of the obvious way. And it was the way Grupo was approaching it through its presentation of the transaction, which is you take the value of the shares. They are New York Stock Exchange shares. Their value on the valuation date that the defendants want to use about when the transaction was approved in late October of 2004 was $3.1 billion. And you compare that to the value, applying generally accepted valuation techniques, of the company to be acquired. And so our expert did that, and you come up with a fairly big disparity.

The value, you know, under a discounted cash flow valuation and a comparable company valuation of Minera Mexico, they are coming in, you know, no more than 2 billion, and that doesn't equal $3.1 billion worth of stock. And so, you know,

that's how it was done in Associated Imports. And we think that is the appropriate approach to --

THE COURT: Yes. Your expert, though, blinded himself to an application of his valuation methodology to Southern Peru itself; correct?

MR. BROWN: No. And "blinded" is kind of a pejorative term, so that's -- I mean, he did not do, obviously, a discounted cash flow valuation of Southern Peru. That is correct.

THE COURT: You know, what would you call -- I used it as a verb because it seemed to be what he intentionally did to himself. And so, I mean, if you want to call it pejorative or not, he seems to have -- for example, what was his explanation, if any, for the reason that Southern Peru's stock was trading at the level it was?

MR. BROWN: The reason it was trading at the level it was? I am not sure there is a reason. That is the market price.

THE COURT: Well, you see, no. These things matter because there was a market price for one company; right?

MR. BROWN: Correct.

THE COURT: One of the things we got

clarity about, this is not a situation where your friends are contending that Southern Peru is overvalued in the market; right?

MR. BROWN: In fact, Mr. Handelsman testified it is undervalued.

THE COURT: Right. So what I am saying is they are not disputing that the shares that were paid to Grupo Mexico were not worth, you know, essentially taking whatever the trading price was times the number of shares. That's not something I need to -- my mind is easily confused, but I get to start with that level of I don't need to worry about that.

The problem is you have got to look at what you are buying on the other side of this; right?

MR. BROWN: Exactly.

THE COURT: And what you say is, oh, it doesn't matter why Southern Peru's stock was worth $3 billion. It doesn't matter; that even if you apply in some consistent way your own expert's approach to the DCF model and applied it to Southern Peru and it would suggest a market -- a value for Southern Peru materially less than the market price, that has no bearing on the fairness of this transaction. And

that's where I am not sure you have got me.

And where I am also -- I want to hear what you have to say about this. For you then to write in your briefs things like the reason why what your friends did and what the committee did can't be considered is because really Southern Peru should have had its cash flows updated, there should have been all this other sorts of stuff, you brought in, you know, someone you believe to be a qualified valuation expert, and he said not one, as I recall it, not one helpful word about that subject matter. You know, you don't address whether some of those factors were considered in the market.

And I am just trying to figure out, is it just this is some sort of, I guess, law school moot court or -- you know, and they have some of the willful blindness kind of issue on their side a little bit, too. But, you know, your expert here didn't apply his methodology to both sides of the transaction.

MR. BROWN: Well, and his testimony was that in the financial community that's not what you would do, because from Southern Peru's perspective, regardless of why the market is attaching

that value to their shares, they are. You know, if this was a cash transaction, we would be just valuing Southern Peru. But the currency, because the currency is not cash, it is stock, you don't do a different analysis --

THE COURT: Well, that's again -- what is his name? Beaulne?

MR. BROWN: Beaulne.

THE COURT: Beaulne.

MR. BROWN: B-O-N-E is how you pronounce it.

THE COURT: I am not really sure that is expert testimony that this is the way the market does it, because again, it is a listed-company acquisition of a nonlisted company. So I am not applauding -- I mean, I have serious questions about things I am going to ask of Mr. Stone.

And it is an odd transaction, and I am in no way, you know, naive to the powerful self-interest involved. But the idea of symmetrically looking at common factors that affect the valuation of each company and making sure that you have equalized them doesn't seem to be something that Warren Buffett would probably blind himself to. Mr. Beaulne might,

and appears to have intentionally done so, and I don't really get that.

MR. BROWN: But can I ask --

THE COURT: For example, the comparable companies. If you apply the comparable company multiple that you applied to Southern Peru -- I mean, that you applied to Minera Mexico, did you apply that to Southern Peru itself? Or was that one of the multiples you used?

MR. BROWN: That's one of the comps.

THE COURT: Where was that level of -- where was that at?

MR. BROWN: 1.8 billion.

THE COURT: For Minera?

MR. BROWN: The comparable company valuation, you know, there is four pure-play copper companies, and they were -- the proxy statement admits they are comparable. I mean, the defendants are sort of really trying to say they are not really comparable, but it says in the proxy they are comparable.

THE COURT: Right.

MR. BROWN: And so the multiples they trade at, the EBITDA multiples were in a pretty tight

range. And so it wasn't -- that's not a complicated analysis. I mean, you apply that to Minera Mexico and you don't get, you know -- and one of the criticisms was, well, you should have -- those are minority multiples. You need to add 20 percent. I mean, even if you do that, it is still far off.

There were two valuations done of Minera Mexico. Our expert's position was the approach, the appropriate approach is even if you did a discounted cash flow valuation or some other valuation of Southern Peru and it was way below the market price, that wouldn't matter in the analysis because the value to Southern Peru of its stock is its market price. The value to Grupo of getting that stock is its measurable value. And so when you are analyzing whether it is fair to Grupo, I mean, you look at what they are getting.

And why, you know, the market is valuing it at that honestly doesn't really matter, except -- now, I understand the point that where -- I think one of the arguments that is kind of floating out there is, well, if you did a discounted cash flow valuation of Southern Peru and it turns out it is nowhere even close to the market price even

manipulating it the best you can, then that somehow shows that Minera Mexico must be worth more than its discounted cash flow valuation, too. I mean, I think that's where this is headed; right?

THE COURT: No, no. I think part of the issue that we heard from your friends on the other side, their witnesses, was this: This was a good space to be in. The underlying metal at issue seemed to be one that humans were going to demand more of; that Minera Mexico had a lot of potential to extract that, and that if you looked at both companies on similar metrics, they had a lot of similar valuation things, and that they weren't focused -- what they were focused on was was this going to be a good deal for Southern Peru from this following perspective: Can we capitalize -- can we make money by bringing Minera Mexico in and capitalize on these growing markets?

And you are right. One of the oddments of this is they sat around and did things with a 90-cent -- right? -- copper price.

MR. BROWN: Long-term copper price assumptions that the company used and that were used in the --

THE COURT: Right. Which turns into a bizarre analysis, because if I understand, what you are saying is if you kind of untangle the analysis -- right?

MR. BROWN: Yes.

THE COURT: -- what Goldman Sachs opined was fair was paying $3.1 billion for something worth 2 billion; right?

MR. BROWN: It is --

THE COURT: Because what it is is what they said was -- I mean, another way of saying it is they should have also bargained, frankly, for them to have to suffer some of their discount in the negotiations because they hadn't proven that they would get the same market multiple as Southern Peru; right?

MR. BROWN: Yes. I mean, there is about 15 points in the things you said that I --

THE COURT: Yes. I want to hear your take on it. But I also need you to take on what they say they did in a sophisticated way. And Mr. Beaulne just saying that no one would ever look at it this way, that's a very confident position. I hope he cites, you know, a lot of bigtime investors for it.

But it is not necessarily the most deeply engaging refutation of what they did.

MR. BROWN: Well, it is -- but wouldn't you agree, Your Honor, it is the obvious approach? It is the approach that Goldman took at first. You know, we are a big company. We have got these shares. They are worth 3.1 billion. That's what they are asking for. Grupo is asking for the shares to be valued at the market price. They want 3.1 billion. They have come to us with a sort of weird terminology, I think, saying and we are giving you -- essentially we are delivering a company with an equity value of 3.1 billion. That's our valuation of what we are giving you.

And so to analyze it that way, it doesn't seem unfair to Grupo. That's how they were presenting it. And so, you know, Goldman applied generally accepted valuation techniques or tried to, and they didn't come up with a value -- and they had A&S come in because, you know, Grupo was in sale mode. They had gotten Mintec to come in and do updated certifications of the mines, and, you know, they came up with their aggressive projections. They are sellers. And the committee got A&S to come in and

said some of this stuff is just indefensible, so we have to make some corrections to it. But the valuation you get if you value Minera Mexico is not close to 3.1 billion. That's just -- I don't think -- there is no one here --

THE COURT: If, if you used a 1.30 copper price, was it?

MR. BROWN: No. Now, let me explain that. And that's a big issue in this case. And I think it is important to understand, like, how it slots into the arguments as they sequence.

THE COURT: Okay.

MR. BROWN: And so, you know, our argument is -- you understand our argument. You know, this is the appropriate approach --

THE COURT: Right.

MR. BROWN: -- to assessing whether it is fair. They have done -- now, Grupo, it is odd, because this is a case against Grupo. The committee is out. They are not the defendants here. But Grupo didn't come, and there was no Grupo witness saying --

THE COURT: You find that odd?

MR. BROWN: I do. They were the ones that put out a proposal, Your Honor --

THE COURT: Well, you could have called them, I guess; right? Or, I mean, these are the defendants. The defendants are obviously going to put on the people that they viewed most central, and they are going to make the argument the special committee had bargaining power and tell the committee story. I don't know that it is anything odd other than that.

If you want to put the evil controller on, that's probably more your case.

MR. BROWN: But if you are the defendant in an entire fairness case and you either might have the burden or have the burden and you offered up a $3.1 billion valuation, that's the position you took, wouldn't you want to come and say, "Well, here is how we came up with that and it is reasonable, and that's what we are arguing"?

They didn't do that. They dropped the argument they were making during the negotiations and they now switched to what the special committee's advisors were doing. So to me that's a little odd.

So in response to our argument, Grupo comes in with an expert witness that essentially has done something very similar to what Goldman did, which

is do -- he only did a discounted cash flow valuation. He didn't do any other methodologies to check them, which is also flawed, I think, as he admitted at trial, that, you know, normally you would want to do other -- apply some other methodologies as checks. But he did, you know, a discounted cash flow valuation of Minera, came up with a value that was less than -- actually less than our expert did, and he did a discounted cash flow valuation of Southern Peru.

Now, the critical assumption to make that work is that changes in the price of copper affect both companies equally, and that is just not true. The one tagline they have left off is changes in the prices of copper affect both companies equally or benefit Southern because Grupo's value changes more, assuming you hold production constant.

And the big -- there is all this talk of reserves, reserves, reserves. Reserves are inextricably related to your long-term copper price assumption.

THE COURT: Because -- and this is what we talked about at trial. This is because the higher the price is, the more things that might not be characterized as reserves at a lower price, the more

they become reserves, and the more economically viable it is to actually go out to them and extract them.

MR. BROWN: And it is not more economically -- the definition of reserves -- and there was a lot of trial testimony about this -- is copper that can be extracted from the ground at a profit. So the company is required to make its best, you know, long-term copper price assumption and disclose what its copper reserves are under that price. And actually, you know, the rules were changing as to what copper price assumptions and what other alternative scenarios they are required to disclose in their SEC filings --

THE COURT: And part of this you are making here. This is both the process and a price point, isn't it?

MR. BROWN: Yes, yes. Let me just say --

THE COURT: I mean, I take it what you are saying about your friends is they want to have it both ways a little bit, which is they did these metrics at the time that they did them and it doesn't yield anything close to the market price of Southern Peru. What they say, though, is, well, what you have

got to really do is pump in other metrics.

But what we can't recreate in time is when they were creating these metrics, that on the things like updated reserve estimates, all those sorts of things, they intensely focused on the Minera Mexico side of the equation -- I mean on the Minera Mexico side of the equation to get those things updated, with an incentive on the part of Grupo Mexico to make Minera's picture as profitable -- but what they didn't do is do the same analysis on Southern Peru and say if we are going to really look at these metrics and apply them in a way and this is going to be what drives our process, then let's genuinely do it equally on each side of the equation.

MR. BROWN: Right. And really, again, I would like to put all these different arguments in what I think is the sequence that it takes to really, at least for me, to understand them. But that point goes to -- you know, when they say, well, you know, the DCF of Southern Copper is less than the market price, well, there is one obvious reason it could be less: That the projections are conservative. And the evidence actually showed it, Your Honor, because in 2004 Southern blew away their projections. They

couldn't even project one year. Minera was basically spot on.

So, you know, the reality is there is a reason to believe --

THE COURT: Can I look at that? I mean, I am tempted to actually make you all write me a five-page letter on temporal blinders.

MR. BROWN: This was done before the closing.

THE COURT: Okay. Because each of your briefs have some stuff that peeks into the future.

MR. BROWN: And that's a whole 'nother issue, and we will talk about that. But there is kind of a weird issue here, because the defendants have argued that the valuation date should be October 21, but the closing was April 1, so I think things -- honestly, I think things that happened that were knowable on April 1 kind of ought to be fair game. I mean, that was before the deal closed.

Mr. Handelsman testified that he went back to Goldman and asked them to tell him it was fair. That's a whole 'nother issue.

But back to the 90-cent issue; okay?

The critical assumption for this so-called relative valuation analysis to work is that copper prices affect both companies equally. And, I mean, we have explained, I tried to explain, reserves are not just some scan of what is in the ground and so we know what is there. It is an analysis of what is there and how much it cost to get it out --

THE COURT: Right.

MR. BROWN: -- and what we expect to be able to sell it for, you know, into -- for the life of the mine and --

THE COURT: And so it matches up in a way. That in some ways becomes your projections, assuming a certain estimate of long-term copper price.

MR. BROWN: Right. So -- because the projections are built on some long-term copper price assumption. I mean, in the projections --

THE COURT: And investment banks we know have all these things, certainly Goldman Sachs did, where they could do sensitivity analysis when they have an updated thing --

MR. BROWN: But here --

THE COURT: -- where they could take -- as I take it, the moving parts would be here

is the potential different quality; right? In oil, they have different levels of, you know, proven, probable, all this kind of stuff. I take it this is slightly different. But I am assuming you could, when you did the necessary work on it, you can match up -- you can take Minera Mexico, you can take Southern Peru, you can look at their reserves on an updated basis, sort of the quality of the things, and then you can apply a sensitivity analysis of different assumptions about copper pricing -- right? -- to come up with your projections.

MR. BROWN: It is a little more complicated, because if you change -- but let me explain. I wanted to get my point out.

THE COURT: Okay.

MR. BROWN: It is a little more complicated because you have to change a production plan. And so the investment bankers can't just -- like Mr. Beaulne testified, "I can't just change a production plan."

THE COURT: Because what you are saying --

MR. BROWN: Here is what happens. At 90 cents, the reserves are disclosed. That's the

copper in the ground they can take out at a profit. For Minera Mexico it was about 20 million tons. For Southern Peru it was about 13 million tons. Those were the reserves, and that's at the 90-cent level that the company uses for its long-term planning. It is disclosed in the proxy, and, you know, those are the reserves.

If you say, well, what if we plug in $1.30, well, if you plug in a $1.30 long-term copper price assumption, the reserve profile changes. And it was in our brief, but the defendants helpfully put it in an exhibit to their post-trial answering brief. It is the very, very last page.

But the relative reserves change dramatically. And if you assume -- here it is $1.26 because that is what was disclosed in the SEC filings. They are required to do a 20 percent -- show 20 percent up and down off the base number in the SEC filings, which they did. And reserves go for Southern Peru from 13 million tons to 28.3 million tons, for -- and this is in 2005, and for Minera Mexico, 20 to 29. So it goes from, you know, Minera having a lot more reserves -- and again, this means copper you can take out of the ground at a profit -- to being the same.

The relative values, if you change your long-term copper price assumption, cannot stay the same. I mean, their expert testified that, you know, valuing a copper company, it is about the reserves. That's what they have. So you -- and what they are saying is, well, but we are assuming you don't change the production plan. But that is, I have to say -- I mean, I hate to use my own perjorative words, but it is kind of ridiculous, because if you are a business --

THE COURT: Right.

MR. BROWN: -- and you went from 13 million tons of copper you can take out of the ground at a profit to more than double that, you wouldn't take it out or change your plan at all?

And so -- and Minera went up, too, but by a much smaller percentage.

So the whole relative valuation analysis has a gigantic factual flaw, which is -- and I think it is critical to understanding the case.

THE COURT: What we don't know is, you know -- and this is where your guy Mr. Beaulne getting into the game a little bit would have been somewhat helpful to me -- is are there industry metrics or

other things that -- you know, what you say here is if you use this -- you know, there is actually a bigger Minera is what you are saying in the first year of this chart; right? Southern Peru reserves go up at a much higher clip than Minera Mexico's; right?

MR. BROWN: Well, that's what they are arguing. They are saying -- I mean, here is where it fits in. The other years --

THE COURT: Is that what they are saying?

MR. BROWN: No.

THE COURT: I think that's your argument.

MR. BROWN: They said we will just use $1.30.

THE COURT: What I am saying is that's your best -- that year is actually good for you, as I understand.

MR. BROWN: But I don't know where the other -- honestly, I don't know where the other numbers came from, and I don't think they were -- they weren't disclosed or knowable on the valuation date.

THE COURT: No. No. I mean, you do know because there is a note, and they weren't -- I

mean, you may have, again, chosen not to -- you may not have read beyond the 2005, but it basically looks like it is from, you know, their annual --

MR. BROWN: I know, but their point is --

THE COURT: What I am trying to do, and I am trying to understand your argument as it goes along here. And I thought this was something that was helpful to you.

What you are pointing out to me is, okay, you know, the reserves go up a lot; right?

MR. BROWN: In proportion --

THE COURT: Well, let me get my point out so you can -- because I think it relates to exactly what you are saying, but I need your help here to translate it into something if I am going to, you know, make it as something, a criterion in my decision-making.

You are saying here, okay, you have gone up to $1.26 in your assumption about the price of copper. That more than doubles Southern Peru's reserves. What did you do, special committee, to take into account that increased production? And you are saying, as I understand it, you are saying my expert

couldn't come up with that, but they are clearly going to produce a lot more copper because you can do that productively, and this is twice as much in terms of reserves.

Is that -- I mean, I take it that is part of your point; right?

MR. BROWN: Yes.

THE COURT: And what I am asking is, you know, what are the metrics about how much an increase in reserves turns into production. Do you know?

MR. BROWN: No.

THE COURT: Is there an industry knowledge out there or anything? I mean, or is that part of your point, that the committee didn't do that?

MR. BROWN: The committee didn't do it. Their assumption in their model is that is the basis for the whole model, and if that assumption is wrong, the model is not valid, and that is, copper price changes affect both companies equally, and they do -- or they benefit Minera more if you hold production constant, according to them.

But our response to that argument is but you --

THE COURT: But that's why -- that's the whole basis why they become reserves --

MR. BROWN: Yes.

THE COURT: -- is because you can now produce them profitably, and so production is what wouldn't remain constant.

MR. BROWN: Exactly. And so really, we are not -- I didn't -- this was in the sequence of things, you know, we made our argument. They come back with a relative valuation, and then our point about the relative valuation is, well, there is something seriously flawed with this because your DCF value is way off the market price. You have got to -- there has got to be some explanation of that. Anytime a valuation person does a DCF, you know, you at least check it against the market to see what -- see where it stands. And it is way off. And we said it is way off. You haven't checked it against anything. You haven't given any explanation for it.

Our explanation is you are using conservative projections compared to optimized projections for the seller. But their response is, well, you know, the market must be using a $1.30 copper price. That's the explanation. And that's not

correct, because if you change -- and they say, well, if we use $1.30 copper prices in both models, you know, it is still fair. But you can't just make that one change, because a change in your long-term copper price assumption is inextricably related to the calculation of your reserves. So the whole model changes, and it is not valid anymore.

So where this came into the argument, as far as I was concerned, was, you know, in response to their arguments, their expert's point, well, just use $1.30. You can't just use $1.30. There is other reasons, too, why you can't just use $1.30, which is the company wasn't using it. It is all over their SEC filings and the limited SEC filings Minera made that they were using it to assist and it is the analysts' consensus and that is how valuation people do it.

Now, they point out, well, there is, you know, reasons copper prices are higher. Well, that is accounted for in the model. I mean, in the first few years higher prices are used based on different issues. But one big point is what is the long-term copper price to use.

THE COURT: Well, and one of those points is what they might say, though, in terms of

reconciling Southern Peru's market price to the DCF is that in some ways the copper price thing does it for you alone because, you know, in a complex dynamic the market values that. The market does the translation in its head that you are talking about -- right? -- which said at $1.30 their reserves are going up, their production is going up, and that explains why, you know, the market was valuing Southern Peru at what it did. You get my drift.

MR. BROWN: Well, that's just a guess.

THE COURT: Well, it is, but, you see, the things with Mr. Beaulne -- experts, most of the time what they do is a guess, and I have got to deal with someone who chose not to guess on a rather critical part of the case.

MR. BROWN: But I understand that Your Honor thinks that that's critical, but here is why I don't think it is. And this is my best argument.

THE COURT: You know, I am not saying it was critical or not. I am saying it is unhelpful.

MR. BROWN: Because in an entire fairness case -- that's why I get back to the question of how do you decide if it is fair, because really what you are saying is in this transaction we know

what the fiduciary got. They got 3.1 billion. I mean, it is no different from getting cash, honestly. That's my approach.

I mean, I think their whole approach assumes you have to do a different analysis versus cash and stock, and I don't think that's legally defensible.

We know what they got, so whether -- why it is worth that doesn't matter. That's what it is actually worth. That's what it is worth to Southern Copper. I mean, they could do a public offering, generate the 3.1 billion in cash or something around there, maybe more, according to Handelsman. And, you know, so that's what the value of these shares are to the company that is issuing them, and that's what the value is to Grupo, and that's the value -- in fact, they attached --

THE COURT: Again, you are assuming that they looked at it that way, because it is not clear that they looked at it at all like it was, you know -- they are looking at the upside of what they are getting from Minera Mexico; right?

MR. BROWN: I don't think so. I think they did a valuation of Minera Mexico -- I mean, what

Mr. Handelsman testified to I think to me was somewhat remarkable. You know, their initial reaction, I think everybody looking at something like this is, well, they are asking for 3.1 billion in stock at the market price. Let's do a valuation of Minera. It is not coming out anywhere near it, instead of saying let's go back to Minera and argue about this valuation and try to figure out --

THE COURT: Right.

MR. BROWN: -- what is wrong with Minera.

THE COURT: We can only get to 2.2 billion. That's what we will give for you.

MR. BROWN: We will give you 2.2. If you were authorized to make counteroffers -- and two of the committee members thought they weren't.

Let me just ask a hypothetical, Your Honor. If you or me or anyone else was the 55 percent shareholder of Southern Peru and the rest was public, and Grupo, who is now a third party, came to you and made the same proposal, "We would like to sell you Minera Mexico, its mining operations. Now, there is no synergies for you. It is in a totally different part of the world, but it is what you do. And, you

know, we would like to move it out of, you know, the Mexican stock market into the U.S. stock market. And our valuation is 3.1 billion. We will do it if you will issue us $3.1 billion of stock," I mean, is there any thought that you would do a discounted cash flow valuation, try to justify it on the basis that my stock is really only worth half of the market price? No. You would say, "Right. The consideration going out is 3.1 billion. Let's talk about -- let's argue this and negotiate this based on the value of Minera." You apply generally accepted valuation techniques.

Now, there is this one argument that is kind of floating out there that I did want to address a little bit on this point, which is -- and it kinds of relates to your argument -- your questions on the DCF on both sides. I mean, they sort of point out based on one document that is kind of hearsay, but that one of their bankers sort of did an analysis and said, "Well, these copper companies, they are trading at a premium to their DCF, and so that's really what is going on here. There is a DCF, but it is just being valued in the market more than that."

And again, there is two flaws in that. One, you can't just compare unknown DCFs. The one we

know about and that has been scrutinized by the committee and the lawyers and in the litigation is the Minera DCF. And, you know, it was optimized, and it was real aggressive, and they even tried -- it was even stepped back by the committee. So that's the real DCF, you know.

But the fundamental point is that's not a valid valuation methodology. I mean, all they are doing in that argument is a comparable company valuation. But the metric they are using isn't EBITDA. It is, you know, 1.5 times your DCF valuation. And as Mr. Beaulne testified, "And I have never seen in any financial literature or in any case that that's a methodology you use." If you want to value Minera by looking at comparable companies, the metric you use isn't something times the DCF. It is something times its EBITDA.

THE COURT: Plus if you were doing that on that logic, one would hope you would look at the sustainability of something like that. I mean, I remember what was it? Web, Webvan? What was the one that was going to deliver Mars bars to yuppies in Greenwich Village when they had the munchies for whatever reason at 2:00 a.m? I am sure it was trading

at some ginormous multiple to its DCF.

If you were buying a company when you thought the only reason to buy it at that point was to see whether you could take advantage of the bubble for some period of time and then sell it -- right? -- you would actually be kind of suspicious of, you know, being a victim of what you are currently benefiting from, if you get my drift, which is typically you would want to buy something at a discount to its DCF or something like that and not a multiple.

I think, though -- how do you deal with -- what if they were just using the 90 cents as just a conservative leveler to make sure that the assets were kind of equally valuable, but in their mindset they actually believed that the market was a more bullish one, that the value of copper was $1.30, that when you applied that metric, Minera Mexico's value would equal or exceed the value of the currency being used, and that because of the positive direction of the marketplace, putting together these two assets and being able to combine them and take advantage of them in the public marketplace at their valuation is a really good deal.

MR. BROWN: Well, first, that's not

what the committee did. I mean, if you want to say, well -- if you are having an intellectually honest approach to this and acting as if you are a third party, you know, you may say, gee, 90 cents, you know, but it is a complicated analysis. If you just increase the price, the long-term price to $1.30, I mean, you have to change everything in the model, so -- and they didn't do that. And I don't know what it would have come out to be, whether it would be more than 3.1 billion or not. You know, I think you just can't do that. But --

THE COURT: Isn't it the case, though, in terms of Southern Peru, when you look at its own metrics, though, something has to explain the market price? And one of the things that explains the market price is that the market had more bullish expectations for Southern Peru than were reflected in Southern Peru's publicly disclosed reserve plan or projections, and that what the market believed was that, frankly, the demand for copper was going to grow such that the price would get higher, that Southern Peru would benefit from that because its reserves would increase and its production would go up, and that the gap -- you know, you are clinging to the market price as the

evidence of its real value; right?

MR. BROWN: Well, that's -- no.

THE COURT: But wait. You are suggesting -- you are not suggesting that Southern Peru was somehow trading at a discount to intrinsic value. I hate that term. You know, to some sort of measure of --

MR. BROWN: Yes, that's what Mr. Handelsman testified to.

THE COURT: No. But your side of the V and Mr. Beaulne are not pushing that point.

MR. BROWN: Because here is our argument, and it has to do with going back to my initial question or theory, which is how do you analyze it, because this is a transaction where the controlling shareholder got something of a measurable economic value, and so we are trying to decide if that's fair. And so what it is worth and what they are -- that's why I don't think --

THE COURT: But, see, again, I mean, just for future cases, gentlemen -- and I will note for the record that it is all gentlemen -- actually, men. I don't know if they are gentlemen or not. I suppose some of them are rogues or fancy themselves

so.

But it is not the most helpful way to present a case to a court, because, news to you all, I am not on either side of the V. And you have left me in a situation where you are not trying to argue -- you don't embrace -- for example, you do not embrace -- I think you just parodied and believe it is not true -- the multiple to DCF; right?

MR. BROWN: Correct. It is not a valid methodology.

THE COURT: See, you know, everybody can get in little rigid boxes. Here is something. Valuation people are not scientists. The idea that this market necessarily trades on long-term expected cash flows is ridiculous given trading velocities. Cash flows change just by the moment. It trades on the greater fool theory and what people think something is going to sell at in a month.

MR. BROWN: Or some other crazy stuff. I mean, who can explain Internet stocks --

THE COURT: Fine. But there has to be something. And the Internet, people expect the Internet to -- generally demand is going to go up, but they also know generally people get excited about this

in the early stages; that if you can get in early and get in at the right time, you can make a lot of money, and people get excited about that sort of thing, which is why I think there tends to be some evidence out there that markets tend to overvalue things rather than undervalue them.

But you have ultimately got to win not only the case but you have got to have me come in with a remedy, and I have got to measure that remedy. And you don't like -- you don't think Southern Peru was trading at one and a half times its genuine -- its best estimate of future cash flow value; right? You don't think that's right.

MR. BROWN: Correct.

THE COURT: But you also don't embrace the defendants' basic perception that the marketplace seems to have been likely looking at Southern Peru and others believing that there was more demand for copper than was used in the business plans of these companies, perhaps the business plans being conservative, because you want to -- you would rather err on the, you know, low side.

You know, you want to play the Jack Welch technique -- right? -- which is I would rather

always deliver more. You know, for 27 years I have always delivered more than I promised, every quarter -- right? -- which made me -- I wasn't really promising all of what I could probably deliver. I was holding some back so that you would be surprised rather than disappointed -- right? -- every quarter. You know, it is difficult to be so, you know, predictively, you know, delivering wonderful, you know, gains to people.

But I am just trying to figure substantively what is wrong with their argument. I mean, it seems to be right.

And the market also -- one of the great things about the market is it doesn't have to actually think about reserves different from increases in production different from increases in copper prices. What the market does, or people who focus on it, is a $1.30 copper price. That's going to provide a lot more room for companies like Southern Peru to produce more at a profitable level.

You look at the reserves for the same reason. The reserves are measured as an economic thing; right? What is the amount of copper -- what is the copper, you know, ore that is profitable to

produce? So the market is making a general assessment. And what they are saying is if you look at a $1.30 copper price, if you want to focus on a single variable, that alone does an awful lot to explain, you know, the market price of Southern Peru. And if you apply that same metric to Minera Mexico --

MR. BROWN: It is not fair --

THE COURT: Okay.

MR. BROWN: -- because, you know, their expert came in, Your Honor, and he is not -- it is not fair by a lot. It isn't fair by 67 point something million shares. I mean, it is real close to where it is. So a little difference in the relative value and it is not fair, according to their expert.

And so if you change the assumption about copper prices, you have to redo the model. And again, he testified that the model isn't valid unless you are having this same effect. And it doesn't have the same effect.

THE COURT: Now, do I have some version of Gonzales here from you in terms of a remedy, which is were I to conclude that they have the ultimate -- they have the burden of fairness -- and I guess there will be issues about whether we did this

sort of fairness L-I-T-E shifting. We should spend some time on that before you get down in terms of whether you are really mounting some process challenge to the committee or whether you are just saying, frankly, they weren't that wise, because I am not sure that that's -- I don't think -- I am not sure we should talk about it the second way, that you don't get a burden-shift just because you don't think somebody was -- as I said, let's stick to Warren Buffett as opposed to somebody else.

But how do I -- what I mean by Gonzales, as you remember, Chancellor Allen said in Gonzales we get all these men and women in valuation science, they supposedly apply the same thing, and they come in with these ridiculously disparate approaches to valuation. What he just said -- that was in an appraisal context -- "I am just going to pick one. I am going to make a decision about who was more credible in the end, and I am not going to play games with all of it. I am going to pick one over the other." And the Supreme Court said, "You can't do that. You have got to come up with your own estimate of value."

To some extent what you are telling

me, Mr. Brown, is if they were going to do what they did, you had to be -- you know, you had to play it straight. You need to get updated reserve estimates and all that kind of stuff for Southern Peru and do everything that you could on the Southern Peru side of the equation if you are the special committee to make sure that you had accurate and responsibly optimistic in the sense of we are representing the stockholders of Southern Peru, the minority stockholders. We need to be responsibly aggressive about that and make sure that we are at least as responsibly aggressive, if not more so, than the other side of this analysis, and that that was not done.

MR. BROWN: Correct. It was --

THE COURT: Okay. If that is the case, if I were to find, for example, that your rather simplistic thing that doesn't sway me, that they are stuck with their 90 cents and that the real damages here are the difference between the undisputed -- what they now say the undisputed market value of what they gave up -- right? -- and their DCF, as they did it, as you can unpack it from their analysis -- right? -- I mean, isn't that kind of a Gonzales choice? I mean, because you are not giving me anything --

MR. BROWN: No.
THE COURT: -- that is more nuanced.
MR. BROWN: Well, and I know. And because of the -- we shortchanged ourselves on the briefs. You know, we were focusing on liability.
THE COURT: But I am not sure there is anything in the record. Again, this is where Mr. Beaulne and you all decided to really --
MR. BROWN: Go all or nothing?
THE COURT: Yes, and also almost purposely avoid, you know, some of the more interesting gray areas.
MR. BROWN: There was no purposeful intent to avoid it.
THE COURT: Okay.
MR. BROWN: This was -- if it was not -- it turns out to be, you know, a strategy, litigation plan that doesn't work out -- I mean, we make a good-faith effort to sort of figure out how to present our case in the best way we can, and, you know, this is what was done. And --
THE COURT: Sure.
MR. BROWN: -- obviously, you know, in every case, if we had the comments of the Court and we

knew that --

THE COURT: No. I am saying --

MR. BROWN: -- we would do it differently.

THE COURT: But embedded in your own arguments, though, coming out from your own arguments is the obvious question that someone like me would ask, which is, okay, you say that this should have been done on the Southern Peru side of the analysis. Now having held discovery and experts, how would it have affected the analysis if it had been done?

MR. BROWN: But that's the problem for us, because we can't do it. I mean, we can't, you know, change the copper price assumptions and optimize the model and figure out what the different production -- it is just not possible for us to do. You know, nobody other than the company with all their personnel and knowledge could do that.

So what we are pointing out --

THE COURT: No, but you had Mr. Beaulne. For example, the multiples. You are telling me there is no way of using, you know, a multiples analysis looking at different copper prices and how the markets tended to react over time when

copper prices go up or down in terms of what people -- you know, how people view these kind of companies?

MR. BROWN: You are going a little over my head. I mean, I don't know what that analysis would be. I mean --

THE COURT: Well, what I am saying is if you expect -- if you have got companies that are, say, pure-play copper companies, multiples are just an indirect way of -- you know, if you believe in the capital asset pricing model, everybody is supposed to be looking at the companies to see what their production of long-term cash flows will be; right? And then you discount it back to present value.

One way the market does that, the one way you can measure the market's expectation is multiples. The multiples are supposed to embed -- right? -- the optimism you have about future cash flows. So if you have a higher copper price -- right? -- expectation in the marketplace, you might think that the copper companies would be trading at a higher multiple than if you had a more bearish outlook for copper pricing; right?

MR. BROWN: Okay.

THE COURT: Don't you think?

MR. BROWN: Okay.

THE COURT: I mean, does that make sense to you?

MR. BROWN: Well --

THE COURT: And if it does -- what I am trying to yearn for here is, like, this is a case, pretty obviously, where there are vulnerabilities for both sides, but measuring -- and maybe you should feel good that you are up here and the judge is actually inquiring into the things that may get into remedial aspects of the case. Like, obviously, if I don't rule for you, I don't have to get into any of this. But if I do, there is the possibility that, frankly, I am just not as starkly convinced by the other side's recitation as you would like, and that with respect to measuring the level of any unfairness, I am going to look at these sorts of things.

And part of what I am yearning for -- and I don't think it is because the briefs are shorter -- is where in the record do I find anything helpful from your side on this.

MR. BROWN: Well, we have presented the analysis that we think is appropriate. And I hate to fall back on this, but obviously, and we

acknowledge, the Court has broad discretion to fashion any form of relief the Court thinks is appropriate. So you don't have to mix -- you can sort of do anything you want really: If you say, "I think they haven't passed the entire fairness test, but, you know, I am not going to say that they have to give back 26 million shares." You can say that it was -- you know, it was inappropriate to ignore the market price, and so the valuation here, the valuation that was used shouldn't have been, you know, 100 percent, the DCF valuation of Southern Peru. It should have been 5 percent or 10 percent of the market price. And if you use that, you know, the share issuance is off by a little bit or whatever. I mean, it is hard for us to sort of give all different alternatives of what you can do, because you can look at it and say -- essentially come out wherever you want by saying, you know, different things.

And, you know, one fundamental point here is -- and they dispute it, but their relative valuation analysis does not really give any weight to the market price.

By the way, on the $1.30 point, the market believed that, well, it is equally plausible

that the market simply believed that Southern's projections were conservative. I mean, that's why when we are all talking about --

THE COURT: But, see, here is one of the problems I am having with this, which is you are doing a really good job, I mean, of helping someone who is not that complex a thinker about these things kind of understand the relationship between these reserves and future profitability. Where I think we are talking past each other is I am not sure that you are not speaking exactly the same language as, substantive economic language, as your friends, but they have just used a sort of simple metric to explain an interrelated phenomenon, which is, as I understand it, what you say is higher prices equals higher reserves equals a more aggressive production plan; right? So you put those three together. Higher prices increases your reserves, translates into more aggressive production plan, results in, bottom line, higher future expected cash flows.

MR. BROWN: Right. And it changed.

THE COURT: And what your friends say is even if you are right -- and part of the premise of their case is you are right. Their own witnesses said

you are right in this regard, and this may be a shocking insight, but I believe confessed you are right in this. They can't be justifying this on the basis that the price of copper at that time they really believed was 90 cents, I don't think, because then it was a stupid deal.

I mean, one thing that has gotten in my dullard mind for sure, this would be a genuinely dumb deal if you were bearish on copper, because you would have been -- instead of capitalizing on the market multiple you were getting and monetizing it and doing a special dividend, you would have essentially bought into something you knew was overpriced.

MR. BROWN: You are --

THE COURT: But, see, let's isolate this. I am really focusing here for you, I mean, part of it, there are elements of this case that there are a lot of questions asked about the defendants. But if I am going to get to a remedy for you, you know me well enough that it is probably unlikely to be as usefully simplistic for you as you would like. And I might hunger to actually follow up on exactly what you said they should have done, which is a more sophisticated dynamic analysis of the effect of higher

copper prices on the actual future cash flows of the two companies involved. That strikes me as something that, you know, I am going to ask about. It seems to me, frankly, something quite plausible for a banker suggesting a valuation move of the kind they made to have actually insisted upon if they were giving a fairness opinion to a special committee.

Where in the record, though -- say I go with you on that. Then you make -- and your brief does make this argument. I am then supposed to go with you and saying if you do that, that would comparatively turn out better for Southern Peru than what Goldman Sachs did. Where do I find evidence for that in the record that is helpful?

MR. BROWN: Of the quantification of it?

THE COURT: Quantification, the reason. I mean, really, I hunger for --

MR. BROWN: That's why -- there isn't the specific evidence that you are asking for. But let me try to explain where it fits in, because, again, I think the sequence of the arguments is important to understand what is being asserted for what reason.

We have our analysis. They have their relative valuation. We point out that it is flawed. It is so far off from the market, there is something wrong with it. Their response is, well, we could use $1.30, and our response to that is you can only use $1.30, you can only change copper prices in your relative valuation model -- and this is your own theory -- if it affects both companies equally. Now, and we can show that it doesn't. It changed -- the reserves change out of proportion to each other. And so the whole -- the argument is made to take down their analysis.

We were not capable of saying but, you know, if you had done the analysis, I mean, if you really thought $1.30 was the appropriate price to use, you know, here is what you would have come out with. We just were not capable of doing that. And so there isn't any evidence in the record of that. But the point --

THE COURT: Well, are there things -- what I was trying to ask you about the multiples analysis and other things like that is this: Are there things from which I can derive from market evidence general rough judgments about how the

marketplace views the effect of higher, you know, reserves or higher, you know, copper prices on multiples? I doubt the market knows -- the market is stuck with what you have, what you said, which is they don't know exactly what the increased production plans are going to be; right?

And, you know, one of the things we will get into is, you know, there is all kinds of complexity, the difference between mining in Mexico and its political environment and its climate and geography versus mining in Peru versus mining in West Virginia. Markets probably, though, have some, you know, translation, some rough sorts of things. They smooth out things. You know, it is not exactly comparable but pretty close.

And, I mean -- and I will let you sit down, too. What I am saying is I do need, you know -- one of the things I admire about you as a practitioner is you are admirably candid, and you seek an economic objective for your client, which is what you should get if you are entitled to it, because that's what your client wants. I mean, to turn around to your client, Vice Chancellor Strine or now Chancellor Strine -- it is hard for me. As most of you know, the

vice will never come entirely out of me. It is just not something that is likely to happen.

You know, you want to equally get an award that you think compensates your client fairly for the unfairness, and, you know, I am going to need to come up with a remedy for you then. And I don't like to guess. I mean, one of the reasons I don't like about appraisal cases, because it is a lot of guess, and so you know that.

And what I am saying -- when you sit down, you may want -- and I may give you some follow-up in a letter. But this is really kind of a gap that kind of concerns me. And you know they are going to pile into this in a second on you.

MR. BROWN: I know. And honestly, as I am standing here, I am being handed pieces of paper. I really don't know the answer to that --

THE COURT: Okay. That is fine.

MR. BROWN: -- as I am standing here. I mean, we can --

THE COURT: It is tough now doing it without -- do you want to talk a little bit about the process?

MR. BROWN: Let me talk about the

process, Your Honor. And I mentioned something at the beginning, you know, a little bit before, what I consider to be the basic test of process going back to Weinberger, which is have you done something that approximates what would have occurred in an arm's-length transaction, and if you set up a process and did it actually work. You don't just look at the resumes of the committee. You have to look at what they did. I mean, otherwise, in Van Gorkom, there never would have been a liability. They had the longest list of the most qualified people, and, you know, sometimes people make mistakes.

Now, here, so really the question is -- I mean, I think you ought to start off with, well, if I was the owner, would I have done it this way. And clearly, I don't think -- you know, and a third party wouldn't be turning to a valuation, you know, or a methodology that valued its stock at that time less than its market price. They would be focusing on the Minera valuation, which really wasn't done here.

But I think the ultimate test, you know, of the process is let's talk about the facts of what happened. Their main point is they thought they

did a fantastic job. They got a lot of things. And so there is basically five things that they say they got that show that they were an effectively functioning committee, an informed committee. And really, when you go through them -- it is not going to take me all that long, but when you go through them, they didn't get anything of all that great significance. I mean, giving them the benefit of the doubt, even if you consider some of the things they got to have some value, they really don't amount to anything. So this was not a committee that functioned properly, that obtained anything.

And the most important point, obviously, is the price. I mean, this has been mentioned ad nauseum. They asked for 3.1 billion. They got on -- at the time the defendants contend is the valuation date, October 21, they got 3.1 billion.

THE COURT: And so the ask there -- one of the things, you know, what judges always love is the ability of parties to disagree on just virtually anything. And as I understand it, your point is they actually did basically the same or slightly worse than if they had just accepted the initial bid; right?

MR. BROWN: Yes. It is not slightly worse. I mean, actually --

THE COURT: But isn't here what you place an emphasis on is the value, the economic value that Grupo Mexico referred to in its offer; right? Is the difference between you and the defendants that they focus on the indicative number of shares?

MR. BROWN: Yes. And let me try to explain it, because there is a lot of sort of people talking about different numbers.

THE COURT: Right. But just so I -- you are saying -- their ask really was, you know, $3 billion and 50 million. You know, it wasn't even 3.1. It was 3 -- it was a very specific economic number. And that was their ask; right?

MR. BROWN: To be valued at the market price during a window right before closing.

THE COURT: Right.

MR. BROWN: That was the --

THE COURT: And so when you are talking about the difference between if they had just simply signed up that deal; right?

MR. BROWN: Or if they had accepted that pricing term. Obviously, other terms would be

negotiated. But that was the pricing term they were proposing. The methodology determined the number of shares. If it accepted the pricing term, it said we will do that pricing term, and, you know, here is the other things --

THE COURT: And, I mean, this is a very -- I am going to ask Mr. Stone the same thing. You argue that if they had accepted that, that would have been better off -- they would have been better off than if they did the deal they did. Mr. Stone says no, we actually did a lot better than that, because what they asked for was 72.3 million shares, and they ultimately only got 67 million; right?

MR. BROWN: Right.

THE COURT: And what I am saying is the explanation there is he is focused on the 72.3 million indicative figure, and you are focused on the economic number and saying that indicative is indicative of the fact they weren't focused on the number of shares. They were focused on an economic value, and that's really what matters here.

MR. BROWN: Yes. And the 72 million is just 3.1 billion divided by the market price earlier.

THE COURT: Right. And that's why -- exactly.

MR. BROWN: Our point is -- you know, and this requires some explanation. But really, they asked for 3.1 billion in stock and valued at the market at a certain time, and they wanted to do it during a 20-day window before the closing. The committee said from the outset that's a nonstarter. We don't like this fluctuating. It is not really fluctuating. It is just we don't like that date for setting the value because it is far in the future and we don't know how many shares it will be. And so they ultimately agreed to 67 million shares, which is all it is is a difference in timing of when you are valuing them, because 67 million shares at, you know, October 21 or, you know, the price around that time was 3.1 billion. And so, you know, I mean, they didn't change the price.

In fact, our point is if they had accepted that term, which was 3.1 billion valued at the 20-day average above the closing, there would have been 52 million shares issued versus 67. I mean, they cost them 15 million shares by going -- by this change.

Now, you can say, Your Honor, well, just because, you know -- it is not ipso facto. Because in the negotiations they did something that didn't work out, that doesn't mean they did something wrong. I agree. So the real issue is why did they do it and did they have an informed basis for doing it and was it a reasonable decision to want to change this pricing term in this way that worked out to be a disaster on the price. And I know they said, well, there is other things, and I will get to those. But they didn't. From Day One they said it is a nonstarter.

Well, you only are concerned about the so-called floating exchange ratio if you expect the stock price to go down. If it is going to go up, it works to your advantage and you want it. And they brought Raul Jacobs in here, and he testified that the stock price was trending up and we expected it to trend up.

THE COURT: Right. So what you are saying is now there is a little cognitive dissonance there because you are saying the committee is getting this relative valuation analysis, and the copper pricing numbers that they are using are south of a

dollar, but the sell to -- I don't mean that pejoratively, but the sell to me about the rationale for this was copper is going gangbusters.

We are now dealing with the controller. The controller has been pretty rigid about what it says Minera is worth. But we decide to do a floating exchange ratio, which can only --

MR. BROWN: Fixed.

THE COURT: Okay. We do a fixed.

MR. BROWN: It is sort of -- I think the floating versus fixed is kind of a misnomer. It is the date you use to set the number of shares --

THE COURT: Right.

MR. BROWN: -- the date you divide the market price by to figure out the number of shares. But that is our point. It is an inexplicable decision. If you think copper is going gangbusters, obviously --

THE COURT: Well, they are going to make -- aren't they going to make the argument about their way of looking at the world is that -- because they viewed these companies so similar that there really isn't any --

MR. BROWN: Well, but the third party,

what would a third party do, Your Honor? They made a proposal that they wanted to have 3, whatever the number is, 3.1 billion of stock valued at the market.

THE COURT: If this was so junky, if this was such a junky deal -- and this gets back to the merits, because I do want to stay on process and let you finish and ask our good reporter if she wants a five-minute break before we come to Mr. Stone and his stentorian comments.

If the market -- if this was so materially mispriced, why didn't that blunt the stock price momentum for Southern Peru?

MR. BROWN: Well, and because we don't know that it didn't is my answer. Because that's --

THE COURT: I mean, I understand that. And again, I know that you are going to say this is a fairness thing and all. But, you know, it is quite common for the buy side of these type of deals to suffer, you know, a durable diminution in their stock price for some time when they announce this sort of acquisition. Let's go to the late '90's-style CEO love match mergers of equals -- right? -- where they were all -- you know, the relationship could not be torn asunder, all this stuff. You know, they could

each go on "The Bachelor" and they would never be unfaithful to the other, that kind of, you know, late '90's thing. There was typically a market discount.

Here you have got one of these things where you could easily see the market going, "Well, wait a minute. You are buying this from the controller. You know, we are really high on you, and you are just way overpaying."

And what you are saying is we don't know that there wasn't because there wasn't an events study or anything done; right?

MR. BROWN: Right.

THE COURT: You didn't do an events study either; right?

MR. BROWN: Your Honor, it is not possible to do an events study of that nature over a four-month window or longer. You could do it over a day or two. You can't factor out all the other information that is affecting this company other than this transaction over a four-month period.

THE COURT: Well, all we are saying, though, if we had a durably -- you are talking about -- the high end of what you say -- I mean, what is your high ask here from me?

MR. BROWN: Do you mean on the remedy?
THE COURT: Yes.
MR. BROWN: It is they were overpaid by 26 million shares. They should be given back.
THE COURT: Okay. Tell me about that, what that translates into in dollar terms. A billion?
MR. BROWN: It is into the billions, yes.
THE COURT: Yes. So, I mean, it is not the sort of thing where you should say, like, a one-day price drop and a billion-dollar loss in value.
MR. BROWN: Well, let me kind of address this, come at this a different way. Really what you are saying is there is the third methodology to decide whether it is fair, which is it turned out good. Okay? And I think there is two problems with that at least. One is we are not saying that they shouldn't have done this transaction under any circumstance. It was required to be fair. The question is, you know, of the value that was created, was it shared in a fair proportion between Grupo and the minority shareholders.
THE COURT: But what we are saying is, you see, for it to be -- you know, again, we credit

markets with this thinking that they obviously don't do. But they do do some rough thinking.

If you overpaid for Minera Mexico to the tune you are talking about, the deal shouldn't make sense. That if what you are saying is you bought something, you know, at a billion dollars above its expected cash flows, there is still enough difference between zero and a billion to have an effect on a market float of this nature. A half-billion-dollar impact would still be a pretty big drag on a stock price. We don't see any over the period that you are talking about, even putting aside turning out well, turning out good, whatever it is. I don't really know how it turned out, and that's why you guys can send me letters about that.

But I am saying even over the period you are talking about -- right? -- between when they sign up the deal and the announcement, there is very positive stock growth, stock price growth.

MR. BROWN: Twenty percent.

THE COURT: Yes.

MR. BROWN: Twenty percent.

THE COURT: And --

MR. BROWN: And the comps all went up

by 24, 25 percent.

THE COURT: Went up by less.

MR. BROWN: It went up by less during that window, yes. That's correct.

THE COURT: Well, and is that a measure? And what would that translate into?

MR. BROWN: I don't know. We can do that calculation.

THE COURT: No. That's what I am talking about. Because it could obviously have been a drag but not to the billion-dollar level; right?

MR. BROWN: Yes.

THE COURT: And now get back to process. Kahn v. Lynch, burden-shifting lite. The special committee had a lot of process. Obviously, they had some weird things where they had meetings where they did a minimum, but they met a lot of times. They didn't hire your typical advisors, the typical, you know -- I should not say "typical." That's not the right word. Let's just say they hired some fancy type of advisors who tend to, you know, often advise controllers themselves or things like that. They seemed to be pretty smart folks. They made some judgments that you don't believe were wise, but they

had good answers for them, why they did them. They had explanations.

Do you not get a fairness -- do you not get a burden-shift based on a post hoc assessment of effectiveness, or is it really in the first instance is this a credible special committee? Did they have bargaining power? Did they have quality advisors? Did they have the proper motivations? And if they did, you get the burden shift. And you still get the chance to show, frankly, under a favorable -- a preponderance standard, but you still get the substantive chance to get right into fairness.

If I am looking back and in order to determine the burden-shift I am looking into things like fixed versus floating, you know, things about this valuation --

MR. BROWN: Well, I think here is -- first of all, the structure, you are talking about sort of the structure of it versus what they actually did. I mean, they are arguing both. They are saying we had the proper structure and we obtained real benefits, so we actually had a meaningful contribution.

Our argument on the structure is, I

mean, the structure was flawed from the beginning. I mean, they didn't have a resolution setting up a true third-party situation where they were authorized to negotiate and reject the transaction. Like I said, it says "evaluate" in the resolution. Two of the committee members testified that they didn't think they had authority to make counteroffers. I mean, that's not the kind of committee that approximates arm's-length negotiation. And I will tell you --

THE COURT: So you are saying actually the confusion about their mandate is one of the issues about the burden-shift to begin with.

MR. BROWN: And that creates an issue. I mean, that is not a giant point. That is not my main point, but that is that point. There is a fact here that I have never seen, honestly. One of the committee members, one of the four abstained from voting on the transaction that he worked on. I mean, at the end --

THE COURT: No. I get that. I am not sure what to make of that, because you get these skittish members of our profession with skittish members of the investment banking community, and so at this end of the process they say let's just make this

as Ivory Soap as we can by having that person not vote so that it is clear that his vote didn't carry the day, even though you have never excluded him from the process, even though he has been substantively part of the discussions. You know, what does that really do?

MR. BROWN: I don't know, but to me it is bizarre. And that's the --

THE COURT: Is it bizarre or is it just easily explainable by -- lawyers, we get sometimes caught up in things, and so what we do is, you know, we can't disqualify him but let's make sure -- look, there are instructions on this in Sarbanes-Oxley, like excuse the people from the meeting. Some of those things are real. I don't know whether they voted for the deal in his absence. I mean, if you were actually going to worry about something like this, you probably should have an executive session without the person and you should talk about the issue of concern, about whether anybody has any concerns about this, if there is any reason to believe that the process has been tainted by this person's involvement.

Did he leave the room? Do we know?

MR. BROWN: I don't know. He didn't

vote on it.

THE COURT: Right. But was he sitting in the room? Because, I mean, even under the psychological theories under which this stuff matters, having him sit there in the room still doesn't really cleanse the issue, because nobody could talk about the problem that gave rise to the abstention, to the extent it was a problem. But how much of a problem was it?

MR. BROWN: Well, I just think it is another factor.

THE COURT: But was the substance of it a problem? Because --

MR. BROWN: It was because -- here is why. He is the guy that at the same time he is supposedly negotiating, you know, the deal to acquire Minera Mexico, he is negotiating his client's exit from the company. And so that's not a conflict that creates a loyalty issue. Your Honor has already held that. But it is an issue. This is not a clean -- this was not a pristine committee.

You know, there was a guy that has a different agenda, and the extent to which it really conflicts with the minority's goals, I mean, can be

argued about, but there is a difference. And I think I have to get back to -- I don't think you can just not look at what they did.

I mean, on price, our point is they didn't get anything. They lost ground.

THE COURT: No, no. I am looking -- this is on the burden-shift point? I am trying -- you know, sometimes the law makes you do things, and I have got this -- one of my whole issues with Kahn v. Lynch is I have really never quite understood the burden-shift and what all the momentum is about, you know, who gets the win if I land on the -- you know, if I fall off my bike seat onto the bar and I get stuck there, besides it being very painful to be stuck there, if I am stuck there, which way -- if the wind blows, which side of the bike I fall off depends on who wins. I mean, it is a preponderance standard. But our law purports to do this; right?

And, you know, the first thing I am supposed to do in the analysis is determine who has the burden of proof.

MR. BROWN: But I don't think you -- I think, Your Honor, if you can go through the evidence and say the preponderance of the evidence here

indicates unfairness to me, then it doesn't matter if the burden has shifted. Then you can assume it shifted. The preponderance has under either standard, you know --

THE COURT: Yes. Analytically, as a person who grew up as a pretty traditional jurist who believes that standards of review are used to decide cases and not labels, it just always is frustrating for me to just not know. And I think formally speaking, I am supposed to go through this kind of -- they have applied for a burden-shift; right? I believe there has been an application for a --

MR. BROWN: Correct.

THE COURT: -- burden-shift.

MR. BROWN: I mean, my view of it is, honestly, I mean, I kind of -- I think I have a similar approach to Your Honor, which is it doesn't seem all that significant. You know, if you are going to say it is 50-50, you lose, because you had the burden, I mean, I don't think we would have won anyway. You know, in a case where we are seeking this, I mean, you have to be convinced.

THE COURT: I know, and that's why I am really -- I mean, I am taking up your time mostly

for my own purposes, because again, I do have a different role. And I think one of the things about the burden-shift part of Kahn v. Lynch is that nobody really tends to want to spend a whole lot of time on it because the effect of it in the end is so minimal.

But why don't I let you stand down. I think it probably does make sense for everybody to stretch their legs and take a break. Can we come back -- is ten minutes long enough?

(Recess taken.)

MR. STONE: Good morning, Your Honor. Your Honor, I just want to frame, I think, the analysis here, and then I want to go to some of the specific points that Your Honor discussed with Mr. Brown.

First, I really think the plaintiffs both in their briefs and in their presentation today really shied away from, if not ignored, the process part of this test. I think the starting point for this analysis has to be the process, because not only, as Your Honor mentioned in the latter part of Mr. Brown's argument, does it determine who has the burden here, but it also colors the pricing inquiry.

And I think the question here today is

whether we are going to find that four highly qualified independent directors who acted in good faith, who relied on a leading investment advisor to determine fairness, did so in error and whether they, in fact, missed by billions of dollars. And the fact that there really is no discernible motive, there is no evidence in the record that they had any motive other than to get the best price possible I think is key to answering the question about whether this was a fair deal. So I think we need to make sure that we view the evidence through that prism.

There is one point, Your Honor, that I want to address first, because I think it is really a misconception, as I hear it from Your Honor's questions, about what was done with respect to SPCC.

THE COURT: Yes. I mean, that is important, because I do think, you know, we have all been around enough to see things shift in how you look at a valuation analysis, and they always tend to shift in a certain way. Even when there is no discernible motives, there seems to be a tendency to justify the deal. And there are some powerful incentives even for high-quality advisors to come out with a deal. And, you know, so I do want to hear about that, because as

I understand it, it is conceded that, you know, your clients didn't really buy 90 cents as the copper price; right? Correct?

MR. STONE: Well --

THE COURT: That the company was using that -- you know, as I said, there is always kind -- but we always create a certain amount of cognitive dissonance in life. That the company is using 90 cents as its planning metric, that that is a conservative assumption, and that is not the basis on which the deal got done. And if that was the basis of looking at the world, this was a really dumb deal; right?

MR. STONE: No.

THE COURT: No?

MR. STONE: No.

THE COURT: Okay. Then --

MR. STONE: On a relative basis 90 cents works. Ninety cents is fair.

THE COURT: On a relative basis, if I have an overvalued asset and I know it to be overvalued and I can turn it into cash, I would not buy another similar asset and then jack its value up by what I believe to be market foolishness and,

instead of monetizing my good fortune to be holding onto an asset that the market is improvidently valuing, engaging in the same foolishness, unless I thought I could then turn around and sell immediately the combined thing for an even more foolish thing.

So that's why I really don't get the 90-cent story, because it can't cohere with your clients believing that the market price of Southern Peru was real, which means you could have gone out and done a secondary offering of stock and gotten 3 billion bucks. And if you do a deal where you give away 3 billion bucks to get back two, that is stupid; right?

MR. STONE: Right, Your Honor.

THE COURT: And that's why Mr. Handelsman, who is a sharp cookie, who has been hired by really -- he worked for very sharp cookies in Chicago; right?

MR. STONE: Right.

THE COURT: They don't hire -- I don't think the Pritzker family is kind of keeping a fool around for decades. And his sell to me, and again, not being pejorative, but his sell to me was, no, it wasn't 90 cents. This is a bull market for copper.

Minera Mexico is even -- is probably even more undervalued than us. This is a great chance to buy an undervalued, you know, asset that we can bring together with us and take advantage of a great ride in the copper market. That was his sell; right?

And if that's his sell, he is not saying he ever evaluated this deal like 90 cents per share was the right copper price, and it makes sense. I mean, I understand how people can get into --

MR. STONE: No, no. That's correct, Your Honor. You are right. We hoped that, certainly the directors hoped 90 cents would not be the price. I think they believed, as Your Honor said, that demand for copper was increasing.

Our point is that the deal works if you use that 90 cents. But let me get back to the point that I was trying to address on SPCC. So it is not the case that the advisors didn't look at SPCC.

THE COURT: Okay.

MR. STONE: So two things about that. Number one, first of all, Minera was controlled by Grupo. The advisors had to be more skeptical of their projections and their numbers and everything else, and they spent a lot more time on it. No question about

it. They had confidence in people like Raul Jacob, who they dealt with every day, who was in charge of projections for SPCC, so they had a certain level of confidence going in. But certainly --

THE COURT: Grupo Mexico already controlled Southern Peru, though, too.

MR. STONE: They did, indeed. They did.

THE COURT: And Raul Jacob, I mean, again, you are an independent director of a controlled company.

MR. STONE: Right.

THE COURT: That doesn't mean you should be hostile --

MR. STONE: Right.

THE COURT: -- to management.

MR. STONE: But they were separately managed entities. There is no question about that. But the real point is Anderson & Schwab went in and did the same analysis as they did on Minera and they did on SPCC, and I can show you --

THE COURT: Okay. Yes, where in the record is that?

MR. STONE: Okay. This is the

deposition of Thomas Parker, who was the main copper analyst with Anderson & Schwab. And the plaintiffs asked him a number of questions about his due diligence, and they were focusing mostly on the Mintec reports for Minera, and he was talking about the fact that they went through and analyzed those in detail, taking geologic information, ore reserves, designing a pit, looking at the assumptions underlying these things.

And he was asked a question on page 41 of his deposition: "So is it fair to say that your work was focused more on assessing the reliability of the geostatistical program that Mintec was using?

"Answer: I wouldn't characterize it as the reliability of the program. The programs are, you know, they are commercial software. What we were doing, the geostatistical package and hence the ore reserves that drives the mine plan was just one piece of what we were reviewing. In a general sense we were verifying that the assumptions that go into the forward plans for both companies were reasonable and supported by historical data."

And that's just one example of his testimony.

And Goldman Sachs, there is testimony from Mr. Sanchez as well that they did due diligence on SPCC. So it is not as if they didn't do the same level of analysis on SPCC, and I am not sure where that misconception arose.

THE COURT: Well, I mean, you know, obviously, in litigation misconceptions can arise, you know, I mean, obviously, the point of no incentives to share your conceptions of the world or vice versa.

MR. STONE: The only thing --

THE COURT: But what I am saying is were there reports generated on the reserves, the changes in reserves, on the reserve levels at Minera Mexico and other aspects of what is going on at Minera Mexico which were not done at Southern Peru by independent people?

MR. STONE: We don't know the detail, but we only know that they looked at both. And I don't think the record reflects any particular --

THE COURT: What you are saying is the plaintiffs can't stand up with a report in their hand and say, "Look, this is a fully updated report from Minera Mexico done by independent advisors employed by the special committee specifically for that purpose,

and there is no comparable report for Southern Peru itself"?

MR. STONE: That's right. And, in fact, the record reflects that A&S made adjustments to both the projections of Minera and the projections of SPCC, and those were accepted by Goldman and by the special committee. So they certainly looked at both companies.

And one of the things also, Your Honor, I think it is important to understand is -- and this goes back to a question that Your Honor asked our expert on the stand, which I want to make sure Your Honor understands what he was saying. You asked Professor Schwartz whether he had reviewed the projections of SPCC in detail, and he said, "No, I haven't." He relied on A&S. And he had to. And the reason is these studies take six years. I think Your Honor can take judicial notice of what is in the 10-K. It took six years for them to update the reserves at SPCC. They are longitudinal studies. They do drilling programs. They analyze those. They do seismic data. They do lots of geological studies. It takes six years.

Now, I suppose Professor Schwartz

could have done that. He would have needed an army of people to go in and do that to make sure that he in detail had confidence in the projections of either of the companies. But it is just not possible in the time -- I guess we have been at this six years, so maybe if he started at Day One, he could have done it. But it is not as simple as the typical DCF that you do when you look at the projections and you get behind the assumptions. And, I mean, it is not that kind of a company. It is much, much more complicated than that.

And so Professor Schwartz certainly did all the economic analysis, and that's reflected in his report. He looked at those projections. He just didn't get down to the level of detail that he as a mining expert and someone who worked with a mining company for ten years could have done but didn't have the time to do.

THE COURT: But what I am really, I think, focused on is symmetry. And so you are telling me there is really no "there" there when it comes to the plaintiff's assertion that there was this big update of everything that was done at Minera by independent advisors to the special committee and,

frankly, with Grupo Mexico pushing a valuation of Minera that's aggressive and that there was nothing done comparable on the Southern Peru side. This is not the case.

MR. STONE: This is not the case. And there were independent consultants at SPCC working, just as there were at Mintec, on updating reserves.

THE COURT: Were they the same consultants?

MR. STONE: I don't know if it was Mintec that was hired at SPCC as well that --

THE COURT: Who were they under the control of, these people being hired?

MR. STONE: Well, they are paid ultimately by SPCC or by Minera.

THE COURT: So Mintec was working for Minera Mexico.

MR. STONE: Correct. I don't know who the consultant was at SPCC. But the plaintiffs make a big point of the fact that the reserve estimates --

THE COURT: I think what your friends are saying is Grupo Mexico is trying to, you know -- imagine it is a house; right? They have hired the expert to go in and, like, go through and say let's

make the house look as spiffy as we can when we are going to sell it. And they have got people under their control doing that.

What comparable effort is there of the special committee to say, "Well, that's nice that you are doing that, but if we are going to be apples to apples here and we are going to look at everything current, then our currency is even more valuable, because if you look at our reserves, if you look at what we have to offer, we get more valuable under those things, and so you shouldn't be -- you can't justify this ask."

MR. STONE: Right.

THE COURT: That's what I think they are saying.

MR. STONE: That's what they are saying, and I think what they are saying is completely unsupported by the record. In fact, what is in the record is that Anderson & Schwab did due diligence on both companies, and there is no evidence that they did a deeper level of --

THE COURT: And who was Anderson & Schwab working for? The special committee?

MR. STONE: The special committee.

They were independent consultants hired by the special committee.

The other point I wanted to make with regard to that is Your Honor had several questions about, okay, so how do I translate reserves into production. And I think that's an excellent question, but it is a very complicated question. It is not, again -- it is true that, you know, Goldman in their sensitivity analysis did not take into account what would happen at higher copper prices. But again, that is a very, very complicated analysis, and it has to take into account things like capital expenditures and capacity.

I think you heard some testimony, and I forget whether it was from Professor Schwartz or from one of the directors, these companies are capacity-constrained. They can only produce so much copper. So as the reserves go up, they may have lots of reserves that they can tap, but they can only tap so much if it is filling up the capacity in their plant every single day. And the only option then is to build a new plant, which is huge capital expenditures and several years.

So it is not as easy as, you know,

saying that, oh, we are necessarily going to change a production plan, because, in fact, it may not change at all.

THE COURT: Right. It may not. But it might well.

MR. STONE: It might well.

THE COURT: And the definitions of reserves are really set to some sort of economic viability factor; right?

MR. STONE: Correct. They are.

THE COURT: And that's determined a lot by pricing, isn't it?

MR. STONE: It is determined by pricing, but when the price goes up -- for instance, every year when the company has to do its SEC filings, they have to go back to their production people and they have to say, "All right, at this new price that the SEC is requiring us to use, how does that change your production plan?" And it may not change it at all. It depends. It just depends on what the circumstances are.

So you can make assumptions about that, but, you know, what we do have in the record? The only evidence in the record on increase in

reserves I think is Mr. Sanchez in his deposition saying that Minera Mexico increases faster than Southern Peru; the directors, who both testified, Minera Mexico increases faster than Southern Peru; and then we have the 10-Ks, which we have summarized in a chart, that shows that, in fact, Minera Mexico increases faster.

And, Your Honor, just so it is clear, that chart also takes into account the update in reserves on the Southern Peru side as of 2006, which had not yet happened at the Minera Mexico side. So, in fact, without that updated study and if you would -- or alternatively, if you have included Minera Mexico's updated study, which I think came out several years later, you would see that Minera actually increases even faster.

THE COURT: Talk to me about how much -- it is almost a philosophical discussion, but how much of this chart can I consider?

MR. STONE: Well, Your Honor, I think that if this were a point that we were talking about that, for instance, if this were an input into a DCF, I think we would have trouble, based on the current case law, considering it, because it certainly is not

something that was known or knowable as of the time of the valuation.

THE COURT: No. That's right. So we have this where we say, look, the committee has got to justify -- as I understand, your point on this is the following: My clients, I mean -- or you represent somebody else. But the special committee had a way of looking at this, and they have explained what they did based on what they knew at the time.

MR. STONE: Right.

THE COURT: The plaintiffs want to say it caused grievous harm and that the committee had no basis to make any rough judgments about this. Well, so long as the committee has -- if you are just trying to -- if you are trying to sort of get to the point where you say, you know, something unfair was done and the committee has a basis for what it is saying and what it knew at the time, why should the Court blind itself to the fact that, frankly, the way things turned out were consistent with what the committee's assumptions are?

MR. STONE: That's what I am getting to, Your Honor. This is corroborative of the advice that the committee was given by Goldman Sachs and

ultimately of the view that the committee formed. And the fact we had price increases --

THE COURT: But what I am talking about -- and I did this to Mr. Brown, and it is a difference between ultimately our roles and the way it affects you, because there is ultimately an appellate court that looks at these things. Where in the law is this distinction? Because intuitively it makes sense that you say he is not going to give a damage award to someone without considering whether there is any damage.

You know, we wouldn't say like a doctor says, "Here is all the things I took into account," and the patient has another credible side of the story, but then it turns out that the doctor's treatment plan pans out, and, you know -- but where in our law do we get this distinction? Are there cases that make it?

MR. STONE: Well, there are cases certainly, Your Honor, that would hold that for valuation purposes, the valuation analyst in an appraisal action or in entire fairness actions needs to look at what is known or knowable as of the valuation date.

THE COURT: Right.

MR. STONE: And I think that's pretty well established. I do think, however, that if you are going to present post-transaction evidence that is designed not necessarily to an evaluation as it is to corroborate or support other types of evidence, I don't think there is anything wrong with that.

And what we are doing here, even though I understand this has numbers and it is arguably economic, is showing -- and, look, if there had been price increases leading up to the time of the transaction, we may have had some pre-transaction data to make precisely the same point. The problem is that the copper prices were in the doldrums for several years, and we didn't have any recent data that would be indicative of this point, but lo and behold, since this case has taken six or seven years, we had post-transaction data to show the same point. And so, I mean, my view is philosophically that this ought to be accepted and viewed and considered by the Court.

THE COURT: Well, and I get that, and that's a plausible thing. But there is not a case or something that you can cite to for that proposition.

MR. STONE: I think that there are

cases where courts have taken into account post-transaction information. I don't know that there is a case that would precisely articulate a standard that says it is not okay for valuation but that it is okay for other types of things.

THE COURT: Well, how do -- don't I really do have -- don't I have to look at this as if the special committee -- that Mr. Handelsman's story is the story, which is that, you know, Goldman -- that this 90-cent thing was not what anybody believed; that what they believed was when you had the appropriately bullish perspective on the marketplace, Minera Mexico was a good deal to buy.

Why isn't Goldman doing an analysis that actually is based on the underlying premise given by the committee for its actions? Well, because as I understand it, the relative valuation used a 90-cent copper price.

MR. STONE: It used prices between 90 cents and $1.20.

THE COURT: Right. But it yields -- when you, you know, untangle it all, it yields values for Minera Mexico which don't support the deal being particularly apt, being a good deal; right?

MR. STONE: No.

THE COURT: Well, then walk me through why at 90 cents per share -- tell me what Minera Mexico is worth. And I don't want to hear about this relative stuff.

MR. STONE: Okay. I am not going to tell you about relative stuff. I am going to tell you about a DCF analysis of SPCC; okay? So Goldman did one, but they weren't the only ones who did analyses of SPCC. Analysts did them as well. And you know what? Goldman's numbers came out very similar to what the analysts' numbers came out at. And they were about half of the market price. The analysts' numbers were 21 and $20 a share when the stock was trading at 40. That's something that Goldman took a look at. That's something that UBS took a look at. That was shared with the special committee.

THE COURT: Okay. And what I am saying there, you know, because you are an excellent lawyer, and you know a little bit about the business side of things because you have been an excellent business lawyer for years, is the committee had to be believing that the DCF was wrong, that it was not an appropriately realistic assessment of the future of

Southern Peru and that it was artificially low, because otherwise, if it believed that Southern Peru was trading at twice -- you said it to be twice its DCF.

MR. STONE: It was its NAV, yes.

THE COURT: They should have immediately done a secondary offering and never bought another company, much less take your market valuation and let's buy another company for twice its DCF value?

MR. STONE: Right. But, Your Honor, I think --

THE COURT: But, see, this is important. Your clients conceded that they could monetize what was given to Grupo Mexico at the market price, that you could get $3 billion.

MR. STONE: Not all at once maybe, but yes.

THE COURT: Well, but even getting close, it is not -- even Strine doesn't give $3 billion -- tell me, I have got a piece of paper that the market is valuing twice as much as what it is worth. I could go get the market price. Somebody else is in my situation, but they don't have any market for what they have, and I know this is the

situation. So rather than sell my asset at twice its fundamental earnings worth, I buy someone else. That's called charity. And when it is done towards the controlling stockholder, it is called unfairness.

So your client's story can't work at 90 cents because at 90 cents Mr. Brown's case, it is pretty slam dunk. You can't do that. No matter how nice the CEO of Grupo Mexico is, you know, and however excited you are about Mexico winning the under-17 World Cup, they cannot be rewarded with public company stockholders' money in that way. And that's why I am saying I don't understand your committee's story to hold up at 90 cents per share and why they weren't asking the banker, "This is really weird. Why haven't you -- if we believe that the market -- if Mr. Handelsman really believed the long-term copper price was $1.20, $1.30, why aren't we doing the relative valuation on those metrics? And if we can't and, Goldman, if you are telling us you won't give us a DCF value at that level, then we are not doing the deal."

How do you answer that? Why isn't --

MR. STONE: I mean, I think that's in some ways precisely consistent with what happened,

because Goldman first did a DCF of Minera, and the committee looked at it and they said, "Wow, that's really a lot lower than the 3.1 billion that Grupo pegged it to. How do you explain that?" And the number they came out with was 1.7 billion or something like that. And, in fact, Goldman explained that to them, and they said a billion dollars of the difference is due to assumptions about copper price. If you use the $1 that is in Minera Mexico's projections, it accounts for a billion dollars. You are almost up to the $3 billion.

THE COURT: All right. Wait a minute. Let's start with that.

MR. STONE: Okay.

THE COURT: So if you use the $1, you said you are almost up to -- you close the gap.

MR. STONE: Almost.

THE COURT: So what that means is in normalizing the way you look at this, they are saying we are paying with this. This is our market multiple. We are paying with this. We know the cash value of this. Minera Mexico is only a billion-seven under a buck --

MR. STONE: No. No. Under 85 cents,

which is what Goldman used.

THE COURT: Okay. If you bring it up to a buck --

MR. STONE: If you bring up to a buck, you are at 2.7 billion.

THE COURT: You are at 2.7.

MR. STONE: Right.

THE COURT: And the market at that time for Southern Peru would be what; about 3? Do we know?

MR. STONE: The market capitalization?

THE COURT: Whatever the ask was.

MR. STONE: Yes, 3.1 billion; that's right. And the other two factors which took it actually well over 3.1 billion were an assumption about taxes and the downward adjustments that Anderson & Schwab had made on the projections of Minera. And if you add all of those up, you actually get up to $3.7 billion. So --

THE COURT: No. The Anderson & Schwab, that's your own advisors.

MR. STONE: I understand. That's our own advisors. So you take that out of the equation, though; you are still up over the 3.1 just with the

tax assumption, which is something that, as we found out, came true. So I think that was Step 1.

Then they went to doing a DCF of SPCC, and they came out with numbers, as Mr. Handelsman testified, that were well below the market price that were again sort of within the range of Minera Mexico. And they said, "What is the deal here?" And they looked at it and said this is the way the market is treating these companies. This is the way it is trading.

THE COURT: But how do they get to where -- how do I get to what their belief is? Because 2.7 is still a fairly big gap from 3.1.

MR. STONE: There is no gap if you take into account the tax credit that Minera had.

THE COURT: Well, how did the special committee treat the tax credit?

MR. STONE: Well, Goldman did a sensitivity analysis on it in the end, but -- and they actually did it in their DCF of Minera as well. It was worth, in the middle, half a billion dollars.

THE COURT: If the committee -- at a dollar what was the DCF model for Southern Peru?

MR. STONE: If they did it at a

dollar?

THE COURT: Yes. What was Southern Peru worth --

MR. STONE: I can look it up.

THE COURT: -- under the Goldman model?

MR. STONE: At a dollar it looks like it was about $2-1/2 billion. All right? And it was trading at roughly 3.1 at the time.

THE COURT: And then at a dollar Minera Mexico they are saying is worth more than the DCF value of Southern Peru?

MR. STONE: Correct.

THE COURT: But not as much as the market value of Southern Peru.

MR. STONE: Correct.

THE COURT: And it is still not a good deal to do that deal; right?

MR. STONE: At a dollar?

THE COURT: Your clients testified that, you know, you can factor all the things -- basically, you could get the market price.

MR. STONE: I think what my client testified was for the whole company.

THE COURT: Well, see, a control overlay doesn't help.

MR. STONE: I know it doesn't help. I am just telling you that's what the testimony was.

THE COURT: No. I mean, constraining options. I mean, this was a very large block of -- you know, and no one -- it would be very strange to think it was selling at a control premium.

MR. STONE: I am not saying that it was. I am just saying -- what he is saying is the price was what it was and he believed it, yes.

THE COURT: Exactly. Which meant that you could do a secondary offering of some kind.

MR. STONE: Well, I don't know that anyone opined on that, Your Honor, because there are lots of --

THE COURT: All I am saying is --

MR. STONE: There are lots of factors that go into whether a secondary offering with dilution will actually get you the benefit that you expect from it.

THE COURT: I understand that dilution -- you know, one of your arguments, as you know, out of this case is the float. And so I am not

really understanding how having a more diversified stockholder base with a bigger, you know, public float is going to be worse for everybody than what was done. And it gets back to the point is if 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 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.

MR. STONE: That's not what my clients believed.

THE COURT: Well, that's what I am trying --

MR. STONE: They believed, as they testified, that they were getting a bargain; that Minera was worth more than the consideration that Grupo received.

THE COURT: And I thought that's what I was -- I thought I was engaging you on your own argument by saying that's why your clients must have believed -- right? -- that really the long-term copper price was higher, materially higher than 90 cents per share.

MR. STONE: I don't think there is any doubt about that. I think --

THE COURT: But that's why -- why didn't they say to their advisors, "Get this straight and figure it out" and say to Southern Peru and, frankly, to Grupo Mexico, "We are not getting it. We are telling the public that our long-term prospects are 90 cents per share -- the long-term copper price is 90 cents per share. We are not doing this. If you want to do this relative valuation, if you are really telling us we are trading at twice DCF, then we are not going to be a buyer at twice DCF because I am Mr. Handelsman and I work for the Pritzkers."

MR. STONE: Your Honor --

THE COURT: And I want to get this straight. And that's where I am trying to figure out, you know, he has got liquidity issues. There is this issue, and you mentioned about liquidity. They are locked up; right?

MR. STONE: Not locked up.

THE COURT: What are they?

MR. STONE: Restricted.

THE COURT: So how much can they sell, you know --

MR. STONE: I don't know. They could dribble it out over time.

THE COURT: Over a long time.

MR. STONE: Yes.

THE COURT: As long as this case; right?

MR. STONE: Maybe longer.

THE COURT: Maybe even longer.

MR. STONE: Your Honor, this really goes back to the same point. And it is a good question. But from a negotiation standpoint -- and I think Mr. Palomino made this very clear -- the committee considered it to be in their best interest in the negotiations to push for lower copper prices. And the reason that they did that is because they believed that as you increase the copper prices, the value of Minera goes up faster than SPCC.

So maybe they were wrong about that. They were advised that by their advisors, and they held that firm belief. And so in the negotiations they didn't want to say, "Hey, let's do the DCF at a buck 20."

THE COURT: Well, we are not at this level of subtlety. It brings to mind Bismarck or

Kissinger or something.

What you are saying is that from a business standpoint, the strategic rationale for this deal was, frankly, very bullish copper prices, much great demand for copper. Get another asset that will be able to take advantage of that and get it at a good price. That's their ultimate business objective.

MR. STONE: Right. Get reserves.

THE COURT: In order to do that, because the target of that objective was actually more price-sensitive than the buyer and would value -- would benefit in negotiations more from a more bullish thing, incurs the use of valuation metrics that on their face look really idiotic. Well, they look idiotic in this way is what we talked about. It tends to suggest that the market -- that this was a great time to monetize whatever you had in Southern Peru or some of it, because if you are getting twice what a DCF is in the market and it is not something new, you probably ought to get some cash out of it at this point.

MR. STONE: And, Your Honor, I mean --

THE COURT: But then it gets to this thing, so okay; say I am indulging that and I don't

have any conflict. The committee -- explain to me the floating exchange ratio.

MR. STONE: The floating exchange ratio.

THE COURT: Or whatever it was.

MR. STONE: They wanted a fixed exchange ratio.

THE COURT: The fixed. Explain to me that part of the deal.

MR. STONE: Okay. So Grupo Mexico originally offered 72 million shares. They said that's what they wanted the consideration to be. But they said it is a floating exchange ratio, so it is going to rise --

THE COURT: Right.

MR. STONE: -- or fall depending on the stock price of SPCC.

The committee said no. We would like to have a fixed number of shares so that we are not subject to the vagaries and the volatility, frankly, of the market. Nobody knew when this first started out where the market was going to go. As it turned out, it started going up pretty rapidly. But even then, as of the time of the closing, nobody knew how

sustainable that was. So, you know, their idea was let's get a fixed number of shares so we are not subject to the ups and downs of the marketplace.

THE COURT: And what was ultimately done, though, was what?

MR. STONE: A fixed exchange ratio.

THE COURT: But then the value went up.

MR. STONE: The value went up significantly, because copper prices went up significantly.

THE COURT: That's my point. Which is --

MR. STONE: Right. They couldn't --

THE COURT: I want to unwind the analytical road with your clients.

MR. STONE: I am sorry?

THE COURT: Well, Step 1 was strategically this deal only makes sense economically if you have got a bullish sense of copper pricing.

MR. STONE: Well, you can do that, but -- okay.

THE COURT: Well, again, then you are back to you don't pay $3 billion that's real

$3 billion for something --

MR. STONE: If you are paying $3 billion. In other words, if during the term of the due diligence and the negotiations the copper price had gone down and the stock price had gone down --

THE COURT: 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 with some sort of factoring discount that nobody in the case has come up with, but I am not going to price it hundreds of millions of dollars.

MR. STONE: Right. And that went up and down over time.

THE COURT: It went up and down. But the first premise has to be -- so my first premise is you don't give $3 billion for overpriced assets that you think are trading at an artificially high price. You know, when the market is artificially high-valuing assets, you monetize them. You don't go deeper into that asset class.

MR. STONE: But that's not --

THE COURT: Right. So the premise was

these were not dumb people.

MR. STONE: Right.

THE COURT: So the first step is no, we are bullish on copper.

MR. STONE: Well, they were somewhat bullish on copper, but I think everyone was uncertain about it. But, Your Honor, in terms of the market being --

THE COURT: Again, if they are --

MR. STONE: In terms of the market being --

THE COURT: If they are not bullish on copper, this deal makes no sense; right? They have to be bullish on the prospects of Minera Mexico, and the primary thing that you focused on here with that is their copper.

MR. STONE: And getting the copper at a price --

THE COURT: And so Step 1 that that's --

MR. STONE: Getting the copper at a price that makes sense makes this deal make sense, and that depends --

THE COURT: And your second point --

MR. STONE: -- and that depends on your view of the world going forward.

THE COURT: But what I am saying is the second subtle thing is the deal -- at least the way I am seeing it is the only thing that makes sense is what Handelsman said. In a bullish world the deal makes sense.

MR. STONE: Okay.

THE COURT: The second step is negotiating dynamic. Though we may not necessarily want to be so transparent about what -- how we look at this, and then when we bargain, we actually -- let's use lower copper price metrics because that's actually better for us, because it obscures the fact that we think Minera Mexico in a world of increased copper prices is actually going to increase in value even more than we will on a relative basis.

MR. STONE: Right.

THE COURT: Step 2.

MR. STONE: Yes.

THE COURT: Step 3 is this exchange thing where, you know, they get a fixed number of shares; right?

MR. STONE: Right.

THE COURT: And we are the public market company, which means if our Premise 1 is bought by the marketplace, then we are going to rise in value, not fall in value. Therefore, as our price rises during the course between signing this up and closure, we pay more. And we should do -- we should lock this in now. What was the thinking around that?

MR. STONE: The thinking was, as the directors testified, they wanted to protect the downside. It is okay to be optimistic. It is okay to say we think that SPCC and Minera and every other copper company are using conservative long-term copper prices. We actually think the price is higher. But it is also okay at the same time to say I want to protect my downside. What if the price goes down? I can't predict it. Copper is volatile. Yes, we are enjoying an increase in copper now. Yes, we hope it continues. Yes, this deal makes sense if it continues to go up. But if between the time of signing and closing it goes down, I am going to look like a real idiot if I haven't done something to protect myself.

THE COURT: Well, did they negotiate for -- I mean, you could do asymmetrical collars. Did they negotiate for one?

MR. STONE: Well, they asked for a collar, but they already had their fixed exchange ratio, and they believed that that combined with the fact that they thought that these two companies would rise and fall relatively the same would protect them.

THE COURT: Well, that's what I said. So that's another -- so if you are assuming an artificial world, I mean, again, we are back to World 1, where we, see, in our heart of hearts believe that the price of copper is going up, that actually Minera Mexico is actually becoming comparatively more valuable even though our actual cost of acquisition is going up. But our negotiating adversary, you know, originally was willing to take just a chunk fixed; right?

MR. STONE: No.

THE COURT: No?

MR. STONE: They wanted a floating number. They originally offered 72 million shares as --

THE COURT: So we will go --

MR. STONE: And that 72 million shares on the date of the closing was worth over 4 billion.

THE COURT: But that's why you

can't -- and that gets back to another issue I asked Mr. Brown about. You two fundamentally disagree on whether the committee made any progress from the opening bid.

MR. STONE: Correct.

THE COURT: He focuses on the economic number. You focus on the indicative number of shares.

MR. STONE: Correct. And I, frankly, find his argument silly. I mean, it is a coincidence that the market price was such that ultimately those 67 million shares were worth $3.1 billion, approximately. And the fact is that this was a robust process. There were 24 meetings. People attended them.

THE COURT: But if it is silly, it is silly in both directions, isn't it?

MR. STONE: Well, no, no. Because ultimately the amount of SPCC -- the chunk of the equity that SPCC had to give up in order to get Minera Mexico was smaller.

THE COURT: Well --

MR. STONE: Yes. It was 67 million shares instead of 72. That's a reduction in the amount of equity that they gave up. And I think

that's the appropriate way to look at it.

THE COURT: But I think what Mr. Brown was saying is what they were focused on was saying Minera Mexico was worth approximately the $3.1 billion.

MR. STONE: That's what Grupo said.

THE COURT: Well, that's a deal, and Grupo wanted 3 to 3.1 billion, and what they ultimately got was between 3 and 3.1 billion in your stock.

MR. STONE: Right. And that's coincidental.

THE COURT: And that the reason why it is called an indicative figure is that the key focus was, from Grupo Mexico, is we want $3.1 billion. What turns out to equal 3.1 billion -- I am just figuring why it is indicative -- is the number of shares.

MR. STONE: Right.

THE COURT: And at the end of the negotiation they got pretty much exactly their ask.

MR. STONE: They got a smaller amount of the equity of Southern Peru Copper Company.

THE COURT: So you are translating their ask --

MR. STONE: I am not translating their ask. I am saying that's what they got.

THE COURT: What was their ask was --

MR. STONE: 72 million shares on a --

THE COURT: But their ask was -- you are then translating it by a future market price for something.

MR. STONE: No.

THE COURT: The 72.3 million shares was come up with by Grupo Mexico by saying we have something we consider to be worth between 3 and 3.1 billion and we want currency from you equal to that value.

MR. STONE: Okay.

THE COURT: Right?

MR. STONE: Right. But as a percentage of the equity, that was a smaller -- ultimately what was given was a smaller number.

THE COURT: Well, ultimately, yes, because the stock price had gone up.

MR. STONE: That's right. So now the company was more valuable.

THE COURT: Well, right. But there is not -- and what I have to assume about that is Minera

Mexico's value went up, too; right?

MR. STONE: That's correct.

THE COURT: So it is still the same deal.

MR. STONE: It is not, Your Honor. The percentage of the equity that Grupo ultimately received from Minera Mexico was smaller than what they asked for originally.

THE COURT: So you are saying actually this is a really good deal because a fewer number of shares equaled the 3 billion, and Minera Mexico actually probably increased in value above 3 billion, and therefore, we got a better deal.

MR. STONE: We certainly did. But, Your Honor, again, I mean, all of this focus on the back and forth and the idea that Mr. Handelsman and Mr. Palomino and the other two directors who didn't testify, who are also very sophisticated investment bankers, who took their jobs very seriously, went through eight months and 24 meetings of window dressing to arrive in the same place is just preposterous. I mean, what were they doing? They spent hours and hours analyzing this, meeting with their investors, several presentations from Goldman

Sachs. I mean, this was not window dressing. This was an actual negotiation.

And getting back to another point about the process, which is, I think Your Honor called it, you know, they misconstrued their charge or something, I don't think they misconstrued anything.

THE COURT: Well, then why doesn't the committee charter plainly say that they have the ability to negotiate?

MR. STONE: I think the committee charter -- I don't know why. The answer is I don't think that the record reflects why exactly those words were used, but --

THE COURT: Well, but see, one of the things that special committees can ask for is clarity in their mandate and bargaining power. And there is some deposition testimony, is there not, where the special committee members are not exactly necessarily all on the same page about what flexibility they have?

MR. STONE: I don't know. I would disagree with that. I think that they all had understood that they had the right to say no, and the evidence is consistent that they said no over and over and over again. And, in fact, they made a

counteroffer at the end once they got within striking distance. That was their strategy.

And I don't know that there is a huge difference between someone offering you something and you saying no or making them bid against themselves and instead negotiating in a way where they give you an offer, you give them a counteroffer, and you go back and forth. Those are two different ways of negotiating. And I don't think that our courts have come to the point where they are going to micromanage the way that independent directors on a special committee determine to negotiate.

But the fact is regardless of what the charge said in the resolution --

THE COURT: I think, when you are talking about micromanage, I mean, I don't think the Court micromanages -- I mean, it is a weird kind of '80's term that we came up with that does violence to the English language's beauty.

But for the Court in evaluating whether to give credence to a special committee to expect clarity about that it has the power to negotiate and is not just expected to evaluate specific proposals, I mean, I don't really think

that's if you want to use the term micromanaging.

And I think there was some deposition testimony where the committee wasn't exactly clear whether they could bargain; right? They couldn't consider alternatives. You agree with that; right?

MR. STONE: Yes. They could not consider alternatives.

THE COURT: The only alternative is this one.

MR. STONE: Right, right. But they clearly -- again, regardless of what the resolution said, the fact is that they did negotiate.

THE COURT: Why this change in rubric by Goldman from the original look? Don't you think Goldman would have done this on a pretty simple basis if it could have generated a DCF for Minera Mexico that was equal to the market price of Southern Peru?

MR. STONE: I don't know the answer to that, Your Honor. I don't know what was in their mind in terms -- I mean, it is a complete hypothetical.

THE COURT: Well, they did take -- that was their first --

MR. STONE: They were very methodical. Their first step was to do a DCF of Minera. The

second step was to do a DCF of SPCC. And they were very methodical about it.

THE COURT: Right. But their first step wasn't to jump to a relative valuation, was it?

MR. STONE: No, it was not. But I am not sure where that goes, Your Honor, simply because --

THE COURT: Well, I think where it goes --

MR. STONE: -- simply because they ultimately arrived at it and decided that was the right way to do it --

THE COURT: Well, again, that's where you get into incentives. See, the right way to do it --

MR. STONE: What incentive? What incentive did they have to do it in any other way?

THE COURT: Well, there is a huge incentive. I mean, what was the bulk of the compensation of the bankers in the case?

MR. STONE: I frankly don't know, Your Honor.

THE COURT: How much of it was contingent on a deal?

MR. STONE: I don't know that either, Your Honor.

THE COURT: All I know is if your first step is to do it the right way, and since most banks start with their football field looking approximately like their final fairness opinion and they just tweak the inputs as they get closer -- frankly, their first presentation to the special committee looks a lot like their pitch book, and they all ultimately look the same, and that's why you get into these things, you have got to look very carefully at how the numbers move. Where in the first presentation to the special committee was this is a relative valuation case and the first thing we need to do is get a DCF value of each of these companies? That wasn't their first move; right?

MR. STONE: It was not their first move.

THE COURT: And the first move they made was fairly simple, which is let's see whether the target -- what the target is worth, because we know what our currency is worth. And it was only when the target DCF value was astonishingly lower than the currency that we move into relative valuation

territory; right?

And what evidence is there that the committee used its negotiating leverage with the controller to say, "Hey, pal, you are going to pay a discount for this. We have a proven market for our currency. You don't have a proven market for what you are. Under a very traditional way of valuing this, if we were paying cash for this, Grupo Mexico, we wouldn't do a DCF of the cash"?

MR. STONE: Well, Your Honor, there is evidence that after they did the first DCF of SPCC, the one that was lower, and then they asked for an explanation, those same minutes talk about the fact that Mr. Ruiz was going to go back to Mr. Larrea and tell him that the $3.1 billion price on Minera was much too high, and he did.

THE COURT: Okay.

MR. STONE: And so --

THE COURT: And what Mr. Brown is going to say is in the end he went back and he said 3.1 billion is too high, and then when the transaction was approved --

MR. STONE: Right.

THE COURT: -- the special committee

apparently agreed that 3.021 billion --

MR. STONE: Right.

THE COURT: -- was just right.

MR. STONE: And two significant things, Your Honor. Copper prices were very different, number one, and number two, it was a negotiation. In other words, Mr. Ruiz knew that you could make up most of that difference by using a $1 copper price assumption. So this was a negotiation. They were using their leverage. That was the question that Your Honor had.

THE COURT: Yes. But, I mean, if he went back and he focused on a dollar figure, then you are right back to Mr. Brown saying, okay, they didn't negotiate. I mean, there is no doubt there was a lot of motion.

MR. STONE: Right. And --

THE COURT: I mean, there are things --

MR. STONE: -- ultimately they agreed to a $3.1 billion price at a time --

THE COURT: Ultimately --

MR. STONE: -- when Minera was worth even more, because copper prices had gone up.

Circumstances had changed.

THE COURT: Right. Which gets me back to my -- copper prices were up. The valuation models were never updated to reflect them being up. The public markets were never told about that assumption being up; right?

MR. STONE: The public was well aware of copper prices being up.

THE COURT: Okay. But had Southern Peru done anything to look at its own -- you know, what it was telling the marketplace?

MR. STONE: It is required to every year by the SEC.

THE COURT: Right, but --

MR. STONE: And in terms of what the committee knew, they had a sensitivity analysis that went all the way up to $1.20 at least. So they knew what that relative valuation looked like at $1.20, which was even more fair than it was at lower prices.

THE COURT: Okay.

MR. STONE: All right? Okay. I am just -- I guess I didn't know, Your Honor, the Goldman Sachs fee was not contingent on the deal being done.

THE COURT: It was not?

MR. STONE: It was not.

THE COURT: So they got the same fee regardless of whether there was a deal or not? They didn't get a percentage of the deal?

MR. STONE: Goldman Sachs's fees for its services to the special committee are payable regardless of whether the merger is consummated.

THE COURT: That's what I am saying. Okay. That's good to know. It is not a typical -- so they got some sort of flat fee?

MR. STONE: Yes.

THE COURT: No success fee?

MR. STONE: No success fee.

THE COURT: Okay. That is helpful.

MR. STONE: Just checking my notes, Your Honor.

THE COURT: Don't ever let that banker, whoever negotiated that term, do that again.

MR. STONE: He has left the company.

THE COURT: I know I have never seen one. I mean, it is unusual.

MR. STONE: I think that's all I have, Your Honor, unless Your Honor has any other questions.

THE COURT: Tell me about the burden-

shift. I assume you are asking for one.

MR. STONE: Yes, Your Honor. I mean, I don't think that there is any serious challenge to independence, disinterestedness, and, I mean, I do think that this was a pristine process. I just don't --

THE COURT: See, I want to hear what pristine -- you mean pristine from the sense of not untainted by improper motive.

MR. STONE: Correct.

THE COURT: Not, you know, Gomer Pyle versus Warren Buffett.

MR. STONE: Right.

THE COURT: It is just --

MR. STONE: Right. And, Your Honor, I do think that the appropriate thing in looking at the burden shift is -- I mean, the Court can consider all the circumstances, but I think that a post hoc look should be far less important than looking at what the process was that was followed here.

THE COURT: No. I am just trying to think, because there is also the other Kahn case.

MR. STONE: Tremont?

THE COURT: Yes.

MR. STONE: Yes.
THE COURT: Which seems to --
MR. STONE: Tremont, though --
THE COURT: -- go fairly deeply. And when you use terms like an "effective" special committee --
MR. STONE: Right.
THE COURT: -- you are bleeding together the substantive analysis of whether there was a fair process and price with whether to give -- how to start to apply the standard of review.
MR. STONE: Right. And Tremont says that the special committee must have functioned in a manner that indicates that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining power. And we think both of those things are true.
THE COURT: Real bargaining power being distilled down to not that you use the bargaining power that you had.
MR. STONE: They used -- what they had was the power to say no.
THE COURT: It is if you have the power and have displayed a knowledge of having the

power and having no apparent motive not to use it in good faith.

MR. STONE: Well, I think that's true, but I think the committee here used it.

THE COURT: No, no. I understand.

MR. STONE: Yes.

THE COURT: What I am trying to separate out in my own mind is to be useful, this burden-shift has to involve an analytical assessment of the special committee, which is, in fact, different from the actual fairness analysis itself. When one starts using words like "effective" or "real bargaining," you know, an effective, you know, such that it look -- that's when you start going -- I understand the idea of looking at the committee and saying are they qualified people. Can they do this sort of thing? Yes. Absence of improper motive, I get that. Look at it, yes. High-quality advisors, yes. Demonstrated commitment to the process such that -- you know, I don't want to denigrate motive. Motive is important. Motion, there is meetings. There is consideration. Appreciation that they had the power to say no and bargaining, yes, but not getting into the qualitative assessment of whether

they were good at it, whether they yielded a high price, you know, whether they -- because then it just becomes one blur. And it is not clear why you actually have any burden-shifting device separate from just saying, frankly, the controller met its entire fairness burden.

MR. STONE: Yes, I think we can go back to Tremont and look at what the Supreme Court looked at there, and you can quibble about whether they were reading the evidence the way they should have. I mean, I thought Chancellor Allen did a fine job below. But the Supreme Court in Tremont was most worried about the fact that two of the three members they found just abdicated their responsibility. I mean, they didn't show up for the meetings. There were only three meetings, and they didn't show up for them. And the one guy who actually did show up and hired the advisors, both the lawyers and the banker, was a guy who had been paid millions of dollars by the company. That was their concern. That's the way they read the evidence.

So I think it is those types of factors that you have to analyze when you are looking at the burden-shift question.

THE COURT: Okay. All right.

MR. STONE: All right?

THE COURT: Thank you, Mr. Stone.

MR. STONE: Thank you.

THE COURT: Mr. Brown.

MR. BROWN: Your Honor, I think there are a couple factual things that I think we disagree with but I think were wrong. First, Mr. Stone said the Minera Mexico DCF analysis that Goldman did, if you use a dollar, it gets to 3 billion. I mean, it is just not true. For the record I will say it is JX-101 at SPCC3375. It has got the two sensitivity analyses at a dollar, and using the Minera Mexico case, it is 2.3 to 3 billion. But that's the Minera Mexico case, depending on the different discount rates from --

THE COURT: Well, and what I am going to do, just to ease anybody's concerns and also for my own purposes, which is make these points, and I will say to both you and to Mr. Stone give me short, nonargumentative letters. Now, if there are some things that came up at argument and you want to say, "Here in the record is what it is, Your Honor," please do that. And maybe we can agree to do that by Friday or by Monday, whatever you agree on.

Don't make them argumentative. Just say on this point that came up at argument we refer Your Honor to this, you know.

MR. BROWN: Okay. And there was a whole bunch that I won't try to mention --

THE COURT: No. Go through it now. But what I am saying is rather than me have to pick it out -- I am going to read the transcript again, but rather than pick it out, sometimes it is convenient to have that kind of compilation of some --

MR. BROWN: So there is the Minera Mexico case and then there is the A&S case. Again, Minera Mexico gave them those aggressive projections. A&S knocked them down a little bit. And a dollar per share for A&S, it is 1.8 to 2.4. I mean, it is not 3.1. You only get close to 3 if you use the projections as provided.

Now, the --

THE COURT: And if you are saying even in the price; right?

MR. BROWN: So even if you said we will take their projections at face value, we won't even adopt any of the modifications that A&S is recommending to us, recommending to the committee,

because it is just where they thought the projections were unrealistically aggressive, you know, you get to 3 billion only on the highest discount rate and sort of it is the metric at the far right at the bottom of the chart. But, I mean, on the A&S case, you don't get close to it. So this dollar a share thing gets you to 3 billion, that is just factually wrong.

There was the argument that, well, there is really no proof that the Southern Peru, you know, model wasn't sort of optimized and there is really no proof that the Minera Mexico model was optimized. I mean, it is just wrong. I mean, let me -- I mean, we will quote it in our letter, but I guess it is JX-75, A&S said, "There is expansion potential at both Toquepala and Cuajone." Those are the two Southern Peru mines. "If time permits, the conceptual studies should be expanded, similar to Alternative 3 at Cananea," which is what -- that's the optimization plan, and I will get to the quotes for those in a minute that they did for Minera Mexico. "There is no doubt optimization can be done to the current thinking that will add value at lower capital expenditures."

So A&S looked at it and they said

look, it is okay, but you have to know it is conservative. It is not optimized like Minera is.

And then for Minera in JX-103, which is one of the Goldman presentations, that's when the sort of optimization plan started being, you know, pushed, and it says, "New optimization plan for Cananea," which they call Alternative 3, "recently developed by GM and Mintec was not included in the projections at this point. According to Mintec, such plan could yield 240 million in" nominal "value on a pre-tax. . .basis. . . ." And then later on in subsequent presentations they explain that, you know, the analysis and the projections do include the optimization plan for Cananea, Alternative 3, developed by Grupo Mexico. So they were polishing up the house, you know, putting out their best foot forward, and that wasn't happening with Southern Peru when they are doing these two discounted cash flow valuations.

THE COURT: Well, how do you deal with Mr. Stone's point that the same -- that the special committee had an independent advisor along with Goldman Sachs that was, you know, looking at these things?

MR. BROWN: Yes, A&S was looking at them, and what they said in their analysis were the Minera optimization plan, it is aggressive, and we recommend knocking it down in these ways. With respect to the Southern Peru stuff, they said it is not optimized. It could be. We recommend that you do it. But, you know --

THE COURT: So they recommended optimizing it and it didn't get done.

MR. BROWN: I mean, I just read it to you. And so it is not that they were -- he said, well, they looked at it and they thought it was reasonable. Well, you know, they looked at it and they said these aren't aggressive projections. I mean, they are what they are.

THE COURT: And you are saying in the ultimate fairness opinion they used the more aggressive new one.

MR. BROWN: For Minera Mexico, yes. But as -- and A&S, you know, recommended, you know, modifications to it, and they usually showed both, the Minera Mexico model and the A&S model.

THE COURT: Does the deal come out fair under either scenario?

MR. BROWN: No, it didn't come out to 3.1 billion.

THE COURT: No. Under the -- within their rubric, did it come out fair?

MR. BROWN: I am telling you, if you -- you know, there is a big record here. If you go back and look at the last Goldman Sachs presentation, it is actually really helpful to look at them all, because it is the strangest thing. You know, at first it is the way you expect it to look and they are spelling everything out. By the last book you can't tell what the valuations are. There is nothing but these matrixes of numbers of shares. They don't tell you they took out all the numbers that show what the underlying valuations are. So fair, I mean, they have a giant matrix.

I mean, under the Goldman Sachs valuation, you know, the way they were doing it, any number of shares -- I mean, there was a gigantic range. Any number of shares almost would have been fair, I mean, anything from, you know, 30 to 90 or whatever.

Now, let me -- I just want to try to make it as clear as I can on this, what we are calling

the floating versus fixed issue. And Mr. Stone mentioned 72 million. No. And there was testimony about this by the special committee members. The first presentation that they thought or the first term sheet that was real that they could respond to -- before then there was sort of talk and stuff, but there was nothing specific. And at some point, you know, they mentioned 3.1 billion and then the 72 million. But the first term sheet they got that they could respond to, to me that's the opening bid, and that asked for $3.1 billion in stock valued at the market price during a 20-day average before the closing. And so that's what they wanted, $3 billion of stock valued at the market price later on.

And, you know, the committee immediately said, and the testimony was, that was a nonstarter. And again, that's -- if you think copper prices are going to go up, which is the whole basis for the deal, you don't immediately reject something that is going to work to your benefit.

Now, our point is if they had accepted that pricing term -- that is, let's set the number of shares based on the market price during a 20-day window before the closing that equals 3.1 billion --

about 52 million shares would have been issued versus the 67. And, you know, they say 67 is a coincidence. Actually, if you look -- and we tried to spell this out in our brief -- pretty much every time the number of shares changed, you know, from Grupo, if you did the math using the market price about the time -- and we have the whole market price sheet -- it comes out to around 3 billion.

I mean, they were sort of duped -- the committee was focusing on numbers of shares, which really to me that's -- the question is what they are worth. And Mr. Stone says, well --

THE COURT: You are saying that Grupo Mexico had a fixed idea, which is we want $3.1 billion.

MR. BROWN: Yes, as if it was almost -- as if it was cash currency. And he says, well, they got a lower percentage of the entity. If you have a smaller percentage of an entity with a greater value, you have the same thing as a bigger percentage of a smaller entity. I mean, it is value that was the issue.

THE COURT: Especially because they already had voting control; right?

MR. BROWN: Right. Now --

THE COURT: But go through your 52 million, how they would have gotten to 52 million.

MR. BROWN: The original pricing term in the first term sheet -- and we can get that -- was give us $3.1 billion of stock --

THE COURT: Right.

MR. BROWN: -- calculated by taking the 20-day average starting five days before the closing, which was April 1, 2005. And if you do that -- and the stock prices are in the chart -- you get the number of shares based on the stock price at that time would be 52 -- we have it in our brief. It is 52 million shares. It is 15 million shares less than they ended up issuing.

And really what happened was, the way I think of it is, the first real proposal was 3.1 billion of stock valued at the market price but at the market price later on. And what the committee ended up doing was in effect saying, well, we will give you 3.1 billion in stock, but we want to peg it, you know, not at the closing but at the time we are approving the transaction. And to me that was almost an unforgivable mistake, because then the way it was

structured, that put all the risk on Southern Peru, because if the stock price went down --

THE COURT: They got more.

MR. BROWN: Well --

THE COURT: No, you didn't get more.

MR. BROWN: It is fixed. If the stock price went down, you would say, well, gee, that would work for us, because we are issuing less value. No. They had the right to vote it down.

THE COURT: Oh, because they could walk.

MR. BROWN: So they had no fear of downside loss. You know, locking in the number of shares to them, because they wanted 3.1 billion, they knew they were going to get at least 3.1 billion and probably more, because by that point everyone was expecting it to go up, so -- but if there was some disaster, they could vote against it.

Southern Peru, from the special committee's perspective, you know, if it went down, they didn't get the benefit of that because --

THE COURT: Remind me why there was a delay anyway.

MR. BROWN: A delay in the closing?

THE COURT: Yes.

MR. BROWN: Well, the agreements were signed, you know, on October 21. I mean, it takes three months or so to get a proxy statement done and have a meeting. I mean, that's my understanding.

THE COURT: Oh, that's right, because of the vote.

MR. BROWN: They had a vote. So it is kind of weird. And if you look, you know, the committee minutes and the testimony was, you know, that they recognized, and they all, I think, testified a collar is critical if we are going to do this, and they asked for a collar, and the answer was "No. Go away." And so they let it go. And, in fact, if they had a collar, the 20 percent collar they had asked for, it would have been triggered.

So, I mean, the way they did this, the pricing, I mean, it is like -- it is inexplicable. And, you know, as you said, the whole theory of their analysis is copper is going to go gangbusters. This company tracks -- you know, the price fluctuates with copper prices. If we think copper prices are going to go up, let's take this risk, because then we can issue a lot less shares. It will still be $3 billion, but

it will be, you know, a lot less shares.

I mean, they ended up issuing 67 million shares with a market price, you know, if you use an average near the closing, 3.7 billion. So what they really paid, you know, assuming the valuation date were the closing date, is 3.7, not 3.1.

Now, you might say, and I think they are saying, well, Minera Mexico's value might have gone up, too. But no, that's not what we are talking about. We are talking about the negotiation. They had the chance to get what we call -- I mean, it is called floating exchange ratio. It is really just fixing the number of shares based on the market price close to the closing. They had a chance to get that. It was clearly in their interest to do it. Why they said from Day One it is a nonstarter is inexplicable. That is -- to me that's an uninformed decision by the committee. They didn't have any information in front of them. You know, there is no documents, there is no nothing. There is -- nobody was telling them it is too dangerous, you know, you have got to lock it in. So that's on that point.

And I do want to say, my last point is, Your Honor -- we are talking about copper prices

all over the place -- there is a difference --

THE COURT: So basically what you are saying is if they had done basically a fixed value, we will give you stock worth --

MR. BROWN: This at the time of the closing.

THE COURT: They then give you stock worth the initial demand.

MR. BROWN: Three billion.

THE COURT: Then it would have been better than what ultimately happened, because they ultimately delivered value materially in excess of that.

MR. BROWN: Right. Right. In effect, what they -- you know, the point was why would you lock the number of shares in. If you -- in a deal like this, if you have reason to believe your stock price is going to go up, it is to your great benefit to calculate the number of shares in the 3 billion at the time.

THE COURT: Yes. What you are saying might make sense is a lock in the value you deliver.

MR. BROWN: Yes, yes.

THE COURT: But --

MR. BROWN: So instead of issuing 52 million shares worth 3.1 billion, they issued 67 million shares worth 3.7 billion. I mean, but again, we are talking about the different assets. And we have kind of all focused on the date the committee approved it, and the basic point is there is -- as you said, they asked for 3.1 billion in stock. That's what they got. And if you look at the different changes over time, it is always around 3.1 billion. It was never changing.

The committee, if they were actually focused on number of shares being relevant, I think that's hard to believe, because it is not the number; it is the value of your currency. If I have 100 one-hundred-dollar bills and one one-hundred-dollar bill, they would have said, you know, let's only get the one, let's only get the hundred, because if we have to give away all these ones, that's more pieces of paper. I mean, it is the value of the share of stock, not the number of certificates.

My last point, Your Honor, is on the stock price -- on the copper prices. There is a lot of discussion of, you know, 90 cents or $1.30, I think. Just remember, there is a very big difference

between short-term copper prices -- that is one, two, three, four years -- and long-term copper prices. So, you know, when someone is saying 90 cents or $1.20, I mean, everyone was using much higher prices for short-term, and in the DCFs, higher prices were used in the short-term. When you are talking about doing the DCF and the long-term number, that's a different calculation. Like, as Mr. Stone said, just because the market is going crazy right now, that doesn't mean, you know, necessarily mean it will continue.

You know, what the company continued to say was for long-term purposes, we use 90 cents. I mean, they continued to use 90 cents into 2007, when the price was 2 to $3 a share, and they finally increased their long-term number to $1.20. So saying we are going to increase the long-term copper price assumption to $1.30 is a humongous move, and, you know, even if they expected short-term prices to go up, I mean, I think --

THE COURT: So what you are saying is there is another thing where there is another -- that they never actually moved to this more bullish thing in running the business after the transaction.

MR. BROWN: Not for years. That's

right.

Okay. Unless Your Honor has any questions, we will leave it at that.

THE COURT: No. Thank you, Mr. Brown.

MR. STONE: Your Honor, just two quick things. Your Honor, they didn't change because the SEC wouldn't let them change. It is a three-year average. You have a three-year look-back, so that's why they didn't change.

But two quick points. I want to read from JX-103.

THE COURT: Is that in the record somewhere?

MR. STONE: What is that? That the SEC required them to use a three-year look-back? I think Mr. Jacob testified to that.

THE COURT: So it takes three years to update your copper prices?

MR. STONE: Essentially, yes. I mean, you have to look back three years. It is an average over the past three years.

Reading from a July 8 presentation of Goldman Sachs to the special committee -- and this just goes to the whole point about what could happen

with a floating exchange ratio -- they had had discussions with UBS and Grupo, and it says, "Assuming the share price of SPCC of $40.90 (the closing price on the" NYSE "as of July 2, 2004) and the formula provided in the Term Sheet, SPCC would issue 90.6 million new shares to" Grupo Mexico, "which would result in" Grupo Mexico "owning 78.5 percent of SPCC as compared to 54.2 percent (as of today)."

So that's what the committee was focused on, is that based on the fluctuations of stock, it wasn't just 72 million shares anymore. Now it is 90 million shares. They wanted to lock it in.

The second point, Your Honor, is Mr. Brown, I think, just proved that Anderson & Schwab actually looked at both companies and did their due diligence, but what he cited really is completely misleading. The expansion studies at Toquepala and Cuajone were greenfield studies on mines that had been identified as copper deposits, but that's it. No pre-feasibility studies had been done. They were in the nascent stages of looking at these properties.

You compare that to the Phase 3 at Cananea, which was a brownfield project, meaning the deposit was there. It was tested. They had been

through feasibility studies. It was a question of expanding a current mine. That's why it was included ultimately in Goldman Sachs's, because it had been completed, whereas the expansion studies at Toquepala and Cuajone would have taken way more than the eight months that the committee took to evaluate this transaction. So while there may have been some valuing there, I think Anderson & Schwab itself says you couldn't quantify it at this point without a further study, and that study would have taken years.

So there was nobody, you know, trying to, you know, update what was going on at Minera and not at SPCC. It was just a matter of where they were in those projects. They were completely different.

THE COURT: Yes. I think Mr. Brown says there was somebody at Minera trying to update things. It is called Grupo Mexico.

MR. STONE: Well, no, no. They were trying to update both of them. The problem is Toquepala and Cuajone were at a stage where you had to first do a pre-feasibility study, which is where you go out and drill these little pipes into the ground, and then you try to analyze and see how big the reserve is. And it is a very painstaking process. It

takes a long time.

The Cananea mine is the largest copper deposit in the world or the second largest. Everybody knew that copper was there. That Phase 3 project that they included ultimately in the final book was something that had been in process for a long time, and it was done by the time that Goldman Sachs did its opinion, so it was able to update it. And it was an existing field. It wasn't -- Toquepala and Cuajone were different locations in Peru. They were untested grounds.

THE COURT: Thank you. Thank you, Mr. Stone, thank you, Mr. Brown, for excellent arguments. It is a case that hurts my head a little bit in all kinds of different ways.

And I appreciate our reporter's patience with the fast-moving questioning.

I would welcome, you know, short, to-the-point letters. I don't want argument. What I am saying is a lot comes up in these things. These are questions I ask, and I care about trying to get it right. And to the extent that you are able to just give me some letters citing to the record things you want me to refer to, I would appreciate it.

The only argument that I would welcome is this one about the temporally what I can take into account and your perspectives on it. I don't want anything long, but each side to some extent has pointed to events that transpired after the closing. You know, interestingly, depending on how you look at the situation, it is not even clear you are supposed to look at closing, I mean, if you think about it; right? I mean, you could be so pure that you can't even see how the deal, you know, got consummated. And I want to be analytically rigorous about it, and I know it matters, and I know it is a little bit different than an appraisal.

And so I would appreciate any -- I don't want 20-page briefs on it. What I am saying is if you have got -- if there is some case law out there that actually puts a point on it from your perspective, you can put that in the letter, too. But keep it short. Talk to each other. I don't want an exchange of replies to the letters. I am saying think about what came up at argument. There might be parts of the record you wish to highlight. And you just simply put, you know, in some organized way, "Your Honor, this came up at argument. I think you might

well look at JX-" blank. "The relevant part of the Goldman thing is" blank, you know, and just try to in a nonargumentative way, you know, kind of put before me, you know, some of the evidence that you think is pertinent to the valuable discussion that you were able to provide me with today.

So try to stay as cool as you can. It is a pretty hot bench; right? But, you know, I think today the temperature, it is actually even cooler during the midst of a Chancery argument than it is outside. So maybe you have got, like, air-conditioned vehicles waiting for you. I hope so. And, you know, avoid, you know, Long Island Iced Tea. It is a temporary -- it will taste delicious, but you will pay the price later.

So thank you everyone. Thanks for working through lunch.

- - -

(Court adjourned at 1:16 p.m.)

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CERTIFICATE

I, LORRAINE B. MARINO, Registered Diplomate Reporter and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 147 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 13th day of July, 2011.

/s/Lorraine B. Marino, RDR
Registered Diplomate Reporter
and Delaware Notary Public

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

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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.

[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-

[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

[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 & Comm'cns 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 & Comm'cns 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. <u>The Special Committee Could Never Justify The Merger Based On Standalone Valuations Of Minera</u>

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 *733 (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

[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 $3.672 billion.[204] The remedy, therefore, amounts to $1.263 billion.[205] The parties shall implement my remedy as follows. They shall add interest at the statutory rate, without compounding, to the value of $1.263 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] This adjusts for the $100 million dividend. The dividend resulted in a per share value of $1.25, as there were 80 million shares outstanding. Thus, ($55.89 share price – $1.25) x 67,200,000 = $3,671,808,000.
[205] $3.672 billion - $2.409 billion = $1.263 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.

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

PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND EXPENSES

Plaintiff's counsel hereby petitions the Court for an award of attorneys' fees and expenses in the amount of 22.5% of the recovery in this action plus interest on the award until it is paid. In support thereof, plaintiff shows as follows:

INTRODUCTION

The standards for determining an award of counsel fees and expenses in corporate litigation under Delaware law are well established.[1] Fees are awarded when the litigation results in a benefit to a corporation or its stockholders.[2] The amount of the award is left to the broad discretion of the Court.[3]

The "*Sugarland* Factors" that this Court considers in setting a fee are "1) the benefits achieved in the action; 2) the efforts of counsel and the time spent in connection with the case; 3) the contingent nature of the case; 4) the difficulty of the litigation; and 5) the standing and ability of counsel."[4] The benefit conferred is the paramount factor.[5]

[1] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989).

[2] *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966).

[3] *Tandycrafts*, 562 A.2d at 1165; *Chrysler Corp.*, 223 A.2d at 386, 389; *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

[4] *In Re Cox Communications Inc. S'holders' Litig.*, 879 A.2d 604, 640 (Del.Ch. 2005).

[5] *See Ryan v. Gifford*, 2009 WL 18143 (Del. Ch.) ("The benefit achieved for the Company and the shareholders should be accorded the greatest weight in determining the fees to be awarded.")

Plaintiff respectfully submits that the post-trial $1.9049 billion[6] benefit conferred upon Southern Peru,[7] as well as the other applicable *Sugarland* factors, demonstrates that a 22.5% fee award is appropriate here.

ARGUMENT

A. The Benefit Achieved by the Action

The benefit achieved here is truly unprecedented: a derivative recovery of $1.9049 billion[8] by judgment after trial. Plaintiff's counsel seeks an award of 22.5% of that fund.

1. Fees Should be Assessed as a Percentage of the Common Fund Received by Southern Peru

The defendants are evidently going to argue that since Grupo Mexico, S.A.B. de C.V. ("Grupo") owns 80% of Southern Copper Corporation ("Southern Peru"), the "benefit" here should be viewed as only 20% of the actual recovery that Southern Peru will receive. This contention misunderstands the nature of a derivative suit, ignores the separate corporate existence of Southern Peru, is contrary to Delaware law and policy governing fee awards from a common fund, and simply has not been the approach this Court has used in awarding fees in other derivative cases.

The common fund doctrine provides for a successful litigant to recover a reasonable fee from the fund as a whole.[9] This Court rejected the "look through" approach to awarding fees in

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[6] Plaintiff submits the Court should not have adjusted the market value of the 67.2 million Southern Peru shares in calculating damages to account for a $100 million dividend paid by Southern Peru on March 1, 2005 (a month before the Merger Date) (Dkt #284). Defendants disagree. (Dkt #285). Should the Court decide the issue in plaintiff's favor, the judgment amount, including pre-judgment interest, will be $2.0316 billion.

[7] On October 11, 2005, Southern Peru Copper Corporation changed its name to Southern Copper Corporation.

[8] *But see supra* n.6.

[9] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996).

a derivative case in *Wilderman v. Wilderman*.[10] In *Wilderman*, one of two shareholders of a company obtained a derivative recovery against the other shareholder requiring him to return excessive compensation to the company. In response to plaintiff's fee application, the defendant argued that the "benefit" should not be seen as the full amount of the recovery since the corporation only had two shareholders and the recovery would likely be paid out to them in a dividend.[11] This Court clearly held that "[s]uch a disregard of the corporate entity" would be "clearly inapposite," and that attorneys' fees should be awarded based upon the benefit conferred upon the corporation.[12]

More recently, this Court reiterated this rule in *Carlson v. Hallinan*[13] where a 30% stockholder successfully asserted derivative claims against defendant Hallinan, who was Chairman of the Board and the 65% controlling stockholder, and defendant Gordon, who was a director, officer and a 5% stockholder.[14] Plaintiffs prevailed both on direct and derivative claims.[15] The Court acknowledged that under the common fund doctrine a successful derivative plaintiff is entitled to fees and expenses through proportional contribution from all those who share in a common benefit resulting from plaintiff's efforts.[16] Thus, the Court held that plaintiffs were entitled to fees and expenses based on the full derivative recovery because they had

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[10] 328 A.2d 456 (Del. Ch. 1974).

[11] *Id*. at 458.

[12] *Id.* at 458-59 (*citing Keenan v. Eshleman*, 2 A.2d 904 (Del. Ch. 1938)).

[13] 925 A.2d 506, 546-48 (Del. Ch. 2006).

[14] *Id.* at 513-14.

[15] *Id.* at 548. The Court held the plaintiffs were not entitled to fees for the successful direct claims that only benefitted the individual plaintiff. *Id.* at 547.

[16] *Id.* at 546-547, citing D. Wolfe & M. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, §9.5[a].

enforced important corporate rights.[17] The Court ordered the payment of attorneys' fees and expenses notwithstanding the fact that defendants owned 70% of the corporation and the derivative recovery was to be distributed proportionately to all stockholders upon Court-ordered dissolution of the corporation.[18] The Court found that the public policy rationale behind the common fund doctrine, including requiring the persons who benefit to contribute to the costs of the suit and incentivizing stockholders to bring derivative suits to enforce the rights of the corporation as a whole, supported the award of fees and expenses even where the derivative recovery was to be distributed directly to the stockholders in a dissolution.[19]

This case differs from *Carlson* in that Southern Peru does not intend to dissolve, and the judgment will thus remain with the Company. Southern Peru will receive the entire judgment, and all stockholders, including Grupo and the minority stockholders, will benefit from the increased value of the corporation. Southern Peru will receive 100% of the derivative recovery; it should not pay attorneys' fees and expenses as if it had only received 20% of the recovery.

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[17] *Id*. at 547.

[18] *Id*.

[19] *Id. See also Goodrich*, 681 A.2d at 1044 (assessing fees out of the entire fund spreads the cost burden proportionately); *Levien v. Sinclair Oil Corp*., 1975 WL 1952, at *3 (Del. Ch.) (refusing to treat a multi-million dollar derivative judgment against a 97% controlling stockholder as only a recovery of the minorities' 3%); *Taormina v. Taormina Corp.*, 78 A.2d 473, 476 (Del. Ch. 1951) ("The relief to be obtained in a derivative action is relief to the corporation in which all stockholders, whether guilty or innocent of the wrongs complained of, shall share indirectly. Indeed, it is doubtful whether the result would be different even if the suing stockholder owned all of the stock of the wronged corporation."); *Keenan*, 2 A.2d at 253 (court will not permit recovery in derivative case to be diminished by an amount in proportion to defendants stockholdings because that would amount to transforming a derivative action into a direct action).

Indeed, in prior cases, this Court has not reduced the monetary benefit of a derivative recovery because the payor was also the majority stockholder.[20]

Similarly, all stockholders, including Grupo, should indirectly contribute to the fees and expenses. Given Grupo's culpability, there is nothing inequitable in requiring Grupo, as Southern Peru's majority stockholder, to bear most of the resulting cost of the litigation. To exclude 80% of the derivative recovery from the common fund because Grupo owns 80% of Southern Peru would effectively penalize plaintiff's counsel for litigating against a corporate controller, and unfairly reward the wrongdoer with an undeserved financial benefit.

Defendants' position that for fee purposes a derivative recovery should be treated as allocable to particular stockholders simply finds no support in Delaware law. Individual stockholders have no right to any pro-rata or other interest in the corporation's assets, including the recovery plaintiff has obtained for the Company.[21] Thus, Grupo cannot claim, in effect, that it owns 80% of the recovery Southern Peru receives. Basically, defendants want to treat this case as a direct action for purposes of the fee award. They cannot do that. The form and consequences of a derivative action cannot be ignored or disregarded.

Accordingly, the "common fund" created by this litigation is $1.9049 billion.[22] Defendants' argument that this amount should be reduced by 80% for purposes of determining

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[20] *See Thorpe v. CERBCO, Inc*., 1997 WL 67833, at *5 (Del. Ch.) (Court awarded attorneys' fees equal to 33% of full amount of the judgment plus pre-judgment interest notwithstnding judgment was against the company's 60% stockholder); *In re Emerson Radio Shareholder Derivative Litig.*, 2011 WL 1135006, at *4 (Del. Ch.) (Court awarded a percentage of the total $3 million paid by the 60% majority stockholder to settle derivative litigation with no discount for the payor's ownership interest).

[21] *Norte & Co. v. Manor Healthcare Corp.*, 1985 WL 44684, at *3 (Del. Ch.) (stating "the corporation is the legal owner of its property and the stockholders do not have any specific interest in the assets of the corporation").

[22] *But see supra* n.6.

an appropriate attorneys' fee is wrong as both a matter of law and policy, and should be disregarded.

2. The Percentage Sought by Counsel is Reasonable

So, what is a fair fee award in the largest class or derivative judgment ever obtained in this Court?

This Court has repeatedly indicated that a large monetary recovery after trial in hard-fought litigation is the type of "benefit" under the *Sugarland* test that should result in a fee award calculated as a substantial percentage of the benefit. For example, in *Lewis v. Engle*,[23] this Court explained that:

> I have a little different viewpoint on trimming back percentages of plaintiffs' lawyers when big amounts are recovered. I don't get it. I really don't. If some plaintiff's lawyer goes to trial and wins a $10 billion recovery, I will say right now, that's when I am most likely to award 33 percent. I just am. Why? Because that's when the real risk has been taken.[24]

Similarly, in *In re American International Group, Inc. Consolidated Derivative Litigation*,[25] this Court awarded plaintiffs' counsel a fee award equal to 22.5% of the $90 million common fund in a derivative settlement. In doing so, the Court explained:

> [S]ometimes it's forgotten when folks see things like this is that big fees, when much is achieved, they're deserved, particularly when much is at risk. The plaintiffs as a collective put in thousands of hours which could have come to naught.
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> * * * * *
>
> And so it's a big fee, but I think it's important – and I've said this before and I will continue to say it – that, you know, you don't reduce people's fees because they gain much. You should, in fact, want to create an incentive for real litigation. That's what benefits diversified investors, when people will take, you know, good

[23] C.A. No. 497-VCS, Strine, V.C. (Del. Ch. Dec. 29, 2004) (Transcript).

[24] *Id.* Tr at 22.

[25] C.A. No. 769-VCS, Strine, V.C. (Del. Ch. Jan. 25, 2011) (Transcript).

> cases and actually prosecute them and take risk. What doesn't benefit investors is simply the filing of a case every time there's a valuable business opportunity and simply having a handout and getting a toll.[26]

Likewise, in *In re Telecorp. PCS, Inc. Shareholder Litig.,*[27] this Court awarded fees in the amount of 30% of a $47,000,000 cash settlement arrived at on the eve of trial. The fee was contested and the Court flatly rejected the objector's argument that there should be a declining percentage when the recovery is large. The Court indicated that it may well have awarded up to 35% had the case actually be tried rather than settled:

> [O]ne of the reasons I think 30 percent is a fairly logical stopping point [for fees awarded in connection with a settlement] is that there might well be a rationale for actually giving 33 percent or something somewhat higher after a fully-litigated trial. That is contrary to the sort of declining percentage. I would tend not to decline a percentage in a mega case.
>
> * * * * *
>
> I don't get the declining percentage. But I could see holding out the full measure of 33 to maybe 35 percent – I don't know what prevailing norms are for tort lawyers – to hold that out that there's a promise actually if you go to trial, it will be at the highest end of the range. I would think that would be the time we would wish to be the least parsimonious.[28]

Plaintiff submits that the Court's reasoning in *Lewis*, *AIG*, and *Telecorp* is the correct approach because limiting fee awards in large cases would create a strong disincentive to take the huge risk of trying large cases. For example, how would lawyers be incentivized to take a potential billion dollar case to trial if they know that if they win a billion dollars they will get the same fee award as they would have if they settled the case for $200 million? It is clear that such a declining percentage approach would misalign the interests of the lawyers and those they represent.

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[26] *Id.* at 9:17-10:17.

[27] C.A. No. 19260-VCS, Strine, V.C. (Del. Ch. Aug 20, 2003) (Transcript).

[28] *Id.* at 102-103.

Many federal courts similarly have held that a declining percentage in large cases "creates the perverse incentive for Class Counsel to settle too early for too little."[29] Instead, the *Allapattah* court awarded attorneys' fees equal to a flat 31 1/3% of a common fund exceeding $1 billion. Further, as one leading commentator has noted, there is authority for ***increasing*** the percentage as the recovery grows larger:

> In contrast, to provide a sufficient financial fee-award incentive to maximize the recovery achieved, at least one court has adopted an intended fee schedule with an upward scale as the recovery increases. In *American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, Judge Bilby, before any decision on the merits, set forth the level of fees that would be awarded in the event that plaintiffs were ultimately successful. Significantly, the court stated that it would award 25% of the first $150 million and 29% of any class recovery in excess of $150 million.[30]

In the Opinion in this case, the Court indicated that plaintiff's counsel should be conservative in connection with a fee application due to the pace of the litigation. We understand the Court's admonition and, in considering what percentage award would be appropriate, we reduced the request from the one-third award previously discussed by almost a third. In order to confirm the reasonableness of the resulting figure, we looked to the second largest derivative recovery in this Court (the largest prior to this case). In *Teachers' Retirement Sys. of Louisiana v. Greenberg*,[31] there was a derivative cash settlement of $115 million on the eve of trial. Plaintiff's counsel had agreed with its client at the outset of the case to limit any fee petition to 22.5% so that was what was requested and it was what this Court awarded.[32] In

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[29] *Allapattah Services, Inc. et al. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1213 (S.D.Fla. July 6, 2006).

[30] ALBA CONTE, 1 *Attorney Fee Awards*, 3d Ed., § 2.9 (Database Updated October 2008) (citation omitted) (hereinafter "ALBA CONTE").

[31] C.A. No. 20106, Strine, V.C. (Del. Ch. Dec. 17, 2008) (Transcript).

[32] The retainer agreement in this case authorized counsel to seek up to 30% of any monetary recovery.

granting the fee application, the Court noted that "this isn't a generous award."[33] Since 22.5% was considered conservative in *Greenberg*, we feel that the percentage award here should not be smaller where a far bigger and better result was obtained, and where it was obtained after trial (as opposed to settlement).

B. Time and Effort Expended By Counsel and Contingent Nature of the Litigation

Plaintiff's counsel prosecuted this action on an entirely contingent basis.[34] Plaintiff's counsel worked a total of approximately 8,597 hours on this case since inception.[35] Plaintiff's counsel also incurred out-of-pocket expenses of approximately $1,117,816 in pursuit of this Action.[36] Most of these expenses (nearly 80%) were expert witness fees that plaintiff's counsel paid out-of-pocket.

In a situation involving a recovery of the magnitude at issue here after trial, we submit that "hours" worked should have minimal significance in connection with this Court's broad discretion in applying the *Sugarland* factors. Nevertheless, the substantial investment of time and money (more than $1 million in expenses, for example) to take this case through trial where plaintiff's counsel might have received nothing is a factor that suggests that an award of 22.5% of the benefit is reasonable.

C. The Complexity of the Litigation

This was a difficult and complex case. There was a special committee composed of individuals with impressive resumes. The valuation issues were complex. Discovery involved

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[33] *Id.*, Tr. at 8:22.

[34] *See Ryan*, 2009 WL 18143, at *13 ("This Court has recognized that an attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis.")

[35] *See* Affidavit of Ronald A. Brown, Jr. at ¶4.

[36] *See* Affidavit of Ronald A. Brown, Jr. at ¶7.

extensive world travel. And this was certainly not a case that was any sort of "slam dunk." The defendants appeared convinced throughout the case that they had virtually no chance of losing. Obtaining this result in a case in which defendants openly proclaim to have been "shocked"[37] further demonstrates that this was a difficult and complex case, and further supports plaintiff's request for a 22.5% fee after trial.

D. The Standing and Skill of Counsel

Plaintiff's counsel are well known to the Court and, as such, we leave the assessment of this factor to the Court.

CONCLUSION

The application of the *Sugarland* factors here shows that a fee award in the amount of 22.5% of the monetary recovery after trial is reasonable and appropriate. This is by far the largest monetary recovery ever obtained in a contingent class or derivative action in this Court and, as such, the "benefit conferred" prong of the *Sugarland* test certainly supports a 22.5% fee award. The other factors, while taking on much less significance given the unprecedented benefit, also support the 22.5% fee request.

For all of the foregoing reasons, plaintiff's counsel's petition for an award of attorneys' fees and expenses in the amount of 22.5% of the recovery in this case plus interest on the award at the legal rate until paid should be granted.

[37]http://www.google.com/url?sa=X&q=http://newsandinsight.thomsonreuters.com/Legal/News/2011/10_-_October/%241_3bn_Grupo_ruling_is_Strine_v__Goldman,_ex-Wachtell_partner/&ct=ga&cad=CAcQAxgAIAAoAjAAOABApoj59ARIAVgBYgVlbi1VUw&cd=YXCXuAGvaJE&usg=AFQjCNFmpAELxIxmtfnpl0xX3XxTqPjoUw

PRICKETT, JONES & ELLIOTT, P.A.

By: /s/ Ronald A. Brown, Jr.
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(610) 667-7706

Dated: October 28, 2011

CERTIFICATE OF SERVICE

I, Ronald A. Brown, Jr., do hereby certify on this 28th day of October, 2011, that I caused a copy of Plaintiff's Petition for Attorneys Fees and Expenses to be served via eFiling through LexisNexis File and Serve to counsel for the parties as follows:

S. Mark Hurd, Esquire
Kevin M. Coen, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
Wilmington, Delaware 19801

Richard L. Renck, Esquire
Ashby & Geddes
500 Delaware Avenue
Wilmington, Delaware 19801

/s/ Ronald A. Brown, Jr.
Ronald A. Brown, Jr. (DE Bar No. 2849)

EFiled: Oct 28 2011 3:27PM EDT
Transaction ID 40586888
Case No. 961-CS

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

AFFIDAVIT OF RONALD A. BROWN, JR.

I, Ronald A. Brown, Jr., am a member of the Delaware bar and a director of the law firm, Prickett, Jones & Elliott, P.A. ("Prickett Jones").

1. Prickett Jones along with its co-counsel Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz") represented plaintiff in the above-referenced action. The representation was undertaken on a fully contingent basis.

2. Based on the accounting records of the Prickett Jones firm, attorneys and paralegals at Prickett Jones worked approximately 2,998.35 hours on this matter through July 18, 2011, which are itemized as follows:

Attorney	Hourly Rate	Hours	Value at applicable hourly rate
William Prickett (Partner)	$350.00	1.50	$ 525.00
James L. Holzman (Partner)	$410.56	106.40	$ 43,684.00
Michael Hanrahan (Partner)	$649.17	46.00	$ 29,862.00
Gary F. Traynor (Partner)	$498.64	4.40	$ 2,194.00
Ronald A. Brown, Jr. (Partner)	$508.78	1,207.60	$ 614,398.00
Thomas A. Mullen (Partner)	$351.00	107.10	$ 37,592.00
J. Clayton Athey (Partner)	$410.00	1.90	$ 779.00
Laina M. Herbert (Associate)	$200.00	0.90	$ 180.00
Marcus E. Montejo (Associate)	$256.63	1,451.30	$ 372,446.00
Kevin H. Davenport (Associate)	$150.00	29.20	$ 4,380.00
David W. Gregory (Associate)	$160.00	9.20	$ 1,472.00
Donna Thompson (Paralegal)	$120.00	25.95	$ 3,114.00
Susan E. Jackson (Paralegal)	$120.00	0.10	$ 12.00
Pamela L. Reed (Paralegal)	$ 60.00	2.00	$ 120.00
Debra L. Bartell (Paralegal)	$130.00	0.30	$ 39.00
Susan P. Taylor (Paralegal)	$120.00	4.50	$ 540.00
TOTAL:		2,998.35	$1,111,337.00

3. From the inception of this case through July 18, 2011, attorneys, paralegals and investigative staff at Kessler Topaz worked a total of 5,599.52 hours on this matter. Those hours are itemized in the Affidavit of Lee Rudy in Support of an Award of Attorneys' Fees and Expenses attached hereto as Exhibit A (hereinafter "Rudy Aff."). (Rudy Aff. ¶4; Ex. 1).

4. The total hours expended on this matter by the Prickett Jones and Kessler Topaz firms through July 18, 2011 were 8,597.87.

5. The unreimbursed out-of-pocket expenses incurred in the litigation of this matter by the Prickett Jones firm through October 26, 2011 were $590,485.57. The chart below summarizes these expenses:

Expense Category	**Through October 26, 2011**	**Total**
Court Costs	$ 17,847.32	$ 17,847.32
Expert Fees	$411,884.82	$411,884.82
Deposition and Hearing Transcripts	$ 61,415.60	$ 61,415.60
Travel and Related Expenses	$ 20,269.68	$ 20,269.68
Secretary of State Recording, Filing & Research Charges	$ 454.00	$ 454.00
Legal Research Charges	$ 11,137.82	$ 11,137.82
Rule 3(b)(b) Filing and Printing Costs	$ 3,991.00	$ 3,991.00
Document Processing and Reproduction	$ 41,365.00	$ 41,365.00
Courier/Messenger Services	$ 3,576.64	$ 3,576.64
Long Distance & Outside Telephone Charges	$ 501.05	$ 501.05
Outside Photocopying Charges	$ 16,706.04	$ 16,706.04
Telecopy Charges	$ 355.00	$ 355.00
Secretarial Overtime	$ 981.60	$ 981.60
TOTAL:	$590,485.57	$590,485.57

6. The unreimbursed out-of-pocket expenses incurred in the litigation of this matter by the Kessler Topaz firm through October 26, 2011 were $527,331.22. (Rudy Aff. ¶5; Ex. 2).

7. The total unreimbursed out-of-pocket expenses incurred in the litigation of this matter by the Prickett Jones and Kessler Topaz firms were $1,117,816.79.

Ronald A. Brown, Jr. (DE Bar No. 2849)
Prickett, Jones & Elliott, P.A.
1310 King Street
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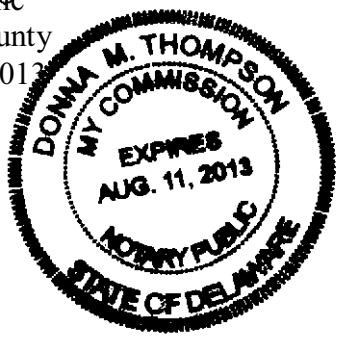
(302) 888-6500
Attorneys for Plaintiff

SWORN TO AND SUBSCRIBED before me this 28th day of October, 2011.

Donna M. Thompson, Notary Public
State of Delaware, New Castle County
My Commission Expires: 08/11/2013



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CERTIFICATE OF SERVICE

I, Ronald A. Brown, Jr., do hereby certify on this 28th day of October, 2011, that I caused a copy of the Affidavit of Ronald A. Brown, Jr. to be served via eFiling through LexisNexis File and Serve upon counsel for the parties as follows:

S. Mark Hurd, Esquire
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/s/ Ronald A. Brown, Jr.
Ronald A. Brown, Jr. (DE Bar No. 2849)

EFiled: Oct 28 2011 3:27PM EDT
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EXHIBIT A

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

AFFIDAVIT OF LEE D. RUDY IN SUPPORT OF AN AWARD OF ATTORNEYS' FEES AND EXPENSES

COMMONWEALTH OF PENNSYLVANIA)
) ss.:
COUNTY OF DELAWARE)

Lee D. Rudy, being first duly sworn, deposes and says:

1. I am a partner of the law firm of Kessler Topaz Meltzer & Check, LLP. I submit this affidavit in support of my firm's application for an award of attorneys' fees and expenses in connection with services rendered in the above-captioned action.

2. The schedule attached hereto as Exhibit 1 is a detailed summary indicating the amount of time spent by each attorney and professional support staff of my firm who was involved in this litigation, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and reimbursement of expenses has not been included in this request.

3. The hourly rates for the attorneys and professional support staff of my firm included in Exhibit 1 have been accepted in other shareholder litigation.

4. The total number of hours expended on this litigation by my firm is 5,599.52 hours, representing a total lodestar of $2,358,547.75 through July 18, 2011.

5. In addition, as detailed in Exhibit 2, my firm has incurred a total of $527,331.22 in unreimbursed expenses in connection with the prosecution of this litigation, all of which was incurred through October 26, 2011.

6. The expenses incurred in this action are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

7. From prior cases, the Court is familiar with the standing of my firm and the attorneys in my firm who were principally involved in this litigation.

I state under penalty of perjury under the laws of the State of Delaware that the foregoing is true and correct. Executed this 26th day of October, 2011, at Radnor, Pennsylvania.

Lee D. Rudy

Sworn to before me this
26th day of October 2011.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Johanna M. Yemm, Notary Public
Norristown Boro, Montgomery County
My Commission Expires Nov. 9, 2011
Member, Pennsylvania Association of Notaries

EXHIBIT 1

In re Southern Peru Copper Corporation Shareholder Derivative Litigation
Consolidated C.A. No. 961-CS

KESSLER TOPAZ MELTZER & CHECK, LLP
TIME REPORT
Inception through July 18, 2011

Name / Designation	HOURLY RATE	HOURS	VALUE AT APPLICABLE HOURLY RATE
PARTNERS			
Berman, Stuart L.	$675.00	1.00	$675.00
Rudy, Lee	$650.00	506.75	$329,387.50
Topaz, Marc A.	$725.00	220.80	$160,080.00
Wagner, Michael	$600.00	243.75	$146,250.00
Zagar, Eric	$650.00	474.00	$308,100.00
ASSOCIATES			
Anderson, Stefanie	$345.00	5.20	$1,794.00
Fuchs-Simon, Jesse	$345.00	2.25	$776.25
Smith, Sandra	$425.00	22.00	$9,350.00
Kerrigan, Quinn	$375.00	154.75	$58,031.25
Miller, James	$405.00	1,917.70	$776,668.50
INVESTIGATION DEPARTMENT			
Rabbiner, David	$450.00	64.55	$29,047.50
Bochet, Jason	$325.00	36.32	$11,804.00
Eisenberg, Emily	$225.00	140.50	$31,612.50
Fitzgerald, Joanna	$225.00	9.00	$2,025.00
Maginnis, Jamie	$325.00	120.25	$39,081.25
Marshall, Kate	$225.00	5.25	$1,181.25
Molina, Henry	$325.00	3.75	$1,218.75

Name / Designation	HOURLY RATE	HOURS	VALUE AT APPLICABLE HOURLY RATE
CONTRACT ATTORNEYS			
Berenson, Andrew	$300.00	136.00	$40,800.00
Grabianowski, Daniel	$325.00	199.00	$64,675.00
Griffith, Rodney B.	$295.00	40.75	$12,021.25
Hernandez, Jennifer	$295.00	44.00	$12,980.00
Johnson-Humphrey-Bennett, Catherine	$325.00	182.50	$59,312.50
Meyers, Robert	$325.00	212.75	$69,143.75
PARALEGALS			
Silberman, David	$225.00	208.70	$46,957.50
Hankins, Andrew	$225.00	8.00	$1,800.00
McGinnis, Christopher	$225.00	143.50	$32,287.50
Tewksbury, Doug	$225.00	22.40	$5,040.00
Yemm, Johanna	$225.00	469.60	$105,660.00
PROFESSIONAL STAFF 1			
Eng, Benjamin	$175.00	4.50	$787.50
TOTALS:		**5,599.52**	**$2,358,547.75**

EXHIBIT 2

In re Southern Peru Copper Corporation Shareholder Derivative Litigation
Consolidated C.A. No. 961-CS

KESSLER TOPAZ MELTZER & CHECK, LLP
EXPENSE REPORT
Inception through October 26, 2011

Expense Description	10/26/2011	FINAL
Filings & Service of Process	701.00	701.00
Court Reporters & Transcripts	5,836.70	5,836.70
Messenger, Courier & Overnight Mail	1,880.62	1,880.62
Photocopying	62,014.72	62,014.72
Postage	3.87	3.87
Meals, Hotels & Transportation	35,485.29	35,485.29
Research	12,188.57	12,188.57
Teleconferences	88.37	88.37
Expert	407,882.08	407,882.08
Document Review Storage and Retrieval	1,250.00	1,250.00

TOTAL:	**527,331.22**	**$527,331.22**

EFiled: Oct 28 2011 3:27PM EDT
Transaction ID 40586888
Case No. 961-CS

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

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, 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 October, 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 the date of the Opinion:	$684,617,363
Total Amount of Judgment:	$2,031,617,363

(hereinafter the "Judgment").

2. 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]

4. Plaintiff's counsel are awarded fees and expenses in the amount of ____% of the Judgment, or $_____, plus post-Judgment interest at the legal rate until such

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

attorneys' fee/expense award is satisfied, to be paid by Southern Copper, which amount the Court finds to be fair and reasonable.

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

EFiled: Oct 28 2011 3:27PM EDT
Transaction ID 40586888
Case No. 961-CS

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

FINAL ORDER AND JUDGMENT

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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 October, 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:	$1,263,000,000
Pre-Judgment Interest through the date of the Opinion:	$641,900,000
Total Amount of Judgment:	$1,904,900,000

(hereinafter the "Judgment").

2. 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 $198,965.

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]

4. Plaintiff's counsel are awarded fees and expenses in the amount of ____% of the Judgment, or $_____, plus post-Judgment interest at the legal rate until such

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

attorneys' fee/expense award is satisfied, to be paid by Southern Copper, which amount the Court finds to be fair and reasonable.

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

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

AMC DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND EXPENSES

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
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Attorneys for Defendants Americas Mining Corporation, 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.

OF COUNSEL:

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New York, NY 10005
(212) 530-5000

November 11, 2011

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CASES

Defendants 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 (the "AMC Defendants") respectfully submit this opposition to Plaintiff's Petition For Attorneys' Fees and Expenses (the "Petition").

PRELIMINARY STATEMENT

The Court directed Plaintiff's counsel to seek a "responsible" and "conservativ[e]" fee award. Despite this clear direction, Plaintiff's counsel has asked this Court to award approximately $428.2 million in attorneys' fees and expenses, over $130 million more than the benefit that arguably would be conferred on SPCC's minority stockholders as a result of the Court's Opinion. This amount is more than ***123 times*** Plaintiff's counsel's lodestar and would represent an unprecedented rate of more than ***$49,000 per hour***. Plaintiff's counsel's request is unreasonable, unsupported by Delaware law, and seeks an impermissible windfall.

The Opinion allows AMC to satisfy the Judgment in cash, by returning stock to SPCC, by allowing the cancellation of shares AMC received in the Merger, or any combination of those methods. If AMC decides to return shares or allow their cancellation it would be a balance sheet event that would only change the percentages of each shareholder's ownership of SPCC but would not result in any direct cash payments to SPCC or any minority shareholder. Therefore, there would be no tangible, common-fund benefit conferred. [1] If, however, AMC decides to satisfy the Judgment by paying cash, the benefit conferred by the litigation is at most $360.6 million, not $1.9 billion, because only 20% of the Judgment would benefit SPCC's

[1] Any benefit to the minority stockholders resulting from the cancellation or return of shares would be marginal at best. Indeed, if the shares are returned or canceled, AMC would go from owning 80% of the Company's outstanding shares to owning 78%. This slight reduction in AMC's controlling interest does not justify a $428 million attorneys' fee award.

minority shareholders.[2] Plaintiff's counsel, however, have requested $428.2 million, 12.5% more than the total amount of any cash payment that would be allocable to the minority shareholders. But the imbalance is even worse, because Plaintiff's counsel will be paid out of the Judgment, which means it will come "off the top." Thus, if granted, Plaintiff's counsel's $428.2 million fee would be subtracted from the $1.9 billion judgment leaving $1.472 billion, 20% of which – or $294.97 million – would benefit the minority stockholders, ***45.2% less*** than the requested fee.

The AMC Defendants respectfully submit that, in light of these facts, the most reasonable method of awarding fees here would be to use a multiple of Plaintiff's counsel's lodestar, which also reflects the benefit actually conferred. The AMC Defendants respectfully submit that the Court should use a lodestar multiplier of no more than four, which would be more than enough to compensate and incentivize plaintiffs' counsel without awarding the types of windfalls courts seek to avoid.

FACTUAL BACKGROUND

This lawsuit arises out of a stock-for-stock merger (the "Merger") between Southern Peru Copper Corporation ("SPCC")[3] and Minera Mexico ("Minera"). Trial was held from June 21-24, 2011. At trial, the following individuals testified for the AMC Defendants: (i) Luis Miguel Palomino Bonilla; (ii) Harold Handelsman; (iii) Armando Ortega; (iv) Raul Jacob; and (v) Eduardo Schwartz (the AMC Defendants' expert). The only individual that testified for

[2] AMC owns 80% of SPCC's stock. If AMC pays the Judgment in cash, that percentage will remain unchanged and SPCC would dividend the cash it receives back to all shareholders — 80% would be returned to AMC and 20% would be paid to the minority shareholders, each of whom might owe applicable income or other taxes on the amount received.

[3] After the Merger SPCC changed its name to Southern Copper Corporation.

the Plaintiff was his expert, Daniel Beaulne. The parties also submitted documentary evidence and transcripts of the depositions that had been conducted.

The Court issued the Opinion on October 14, 2011. The Court determined that the Merger was unfair to SPCC's minority stockholders and ordered "Grupo Mexico" [4] to pay $1.263 billion in damages, plus interest.[5] The Court held that AMC can satisfy the judgment by paying cash to SPCC or agreeing to return to SPCC the number of SPCC shares necessary to satisfy the damage award. The Court provided that if AMC opts to satisfy the judgment by returning shares or allowing their cancellation, the number of shares that AMC must return or allow to be canceled shall be calculated by dividing the value of the judgment by the average closing price of SPCC's stock in the 20 trading days prior to the issuance of the Opinion. AMC has not yet determined whether it would satisfy the judgment with cash, returned shares, canceled shares, or a combination thereof.

With respect to attorneys' fees, the Court held that any attorneys' fees shall be paid out of the total award. The Court directed the parties to try to reach agreement on a "responsible fee" and specifically directed Plaintiff's counsel to be "conservative" and take into account their delays in litigating this case. [6] The Opinion specifically noted that Plaintiff's counsel was dilatory in their prosecution of this case and directed that the proposed fee take that

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[4] Grupo Mexico is not a defendant in this action. Although the Court referred to Grupo Mexico and AMC collectively in the Opinion (*see* Opinion at 5 n.2), this memorandum only refers to AMC.

[5] The AMC Defendants respectfully disagree with the Court's decision that the Merger was not entirely fair, but will address their arguments to the Supreme Court.

[6] That direction was consistent with the rule that an attorney seeking compensation "must show that he contributed to the beneficial results of the litigation" and that even such a showing can be counteracted by other factors the trial court may consider. *See Sanders v. Wang*, 2001 WL 599901, at *2 (Del. Ch. May 29, 2001).

into consid eration. Although the AMC De fendants attempted to reach an agreem ent with Plaintiff's counsel regarding a proposed fee award, the parties were too far apart to do so.

The m arket's reaction to the Opinion is not consistent with Plaintiff's counsel's views of the size of the benefit to SPCC that would result from the damage award set forth in the Opinion. Although Plaintiff's counsel did no t s ubmit any evidence relating to the reaction of SPCC's share price to the Opinion — m ore speci fically, P laintiff's counsel did not subm it a n event study to ascertain what that reaction wa s — the AMC Defendants have conducted such an analysis. T he AMC Defendants' event study i ndicates that SPCC's st ock price showed no statistically significan t reaction to the Opinion and th at the changes in SPCC's stock p rice following the issuance of the Opinion correlate w ith changes in the broader m arkets and copper prices.[7]

On October 28, 2011, Plaintiff's counsel su bmitted the Petition. In their cover letter to the Court, Plaintiff's counsel argued that the decision on an award of fees and expenses should be m ade before the AMC Defendants' ap peal to avo id piecemeal litigation. On October 31, 2011, the Court inform ed couns el that it intends to decide Plaintiff's counsel's fee request before appeal and directed the parties to subm it a briefing schedule with re spect to the Petition. This is the AMC Defendants' opposition to the Petition.

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[7] *See* Affidavit of James C. Meehan, dated November 11, 2011 ¶¶ 8-13 & Exh. 2.

ARGUMENT

I. LEGAL STANDARD

The touchstone of any attorneys' fee award is reasonableness.[8] The purpose of granting attorneys' fees in cases like this is to "produce[] appropriate incentives without a significant risk of producing socially unwholesome windfalls."[9] In determining whether a fee award is reasonable, Delaware courts consider the six factors articulated in *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980) (the "*Sugarland* factors"): (i) the size of the benefit conferred; (ii) the efforts of counsel and the time spent in connection with the case; (iii) the contingent nature of the litigation; (iv) the relative complexities of the litigation; and (v) the standing and ability of counsel involved. Delaware courts also consider how the fee demand compares to other fee awards.[10] Because the plaintiff's attorneys' role changes from one of a fiduciary to their clients to a claimant against the recovery created for their clients, a court's review of attorney fee applications must be more than "cursory."[11] That is especially so here, given that no Plaintiff has ever so much as made an appearance before the Court, expressed an opinion regarding this litigation, or expressed an opinion regarding the Petition.

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[8] *See Gelobter v. Bressler*, 1991 WL 236226, at *3 (Del. Ch. Nov. 6, 1991) ("An attorney's fee award represents a discretionary determination of compensation that is reasonable under all the circumstances.").

[9] *Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000).

[10] *Boyer v. Wilmington Materials, Inc.*, 1999 WL 342326, at *2 (Del. Ch. May 17, 1999).

[11] *Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1045 (Del. 1996).

II. PLAINTIFF'S COUNSEL'S FEE DEMAND IS UNREASONABLE

A. Plaintiff's Counsel's Fee Demand Is Greater Than The Benefit Conferred On SPCC's Minority Stockholders

Plaintiff's counsel argues that the benefit achieved in this case is $1.9049 billion, the dollar amount used in the Court's Judgment (including interest). Although the amount used in the Judgment for calculation purposes is $1.263 billion plus interest, the monetary benefit actually conferred on SPCC and SPCC's minority stockholders may be nothing depending upon how AMC decides to satisfy the Judgment.

The Opinion specifically allows AMC to satisfy the Judgment in cash, by returning stock to SPCC, by allowing the cancellation of shares it received in the Merger, or any combination thereof.[12] If AMC elects to return or cancel SPCC shares, this would increase the percentages of each shareholder's ownership of SPCC (and decrease AMC's percentage ownership) but it would not result in a cash payment to SPCC or any other benefit *to SPCC*. It would be a balance sheet event. Thus, the Opinion specifically contemplated that the Judgment might be satisfied in a way that would not result in the creation of a common fund. This fact is critical because, in circumstances such as these where there is no common fund, courts give greater consideration to counsel's lodestar in determining an appropriate fee award.[13] The fact that the Opinion expressly permits this result and the fact that SPCC's market price exhibited no reaction to the Opinion counsel in favor of awarding fees on a *quantum meruit* basis. As set

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[12] AMC has not decided how it intends to satisfy the Judgment and does not anticipate making that determination until the Delaware Supreme Court decides the appeal.

[13] *See Louisiana State Emps. Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *9 (Del. Ch. Sept. 19, 2001); *In re First Interstate Bancorp Consol. S'holders Litig.*, 756 A.2d 353, 359-60 (Del. Ch. 1999), *aff'd*, 755 A.2d 388 (Del. 2000) (TABLE); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 856-57 (Del. Ch. 1998).

forth below, Plaintiff's counsel is not entitled to anywhere near $428 million when calculated on a *quantum merit* basis.

As an initial matter, corporations, of course, have no interest in who owns their stock. To the extent the Judgment is satisfied by reapportioning ownership of SPCC between AMC and the minority shareholders, no benefit will be conferred *on SPCC*. The benefit (*i.e.*, an increase in the percentage of their ownership interest) will be conferred solely on the minority stockholders. This benefit, moreover, will be marginal. If AMC elects to satisfy the judgment by returning or cancelling shares, it will go from owning 80% of the Company's outstanding shares to owning 78%. Plaintiffs have offered no evidence that this marginal decrease in AMC's controlling interest confers a benefit on SPCC or the minority stockholders sufficient to justify a $428 million fee award.

The rationale justifying attorneys' fees in a successful derivative action, moreover, is that "where a litigant has conferred a common *monetary benefit* upon an identifiable class of stockholders, all of the stockholders should contribute to the costs of achieving that benefit." [14] That is, the fee is paid by those who benefit from the award they receive — the fee award is not designed "to saddle the unsuccessful party with the expenses but to impose them on the class that has benefitted from them and that would have had to pay them had it brought the suit."[15]

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[14] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 850 (Del. Ch. 1998).

[15] *Weinberger v. UOP,* 517 A.2d 653, 655 (Del. Ch. 1986); *see also Hall v. Cole*, 412 U.S. 1, 5-6 (1973) ("Fee shifting is justified in [common fund] cases, not because of any 'bad faith' of the defendant but, rather, because 'to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense."); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."). Indeed, the Court specifically held that the AMC Defendants do not have to pay whatever attorneys' fee the

If, by contrast, AMC were to pay the Judgment in cash, 20% of the cash paid to SPCC could be paid through a dividend to the minority shareholders because AMC owns 80% of SPCC's stock.[16] Therefore, at most, the pre-tax monetary benefit of the Judgment to SPCC's minority shareholders could be approximately $380.6 million, not $1.9 billion.[17]

Recognizing this issue,[18] Plaintiff's counsel argues that the "common fund doctrine provides for a successful litigant to recover a reasonable fee from the fund as a whole" – notwithstanding the fact that there may be no fund – and that the amount upon which fees should be awarded should not be reduced to reflect the reality of Grupo Mexico's 80% ownership of SPCC.[19] This argument ignores the unique situation presented here.

B. The Time And Effort Expended By Plaintiff's Counsel Does Not Support Their Fee Request

Courts often look to the hours plaintiffs' counsel worked on a case as a "crosscheck" against a fee demand to ensure that the fee award correlates with a reasonable

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Court might award. *See* Opinion at 104. Focusing on any benefit to SPCC's minority shareholders is necessary to give effect to this specific decision by the Court.

[16] SPCC does not require the cash for its operations, and likely would dividend out any cash received pursuant to the Judgment.

[17] *See, e.g., Lane v. Head*, 566 So. 2d 508, 512 (Fla. 1990) (finding that the benefit conferred by the litigation was the 25% allocable to the minority shareholders and stating "[t]he fact that the action was derivative, based on a right inhering in the corporation and not [plaintiff], in no sense alters this conclusion"); *Lewis v. Great Western United Corp.*, 1978 WL 2490, at *8 (Del. Ch. Mar. 28, 1978) (when "the fee is to be allocated by the Court out of funds which would otherwise belong to others, such generosity must not be unreasonably practiced at the enforced expense of others.").

[18] The AMC Defendants' counsel specifically identified this as one of the AMC Defendants' objections to the fee Plaintiff's counsel proposed before Plaintiff's counsel filed the Petition.

[19] Petition at 2.

hourly rate.[20] Courts do this to guard against awarding windfalls to plaintiffs' counsel. Here, awarding anything close to the fees Plaintiff's counsel seeks would result in exactly the type of windfall Delaware courts seek to avoid.

Plaintiff's counsel purports to have worked 8,597 hours on this case since inception. Plaintiff's counsel's fee demand translates to an effective blended rate of more than $49,000 per hour, 78 times the hourly rate of the highest paid partner on this case and 142 times the hourly rate for junior associates. The Petition does not cite and Defendants are not aware of any case in Delaware (or elsewhere) that has approved anything close to an hourly rate of $49,000.[21] Attorneys' fees are supposed to compensate Plaintiff's counsel for lost opportunity costs and provide modest risk and incentive premia. Plaintiff's counsel's fee demand exceeds any reasonable measure of an appropriate incentive premium and is anything but "modest." Clearly recognizing the disparity between the fee demand and the time and effort expended in this case, Plaintiff's counsel argues that the hours worked should have "minimal significance"

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[20] *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC,* 986 A.2d 370, 396 (Del. Ch. 2010).

[21] Hourly rates for monetary-benefit cases appear to range anywhere from $500 to, on rare occasions, $4000 per hour. *See Berger v. PuBCo Corp.*, 2010 WL 2573881, *1 (Del. Ch. June 23, 2010) (hourly rate of $3,450 is "within the range of hourly rates found among Court of Chancery monetary-benefit cases"); *Brinckerhoff,* 986 A.2d at 396 (using hours worked as a cross-check for fee award and determining that an effective hourly rate of $1000 was reasonable); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *4 n.73 (Del. Ch. Aug. 30, 2007) (awarding fee that represented a "high hourly rate" of $4023); *In re Cox Commc'ns Inc. S'holders' Litig.*, 879 A.2d 604 (Del. Ch. 2005) (rejecting as unreasonable plaintiffs' request for $4.95 million in fees, which would have represented an hourly rate of approximately $2000; final award translated to an hourly rate of approximately $552 per hour); *In re Abercrombie & Fitch Co. S'holders Derivative Litig.*, 886 A.2d 1271, 1273-74 (Del. 2005) (approving multiplier of 2.39 times fees and rejecting request for a 14.33 multiplier as "far beyond" what courts had approved); *Seinfeld,* 847 A.2d at 338 (reducing fee award from 20% to 10% of common fund because hourly rate of $2600 was "much more than necessary to maximize future plaintiffs' incentives to bring meritorious cases and to litigate them efficiently").

given the "magnitude" of the judgment.[22] In other words, Plaintiff's counsel asserts that how much or little they did, and how it fit into what the Court decided, are irrelevant, an argument that is inconsistent with *Sugarland*, fee award jurisprudence generally, and public policy against awarding windfalls.[23]

SPCC has performed an analysis of attorneys' fee awards in other cases with large judgments or settlements, and that analysis confirms that courts do not award windfalls like Plaintiff's counsel seeks here. SPCC's analysis shows that in cases with settlement or judgment amounts greater than $1 billion, the average lodestar multiplier (including expenses) is 3.88. Likewise, the average award as a percentage of recovery (including expenses) is 9.65%. In these large recovery cases, plaintiffs' counsel averaged more than 181,000 hours, more than 21 times the number of hours claimed here, and the average hourly rate awarded was $1,218.40, nearly 41 times less than what Plaintiff's counsel seeks here. This data suggests that Plaintiff's counsel's request is unreasonable and over-reaching using every metric courts typically use to assess fee award requests.

The only support for the 8,597 hours Plaintiff's counsel purportedly expended on this case are affidavits from Ronald Brown and Lee Rudy, which include summary charts setting forth the attorneys who worked on the case, their hourly rates, and the total number of hours they worked. Plaintiff's counsel submitted no time sheets or other contemporaneous time records to

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[22] Petition at 9.

[23] *See In re Cox Commcn's, Inc. S'holders Litig.,* 879 A.2d at 640 (noting that the magnitude of the judgment is not necessarily commensurate with the supposed benefit conferred; "the size of the supposed benefit is largely a product of the size of the transaction itself … I have absolutely no reason to believe the plaintiffs are responsible for more than a very small amount" of that benefit).

support or explain the attorney time billed on this matter.[24] Therefore, there is no way for the AMC Defendants or the Court to evaluate whether the hours are in fact accurate or reasonable.[25] And the staffing — at least 45 personnel, not counting the third firm that disappeared from the case[26] — and its top-heavy structure (12 partners and 9 associates) is curious given how little work was done and how long Plaintiff's counsel delayed the case. However, even assuming that staffing was appropriate, the Petition equates to an average of 191.04 hours per time keeper *for the entirety of the case*, or just 27.96 hours per person per year for the case, raising the question "what was Plaintiff's counsel doing for the six years and ten months the case was pending?" This is likely why Plaintiff's counsel submitted summaries instead of actual time records — time records would confirm that nothing happened for significant parts of the litigation. This is yet another reason why such an exorbitant fee award is inappropriate here — it takes no account of how little Plaintiff's counsel did for so long.

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[24] Delaware law requires plaintiffs' counsel to show not only the number of hours spent on the litigation, but also (i) who worked on them; (ii) the specific tasks performed; and (iii) the hourly rate of the person performing the task. *See, e.g., Fox v. Chase Manhattan*, 1986 Del. Ch. LEXIS 356, at *2 (Jan. 9, 1986). Plaintiff's counsel have failed to provide sufficient documentation to support their fee request.

[25] *In re SS&C Techs., Inc. S'holders Litig.*, 2008 WL 3271242, at *3 (Del. Ch. Aug. 8, 2008) ("[c]ourts generally exclude excessive, redundant, duplicative or otherwise unnecessary hours" when determining whether a fee demand is reasonable) (internal quotations and citations omitted).

[26] Although nowhere mentioned in the Petition, there was a third plaintiffs' firm (now known as Abraham, Fruchter & Twersky, LLP ("AFT") involved in the litigation for the first 5 years (compare D.I. 171 (AFT listed as counsel) with D.I. 283 (AFT no longer listed as counsel)), and the Petition makes no mention of what that firm did, why it is no longer involved with the case, how that happened, and what (if any) arrangement for sharing fees with that firm might exist.

C. The Other *Sugarland* Factors Likewise Demonstrate That Plaintiff's Counsel's Fee Request Is Unreasonable.

1. Plaintiff's Counsel's Assertion That The Litigation Was Complex Does Not Support The Requested Fee

Before filing the Petition, Plaintiff's counsel argued not that this case was complex, but that it was very simple – a fact that militates against a large fee award.[27] Indeed, this case involved what Plaintiff's counsel argued was a straightforward breach of fiduciary duty claim.[28] Although the issues in this case were by no means trivial, they were not the type of novel and complex legal issues that have justified larger fee awards in other cases. For example, there was only one arguably significant discovery dispute (involving the Special Committee Defendants, not the AMC Defendants), the trial was short and not marked by substantial evidentiary disputes, and there were relatively few witnesses. Moreover, as the Court recognized, the primary evidentiary difficulties in the case were of Plaintiff's counsel's making.[29]

Despite their prior statements about the simplicity of this case, Plaintiff's counsel now argues that the case was difficult and complex because: (i) the Special Committee had impressive resumes; (ii) the case involves valuation issues; (iii) the case required world travel; and (iv) the AMC Defendants were shocked by the Court's Opinion. That argument does not support an enhanced fee award:

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[27] *Berger,* 2008 WL 4173860, a*2 ("Although the benefits were substantial, the litigation was not overly complex or novel. This militates against a larger attorneys' fee award.").

[28] *See, e.g.*, Plaintiff's Opening Brief in Support of Their [sic] Motion For Partial Summary Judgment at 36 ("This case turns on simple concepts."); *see also Franklin Balance Sheet Inv. Fund,* 2007 WL 2495018, at *13 (Del. Ch. Aug. 30, 2007) ("[a]llegations of breach of fiduciary duties and waste based on such self-interested transactions are commonplace in shareholder litigation" and do not weigh in favor of an enhanced fee award).

[29] *See, e.g.,* Opinion at 3.

- That the Special Committee has impressive resumes has nothing to do with the complexity of the case. Indeed, Plaintiff's counsel paid no significant attention to the Special Committee members' backgrounds before or during the trial, and really only addressed one member of the Special Committee as part of their case in chief (Mr. Handelsman).

- That Plaintiff filed a motion for partial summary judgment with respect to the valuation methodology used by the Special Committee and the AMC Defendants' expert belies Plaintiff's counsel's newfound assertion that the case involved complex valuation issues — seeking summary judgment as a plaintiff is an indication of a belief that a case can be resolved as a matter of law, not that the case is complex. Indeed, Plaintiff previously argued that the case involved "simple concepts" (*supra* note 28) and turned on one case, *Associated Imports, Inc. v. ASG Industries, Inc.*, 1984 WL 19833 (Del Ch. June 20, 1984).[30]

- The fact that this case involved travel to Mexico and Peru also has nothing to do with the complexity of the case and was simply a function of where the defendants were located. Depositions of their nonresident, individual defendants are typically taken at the location of their residence and the deposition of a corporation through its officers is taken at the principal place of business of the corporation. Plaintiff's counsel traveled to Peru and Mexico because that is where the witnesses whose depositions they wanted to take resided or maintained their principal places of business.

- Finally, the fact that the AMC Defendants were shocked by the Court's decision does not reflect the purported complexity of the case.

2. The Contingent Nature Of Counsel's Engagement Does Not Support Plaintiff's Counsel's Fee Demand

Although Plaintiff's counsel prosecuted this action on an a contingent basis, this does not support Plaintiff's counsel's request for such an exorbitant fee award. Any reward for their risk-taking should be commensurate with the benefit conferred on the SPCC's minority stockholders and balanced against their dilatory prosecution of the case. Moreover, there was no competition for this representation: Immediately after the three complaints were filed, the only

[30] Notably, *Associated Imports* is not cited once in the Opinion.

three firms that filed complaints[31] organized themselves so that all had some sort of role in the case, and the Court was not faced with competition for the lead plaintiff and lead counsel roles. Thus, once they had filed this litigation, there was little risk that Plaintiff's counsel would not get some sort of fee award if they pursued the case and won. Applying a reasonable multiplier to the lodestar will more than compensate them for their risk of litigating this case on a contingent basis.

3. **The Standing And Ability Of Counsel**

The AMC Defendants do not contest the standing and ability of Plaintiff's counsel, but nevertheless submit that this factor does not entitle Plaintiff's counsel to the fee award they seek. The standing and ability of counsel are primarily reflected in the hourly rates they are able to command in the market for legal services, and those rates should be the primary determinant of the fees they are awarded; using reasonable lodestar multipliers to award premia where warranted is the most reasonable way of keeping fee awards tethered to reality and from becoming windfalls.[32] Plaintiff's counsel's experience and familiarity with Delaware law should make them keenly aware that their fee demand is unreasonable.

Despite Plaintiff's counsel's standing and ability, they can hardly claim that the case was won solely through their efforts. Indeed, the Court's analysis is primarily based on arguments never made by Plaintiff's counsel and which the AMC Defendants would have rebutted had they been afforded an opportunity to do so. Moreover, as the Court noted throughout its Opinion, Plaintiff's counsel did not prosecute this case with the same alacrity that

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[31] This is yet another reason the sudden, never-explained disappearance of the third firm from the case is interesting.

[32] *In re Loral Space and Commc'n Inc. Consol. Litig.*, C.A. No. 2808-VCS (Del. Ch. Dec. 22, 2008) (Transcript) at 76-77.

the Court of Chancery expects from plaintiffs' counsel in representative litigation.[33] Thus, the traditional *Sugarland* factors favor a substantial discount on the fee Plaintiff's counsel seek.

D. Plaintiff's Counsel's Fee Demand Is Unreasonable Compared To This Court's Precedent

Plaintiff's counsel's demand for such a huge percentage of the alleged benefit is inconsistent with Delaware precedent. In determining an appropriate fee award, Delaware courts routinely apply a sliding scale approach such that as the size of the benefit increases, the percentage of the benefit used to derive attorneys' fees decreases. In *Goodrich v. E.F. Hutton Group Inc.*, 681 A.2d 1039, 1048 (Del. 1996), the Delaware Supreme Court expressly noted that the Court of Chancery properly recognized "the merit of emerging judicial consensus that the percentage of recovery awarded should 'decrease as the size of the common fund increases.'" This sliding scale approach is consistent with the underlying policy of granting fee awards that "produce[] appropriate incentives without a significant risk of producing socially unwholesome windfalls."[34] As explained by Chancellor Chandler in *Seinfeld v. Coker*, "a point exists at which these incentives are produced, and anything above that point is a windfall. In other words, if a fee of $500,000 produces these incentives, in a particular case, awarding $1 million is a windfall, serving no other purpose than to siphon money away from stockholders and into the hands of their agents."[35]

Plaintiff's counsel argues that 22.5% of the alleged benefit is reasonable because that same percentage was considered conservative in *Teachers' Retirement Sys. of Louisiana v.*

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[33] *See, e.g.*, Opinion at 3, 4, 6 at n.5, 43 and 43 at n. 66, 95, 97 and 98.

[34] *Seinfeld*, 847 A.2d at 333-34, 337.

[35] *Id.* at 335.

Greenberg, C.A. No. 20106-VCS (Del. Ch. Dec. 17, 2008) (Transcript).[36] This argument ignores the other *Sugarland* factors and the fact that *Greenberg* involved a stipulated amount of attorneys' fees. *Greenberg* was a derivative action brought on behalf of American International Group, Inc. and its shareholders alleging breaches of fiduciary duty and self dealing by certain former officers and directors of AIG. The parties settled on the eve of trial after prolonged negotiations. The settlement provided for the monetary recovery of $115 million and attorneys' fees equal to 22.5% of the recovery. The Court approved the settlement as well as the stipulated fee award. Most important for the purposes of this case, in approving the stipulated attorneys' fees, which amounted to $28,063,959.97 (3.64 times the lodestar in that case), the Court cross-checked the award with the plaintiffs' hourly fees.[37] Notably, the hourly rate came out to approximately $1,340 per hour, well within the realm of hourly rates deemed reasonable in determining fee awards.[38] Moreover, Plaintiff's counsel's contention that the percentage award should not be smaller than what the Court approved in *Greenberg* because it was obtained after trial as opposed to settlement is equally without merit. This argument ignores the principles of *Goodrich* and *Seinfeld* and the binary nature of the dispute in this case.

Plaintiff's counsel also cites *Lewis v. Engle*, C.A. No. 497-VCS, *In re American International Group, Inc. Consolidated Derivative Litigation,* C.A. No. 769-VCS, and *In re Telecorp PCS, Inc. Shareholder Litigation*, C.A. No. 19260-VCS in support of their argument

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[36] Petition at 8-9.

[37] The disparity between the lodestars here and in *Greenberg* underscores how little work Plaintiff's counsel did here as compared to the plaintiffs' counsel in *Greenberg*. In *Greenberg*, the fee requested was just slightly over 3.5 times the overall lodestar.

[38] *Greenberg*, C.A. No. 20106-VCS (Del. Ch. Dec. 17, 2008) (Transcript), at 8 ("So I think that the premium – I think that the hourly rate is something less than $1500 an hour. My memory is 1340, or something like that.").

that 22.5% is reasonable.[39] Like *Greenberg*, however, the hourly rate implied by the fee awards in these cases (each of which was vigorously litigated by plaintiffs' counsel) was far below what Plaintiff's counsel seek here. In *AIG*, the fee represented an hourly rate of $1,138, in *Lewis* it was more than $1,000, and in *Telecorp* it was $2,600-2,611.[40] The decisions cited in the Petition thus underscore the unreasonableness of their $49,000 per hour request.

III. A REASONABLE FEE AWARD WOULD BE NO MORE THAN FOUR TIMES PLAINTIFF'S COUNSEL'S LODESTAR

The most reasonable method to calculate Plaintiff's counsel's fee award would be to use a multiplier of the lodestar, as this Court did in *In re Loral Space and Communications Inc. Consolidated Litigation*, C.A. 2808-VCS, and direct the fee to be paid out of the benefit conferred to SPCC's minority shareholders. A reasonable multiplier here would be no more than four times the lodestar (the same multiplier used in *Loral*).[41] That would result in a fee award of no more than $13.88 million, which would represent an effective hourly rate of no more than $1,614.32, more than enough to recognize the result for SPCC's minority shareholders, account for the incentives such awards are intended to foster, and account for the way Plaintiff's counsel

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[39] Petition at 6-7.

[40] *See In re Telecorp. PCS, Inc. S'holder Litig.*, C.A. No. 19260-VCS (Del. Ch. Aug. 20, 2003) (Transcript) at 69; *Lewis v. Engle*, C.A. No. 497-VCS (Del. Ch. Dec. 29, 2004) (Transcript) at 24; *In re American Intn'l Grp., Inc. Consol. Derivative Litig.*, C.A. No. 769-VCS (Del. Ch.) (Plaintiff's Mem. of Law in Support of Their Mot. For Approval of Settlement and Award of Attorneys' Fees and Expenses) at 19.

[41] This would fulfill several principles: It accounts for the large absolute value of the Judgment and the fact that only 20% of it is allocable to the minority shareholders, it takes into account the fact that this case went to trial, it more closely aligns the award with the interests of the minority shareholders Plaintiff's counsel purported to represent, it is consistent with the awards in other cases, it accounts for how Plaintiff's counsel handled the case, and it does not create a windfall. In short, it fulfills all the factors courts consider in awarding attorneys' fees generally and the specific factors this Court indicated should be considered here.

failed to prosecute th is case. And such an awar d would be consistent with the fee awards in other cases in which there are large judgments or settlements.

CONCLUSION

The AMC Defendants respectfully submit that Plaintiff's counsel's fee demand is unreasonable and should not be granted. To the extent the Court believes it should award a fee at this juncture, the AMC Defendants respectfully submit that a multiplier of no more than four times Plaintiff's counsel's lodestar be used to determine an appropriate fee, to which Plaintiff's counsel's expenses would then be added.

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November 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2011, I electronically filed and caused to be served by LexisNexis File an d Serve a copy of the foregoing **AMC DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND EXPENSES** on the following counsel of record:

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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

ANSWERING BRIEF OF NOMINAL DEFENDANT SOUTHERN PERU COPPER CORPORATION IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND EXPENSES

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Dated: November 11, 2011

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PRELIMINARY STATEMENT

Perhaps the most telling statement in Plaintiff's Petition For Attorney's Fees and Expenses (the "Petition") is one that is never made. Nowhere in that 11-page submission does counsel confess to the total dollar amount of the fee they are seeking. The Petition only drily states that counsel seeks 22.5% of the amount of the judgment and interest.

It is not hard to understand their sudden laconicism. The fee sought here is north of **$428,000,000**—a figure so staggering that Plaintiff's counsel could not bring themselves to commit it to paper. As shown below,[1] even by rough metrics, the fee request exceeds any measure of reasonableness:

Judgment Amount (with interest)	Fee Requested (22.5% of the judgment)	Effective Hourly Rate Represented By Fee	Multiplier to Lodestar Fee
$1,904,900,000	$428,602,500.00	$49,849.85	123.52

The Petition ignores the Court's directive in the post-trial opinion that counsel should propose a "responsible" fee award "taking into account the reality that their own delays affected the remedy awarded and are a basis for conservatism in any fee award."[2] Although Plaintiff's counsel's failure to move the litigation forward on a timely basis was a subject of criticism from the Court, the Petition makes no real accommodation for that fact. To the contrary, Plaintiff's counsel insists on profiting from the delay by seeking 22.5% of the interest as part of the award, which would exceed, by hundreds of millions

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[1] This chart is excerpted from the spreadsheet attached at Exhibit A. That chart compares the fee sought in the Petition, and the Company's proposal, to various other cases.

[2] *In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, -- A.3d --, 2011 WL 4907799, at *43 n.206 (Del. Ch. Oct. 14, 2011) (the "Post-trial Opinion").

of dollars, the largest fee ever awarded by this Court. It likewise would exceed many fee awards in cases outside Delaware in which actual monetary benefits in the same order of magnitude were obtained—and in which counsel bore far greater financial risk than did Plaintiff's counsel here.

The magnitude of Plaintiff's counsel's request is unprecedented in this Court. To put it in perspective, the requested fee is equivalent to about 57% of the Delaware Division of Corporations' total annual revenue.[3] Moreover, research did not reveal *any* case *anywhere* in which counsel has been awarded anything close to an effective hourly rate that is more than the median American household makes in a *year*.[4]

Nominal defendant Southern Peru Copper Corporation ("SPCC" or the "Company") opposes the Petition and believes that the attorneys' fees award should be at least an order of magnitude below what Plaintiff's counsel seeks. An award of fees and expenses of approximately $13,500,000 on an all-in basis[5] would adequately compensate counsel for the risks they took and the actual services they provided on behalf of SPCC and its minority stockholders. In addition, to the extent that AMC exercises its option to

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[3] Del. Div. of Corps. 2009 Annual Report, at 2, *available at* http://corp.delaware.gov/2009ar.pdf (last visited Nov. 4, 2011).

[4] US Census Bureau, *Income, Poverty, & Health Ins. Coverage in the United States: 2010*, at 5 (Sept. 2011), *available at* http://www.census.gov/prod/2011pubs/p60-239.pdf ("Real median household income was $49,445 in 2010"). Indeed, the proposed hourly rate would even be excessive by the standards of celebrity culture, exceeding as it does even Kim Kardashian's $10,000 per hour take for her marriage, which reportedly netted her $18 million for an 1,800 hour commitment. *The New York Post*, "Kim Kardashian predicted to make even more money being newly single" (Nov. 1, 2011), *available at* www.nypost.com/p/pagesix/kim_kardashian_predicted_single_0rDxpMsLBpTsNLACkvEceJ.

[5] The Company does not oppose any of the expenses for which reimbursement is sought in the Petition, and agrees with Plaintiff that the fee award should be made on an all-in basis.

satisfy the judgment fee by returning SPCC shares (or those shares are cancelled), the Company respectfully submits that the fee award should likewise be payable in stock.

ARGUMENT

A. The Standards Applicable To An Award Of Attorneys' Fees In Representative Litigation

1. Background On The Applicable Standards

In representative litigation, attorneys' fees are customarily awarded to plaintiffs' counsel who obtain a benefit for the class or nominal defendant under either the common fund doctrine or the corporate benefit doctrine. "The common fund doctrine is applicable where a litigant confers a monetary benefit on an ascertainable class, and the corporate benefit doctrine is applicable where the alleged benefit is not a tangible monetary one."[6] In either case, the award is intended to implement the public policy that the recipients of a benefit resulting from representative litigation should share in the costs of obtaining that benefit.[7]

Under either doctrine, the amount of the fee to be awarded is committed to the Court's discretion.[8] At bottom, the amount of the fee award *must* be reasonable,[9] determined with "jealous regard" for the rights of the absent class members.[10] Arriving at a reasonable fee requires the Court to balance important and competing policy considerations:

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[6] *In re 14 Realty Corp.*, 2009 WL 2490902, at *9 (Del. Ch. Aug. 4, 2009).

[7] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

[8] *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000).

[9] *In re Cox Radio, Inc. S'holders Litig.*, 2011 WL 1806616, at *20 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010).

[10] *PaineWebber R & D Partners II, L.P. v. Centocor, Inc.*, 2000 WL 130632, at *2 (Del. Ch. Jan. 31, 2000).

> A policy of awarding fees based on the benefit obtained for shareholders should induce board members to remain vigilant regarding potential liability to stockholders or to the corporation when they are acting. The fee award should also encourage plaintiffs' attorneys to remain alert in identifying and filing claims that will allow courts to catch the occasional instance of overreaching board conduct. This latter incentive must be balanced with the proper awareness by the Court that an appropriate fee should also help both to deter frivolous lawsuits against defendants, and to avoid financial windfalls to plaintiffs' attorneys.[11]

To guide the Court in this task, two tests have emerged. In corporate benefit cases—that is, cases in which the monetary value of the benefit cannot be quantified with precision—the Court should measure reasonableness of fees on a *quantum meruit* basis.[12] "Under a *quantum meruit* approach, the Court would consider the work the attorneys performed to achieve the benefit, and the amount and value of attorney time required for that purpose, taking into account the experience of counsel and the contingent nature of the case."[13]

Common fund cases are those in which the judgment results in a fund of readily valued consideration being returned to a class of plaintiffs, or in the case of derivative litigation, the nominal defendant. In such cases, the Delaware Supreme Court has directed the use of what are known as the *Sugarland* factors to determine the appropriate amount for the fee award to be deducted from that fund. Those factors are: (i) the

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[11] *In re Nat. City Corp. S'holders Litig.*, 2009 WL 2425389, at *5 (Del. Ch. July 31, 2009).

[12] *Off v. Ross*, 2009 WL 4725978, at *7 (Del. Ch. Dec. 10, 2009).

[13] *Id.* (quoting *In re Diamond Shamrock Corp.*, 1988 WL 94752, at *4 (Del. Ch. Sept. 14, 1988)).

benefits 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.[14] Of these factors, the first—the size of the benefit—is traditionally accorded the most weight.[15] That being said, however, "Delaware Courts have also recognized that time is also a relevant inquiry in determining fee awards"[16] and to that end consider the hours invested by plaintiff's counsel as a backstop check on the reasonableness of a fee award.[17] The necessity of a reasonableness check operates to confirm that the fee award "appropriately reflects the time and effort expended by the attorneys."[18]

Federal courts increasingly use a similar method, which they generally refer to as the percentage of the fund method, in common fund cases.[19] As the name indicates, "the award is simply 'some percentage of the fund created for the benefit of the class.'"[20] The

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[14] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980).

[15] *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 396 (Del. Ch. 2010).

[16] *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1273 (Del. 2005).

[17] *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *14 (Del. Ch. Aug. 30, 2007).

[18] *In re Tyco Int'l Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249, 270 (D.N.H. 2007).

[19] *In re Cendant Corp. Litig.*, 264 F.3d 201, 283 (3d Cir. 2001) (stating the percentage method "essentially ha[s] supplanted the lodestar"); *see In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 487 (S.D.N.Y. 1998) (collecting cases from the First, Third, Sixth, Seventh, Ninth, Tenth and D.C. Circuits); *see also In re AOL Time Warner, Inc. Secs. & "ERISA" Litig.*, 2006 WL 3057232, at *7 (S.D.N.Y. Oct. 25, 2006) (opinion adopting special master's recommendation on attorneys' fees) (describing the history and ascendency of the percentage method); *Seinfeld*, 847 A.2d at 335 (same).

[20] *In re Worldcom, Inc. Secs. Litig.*, 388 F.Supp.2d 319, 355 (S.D.N.Y. 2005).

test in the Third Circuit for determining the appropriate percentage of the fund to award entails considering seven factors similar to those used in *Sugarland*:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.[21]

The percentage method has gained popularity in the federal courts because it is easier to apply than the lodestar method,[22] although it is not immune to criticism because it is inherently subjective.[23] To combat this subjectivity, federal courts, like courts in Delaware, use the lodestar method—which is more objective—as a reality check on the reasonableness of the percentage fee award.[24] Accordingly, federal courts' analysis of fee requests using the percentage method are instructive here.

No Delaware court has had an occasion to consider the applicability of the *Sugarland* factors—and, in particular, what weight should be accorded to the first *Sugarland* factor—in a case in the which the damages figure is pegged at over $1

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[21] *Cendant*, 264 F.3d at 283.

[22] *See In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 520 (E.D.N.Y. 2003) (hereinafter, "*Visa I*"), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir.) (hereinafter, "*Visa II*"), *cert. denied sub nom. Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044 (2005) (observing that, although district courts in the Second Circuit have the discretion to choose between the two methods, the percentage method is more commonly used).

[23] *See AOL Time Warner*, 2006 WL 3057232, at *9 ("such outsized awards magnify the subjectivity of the percentage assessment").

[24] *Id.*; *Worldcom*, 388 F.Supp.2d at 355.

billion.[25] In *Goodrich v. E.F. Hutton Group, Inc.*,[26] the Delaware Supreme Court approved of this Court's recognition "of the emerging judicial consensus that the percentage of recovery awarded should 'decrease as the size of the [common] fund increases.'"[27] Similarly, several federal courts, including the Third Circuit, have held that the size of the benefit, the attorneys' skill and efficiency, and the awards in similar cases "'should receive less weight' in mega-fund cases . . . ."[28] This is because it does not necessarily follow that the magnitude of the recovery in such a case is the result of the efforts of counsel; it may simply be a result of the size of the transaction at issue.[29]

2. The Standard To Be Applied Here

There are at least two problems with applying a *Sugarland* analysis in this case. First, assuming that AMC exercises its option to return shares rather than pay cash,[30] the benefit to the Company achieved by the litigation will not include a common fund of cash

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[25] *See In re Teachers' Retirement System of La. v. Greenberg*, C.A. No. 20106-VCS (TRANSCRIPT), at 7-8 (Del. Ch. Dec. 17, 2007) (hereinafter, "*Greenberg*") ("And I heard people say sort of declining percentages. You know, if it [the common fund] gets so high, you get a declining percentage. Maybe there's a situation where that's that case.").

[26] 681 A.2d 1039 (Del. 1996).

[27] *Seinfeld*, 847 A.2d at 336 (quoting *Goodrich*, 681 A.2d at 1048) (alteration in original); *see also Franklin Bal. Sheet*, 2007 WL 2495018, at *12 ("The fee award, however, can reach a point where it no longer operates as an incentive, and rather morphs into a 'socially unwholesome windfall.'").

[28] *Cendant*, 264 F.3d at 283.

[29] *In re Cox Communications, Inc. S'holders Litig.*, 879 A.2d 604, 640 (Del. Ch. 2005) ("The size of the supposed benefit is largely a product of the size of the transaction itself."); Task Force on Contingent Fees, Tort Trial & Ins. Prac. Section of the Am. Bar Ass'n, *Report On Contingent Fees In Class Action Litig.*, 25 REV. LITIG. 459, 470 (2006) ("The huge fees in a huge case might be less a function of the amount or quality of the attorneys' work, or even of the risk undertaken, and more simply a function of the fact that the lawyers managed to find and bring a case with huge damages").

[30] Post-trial Op. at *43.

out of which to pay a fee award.[31] Second, the monetary value ascribed to the judgment in the Post-trial Opinion raises a large risk of a "socially unwholesome windfall" for counsel—and corresponding detriment to the Company and its stockholders—that courts strive to avoid. These problems are discussed in greater detail in the analysis below.

The Company is aware of this Court's prior observation that potential negative incentives might stem from applying a sliding-scale to a fee award as the benefits get larger.[32] And indeed, one can hypothesize a case in which no reduction would be justified, but this is not such a case. As the cases hold, it is necessary to focus on the particular facts and equities of each situation rather following a rote, cookie-cutter approach such as the one advocated in the Petition here or a hard-and-fast sliding scale.[33]

The nature of the remedy in this case suggests that the corporate benefit doctrine, rather than the common fund doctrine, would be the appropriate lens through which to view the Petition if AMC returns shares. Alternatively, if the remedy in this case is viewed as creating a common fund, in light of the factual and equitable posture of the case, the Company respectfully submits that the Court should give added weight to the second, third and fourth factors of the *Sugarland* test—the time and effort expended by

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[31] For this reason, the Company also respectfully requests that it be given the option of paying the fee award in SPCC stock as contemplated by the Court's Post-trial Opinion. *Id.* ("Any attorneys fees shall be paid out of the award.").

[32] *Seinfeld*, 847 A.2d at 336 n.25; *In re Am. Int'l Group, Inc. Consol. Deriv. Litig.*, C.A. No. 769-VCS (TRANSCRIPT), at 10 (Del. Ch. Jan. 25, 2011).

[33] *Visa II*, 396 F.3d at 123 ("Public policy concerns oftentimes redefine the focus of the court. In this case, the district court's decision in favor of protecting the instant class from an excessive fee award militates against awarding attorneys' fees based purely on economic incentives . . . ."); *cf. In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 302 (3d Cir. 2005) (endorsing that the use of a declining-percentage award scheme in cases involving large funds, but cautioning that district courts nevertheless should engage in a "fact-intensive analysis").

counsel, the contingent nature of the litigation and the complexity of the case—to harmonize the amount of the fee award with counsel's contribution to obtaining the benefit. Moreover, because of the nature of the benefit to the Company and substantial risk of a windfall fee award here, the Court should also give increased weight to the reality check based on actual time spent and actual risk taken.

B. A Return Of Shares Would Confer, At Most, A Corporate Benefit, Not A Common Fund, And In That Event A Fee Award Should Be Determined By *Quantum Meruit.*

Plaintiff's counsel seeks fees under the common fund doctrine, contending that they created a common fund of approximately $1.9 billion, of which they seek 22.5%.[34] They do so without providing any real analysis of how the remedy ordered by the Court results in a "common fund" for the benefit of SPCC. The Petition merely assumes this is the case, an assumption that is faulty on a number of levels.

First, the Petition assumes that the judgment will constitute a common fund with a value to the Company of $1.9 billion, but ignores the possibility that the judgment will be satisfied by AMC returning, or the Company cancelling, stock, in which case no "fund" will be created at all. These remedies would essentially reform the Merger by decreasing the consideration paid for Minera at the time of the Merger,[35] but there would in that case be no common fund of cash out of which to pay attorneys' fees.

Second, returning or cancelling stock will not confer a direct benefit upon the *Company*. Rather, the minority stockholders might be indirectly benefitted by a

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[34] Pet. at 2.

[35] Post-trial Op. at *40.

reduction of the number of shares outstanding—but it is far from clear what (if anything) the value of that benefit might be. It is useful to work through the economics of the return to see how that is the case.

In their proposed order, Plaintiff claims that the judgment and interest total $1,904,900,000, and that a stock price of $26.96 should be used. We leave it to the other parties to debate those numbers, if appropriate, but will use them for the purposes of this discussion. At a stock price of $26.96 and a total judgment of $1,904,900,000, the judgment amounts to 70,656,528 shares. That is approximately 8.374% of the Company's currently outstanding shares. If those shares are retired or returned to treasury, the Company will receive no direct monetary benefit. Nor will total earnings increase by a penny. Instead, perhaps earnings *per share* might increase, all things being equal. That increase in earnings per share will, in theory at least, inure to the benefit of the stockholders, although obviously only the minority stockholders would gain that benefit. Thus (contrary to Plaintiff's argument at page 4 of the Petition), the Company's value will not increase.

Meanwhile, a cash attorneys' fees award of over $428 million would remove in excess of 34.4% of the Company's cash as reported as of September 30, 2011[36]—and as the Court is aware, mining is a cash intensive business. Payment of the requested fee would reduce earnings per share by $0.85.

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[36] Press Release, *Southern Copper Corp. Reports Third Quarter & Nine Month 2011 Results* (Oct. 28, 2011), *available at* http://www.southernperu.com/ENG/invrel/INFDL PressRelease/pr111028.pdf (last visited Nov. 7, 2011).

Thus, while reducing the shares outstanding might increase value per share to the minority, it has no direct and quantifiable benefit to the Company. Accordingly, the claim that the Company will gain an almost $2 billion benefit—and should pay a percentage of that amount attorneys' fees—is both theoretically and mathematically incorrect.

It is perhaps for these reasons that the Petition makes no effort to equate the return of shares to an ascertainable dollar value for the Company. The Petition appears to assume, without any evidence or argument for support, that the financial benefit to the minority stockholders' will equal their increased stake in the Company. It does not follow, however, that if AMC returns $1.9 billion worth of shares, the stock price will increase proportionally. At best, the value of a return of shares to the Company's minority stockholders is speculative, and Plaintiff has not attempted to prove its value.[37] Simply assuming, as Plaintiff has done in the Petition, that the remedy is necessarily worth $1.9 billion to the Company (or its stockholders) is plainly wrong.

In the absence of a monetary fund or proof of a value of the benefit to the Company the remedy here would be properly viewed as some sort of a corporate benefit (since it would arguably help the minority in some sort of unquantifiable way, much like other forms of therapeutic relief) rather than a common fund. The Court addressed a fee

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[37] *See In re Katy Indus., Inc. S'holders Litig.*, 1994 WL 444765, at *5 (Del. Ch. Aug. 11, 1994) (denying attorneys' fees because "there is an insufficient basis to allow one to conclude that the abandonment [of a proposed merger] constituted a financial benefit to the public shareholders."); *AOL Time Warner*, 2006 WL 3057232, at *10 (stating that the reliability of the percentage of the benefit method as a measure of attorneys' fees decreases if the benefits are non-monetary).

request under analogous circumstances in *In re Loral Space & Communications Consolidated Litigation*, which was another case that saw (in essence) a return of stock. After trial, the Court there awarded final relief that amounted to reforming a purchase agreement with the controller by eliminating approximately five million shares of preferred stock and sterilizing the voting power of the remaining preferred shares.[38] Although the Court ascribed monetary value in excess of $100 million to the final remedy,[39] it nevertheless declined to award fees on a percentage basis due to the absence of a common fund.[40] Instead, the Court awarded class counsel fees at four times their normal hourly rate to compensate them for the substantial risk they bore, including nearly $2 million of out-of-pocket fees and over 5,800 attorney hours over about two years.[41]

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[38] *See In re Loral Space & Communications Inc.*, 2008 WL 4293781, at *32 (Del. Ch. Sept. 19, 2008), *aff'd sub nom. Loral Space & Communications Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867 (Del. 2009).

[39] In sharp contrast to the Petition here, class plaintiffs' opening brief in support of the application for a fee award in *Loral* devoted over seven pages to valuing the remedy. *See In re Loral Space & Communications Inc. Consol. Litig.*, C.A. No. 2808-VCS, 2008 WL 4961563 (Class Counsel's Opening Brief in Support of its Motion for an Award of Attorneys' Fees and Expenses), at 18-24 (Nov. 14, 2008) (hereinafter, the "Loral Fee Brief").

[40] *In re Loral Space & Communications Inc. Consol. Litig.*, C.A. No. 2808-VCS (TRANSCRIPT), at 73-74 (Del. Ch. Dec. 22, 2008) (hereinafter, "*Loral Fee Ruling*"), *aff'd sub nom. Loral Space & Communications Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867 (Del. 2009).

[41] *Id.* at 4, 77. The 5,800 hours invested by class counsel was roughly half of the hours required to try the case. The Court observed that class plaintiffs' counsel's fee award was reduced because counsel's risk was ameliorated by the simultaneous derivative claims (litigated by other counsel in tandem with class counsel) attacking the same transaction. *Id.* at 76-77. The Court indicated that an award to class counsel in the range of $2,000-2,500 per hour might have been reasonable but for the other set of plaintiffs' counsel in the case. *Id.* at 77. However, as discussed below, the nexus between counsel's effort and the benefit conferred in *Loral* was far more clear than it is here.

The fee award (viewed on an all-in basis including expenses) implied an effective hourly rate of $1,831.08.

Loral suggests that when the benefit of the litigation does not result in a cash fund, the Court should focus its fee award analysis upon the *quantum meruit* value of counsel's services rather than the value of the "benefit." This makes good sense, since if the "benefit" achieved by the litigation did not result in cash or a bump in the stock price, the benefit to the Company is difficult to measure and might be essentially intangible.[42] Therefore, to the extent that AMC pays in stock, the Court should not award fees based upon a percentage of the $1.9 billion figure in the Petition. The Court should consider awarding fees based upon the *quantum meruit* value of Plaintiff's services rendered with a reasonable risk premium. The metrics of such an award are discussed below in Part D.

We will next discuss the *Sugarland* factors. Like the *quantum meruit* approach, the *Sugarland* factors show that in any event the reasonable fee here should be much less than $428 million.

C. *Sugarland* Analysis

A record-setting fee like the one Plaintiff's counsel seeks could potentially be justifiable in an appropriate case, but only if there was a topping-out of each of the

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[42] Mark J. Lowenstein, *S'holder Deriv. Litig. & Corp. Governance*, 24 DEL. J. CORP. L. 1, 19-20 (1999); *see also* Matthew D. Klaiber, Comment, *A Uniform Fee-Setting Sys. For Calculating Court-Awarded Attorneys' Fees: Combining Ex Ante Rates With A Multifactor Lodestar Method & A Performance-Based Mathematical Model*, 66 MD. L. REV. 228, 262 (2006) (arguing that the percentage of the benefit calculation for the purposes of a fee award should not include nonmonetary relief).

Sugarland factors: "incredible legal and factual complexity, high risk, massive lodestar, and multibillion dollar recovery . . . ."[43] This case has none of those hallmarks.

1. The Benefit Achieved

a. Plaintiff's Counsel Has Not Established The Value Of The Remedy.

As discussed above, Plaintiff's counsel has not attempted to prove, much less actually demonstrated, what the actual value of the remedy awarded in the Post-trial Opinion would be. Nor, as also described above, has Plaintiff's counsel demonstrated that the return of shares would constitute a common fund at all.

b. The Benefit Achieved By This Action Is Not Exclusively Attributable To Plaintiff's Counsel's Effort.

The Petition also erroneously assumes (regardless whether the judgment is satisfied using shares or cash) that the entire $1.9 billion benefit figure in the Post-trial Opinion is attributable solely to counsel's efforts. Once again, the Petition offers no evidence or argument in support of this position. The size of the recovery is not necessarily indicative of counsel's efforts. Rather, the size of the recovery is reflective only of the size of the merger at issue.[44]

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[43] *See Tyco*, 535 F.Supp.2d at 270.

[44] *Cox Communications*, 879 A.2d at 640; Task Force on Contingent Fees, *supra* n.29, at 470; *AOL Time Warner*, 2006 WL 3057232, at *15 ("But the size of a recovery does not necessarily correlate with the quality of the representation. After all, 'a large [recovery] can as much reflect the number of potential class members or the scope of the defendant's past acts as it can indicate the prestige, skill, and vigor of the class's counsel. The amount of this [recovery] is in no insignificant measure attributable to the size of the class. This is a particular circumstance that the courts need to filter to avoid excessive fee awards.") (internal citation omitted) (quoting *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977)).

Moreover, Plaintiff's counsel takes too much credit for the result in the Post-trial Opinion. Indeed, the Court expressed its exasperation on multiple occassions over Plaintiff's counsel's failure to provide both an adequate evidentiary record and salient legal arguments to support the claims.[45] In addition, more than a few of the key factual findings were adduced by the Court's own questions at trial, and the Court's legal conclusions in the Post-trial Opinion were far more a product of its own work than Plaintiff's submissions. These factors should therefore be weighed against the Petition.

c. The "Benefit" Aspect Of The *Sugarland* Analysis Should Take Into Consideration Plaintiff's Delay.

Plaintiff's counsel keys the fee request off a $1.9 billion figure, but that number includes the interest from the date of the Merger to the entry of judgment. In other words, Plaintiff's counsel seeks a percentage of the interest caused by their own delay in litigating this case. Awarding such a fee would create a perverse incentive to delay. Therefore, any monetary figure used to calculate the fee award should not include any interest.

Moreover, as the Court noted, the record here could arguably have supported "a damages award of $2 billion or more."[46] Instead, the Court applied what it termed a "conservative" damages calculation precisely because of Plaintiff's delay and failures of

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[45] *In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, C.A. No. 961-CS (Post-trial Argument Transcript), at 7:2-13, 12:19-13:2, 23:21-24:5, 29:11-20, 43:6-12 (Del. Ch. July 12, 2011) (the Court noting how "unhelpful" Plaintiff's expert was in presenting key aspects of valuation analysis); *id.* at 46:18-21, 50:8-24, 53:10-14, 62:13-14 (the Court identifying key gaps in the evidentiary record); Post-trial Op. at *4 n.7 (noting that Plaintiff's delay created "evidentiary uncertainties").

[46] Post-trial Op. at *41.

proof.[47] Thus, the manner in which this case was litigated might have actually reduced the amount of the judgment by more than $737 million (or 58%)—a significant diminution, no matter how the remedy is valued, to the recovery for SPCC and its minority stockholders.[48]

Plaintiff's counsel should bear the consequences of the delay.[49] To the extent that the Court considers the value of the benefit in fixing the amount of the fee award, the benefit should exclude interest and be further reduced to account for the lack of diligence that the record reflects.

2. Time And Effort Expended By Counsel, The Contingent Nature of the Representation And The Complexity Of The Litigation

These factors examine the *actual* risk borne by counsel in achieving the benefit. The analysis should focus upon the actual risks in the case at hand, as opposed to the risks inherent in any contingent case.[50] Where the risk and complexity are not

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[47] *Id.*

[48] The number was potentially significantly higher since the Court awarded only simple, rather than compound, interest. *Id.*

[49] In addition to the problems with proof and remedies caused by Plaintiff's delay, the delay very nearly cost the Company any recovery altogether. Over the six years that it took to litigate this case, all three original derivative plaintiffs exited the case. *See id.* at *3 n.5. The remaining plaintiff only became a party as a successor trustee upon the death of his father. *Id.* Although the Court did not ultimately accept the defense based upon the inadequacy of the plaintiff, the fact that the defense could be raised at all based on counsel's conduct should be considered when evaluating the request for a fee.

[50] *AOL Time Warner*, 2006 WL 3057232, at *19.

appreciably different than in similar cases, attorneys' fees should also not be exceptional.[51]

a. Counsel's Time And Effort Expended, And Therefore Contingent Risk, Was Modest Compared To Cases Achieving A Comparable Result.

Plaintiff's counsel argues that the hours worked and expenses incurred should be given "minimal significance" here in light of the size of the damages award.[52] In this regard, Plaintiff's counsel contradicts their earlier argument that one of the factors supporting the huge award they seek here is that attorneys should be encouraged to take the risk of going to trial and should be rewarded when that risk pays off.[53]

> Risk has been described by some authorities as the preeminent factor in determining either a percentage [of the benefit to be awarded] or a lodestar multiplier. That is because the Court's major focus in fashioning a fee award is encouraging the bar to undertake future risks for the public good in tomorrow's cases.[54]

By attempting to minimize the importance of financial risks for the purpose of determining the fee, Plaintiff's counsel wants to decouple the risk from the reward.

There are two aspects to counsel's risk in a contingent case: the risk of an adverse decision resulting in no recovery, and the financial risk such as out-of-pocket expenses and other work turned down while the case is ongoing. As this case demonstrates, the two aspects are not necessarily correlated. While Plaintiff's counsel bore significant

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[51] *In re Nortel Networks Corp. Secs. Litig.*, C.A. No. 01-CV-1855 (ORDER & FINAL JUDGMENT), Ex. A at 3 (S.D.N.Y. Jan. 29, 2007), *aff'd*, 539 F.3d 129 (2d Cir. 2008).

[52] Pet. at 9.

[53] *Id.* at 6.

[54] *AOL Time Warner*, 2006 WL 3057232, at *15 (internal citation omitted).

outcome risk by taking this case to trial, the financial risk, demonstrated by the hours and expenses incurred,[55] was not especially high for trying this type of case. Nor is an investment of only 8,597.87 hours and $1.1 million in out of pocket expenses, between two firms over nearly seven years, commensurate with a $428 million dollar attorneys' fee award.[56]

Other cases supporting a fee award comparable to that sought by Plaintiff's counsel here involved tens or even hundreds of thousands of hours of professionals' time and dramatically more out-of-pocket expenses. For instance, Plaintiff's counsel points to a case from federal court in Florida in which a $1.1 billion, post-trial settlement netted counsel a fee equal to $31^1/_3$% of the settlement.[57] Plaintiff's counsel fails to note, however, that the award there was based upon four firms' investment of over *140,479 hours* (with a lodestar value of $42,593,820.50), and millions in out-of-pocket expenses,[58] in litigation described by class action scholar Professor John Coffee as

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[55] *See Tyco*, 535 F.Supp.2d at 267, 270 (stating that plaintiffs' lodestar is the best measure of their risk needed to bring about the result).

[56] Statistics about Plaintiff's attorneys' hours, hourly rates and expenses are drawn from the Affidavits of Ronald A. Brown, Jr., and Lee D. Rudy, which were filed with the Petition. Over 24% of Plaintiff's total time was billed by contract attorneys, paralegals, investigation department personnel and other staff.

[57] Pet. at 8 (citing *Allapattah Svcs., Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1213 (S.D. Fla. 2006)).

[58] *Allapattah*, 454 F.Supp.2d at 1214, 1217.

involving unprecedented effort and risk.[59] Other federal cases show a similar fit between risk and reward:[60]

Case	Total hours billed	Value of time billed at hourly rate	Out-of-pocket expenses	Total award (fees + expenses)
ENRON	89,593.35	131,971,583.20	n/a	$688,010,400.00
Tyco	88,000.00	172,000,000.00	28,938,412.74	$492,938,412.74
Allapattah	140,479.00	$42,593,820.50	n/a	$358,333,364.33
Visa Check/Mastermoney	33,459.00	$62,940,045.84	18,716,511.44	$239,006,671.88
WorldCom, 2005	77,862.00	$83,183,238.70	10,736,948.25	$205,336,948.25
WorldCom, 2004	95,000.00	$57,000,000.00	13,505,969.99	$155,005,969.99
AOL Time Warner	35,185.55	$46,861,731.25	$3,417,237.51	$150,917,237.51
NASDAQ Market-makers	29,628.70	$36,191,751.00	$4,413,485.18	$148,193,485.18
Royal Ahold	47,896.05	$50,858,606.25	$3,267,758.76	$133,915,627.71

The attorneys in those cases received nine-figure fee awards because they were literally betting their firms—investing nearly all their resources in the outcome of a single case.[61] This case did not involve anywhere near that level of risk; neither of Plaintiff's firms—or even the specific lawyers involved here—were betting the farm or precluded from accepting other cases for almost seven years because of this case.[62]

Nor does the risk borne by Plaintiff's counsel in this case merit a record fee when compared to some recent large-fee cases in this Court. *Loral*, which resulted in a $10,627,587 fee award for a recovery *after trial* valued north of $100 million, entailed:

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[59] *Id.* at 1205 (discussing Coffee's affidavit). Professor Coffee has frequently acted as an expert witness regarding the reasonableness of attorneys' fees in class action litigation. There is no such evidence here.

[60] This chart is derived from the data shown on Exhibit A.

[61] *See, e.g., id.* at 1203, 1215.

[62] Only three of the 27 Plaintiffs attorneys who worked on this case billed over 1,000 hours total over six years.

(i) nearly $2 million of expenses borne by one class counsel firm; (ii) heavy motions practice; (iii) substantial third party discovery; (iv) 39 depositions; (v) more than 750,000 pages of document review.[63] In *Greenberg*, the Court awarded a total of over $28 million to plaintiffs' counsel who spent more than 17,000 hours and incurred more than $2.18 million in expenses in litigation that resulted in a $110 million cash settlement on the eve of trial.[64] Discovery in that case consisted of more than 1 million pages of document production, and 62 fact and expert witness depositions.[65] Those cases entailed more risk than this case, yet Plaintiff's counsel here seeks thousands of times more reward.

b. This Case Was Not Unusually Difficult Or Complex.

Plaintiff's counsel asserts that the request for over $428 million is justified because this case was "difficult and complex."[66] They point to the "impressive resumes" of the special committee members (each of whom got out of the case on summary judgment), the "complex" valuation issues involved, the inter-Americas travel required, and the defendants' vigorous defense.[67] None of those factors, however, support the outlier fee award requested here.

Plaintiff's counsel does not point to any evidence, however, that this case was unusually complex, let alone sufficiently complex to justify an hourly rate of over

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[63] Loral Fee Brief, supra n.39, at 8-9, 33, 38.

[64] *See Greenberg* at 9; *Teachers Ret. Sys. of La. v. Greenberg*, C.A. No. 20106-VCS, 2008 WL 5203015 (Affidavit of Cynthia A. Calder, Esquire), ¶¶ 5, 33 (Dec. 9, 2008).

[65] *See Teachers Ret. Sys. of La. v. Greenberg*, C.A. No. 20106-VCS, 2008 WL 5203014 (Pl.'s Mem. In Support Of Its Motion For Approval Of Settlement & An Award Of Attorneys' Fees & Costs) (Dec. 9, 2008).

[66] Pet. at 9.

[67] *Id.* at 9-10.

$49,000. In fact, this case was a fairly ordinary entire fairness case in terms of the effort required for discovery, preparation and trial—and certainly Plaintiff's counsel was under no time pressure. Although discovery here did entail travel to Mexico and Peru, Plaintiff's counsel's travel expenses of approximately $55,000 were not unusual for litigation of this nature, and in any event will be fully reimbursed. The total number of pages produced in document discovery, 282,046, was relatively small by the standards of corporate litigation in this Court. And although defendants were represented by sophisticated counsel and presented a vigorous defense, their defense was, by the standards of this Court in litigation of this nature, not unusual. Certainly the Petition does not point to any aspect of the defense that made this case extraordinarily complex. The total of five defense firms (including the nominal defendant) involved is fewer than in many entire fairness cases. Finally, Plaintiff's counsel offers no support beyond the conclusory statement in the Petition for the contention that the valuation issues in this case were particularly complex for this type of case.

In reality, the only thing out of the ordinary about this case is the amount of damages awarded. "Size of the recovery is not necessarily, however, a reliable measure of the risk undertaken, the quality of the legal work or the effort involved."[68] In other words, it is not necessarily ten times as difficult to prepare and try a one billion dollar case as it is to try a 100 million dollar case. Certainly the Petition here cites to no evidence that the size of the recovery is indicative of the effort or risk that was required.

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[68] *AOL Time Warner*, 2006 WL 3057232, at *20.

Rather, the value ascribed to the remedy here is solely a function of the size of the transaction at issue.[69]

Contast the complexity and risk in this case with other cases shown on Exhibit A that have warranted nine-figure fee awards. *Tyco*, for example, involved novel factual and legal issues, more than 200 depositions and required review of over *82.5 million* pages—a review project so massive that plaintiffs' counsel had to commission the development of new document review software.[70] *Allapattah* required, among other things, tracking Exxon pricing data in 70-80 markets stored in an "archaic programming language 'APL,' that few modern day programmers have even heard of," applying 36 different states' law and prevailing in an interlocutory appeal to the United States Supreme Court on an issue that had divided the Courts of Appeals for a decade.[71] *Visa* "involved almost every U.S. bank and more than five million U.S. merchants."[72] The absence of similar complexity or novelty here militates against a record-setting fee award.

3. The Standing And Skill Of Counsel

The Company does not contest the standing or skill of Plaintiff's counsel. The Court should, however, weigh against this factor the delay in litigating this case.

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[69] *Cox Communications*, 879 A.2d at 640.

[70] *Tyco*, 535 F.Supp.2d at 268.

[71] *Allapattah*, 454 F.Supp.2d at 1206-07.

[72] *Visa I*, 297 F.Supp.2d at 523.

D. The Appropriate Fee Award And Reality Check

The Company submits that an all-in fee award valued at approximately $13,500,000 would be appropriate. Such an award, we believe, constitutes the approximate *quantum meruit* value of Plaintiff's legal fees plus expenses, and provides a reasonable premium for the risk (albeit modest) that Plaintiff's counsel shouldered.[73] It also strikes the appropriate balance among the *Sugarland* factors given all of the facts and equities of this case.

Greenberg and *Loral* provide good benchmarks by which to fashion a fee award in this case and confirm the reasonableness of the Company's proposal. Counsel's effort and financial risk in those cases was greater: in *Greenberg*, because more than twice the hours were invested and in *Loral* because over 5,800 hours were invested by one much smaller firm over about two years, and both cases required a greater outlay for expenses. Moreover, like this case, *Loral* went to trial, meaning that there counsel faced the maximum risk of an adverse decision. Similarly, *Greenberg* involved substantial risk because it settled after discovery with a trial looming. The attorneys in *Greenberg* and *Loral* were complimented for their aggressive and effective approach to the litigation—there was no delay in those cases.

Nevertheless, the fee that the Company proposes would provide Plaintiff's counsel with a risk premium of 2.94 and an effective hourly rate of $1,570.16. This rate is nearly

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[73] Plaintiff's firms billed a total of 8,597.87 hours to this case over the last six years, with a total value at their usual hourly rates of $3,469,890.12. Plaintiff's counsel also incurred unreimbursed expenses of $1,117,816.79. Including expenses as part of the *quantum meruit* value of counsel's service (as was done in the following calculations) yields a total of $4,587,706.91 for fees and expenses.

identical to the rate indicated by the award in *Greenberg*, and is higher than many of the fee awards in the cases shown on Exhibit A.[74]

The reality check on the reasonableness of a fee award dovetails with the ethical requirement that an attorney may not collect an unreasonable fee.[75] While an effective hourly rate for a contingency fee that exceeds what would be reasonable for an hourly representation may be acceptable to account for counsel's contingency risk, the effective rate of a fee award must nonetheless be reasonable in light of the risk.[76] The effective hourly rate sought by Plaintiff's counsel here is plainly unreasonable compared to the prevailing rates in any legal community, and Plaintiff's counsel makes no effort to justify

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[74] Over 24% of Plaintiff's counsel's time reflected on the affidavits attached to the Petition was billed by contract attorneys or non-lawyers. Thus a $1,500 per hour overall effective rate would be particularly generous. If the non-lawyers' and contract lawyers' time is treated as a cost, the fee award range reflects an effective rate for the attorneys' time of over $2,072—within the range of the highest hourly rates suggested in *Loral*. *Loral Fee Ruling* at 77.

[75] *See* Del. Lawyers' R. Prof'l Cond. 1.5(a) ("A lawyer shall not . . . collect an unreasonable fee or an unreasonable amount for expenses.").

[76] *See O'Brien v. IAC/Interactive Corp.*, 2010 WL 3385798, at *12 (Del. Ch. Aug. 27, 2010) (upholding a contingent fee arrangement in a corporate indemnification case; "[a] generous contingency arrangement may be justified by the risk assumed by a particular law firm in a specific case."), *aff'd*, 26 A.3d 174 (Del. 2011).

that rate in terms of actual risk.[77] By contrast, the effective hourly rate represented by SPCC's proposed fee falls within the ranges this Court has previously endorsed.[78]

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[77] *Visa I*, 297 F.Supp.2d at 522 & n.25, 523 (disregarding as unreasonable and "absurd" a request for fees representing 10 times counsel's ordinary hourly rate, even though counsel obtained a settlement consisting of over $3.3 billion in cash and equitable relief valued conservatively at $25 billion); *cf. AOL Time Warner*, 2006 WL 3057232, at *19 (considering whether a fee recommendation "conforms to legal and ethical requirements that a fee be 'reasonable,' using prevailing standards in the legal community as a key measure."); *cf. also* Lester Brickman, *Effective Hourly Rates Of Contingency Fee Lawyers: Competing Data & Non-Competitive Fees*, 81 WASH. U.L.Q. 653, 694-95 (2003) (referring to an effective hourly rate of $25,000-30,000 as unethical).

[78] As shown on the chart attached as Exhibit A, the Company's proposed fee range is also reasonable compared to the awards in cases in which settlements or judgments valued at over $1 billion were obtained in representative litigation. The selected awards shown on the chart average (on an all-in basis) 3.88 times the attorneys' "lodestar" rates, with an average effective hourly rate of $1,218.40. The lowest multiplier, 2.04, was applied in *Nortel Networks* because, according to the court there, the case was not unusually complex risky for a case of its type. *Nortel Networks*, C.A. No. 01-CV-1855 (ORDER & FINAL JUDGMENT), Ex. A at 3. The highest multiplier, 8.41, was applied in *Allapattah* in which the complexity and risk were unprecedented. In each of the cases, eight and nine-figure fee awards were warranted because counsel had invested tens or hundreds of thousands of hours. For instance, in *Allapattah*, counsel was awarded 31.33% of the multi-billion dollar judgment, but their effective hourly rate was just over $2,500 owing to the enormous number of hours that counsel invested. In view of the factors discussed above, this case is far more like *Nortel Networks* than *Allapattah*.

CONCLUSION

For the foregoing reasons, SPCC respectfully requests that the Court deny the Petition, and grant Plaintiff's counsel an award of fees and expenses as described herein, payable in whatever form AMC uses to satisfy the judgment. SPCC further respectfully requests such other relief as the Court deems appropriate.

ASHBY & GEDDES

/s/Richard I.G. Jones, Jr.

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Counsel for Nominal Defendant Southern Peru Copper Corporation (now known as Southern Copper Corporation)

Dated: November 11, 2011

EXHIBIT A

In re Southern Peru Copper Corp. S'holder Deriv. Litig., C.A. No. 961-CS

EXHIBIT A TO SPCC'S ANSWERING BRIEF

FEE AWARD COMPARISONS

Case*	s/t	Settlement or judgment amount	Total hours billed	value of time billed at hourly rate	blended hourly rate	Out-of-pocket expenses	Total award (fees + expenses)	Total award as % of judgment	Effective hourly rate represented by total award	Multiplier (total award ÷ lodestar)
PLAINTIFF'S PROPOSAL	t	**$ 1,904,900,000.00**	**8,597.87**	**$ 3,469,890.12**	**$ 403.58**	**$ 1,117,816.79**	**$ 428,602,500.00**	**22.50%**	**$ 49,849.85**	**123.52**
Allapattah	t/s	$ 1,075,000,000.00	140,479.00	$ 42,593,820.50	$ 303.20	n/a	$ 358,333,364.33	31.33%	$ 2,550.80	8.41
Cendant	s	$ 3,200,000,000.00	35,000.00	$ 8,000,000.00	$ 228.57	n/a	$ 55,000,000.00	1.72%	$ 1,571.43	6.88
ENRON	s	$ 7,227,000,000.00	289,593.35	$ 131,971,583.20	$ 455.71	n/a	$ 688,010,400.00	9.52%	$ 2,375.78	5.21
Loral (Del. Ch.)	t	$ 100,000,000.00	5,804.00	$ 2,164,892.00	$ 373.00	$ 1,968,019.00	$ 10,627,587.00	10.63%	$ 1,831.08	4.91
SPCC'S PROPOSAL**	t	**$ 1,263,000,000.00**	**8,597.87**	**$ 3,469,890.12**	**$ 403.58**	**$ 1,117,816.79**	**$ 15,750,000.00**	**1.25%**	**$ 1,831.85**	**4.54**
NASDAQ Market-makers		$ 1,027,000,000.00	129,628.70	$ 36,191,751.00	$ 279.20	$ 4,413,485.18	$ 148,193,485.18	14.43%	$ 1,143.22	4.09
Visa Check/Mastermoney	s	$ 3,383,400,000.00	233,459.00	$ 62,940,045.84	$ 269.60	$ 18,716,511.44	$ 239,006,671.88	7.06%	$ 1,023.76	3.80
Greenberg (Del. Ch.)	s	$ 115,000,000.00	17,754.00	$ 7,709,620.25	$ 434.25	$ 2,188,959.97	$ 28,063,959.97	24.40%	$ 1,580.71	3.64
AOL Time Warner	s	$ 2,650,000,000.00	135,185.55	$ 46,861,731.25	$ 346.65	$ 3,417,237.51	$ 150,917,237.51	5.69%	$ 1,116.37	3.22
Tyco	s	$ 3,200,000,000.00	488,000.00	$ 172,000,000.00	$ 352.46	$ 28,938,412.74	$ 492,938,412.74	15.40%	$ 1,010.12	2.87
WorldCom, 2004	s	$ 2,575,000,000.00	195,000.00	$ 57,000,000.00	$ 292.31	$ 13,505,969.99	$ 155,005,969.99	6.02%	$ 794.90	2.72
Royal Ahold	s	$ 1,100,000,000.00	147,896.05	$ 50,858,606.25	$ 343.88	$ 3,267,758.76	$ 133,915,627.71	12.17%	$ 905.47	2.63
WorldCom, 2005	t/s	$ 3,558,000,000.00	277,862.00	$ 83,183,238.70	$ 299.37	$ 10,736,948.25	$ 205,336,948.25	5.77%	$ 738.99	2.47
Nortel Networks [CA -1855]	s	$ 1,138,667,428.00	47,846.07	$ 16,655,970.60	$ 348.12	$ 3,750,041.27	$ 37,910,064.11	3.33%	$ 792.33	2.28
Nortel Networks [CA -1659]	s	$ 1,070,157,428.00	58,768.86	$ 17,429,370.30	$ 296.57	$ 3,020,416.60	$ 35,125,139.44	3.28%	$ 597.68	2.02

* See attached list for sources
** Average of range of proposed
S/T - refers to the outcome of the case coming after trial, settlement or both
N/A - indicates data not available

In re Southern Peru Copper Corp. S'holder Deriv. Litig., C.A. No. 961-CS

EXHIBIT A TO SPCC'S ANSWERING BRIEF

PLAINTIFF'S COUNSEL BILLING DATA

Firm	Timekeeper name	Designation	Hourly Rate	Hours Billed	Value at a hourly rate
PJE	William Prickett	Partner	$ 350.00	1.50	$ 525.00
PJE	James L. Holzman	Partner	$ 410.56	106.40	$ 43,683.58
PJE	Michael Hanrahan	Partner	$ 649.17	46.00	$ 29,861.82
PJE	Gary F. Traynor	Partner	$ 498.64	4.40	$ 2,194.02
PJE	Ronald A. Brown, Jr.	Partner	$ 508.78	1,207.60	$ 614,402.73
PJE	Thomas A. Mullen	Partner	$ 351.00	107.10	$ 37,592.10
PJE	J. Clayton Athey	Partner	$ 410.00	1.90	$ 779.00
PJE	Laina M. Herbert	Associate	$ 200.00	0.90	$ 180.00
PJE	Marcus E. Montejo	Associate	$ 256.63	1,451.30	$ 372,447.12
PJE	Kevin H. Davenport	Associate	$ 150.00	29.20	$ 4,380.00
PJE	David W. Gregory	Associate	$ 160.00	9.20	$ 1,472.00
PJE	Donna Thomson	Paralegal	$ 120.00	25.95	$ 3,114.00
PJE	Susan E. Jackson	Paralegal	$ 120.00	0.10	$ 12.00
PJE	Pamela L. Reed	Paralegal	$ 60.00	2.00	$ 120.00
PJE	Debra L. Bartell	Paralegal	$ 130.00	0.30	$ 39.00
PJE	Susan P. Taylor	Paralegal	$ 120.00	4.50	$ 540.00
KTMC	Stuart L. Berman	Partner	$ 675.00	1.00	$ 675.00
KTMC	Lee Rudy	Partner	$ 650.00	506.75	$ 329,387.50
KTMC	Marc A. Topaz	Partner	$ 725.00	220.80	$ 160,080.00
KTMC	Michael Wagner	Partner	$ 600.00	243.75	$ 146,250.00
KTMC	Eric Zagar	Partner	$ 650.00	474.00	$ 308,100.00
KTMC	Stefanie Anderson	Associate	$ 345.00	5.20	$ 1,794.00
KTMC	Jesse Fuchs-Simon	Associate	$ 345.00	2.25	$ 776.25
KTMC	Sandra Smith	Associate	$ 425.00	22.00	$ 9,350.00
KTMC	Quinn Kerrigan	Associate	$ 375.00	154.75	$ 58,031.25
KTMC	James Miller	Associate	$ 405.00	1,917.70	$ 776,668.50
KTMC	David Rabbiner	Investigation Dept.	$ 450.00	64.55	$ 29,047.50
KTMC	Jason Bochet	Investigation Dept.	$ 325.00	36.32	$ 11,804.00
KTMC	Emily Eisenberg	Investigation Dept.	$ 225.00	140.50	$ 31,612.50
KTMC	Joanna Fitzgerald	Investigation Dept.	$ 225.00	9.00	$ 2,025.00
KTMC	Jamie Maginnis	Investigation Dept.	$ 325.00	120.25	$ 39,081.25
KTMC	Kate Marshall	Investigation Dept.	$ 225.00	5.25	$ 1,181.25
KTMC	Henry Molina	Investigation Dept.	$ 325.00	3.75	$ 1,218.75
KTMC	Andrew Berenson	Contract Attorney	$ 300.00	136.00	$ 40,800.00
KTMC	Daniel Grabianowski	Contract Attorney	$ 325.00	199.00	$ 64,675.00
KTMC	Rodney B. Griffith	Contract Attorney	$ 295.00	40.75	$ 12,021.25
KTMC	Jennifer Hernandez	Contract Attorney	$ 295.00	44.00	$ 12,980.00

In re Southern Peru Copper Corp. S'holder Deriv. Litig., C.A. No. 961-CS

EXHIBIT A TO SPCC'S ANSWERING BRIEF

PLAINTIFF'S COUNSEL BILLING DATA

Firm	Timekeeper name	Designation	Hourly Rate	Hours Billed	Value at a hourly rate
KTMC	Catherine Johnson-Humphrey-Bennett	Contract Attorney	$ 325.00	182.50	$ 59,312.50
KTMC	Robert Meyers	Contract Attorney	$ 325.00	212.75	$ 69,143.75
KTMC	David Silberman	Paralegal	$ 225.00	208.70	$ 46,957.50
KTMC	Andrew Hankins	Paralegal	$ 225.00	8.00	$ 1,800.00
KTMC	Christopher McGinnis	Paralegal	$ 225.00	143.50	$ 32,287.50
KTMC	Doug Tewksbury	Paralegal	$ 225.00	22.40	$ 5,040.00
KTMC	Johanna Yemm	Paralegal	$ 225.00	469.60	$ 105,660.00
KTMC	Benjamin Eng	Staff	$ 175.00	4.50	$ 787.50
	-- TOTALS --		**$ 403.58**	**8,597.87**	**$ 3,469,890.12**

In re Southern Peru Copper Corp. S'holder Deriv. Litig., C.A. No. 961-CS

EXHIBIT A TO SPCC'S ANSWERING BRIEF

FEE AWARD REALITY CHECK WORKSHEET

Plaintiff's billing statistics*		Value
Plaintiff's total hours billed		8,597.87
Plaintiff's blended hourly rate	$	403.58
Plaintiff's lodestar	$	3,469,890.12
Ex□enses	$	1,117,816.79
Lodestar fees + ex□enses	$	4,587,706.91

Judgment data	
Judgment amount	$ 1,263,000,000.00
Interest	$ 641,900,000.00
Discount to judgment	0.00%
Judgment total	$ 1,904,900,000.00

Fee award scenarios	Value	Indicated Award
As □ercentage of judgment	0.00%	$ -
As effective hourly rate	$ 1,512.01	$ 13,000,065.42
As multi□lier to total lodestar	2.83	$ 12,983,210.55

Fee award reality check	
Amount of award:	$ 13,500,000.00
Percentage of Judgment	0.71%
Effective hourly rate	$ 1,570.16
Multi□lier	2.94

Data can be entered in highligheted fields.
* Source: Brown and Rudy affidavits

FEE AWARDS COMPARISON CHART

Sources

1. *See generally In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F.Su□□2d 249, 266-72 (D.N.H. 2007).

2. Alla□attah: *Allapattah Svcs., Inc. v. Exxon Corp.*, 454 F.Su□□2d 1185, 1214, 1241-42 (S.D. Fla. 2006).

3. Cendant: *In re Cendant Corp. Litig.*, 243 F.Su□□2d 166, 173-74 (D.N.J. 2003).

4. ENRON: *In re ENRON Corp. Secs., Deriv. & "ERISA" Litig.*, 586 F.Su□□2d 732, 740 & nn.2, 7, 778-80, 803 (S.D. Tex. 2008).

5. Loral: *In re Loral Space & Communications Inc.*, 2008 WL 4293781 (Del. Ch. Se□t. 19, 2008); *In re Loral Space & Communications Inc. Consol. Litig.*, C.A. No. 2808-VCS (TRANSCRIPT) (Del. Ch. Dec. 22, 2008); *In re Loral Space & Communications Inc. Consol. Litig.*, C.A. No. 2808-VCS, 2008 WL 4961563 (Class Counsel's O□ening Brief in Su□□ort of its Motion for an Award of Attorneys' Fees and Ex□enses), at 13-14 (Nov. 14, 2008).

6. NASDAQ Market-makers: *In re NASDAQ Market-makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998).

7. Visa Check/Mastermoney: *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Su□□2d 503, 522-24 (Dec. 19, 2003); *Wal-Mart store, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir.), *cert. denied sub nom. Leonardo's Pizza By The Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044 (2005); *In re Visa Check/Mastermoney Antitrust Litig.*,

CV-96-9238 (CLASS COUNSEL'S PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS AND EXPENSES) (Aug. 18, 2003).

8. Greenberg: *Teachers Ret. Sys. of La. v. Greenberg*, C.A. No. 20106-VCS, 2008 WL 5203014 (Pl.'s Mem. In Su□□ort Of Its Motion For A□□roval Of Settlement & An Award Of Attorneys' Fees & Costs) (Dec. 9, 2008); *Teachers Ret. Sys. of La. v. Greenberg*, C.A. No. 20106-VCS, 2008 WL 5203015 (Affidavit of Cynthia A. Calder, Esquire) (Dec. 9, 2008); *In re Teachers' Ret. System of La. v. Greenberg*, C.A. No. 20106-VCS (TRANSCRIPT) (Del. Ch. Dec. 17, 2007); *Teachers Ret. Sys. of La. v. Greenberg*, C.A. No. 20106-VCS (ORDER & FINAL JUDGMENT), ¶ M (Del. Ch. Dec. 17, 2008).

9. AOL Time Warner: *In re AOL Time Warner, Inc. Secs. & "ERISA" Litig.*, 2006 WL 3057232, at **2, 14, 18.

10. Tyco: *Tyco*, 535 F.Su□□2d at 270, 272.

11. Worldcom, 2004: *In re Woldcom, Inc. Secs. Litig.*, 2004 WL 2591402, at *17 (S.D.N.Y. Nov. 12, 2004).

12. Royal Ahold: *In re Royal Ahold N.V. Secs. & ERISA Litig.*, 461 F.Su□□2d 383, 386, 387 ¶¶ 2-3 (D. Md. 2006).

13. Worldcom, 2005: *In re Worldcom, Inc. Secs. Litig.*, 388 F.Su□□2d 319, 353-54, 359 (S.D.N.Y. 2005); *Barndis v. Worldcom, Inc.*, C.A. No. 02-CV-3416-DLC (CIVIL DOCKET), Orders entered Se□t. 21, 2005.

14. Nortel Networks [CA -1855]: *In re Nortel Networks Corp. Secs. Litig.*, C.A. No. 01-CV-1855 (RMB) (ORDER & FINAL JUDGMENT), at Ex. A at 3-5

(S.D.N.Y. Jan. 29, 2007); *In re Nortel Networks Corp. Secs. Litig.*, 539 F.3d 129 (2d Cir. 2008).

15. Nortel Networks [CA -1659]: *In re Nortel Networks Corp. Secs. Litig.*, C.A. No. 05-MD-1659 (LAP) (ORDER & FINAL JUDGMENT), at 10-11 (S.D.N.Y. Dec. 26, 2006); *In re Nortel Networks Corp. Secs. Litig.*, 539 F.3d 129 (2d Cir. 2008); *In re Nortel Networks Corp. Secs. Litig.*, C.A. No. 05-MD-1659 (LAP) (MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES) [D.I. 16], at 29-30, 33-34 (Sept. 5, 2006).

CERTIFICATE OF SERVICE

I hereby certify that, on November 11, 2011, a copy of the Answering Brief Of Nominal Defendant Southern Peru Copper Corporation In Opposition To Plaintiff's Petition For Attorneys' Fees And Expenses to be served upon the following counsel of record by LexisNexis File & Serve.

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Andrew D. Cordo (#4534)

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

PLAINTIFF'S CORRECTED REPLY TO DEFENDANTS' ANSWERING BRIEFS IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND EXPENSES

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Dated: November 18, 2011

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Cases

ARGUMENT

Defendants' position is that if plaintiff's counsel take a huge case to trial and achieve a $1.9 billion judgment solely as a result of their efforts and risk, they should get a *quantum meruit* award based on the number of hours they expended in achieving the benefit. Here, defendants would peg this amount at $13.5 million,[1] which includes counsel's expenses and could also be paid in Southern Peru stock. This fee, ***which is equivalent to 0.7% of the $1.9 billion benefit***, defendants say, "would be more than enough to compensate and incentivize plaintiffs' counsel."[2] In fact, defendants suggest that plaintiff's counsel who achieve a $1.9 billion judgment after trial – the largest derivative recovery in this Court's history – should be compensated as if they had settled the case for less than $50 million. Really? Of course not.

The Company acknowledges as it must that the first *Sugarland* factor "is traditionally accorded the most weight,"[3] and that "potential negative incentives might stem from applying a sliding-scale to a fee award as the benefits get larger."[4] Defendants nonetheless ask this Court to slide the fee award scale to virtually zero. It is impossible to reconcile the defendants' recommendation that plaintiff's counsel here receive a fee equaling merely ***0.7%*** for their efforts and success with this Court's precedents[5] and guidance.[6] Instead, Plaintiff's counsel submits that

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[1] The Company suggests $13.5 million; the AMC defendants suggest $13.88 million.

[2] AMC Defendants' Answering Brief in Opposition to Plaintiff's Petition for Attorneys' Fees and Expenses ("AMC Br.") at 2.

[3] Answering Brief of Nominal Defendant Southern Peru Copper Corporation in Opposition to Plaintiff's Petition For Attorneys' Fees and Expenses ("Company Br.") at 6.

[4] Company Br. at 9; *see also In re Emerson Radio S'holder Derivative Litig.*, 2011 WL 1135006, at *4 (Del. Ch.) ("Awarding increasing percentages helps offset representative counsel's natural incentive to shirk.")

[5] *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *14 (Del. Ch.) ("Delaware courts recognize the value of representative litigation. In deal cases, Delaware decisions have sought to align the interests of entrepreneurial plaintiffs' counsel with the classes they represent by granting minimal fees for minimal benefits and major fees for major results.").

its request for 22.5% of the benefit achieved through this litigation is fair and reasonable under *Sugarland* and its underlying policies.

A. The Benefit Achieved: An Unprecedented Post-Trial Damages Award

Defendants arrive at their fee recommendation by contorting the clear language of this Court's post-trial Opinion and by ignoring the most important *Sugarland* factor.[7] They assert that depending on how AMC satisfies the judgment, the value of the judgment would be indeterminate (it "may be nothing"[8] or "would be a balance sheet event"[9]). Next, whatever benefit was achieved was not "attributable solely to counsel's efforts."[10] And finally, because

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[6] *Joseph v. Troy Group, Inc.*, C.A. No. 4676-CS, Strine, C. (Del. Ch. June 29, 2011) at 28 ("If there's ever a case like this, and it's clear that the sole reason a class got $2 billion is because of the lawyers, I got no problem, and I will sleep better than I usually do if the lawyers get 33 percent of $2 billion.").

[7] *See, e.g., Marie Raymond Revocable Trust v. MAT Five LLC*, 980 A.2d 388, 409 (Del. Ch. 2008) ("In Delaware, the benefits achieved in the actions receives the greatest weight in determining the fee award."); *id.* at 410 ("…This court has often approved fee requests of 30% or more of the benefits where the settlement benefits are attributable solely to the litigation."); *In re Nat. City Corp. S'holders Litig.*, 2009 WL 2425389, at *5 (Del. Ch.) ("This Court has consistently noted that the most important factor in determining a fee award is the size of the benefit achieved"); *Ryan v. Gifford*, 2009 WL 18143, at *13 (Del. Ch.) ("The benefit achieved for the Company and the shareholders should be accorded the greatest weight in determining the fees to be awarded."); *Olson v. Ev3, Inc.*, 2011 WL 704409, at *8 (Del. Ch.) ("In determining the size of an award of attorney's fees, courts assign the greatest weight to the benefit achieved"); *J.L.Schiffman and Co., Inc. v. Standard Indus., Inc.*, 1993 WL 271441, at *4 (Del. Ch.) ("The benefits achieved by the litigation constitute the factor generally accorded the greatest weight in this jurisdiction.").

[8] The speculative nature of defendants' argument stems from their unwillingness to say how they intend to satisfy the judgment. Grupo Mexico apparently intends to let the current market price of shares of Southern Peru dictate the currency in which it will satisfy the judgment. This gaming, and the speculation it creates, is reason alone to reject defendants' argument that the currency which defendants choose to satisfy the judgment should bear on the attorneys' fee award to plaintiff's counsel.

[9] AMC Br. at 6.

[10] Company Br. at 15.

the benefit is so "speculative,"[11] plaintiff's attorneys' fees should be assessed on a *quantum meruit* basis,[12] rather than as a percentage of the fund.

Hogwash.

Defendants simply ignore reality when they characterize a $1.9 billion post-trial judgment as "some sort of a corporate benefit."[13] Unlike cases like *Loral Space*, which involved benefits which may have been difficult to quantify,[14] here the Court ordered that the "remedy, therefore, amounts to $1.263 billion," plus interest until the judgment is satisfied.[15] The fact that the Court gave Grupo Mexico various means by which it "may satisfy the judgment"[16] does not mean that the size of the judgment (or the benefit conferred) rests in Grupo Mexico's hands.

This is true as a matter of law, equity, and practice. Legally, if Grupo Mexico satisfies the judgment by returning stock to the Company, the stock would have the same value as the monetary judgment – $1.9 billion.[17] Indeed, defendants' arguments to the contrary are

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[11] *Id*. at 12.

[12] *Id*. at 14.

[13] *Id*. at 12.

[14] As this Court is well aware, the equitable remedy crafted in *Loral Space* reformed the terms of preferred stock held by a controlling stockholder. As the Court noted, it could not "value the benefit in a precise way." *In re Loral Space and Communications Inc. Consol. Litig.*, C.A. No. 2808-VCS, Strine, V.C. (Del. Ch. Dec. 22, 2008) (Transcript) at 72. Had the litigation resulted in a quantifiable common fund, the fee issue would have been "easier…because the fund is there and you can just take a percentage." *Id.* at 74.

[15] *In re Southern Peru Copper Corp. S'holder Derivative Litig.*, --- A.3d ----, 2011 WL 4907799, *43 (Del. Ch.).

[16] *Id.*

[17] Based on the Company's own business practices, the value of the returned stock may even exceed the cash value of the judgment. The Company has an aggressive share repurchase program which its Board of Directors recently increased from $500 million to $1 billion. According to Southern Peru's most recent quarterly statement, Southern Peru spent $148 million in the second quarter of 2011 to repurchase 4.6 million shares of common stock. *See* Southern Copper Corporation Form 10-Q, filed with the SEC on November 9, 2011 at 27 (available at http://www.sec.gov/Archives/edgar/data/1001838/000110465911062516/a11-25690_110q.htm).

remarkably similar to the arguments that left them liable at trial – "obscuring the fundamental fact that [shares in] the NYSE-listed company ha[ve] a proven cash value."[18] Whether the stock is held by AMC or Southern Peru, the stock could easily be liquidated into cash.[19] In equity, if Southern Peru determines not to monetize the stock that ***may be*** returned to it, that is Southern Peru's choice, and a choice that cannot be used to manipulate the amount of fees paid to plaintiff's counsel. And practically, defendants' "what if" argument ignores that this Court intends to fix the attorneys' fee award prior to the judgment being satisfied. Thus, defendants' suggestion that the attorneys' fee award should vary based on how Grupo Mexico satisfies the judgment is simply impracticable.

Nor should defendants have the option of paying plaintiff's counsel in stock. Again, defendants are using the market to dictate an outcome most favorable to them. Setting aside the fact that 22.5% of approximately 70.6 million shares would be a significant block of stock for a non-issuer and non-broker to liquidate, plaintiff's counsel should not be required to assume the risk that Southern Peru's stock price (described repeatedly as "volatile" during the trial) will remain strong in the interim. Moreover, plaintiff's counsel should not be required to take a substantial stake in a controlled company where the controlling stockholder has twice in the past three years been held to have breached its fiduciary duties to investors. Plaintiff's counsel highly

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As a result of the trial judgment, if AMC chooses to return stock, Southern Peru will receive more than fifteen times the number of shares it repurchased in the second quarter of 2011 (more than 70.6 million shares). To repurchase the same number of shares on the market Southern Peru would have to spend more than $2.273 billion, based on the average $32.32 per share paid in the second quarter. *Id.* Southern Peru's own business practices establish that a return of stock is plainly a very valuable benefit to the Company.

[18] *Southern Peru*, 2011 WL 4907799, at *1.

[19] *Id.* at *1 ("The . . . billion [dollar number] 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.").

suspects that counsel for defendants has been paid in cash; so too should plaintiff's counsel. This is a derivative case in which the litigation conferred a quantifiable monetary benefit on the corporation and as such the corporation should be required to pay the fee award in cash.

Defendants feebly argue that plaintiff's counsel's efforts were not the actual cause of the $1.9 billion judgment they achieved.[20] They are forced to make such a strained argument only because the precedents clearly dictate that a *quantum meruit* analysis is only applicable when the benefit achieved is hard to define,[21] or the court is unable to parse the cause of the benefit with precision.[22] Their analogy between *Cox Communications*[23] and this litigation, however, is like comparing a Kabuki dance to hand-to-hand combat.

Finally, as anticipated, the AMC defendants argue that even if a percentage of the common fund is used to calculate attorneys' fees, the Court must take into account "the unique situation presented here," *i.e.*, for purposes of calculating attorneys' fees, the common fund must be reduced to account for Grupo Mexico's 80% ownership of Southern Peru. Plaintiff's counsel specifically addressed this argument in their petition. Plaintiff's counsel cited well-settled authority rejecting the claim that the presence of a controlling stockholder – which is hardly a unique situation – diminishes the value of a recovery to the company on whose behalf the

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[20] AMC Br. at 14-15; Company Br. at 15-16.

[21] *See Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *8 (Del. Ch.) ("In determining the size of an award of attorney's fees, courts assign the greatest weight to the benefit achieved by the litigation. When the benefit achieved is unquantifiable, however, courts often find the *quantum meruit* approach most equitable."); *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *8 (Del. Ch.) ("In cases where the benefit created is not quantifiable, the *quantum meruit* approach is often appropriate.")

[22] *See La. State Employees' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *6 (Del. Ch.) (awarding fees under *quantum meruit* where it was "impossible . . . to indentify precisely the degree to which this lawsuit caused [the benefit].")

[23] Company Br. at 15 n. 44; AMC Br. at 10, n.23.

derivative action is brought.[24] The AMC defendants do not address any of the cases cited by plaintiff's counsel.[25] Defendants offer no legal basis to depart from this Court's long-standing practice of calculating attorneys' fees based on the common fund as a whole.[26] Under *Sugarland* and its progeny, plaintiff's counsel's request for 22.5% of that benefit is conservative in relation to the percentage range this Court has repeatedly said is warranted post-trial.

B. Time and Effort Expended By Counsel

Defendants focus their challenge to plaintiff's counsel's fee petition on the "time" expended by counsel. The number of hours expended by plaintiff's counsel in securing a victory at trial should have little bearing on this Court's analysis of the appropriate fee. Counsel's time is relevant as a "cross check" on the reasonableness of an attorneys' fee request in the ***settlement*** context, where counsel has chosen to ***compromise*** his claims. As any compromise is made at the expense of the class which counsel seeks to represent, the settlement context presents the possibility of "different incentive problems, including the risk of cheap early settlements."[27]

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[24] Plaintiff's Petition for Attorneys' Fees and Expenses at 3-6.

[25] Instead, defendants altogether abandon Delaware law to rely on a single case from the State of Florida, *Lane v. Head*, 566 So.2d 508 (Fla. 1990). *Lane* interpreted a partial-contingency fee agreement under a Florida fee statute and Florida case law. *Lane's* holding should have no bearing on this Court's application of *Sugarland* under the facts of this case. Defendants also cite *Lewis v. Great Western United Corp.*, 1978 WL 2490 (Del. Ch.), *see* AMC Br. at 8, n.17, which is completely inapposite. In *Lewis*, the court withheld a portion of plaintiffs' counsel's fees pending a determination by certain stockholders as to whether they would participate in the settlement or seek appraisal of their shares. 1978 WL 2490, at *9.

[26] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996); *see also* Plaintiff's Petition for Attorneys' Fees and Expenses at 4, n.19.

[27] *See Seinfeld v. Coker*, 847 A.2d 330, 336-37 (Del. Ch. 2000) (comparing effect of percentage of fund methodology on attorneys who engaged in "hotly contested litigation" against attorneys who "settled quickly"); *id.* at 339 ("***Settlements*** in class and derivative actions sometimes raise difficult problems regarding the appropriate level of compensation for class or derivative counsel.") (emphasis added). *See also Franklin Balance Sheet*, 2007 WL 2495018, at *13-14 (utilizing "backstop check" where, although plaintiffs' counsel expended 1,047 hours on the case, the action "the fact that Plaintiffs' underlying action never progressed beyond the motion to

Where the interests of lawyer and client might diverge, courts thus appropriately exercise vigilance to assure that a fee request in this context will not represent a "windfall." But where counsel has not compromised, and indeed has taken the case through judgment, there is no risk that the interests of lawyer and client have diverged. No matter how large a fee is awarded post-trial, it is not a "windfall."

Merriam-Webster defines a "windfall" benefit as one which is "unexpected" or "unearned."[28] Though large, the fee sought here would be neither unexpected nor unearned. Plaintiff's counsel litigated this matter through trial with the understanding that if they lost they would receive nothing. If they won, they expected that their efforts would be rewarded with a significant fee which would be measured as a percentage of the benefit they created. Counsel made this investment, and took this risk, while aware of the clear incentives often reiterated by this Court.[29]

Defendants also inappropriately collapse the "time and effort" factor into a single "lodestar" analysis. "This factor has two separate but related components: (i) time and (ii) effort."[30] "More important than hours is effort, as in what plaintiffs' counsel actually did."[31]

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dismiss stage warrants a reduction in the percentage rate used in calculating fees, as this Court has a history of properly awarding lower percentages of the benefit where cases have settled well before trial."); *In re Nat. City Corp.*, 2009 WL 2425389, at *5 (noting the "omnipresent threat that plaintiffs would trade off settlement benefits for an agreement that the defendant will not contest a substantial fee award.") (internal citations and quotations omitted).

[28] Merriam-Webster Dictionary (Online Edition) (available at http://www.merriam-webster.com/dictionary/windfall).

[29] Plaintiff's Petition for Attorneys' Fees and Expenses at 6-8.

[30] *Del Monte*, 2011 WL 2535256, at *12; *Sugarland Indus., Inc. v. Thomas,* 420 A.2d at 142, 149 (Del. 1980).

[31] *Del Monte*, 2011 WL 2535256, at *13 (internal quotations and citation omitted).

"The time (*i.e.*, hours) that counsel claim to have worked is of secondary importance."[32] This is especially true here, where counsel took the case to trial and won. Counsel's "efforts" here were substantial. While the Court has criticized plaintiff's counsel for delays early on in the prosecution of the case, it also noted the "vigor with which [plaintiff's] counsel have prosecuted the case since it was transferred to my docket."[33] And in recognition of the Court's admonitions, plaintiff's counsel have reduced this Court's presumptive 33% post-trial fee award by nearly one-third.

Moreover, "counsel should not be penalized" for litigating their case efficiently and winning.[34] Sometimes less is more. Plaintiff's valuation analyses consumed both his claim of unfair dealing and unfair price, and plaintiff was either right or wrong on the issue. Post-trial, the Court has ruled that plaintiff was right. That result is the prism through which plaintiff's counsel's time and effort should be viewed. Countless hours could have been expended on additional depositions, third-party discovery, or needless motion practice, but none of those hours would have altered the plaintiff's basic theory of the case. To adopt defendants' "lodestar"-based analysis would promote inefficiencies this Court has often discouraged.

Plaintiff's counsel put forth the time and effort necessary to win at trial. As noted below, plaintiff's counsel invested all of that effort without any indication at all that the case would settle, *i.e.*, this is not a case where litigation was pursued with some type of floor recovery assumed. The litigation simply took as many hours as it took, and plaintiff's counsel never

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[32] *Id.* at *12.

[33] *Southern Peru*, 2011 WL 4907799, at *3, n.5.

[34] *See Olson*, 2011 WL 704409, at *15 (giving "no weight to the hours expended" in "achieving complete victory"); *Anderson Clayton*, 1988 WL 97480, at *1 ("We have, for good reasons having to do with efficiency and incentives, resisted the tendency to make hours expended in the effort a central inquiry.") (*citing Sugarland*).

modeled its conduct on an expectation that it would need to justify a possible fee request on the number of hours expended. Plaintiff's counsel respectfully submits that when that effort results in a decisive win for plaintiff after trial,[35] the number of ***hours*** should count for much less than the ***quality*** of counsel's "time and effort."

C. Contingent Nature of the Litigation

Defendants note that plaintiff's counsel faced "little risk that [they] would not get some sort of fee award if they pursued the case and won."[36] That's quite an "if" – to receive a fee, all we had to do was "win." The same defendants who never meaningfully offered to settle the case now oddly pretend that a nearly $2 billion plaintiff's verdict was a fairly likely outcome. They quote plaintiff's counsel's arguments during trial that the case was simple as proof that the case was, in fact, simple.[37] And they recommend that plaintiff's counsel receive a ***four times*** multiple of their "lodestar," as a numeric representation of the contingent risk that plaintiff's counsel actually bore.

Defendants' retrospective analysis of the strength and simplicity of the case that they just lost should carry no weight. If defendants truly thought during trial that the risk of a plaintiff's verdict was actually four to one, they would have offered plaintiff hundreds of millions of dollars to settle. They did not do so. Defendants instead argued that the case posed insurmountable obstacles for plaintiff: a special committee comprised of directors who claimed to be sophisticated, independent and disinterested, and who retained blue-chip advisors; eight months of alleged negotiations between the special committee and Grupo Mexico; and a stock price

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[35] *Southern Peru*, 2011 WL 4907799, at *23 (the burden of proof "matters little because I am not stuck in equipoise about the issue of fairness.").

[36] AMC Br. at 14.

[37] AMC Br. at 12. These words are only now, for the first time in this litigation, apparently accepted by defendants as true.

reaction to the deal that purportedly indicated fairness. No court had found for a plaintiff at trial on similar facts. Moreover, none of the Court's pre-trial rulings indicated that victory was likely. Instead, the Court denied plaintiff's motion for partial summary judgment, dismissed the special committee defendants from the case, and increased the uncertainty by holding off allocation of the burden of proof until after trial. During the trial, this Court made several pointed comments about plaintiff's slim likelihood of success, which resonated with plaintiff's counsel and caused us to redouble our efforts. Defendants appeared more and more confident as the trial progressed, and now proclaim to be "shocked" at the verdict. For defendants now to pretend that these events were all an inexorable prelude to an unsurprising plaintiff's verdict is absurd.

Plaintiff's counsel here invested millions of dollars of time and over a million dollars in expenses by pressing this case through trial and appear likely to incur significant additional time and expense defending the verdict on appeal. Plaintiff's counsel sought not a cheap "disclosure settlement," or to claim "shared credit" with a special committee, but to challenge the terms – the substance – of the special committee's conclusions at trial. Plaintiff's counsel respectfully submits that the risk premium here should reflect the enormous amount of risk undertaken in plaintiff's counsel's all-in approach that has resulted in a nearly $2 billion recovery for Southern Peru.

D. The Complexity of the Litigation

Defendants describe this case as a "fairly ordinary entire fairness case."[38] Plaintiff's counsel has tried quite a few entire fairness cases and respectfully submits that there is no such thing. It is true that plaintiff pared his theory of the case down to a basic fundamental point, but this point was certainly not "simple." Tellingly, this Court's post-trial opinion is 105 pages long.

[38] Company Br. at 22.

But at this stage in the proceedings, plaintiff's counsel respectfully submits that the Court is best positioned to decide whether the complexity of this litigation supports the fee award requested.

E. The Standing and Skill of Counsel

Defendants dismiss plaintiff's counsel's skill and instead credit the Court for their loss. They describe plaintiff's victory as "primarily based on arguments never made by Plaintiff's counsel and which the AMC Defendants would have rebutted had they been afforded the opportunity to do so."[39] Rather than respond to the substance of defendants' argument, plaintiff's counsel respectfully submits that to the extent the Court found plaintiff's counsel's theory of the case, litigation strategy, discovery efforts, briefing, presentation at trial and post-trial briefing and argument to be effective and helpful, or to the extent that counsel's efforts persuaded the Court to rule for plaintiff, or perhaps even changed the Court's view of one or more aspects of the case, such effort is worthy of an award of attorneys' fees proportionate to the largest recovery ever obtained in a contingent class or derivative action in this Court.

[39] AMC Br. at 14.

CONCLUSION

Plaintiff's counsel respectfully submit that, given their proper weight in light of the historic post-trial award of damages conferred to Southern Peru as a result of plaintiff's counsel's prosecution of this action, the *Sugarland* factors support a fee award in the amount of 22.5%. Accordingly, plaintiff's counsel respectfully requests that their petition for an award of attorneys' fees and expenses be granted.

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Dated: November 18, 2011

CERTIFICATE OF SERVICE

I, Ronald A. Brown, Jr., do hereby certify on this 18th day of November, 2011, that I caused a copy of Plaintiff's Corrected Reply to Defendants' Answering Briefs in Opposition to Plaintiff's Petition for Attorneys' Fees and Expenses to be served via eFiling through LexisNexis File and Serve to counsel for the parties as follows:

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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

- - -

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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,

because if the client gets a billion dollars and the lawyer also gets really rich, the client will turn that down because lawyers shouldn't get rich. But the hypothetical client is really cool when the lawyer sues on the deal. It's already a 45 percent premium to market. The company's been shopped to 50 places. 45 percent premium.

Lawyer comes in, "I've got good news. They disclosed five years of cash flows. They didn't disclose the sixth. We don't know why, but they found" -- "we got them in discovery. We're going to get everybody that sixth-year cash flows, settle on that basis. And I'm going to get $750,000, but you'll know about the six years of cash flows, which are perfectly consistent with the previous five." The hypothetical plaintiff is just really cool with that. And that's much more of a windfall than -- and not a -- something an actual client would negotiate -- than the lawyer who straightforwardly says "I want" -- "If you get really rich because of me, I want to get rich, too. I won't get as rich as you will, but I'm going to get a percentage."

I just actually think there are a lot of actual people who would say "If my lawyer hits a

grand slam for me, I'm okay with him getting one or two of the runs because we all win than when the client gets nothing but the lawyer gets paid."

And so I think in terms of the hypothetical bargain, the framework here, the incentives I'm going to talk about, really, the idea that we need -- that what we have here, as I said, that we have bred generations of American representative plaintiffs' lawyers who are like pit bulls and they go and they do violent battle with defendants and irrationally waste -- put at risk their client -- like, the clients could get a good settlement, but the plaintiff's lawyers are just pit bulls. They're mindless fighters who will go to the end and die and that we can't shape a fee system that creates an incentive for more of the senseless violence, this -- this pugilism which is tying up courts, I -- I mean, if somebody believes that's the world we live in, I just -- I don't live in that world.

I live in a world where the incentives are -- where it's costly for plaintiff's lawyers to take -- they take a lot of risk to carry these cases. Their clients, if they -- they go to the mat. They've

got partners who are unhappy with them. There are receivables to experts. Far easier to approach cases in the way that's good for the -- the defense bar understands, everybody kind of understands, which is, you know, we filed -- we're an inconvenience. If we're inconvenienced enough, we get something credible enough to the class and we settle early and we move on. Seems to me we see far more of that.

There's precious little example of an overincentive on the part of plaintiffs' lawyers to really take risks and align their interests with the class to say "I'm not going to do that disclosure-only settlement because my clients sued" -- "I" -- "I put in here that this was a stinky deal. I'm supposed to sue because it's a stinky deal, not because I'm the disclosure police. If I wanted to work in the -- in corporate finance and tell what everybody what, you know, alphabet letter they have to disclose, I would do that. My clients supposedly pay me to attack a deal. If I can't change the deal, I shouldn't settle."

So here we have people, for better or worse -- and, again, I don't know whether there were opportunities to settle or not, but these plaintiffs,

for whatever reason, battled throughout trial. They sought summary judgment. And so I don't -- again, the more you achieve, the more risk you take should be some automatic declining percentage, that's something I don't understand. I don't understand it to be dictated by our Supreme Court. I don't understand the incentive system that it creates -- that that would create to be a healthy one. And I'm not going to embrace it.

Now, does that mean I'm awarding what the plaintiffs are seeking today? I'm not. And I'm going to explain why. I already -- one of the things the defendants did -- the defendants got credit for in this case is that the plaintiffs were slow. The defendants probably don't believe it, but I tried to be conservative in my remedy. 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. And I also took that into account in how I approach interest in the case.

Now, because I was conservative on these factors, it benefits the defendants; but, also,

I have to take that into account in the percentage I award for the plaintiffs, because the fact is I get -- you know, the failure of the Goldman witness to be around, I couldn't lay that entirely at the door of the -- of the defendants. And I took that into account. I took some cap factors into account, setting the interest in what I did. And it seems to me that's where you have to -- honestly, I have to take some away from the plaintiff's lawyers's lawyers on that, because possibly -- you know, frankly, there were grounds for me to award more to the company. And I didn't. And -- and so that is going to impel me to reduce the percentage that I'm awarding, even from the level of -- of the plaintiffs.

I also am not immune to the fact that you have to look at the hours and the effort expended and the total amount. And in this case I think an award of 15 percent of the revised judgment, inclusive of expenses, and -- that is appropriate. I'm not going to do what Mr. Jenkins says and exclude interest altogether. I get that argument. I expect someone as good as Mr. Jenkins and Mr. Stone to make that kind of argument. I kind of knew they would. The interest I awarded is fairly earned by the plaintiffs. It's a

lower amount. And, again, I've taken that into account by the percentage that I'm awarding.

I am not going to have -- as I said before, I'm going to make the defendants satisfy the attorney fees award in cash. They can certainly use their own stock as an asset. And then they can, you know, work out how they're going to do it with the company in terms of the company canceling the remaining shares. I did -- frankly, that was part of my conservatism in the remedy, was giving Grupo Mexico this option. It was not my intent to have the plaintiff's lawyers be subject to some sort of gamesmanship around factoring or something like that. And I'm not.

And in terms of the market risks, that's where the defendants, I think, can, you know -- they're able to deal in the securities market and figure it out.

Now, am I -- do I not understand lest -- that this is a big amount of money? I understand that. I get it. It's approximately -- on what I awarded, approximately $35,000 an hour, if you look at it that way. Now, it's going to go down because I'm assuming there's going to be an appeal, but it's still

going to be a lot per hour. And it's certainly going to be a lot per hour to people who get paid by the hour. Of course, the people who get paid by the hour often get a retainer -- or they should. And if they don't, then, you know, they need to go to CLE on how to get a retainer. And you're guaranteed in advance that you're going to get your fee. I'm betting that the appeal, the people doing the appeal on behalf of the defendants, will be guaranteed their fee. I don't think that they'll be taking any risk, and that there are many cases where, frankly, the plaintiff's lawyers involved in this case don't get anything.

Mr. Brown also makes an apt point. He's done cases -- I've seen him -- where he gets $135,000, not for himself but for the plaintiffs, and he ends up taking much less than his normal hourly rate in part because of the size of the benefit. And he has to take that on the chin even if it's a small corporate case. And other plaintiffs' lawyers do that. And defense counsel come in and says "Well, you got to take into account the size of the thing. They shouldn't get a thousand dollars an hour. They might be doing a thousand dollars an hour of good work, but they chose to sue on something small."

Well, this isn't small and this isn't monitoring. This isn't a case where it's rounding, where the plaintiffs share credit. This isn't a case where there was a government investigation. And, you know, we live in a world where we all know that plenty of market participants make big fees when their clients win. Frankly, we live in a market where a lot of market participants sometimes make big fees when their clients don't. You know, we talk about clawbacks for executive compensation. They talk about CEOs giving back money when the stock price goes down. Ever gotten a rebate check from your mutual fund for any of the bonus compensation or from your investment fund or executive compensation in a year when the market went up 37 percent, even though the next year the fund went down 52 percent and you've been there the whole time? Remember that clawback check? I don't recall any of it. It happens all the time. We are a capitalist, dynamic market system, and there are parts of the market where people are richly compensated.

I think what happens, though, in the law is we are kind of conservative in law. Those of us who are lawyers, we view ourselves a certain way.

And when -- there's an idea that when a lawyer or law firms are going to get a big payment, that there's something somehow wrong about that, just because it's a lawyer. I'm sorry, but investment banks have hit it big, a lot bigger the plaintiffs' lawyer firms have hit it big. They've hit it big many times. And to me, envy is not an appropriate motivation to take into account when you set an attorney fee. It's not. I'm sure that people will envy the law firms who get awarded this fee. They have to defend this appeal. They had to win it. But that's not rational. We're setting a system here. And if envy was the rule, then, again, I think the real windfall cases I talked about before is where the real envy comes in, where people do nothing or close to nothing and fees are awarded. Those are the cases in our society where we have to be, I think, more careful.

And I think what we're having here is because if this were something -- you know, people would say all the time there's much more -- as Mr. Jenkins aptly said, there's much more sensitivity about compensation issues. But I think it's something about lawyers where you think just a lawyer can't get that. If this were a hedge fund manager, it's okay.

If it's an investment bank, heck, if it was even a controlling stockholder, it's okay. Just not a law firm or a lawyer.

Now, I gave a percentage of only 15 percent rather than 20 percent, 22 1/2 percent, or even 33 percent because the amount that's requested is large. I did take that into account. Maybe I am embracing what is a declining thing. I've tried to take into account all the factors, the delay, what was at stake, and what was reasonable. And I gave defendants credit for their arguments by going down to 15 percent. The only basis for some further reduction is, again, envy or there's just some level of too much, there's some natural existing limit on what lawyers as a class should get when they do a deal.

Well, I'm a judge of a common law court. I mean, it's a variant of common law equity, obviously. I think a hypothetical plaintiff who was told that -- by a lawyer straightforwardly "If I get a billion-dollar judgment for you, I'd like to get paid 15 percent of that and $150 million. That's my deal," do I think the hypothetical plaintiff would walk away? Heck, no. I think a plaintiff would say "If we're making a deal where if you really, really produce

benefits for me, you will do really well and go to the mat for me and you do really well, I'm fine with that."

I think -- and so I don't -- you know, if you want to look at -- for me, that's the fundamental test of reasonableness, are we setting good incentives for people.

And windfall. I just don't agree -- I'm not saying -- and I haven't looked at when Chancellor Chandler used that word. I doubt that he did it in a -- you know, in this context. And as much respect as I have for him, if he did -- and I'm not saying he did. And I want to be clear I'm not saying he did it in the context of a case where it went to trial in an entire fairness case -- I don't believe it's apt. I don't think there's anything about this that is a windfall. Nothing fell into the laps of the plaintiffs. They advanced a theory of the case that a judge of this court, me, was reluctant to embrace. I denied their motion for summary judgment. I think I gave Mr. Brown a good amount of grief that day about the theory. I asked a lot of questions at trial because I was still skeptical of the theory. It faced some of the best lawyers I know and am privileged to

have come before me, and they won. And they got a very, very sizable verdict. I don't find anything to be -- about that to be a windfall, and I don't think awarding 15 percent of the benefit for the company to the plaintiffs is unreasonable. I think it is a perfectly sensible approach that fairly implements the most important factors our Supreme Court has highlighted under Sugarland, including the importance of benefits. And I think it creates a healthy incentive for plaintiff's lawyers to actually seek real achievement for the companies that they represent in derivative actions and the classes that they represent in class actions. And I would hate to set a different incentive. I think that that would be worse.

Now, do I realize that reasonable minds can differ on this? I do. It's a perfectly legitimate basis for disagreement in society about how to handle these matters. But I think when you talk about Sugarland and you talk about the difficulty of the litigation, was this difficult? Yes, it was. Were the defense counsel formidable and among the best that we have in our bar? They were. Did the plaintiffs have to do a lot of good work to get done

and have to push back against a judge who was resistant to their approach? They did. And then -- and did they have to -- did they take this on the come and were they at risk? Of course. Do they often do -- and I know Mr. Brown in particular. Do they often do cases they don't get compensated or that involve -- frankly, where the Court looks at the benefit produced as the key factor and says "This is a smaller case, Mr. Brown, and you worked a lot of hours. And, yes, you're hourly rate of $150, but that's still too high because it was a small company"? Yeah, they do that.

So when the Court -- when the Supreme Court says to take into account the benefit, you know, unless we're going to go use it uniformly, I don't think you penalize people for taking a chance in this big case. And they took a chance, and they got a big achievement, and I think getting 15 percent of that is a fair and reasonable thing. As I said, though, reasonable minds can differ. I have no doubt that, you know, it will be a very interesting argument in our Supreme Court.

And I wish you-all a happy holiday season. What I'm going to ask Mr. Brown to do is to

work with Mr. Stone and Mr. Jenkins. I would like a scrivened final judgment over to me, I would hope by the end of the day; if not, by early tomorrow. I'm going to amend the opinion, as I said, to make the alteration we talked about. I think you need to scriven the language about how the attorneys' fees get paid. I think you understand my point. I still want to give Grupo Mexico and the other defendants the option of satisfying the rest in the way that I did.

But I think you have drafts of a final judgment that are done. And I think you-all are here today. Let's get it done. And then you can move it to our fair state capital, you know, if you want to do that. If you -- if you have a post-trial settlement, I'm sure that would be, you know, good news to everyone. But I don't -- as Mr. Brown said, it's kind of a big case and doesn't appear that the parties have ever looked at it quite the same way.

And so have a happy holiday season, everyone. And I appreciate your arguments, and I will see you soon.

MR. JENKINS: Thank you, Your Honor.

(Court adjourned at 11:57 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 87 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 23rd day of December 2011.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAS MINING CORPORATION, GERMAN LARREA MOTA-VELASCO, GENARO LARREA MOTA-VELASCO, OSCAR GONZALEZ ROCHA, EMILIO CARRILLO GAMBOA, JAIME FERNANDO COLLAZO GONZALEZ, XAVIER GARCIA DE QUEVEDO TOPETE, ARMANDO ORTEGA GOMEZ AND JUAN REBELLEDO, Defendants-Below, Appellants, v. MICHAEL THERIAULT, as Trustee for the Theriault Trust, Plaintiff-Below, Appellee.	)	No. _____, 2012 APPEAL FROM THE REVISED OPINION DATED DECEMBER 20, 2011, AND THE REVISED FINAL ORDER AND JUDGMENT DATED DECEMBER 29, 2011, OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN CONSOL. C.A. NO. 961-CC.

NOTICE OF APPEAL

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PLEASE TAKE NOTICE that Americas Mining Corporation, 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, defendants-below/appellants, do hereby appeal to the Supreme Court of Delaware the revised post-trial Opinion of the Court of Chancery dated December 20, 2011, and the Revised Final Order and Judgment of the

Court of Chancery dated December 29, 2011, entered by the Honorable Leo E. Strine, Jr. in Consol. C.A. No. 961-CS, and all rulings and orders of the Court of Chancery incidental thereto, including without limitation, the Court's ruling on Defendants' Motion for Summary Judgment, the Court's ruling on Plaintiff's objection to Defendants' request to present the testimony of a representative of Goldman, Sachs & Co. at trial, and the Court's ruling on Plaintiff's Petition for Attorneys' Fees and Expenses. Copies of the revised Opinion and Revised Final Order and Judgment sought to be reviewed are attached hereto as Exhibits A and B, respectively.

The names and addresses of the attorneys below for the plaintiff-below/appellee are Ronald A. Brown, Jr. and Marcus E. Montejo, Prickett, Jones & Elliott, P.A., 1310 King Street, Wilmington, Delaware 19801.

The party against whom the appeal is taken is Michael Theriault as trustee for the Theriault Trust.

The parties against whom the appeal is not taken are Southern Peru Copper Corporation, Carlos Ruiz Sacristan, Harold S. Handelsman, Gilberto Perezalonso Cifuentes and Luis Miguel Palomino Bonilla. The names and addresses for the attorneys below for Southern Peru Copper Corporation are Stephen E. Jenkins and Richard L. Renck, Ashby & Geddes, 222 Delaware Avenue, Wilmington, Delaware 19801. The names and addresses for the attorneys below for Carlos Ruiz Sacristan, Harold S. Handelsman, Gilberto Perezalonso Cifuentes and Luis Miguel Palomino Bonilla are Raymond J. DiCamillo and Kevin M. Gallagher,

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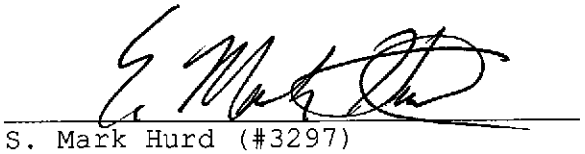
PLEASE TAKE FURTHER NOTICE that, defendants-below/appellants hereby designate the full record below and the full transcript of any and all hearings in accordance with Supreme Court Rules 7 in the following manner: A transcript of the proceedings need not be ordered because proceedings below have been transcribed and are part of the official record in the Court of Chancery.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP



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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2012, I electronically filed and caused to be served by LexisNexis File and Serve a NOTICE OF APPEAL upon the following counsel of record:

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I hereby certify that on March 5, 2012, I electronically filed and caused to be served by LexisNexis File and Serve a JOINT APPENDIX TO APPELLANTS' OPENING BRIEF AND NOMINAL APPELLANT SOUTHERN PERU COPPER CORPORATION'S OEPNING BRIEF upon the following counsel of record:

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