

Case: In re Southern Peru Copper Corp. Shareholder Litigation,  
52 A.3d 761 (Del. Ch. 2011)

Interview of Ronald A. Brown, Jr.

Prickett, Jones & Elliott, P.A.

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#00:00:00# - #00:00:31#

1 MR. MONTEJO: Good morning. So, I was flipping  
2 through my bookshelf, and I pulled this appellate brief out;;  
3 took a quick look at it. It looks like it's from Southern  
4 Peru. I thought it would be fun to talk about it today. What  
5 do you think?

6 MR. BROWN: Well, let's talk about it. It was a big  
7 case—

8 MR. MONTEJO: It was a big case.

9 MR. BROWN: -- for us. And there was - it was - we  
10 put a lot of work into it, but it - you know, let's try to  
11 explain it to everyone.

12 MR. MONTEJO: All right, it sounds good. This was  
13 your baby. How did Prickett Jones end up involved in this  
14 case? #00:01:09#

15 MR. BROWN: Literally, a guy called me and said I'm  
16 a shareholder of Southern Peru Copper Corporation. There is a  
17 transaction happening, and it's - I really don't want - I  
18 think it's unfair. Will you look at it for me? So, we dove

1 into it, and we were a little - you know, it's been ten years,  
2 so I can't remember exactly. My memory is not perfect, but we  
3 were on the later side. It was closer to the proxy statement.  
4 I can't remember if it was the official proxy statement that  
5 was out at the time that I was - we were called, or it was  
6 preliminary. But, it was - my recollection is -- there wasn't  
7 like a ton of time to do something initially. But we, you  
8 know, spent a lot of time looking at the proxy statement and,  
9 I mean, I don't want to say it was a simple transaction, but  
10 basically the controlling - you know, it was a - there was a  
11 company, a publicly-traded New York Stock Exchange company  
12 called Southern Peru Copper Corporation that basically was a  
13 copper mining company that operated - that had its operations  
14 in Peru. And, but they had a controlling shareholder. There  
15 was a shareholder, Grupo Mexico, that was based in Mexico that  
16 owned in excess of 50% of the voting shares of Southern Copper  
17 - what I will call Southern Copper. They changed the name from  
18 Southern Peru to Southern Copper, so it is called Southern  
19 Copper. And they - the controlling shareholder -- decided to  
20 sort of consolidate. - They were essentially a holding  
21 company; they owned other businesses. And one of their other  
22 businesses was also a copper mining operation, but it was  
23 located in Mexico. And so, they decided to propose to come -  
24 essentially - what I had considered sell their Mexican copper

1 mining operations to the subsid... -- other company they  
2 controlled, Southern Copper, and they wanted to take back  
3 shares in exchange. I mean, so, really, that's all it was, was  
4 they were moving a Mexican copper mining operation into  
5 another company that they controlled. And there kind of  
6 weren't any synergies. They were copper mining operations in  
7 different parts of the world, but they wanted to put them  
8 together, and they proposed to put them together. And that's  
9 how it started.

10 MR. MONTEJO: And in and of itself, there is nothing  
11 wrong with a controlling stockholder reorganizing its business  
12 interests, right? #00:04:32#

13 MR. BROWN: Nothing. It's all about the - basically,  
14 whether it's a fair deal. And the - I don't want to jump to  
15 the end at the beginning, but they proposed to - they  
16 basically, you know, Grupo Mexico came in, and there were some  
17 subsidiaries, but basically it as Grupo Mexico was the  
18 controlling entity. They said hey, our - essentially, our  
19 Mexican mining operations are worth about 3.1 billion dollars,  
20 we think. So, we want 3.1 billion dollars in your stock,  
21 measured at the market price, because it was publicly traded  
22 New York Stock Exchange stock. And that was the initial offer.  
23 And, at the end, they got 3.7 billion dollars of stock. So, if  
24 they had just - I mean, if the company had just accepted the

1 original offer, it would have been - they would have done far,  
2 far better than they did in the end. So, it was a very, very -  
3 to me, -- a very strange situation.

4 MR. MONTEJO: And that was something that popped out  
5 right from your initial review of the case. #00:05:56#

6 MR. BROWN: When I looked at it, I'm like, it was  
7 actually quite complicated the way - they had appointed a  
8 special committee, and it just didn't strike me as - the way  
9 they approached it, seemed bizarre to me. They, instead of  
10 just looking at it like, okay, we're buying a Mexican, you  
11 know, or we're buying some copper mining operations, what's it  
12 worth? Let's pay them what it's worth. They ended up doing  
13 this weird - what they called a relative valuation analysis,  
14 which, to this day, I don't even understand. Instead of just  
15 saying, what are we buying and what is the fair price for it?  
16 They ended up sort of trying to justify it because a lot of  
17 people on the... Southern Peru side just seemed like they were  
18 really anxious to get something done, which we can talk about  
19 the details in a second, but...

20 MR. MONTEJO: Right, yeah. And trying not to skip  
21 all the way to the end-

22 MR. BROWN: Yeah.

23 MR. MONTEJO: I guess, you know, so... Straight from  
24 the SEC filings, at least, red flags jumped out at you, right?

1 It's fair to say that once you parsed through the convoluted  
2 way the SEC proxy was prepared, you could figure out that at  
3 least Southern Peru was paying a lot more than Grupo Mexico  
4 even initially proposed in the transaction. #00:07:52#

5 MR. BROWN: And that was the weird thing in the end.  
6 And you actually couldn't tell it from the proxy statement,  
7 because the proxy statement was very sort of confused and hard  
8 to follow and hard to figure out what was really happening.  
9 But, you know, when we really did the work and dug into it,  
10 you know, it was clear that - or it seemed to me that, you  
11 know, they were reaching to try to figure a way to say that it  
12 was fair versus just saying we're issuing shares of a  
13 publicly-traded New York Stock Exchange company that have an  
14 actual market value. That is, you really can't argue with it.  
15 It is worth what it is worth. And, to me, the focus should  
16 have been what was - what was Minera Mexico, which was the  
17 Southern - it was the Mexican mining operations that were  
18 being sold or moved into Southern Copper. It should have been  
19 focused on what they were worth. And actually, in the end,  
20 there wasn't any dispute at trial. Nobody argued a really  
21 different value for Minera Mexico. It turned into - or the way  
22 the case evolved, the defendants sort of - their argument  
23 changed over time, but it evolved into don't - the basic issue  
24 was don't look at the market price of the shares that we are

1 getting back. We're going to do a discounted cash flow  
2 valuation, and we think it's that, if we did a discounted cash  
3 flow valuation of the shares of Southern Copper that we are  
4 getting back, they are worth a lot less than the market price.  
5 And that was the essence of the case. And the essence of our  
6 argument was this is not an appraisal case; you're dealing  
7 with, essentially, cash. You know, shares that could be sold  
8 to the public to produce the market price. And the defendants  
9 never said that those shares, even though they were issuing 67  
10 million shares, the defendants never said they're not worth  
11 the market price - or they couldn't be sold for the market  
12 price. They just argued that we should do a discounted cash  
13 flow valuation and other - maybe some other valuation  
14 methodologies for those shares, and get it - and we'd come up  
15 with a lower value-

16 MR. MONTEJO: Right. And I guess, you know, stepping  
17 back a little bit and thinking about, you know, from the  
18 parties in play, the people that were looking at this. And for  
19 me, you know, as I look back on it, eight, nine years later,  
20 it's hard to not look at it also through the way the law has  
21 developed since, particularly, you know, we've got the Corwin  
22 doctrine, we've got MFW in play now, here in Delaware. But,  
23 looking at this transaction, the parties in play, I mean the  
24 special committee - you recall, I mean the individuals - were

1 they qualified? Could you tell just from the SEC filings  
2 whether there was conflicts of interest or any, you know,  
3 undue influence that at least the controlling stockholder  
4 could have placed on the special committee? #00:12:01#

5 MR. BROWN: It was unusual because the special  
6 committee members seemed highly qualified. And the lead  
7 special committee member, Harold Handelsman, was an attorney.  
8 There were several other large shareholders besides Southern  
9 Copper--

10 MR. MONTEJO: Right. And just, I guess, yeah. So, we  
11 had Ruiz, who was the chair of the special committee, right?  
12 That's - and then- #00:12:30#

13 MR. BROWN: I thought it was Handelsman that was the  
14 chair of the special committee.

15 MR. MONTEJO: So, Handelsman was represented, you  
16 know, the Pritzkers' interest, which was a huge--

17 MR. BROWN: Yeah. So, Harold Handelsman was an  
18 extremely successful lawyer and really had an - to me, an  
19 impeccable reputation. And he was a very senior lawyer for the  
20 Pritzker organization. The Pritzkers are a billionaire family  
21 from Chicago that have many business interests, and they were  
22 sort of famously involved in Smith vs. Van Gorkom. They were  
23 the buyers in Smith vs. Van Gorkom, in that case. And so, and  
24 Harold Handelsman had a long career and understood the law,

1 and I don't believe would intend to it - to, really, do  
2 anything wrong. But he was at the very end of his - he was a -  
3 I believe he was the lead - more or less -- the lead person on  
4 the special committee, and he was trying to get the Pritzkers  
5 out. The Pritzker organization had a significant investment in  
6 Southern Copper. And so, his orders were we want out. Like we  
7 want our - get as much money for us and get us out. And he was  
8 at the end of his career. He was retiring, and he was just  
9 trying to get a deal done. And he was the - we can all read  
10 the opinions that there is a hundred-plus page opinion from  
11 the Delaware Supreme Court that outlines everything, so there  
12 is far more in there than I can explain today. But Handelsman,  
13 even though none of us really believe he had - it didn't seem  
14 like he had a motive - he wasn't trying to steal money or  
15 cheat anybody or anything. But he - it just, it was just a  
16 weird set of circumstances that he was at the end of his  
17 career, his job was to get his - his company or his investors  
18 out, and so, he was reaching - like trying to find a way to  
19 get the deal done. And when Goldman - you know, they hired the  
20 best investment bankers in the world-

21 MR. MONTEJO: Which was going to be my next question  
22 about the advisors. So, you had - the committee was built up  
23 of very reputable business- #00:15:16#

1           MR. BROWN: They had Latham & Watkins representing  
2 them. They had Goldman Sachs - I mean they're the best,  
3 essentially. And they came in, initially, and - I think  
4 everyone thought like, okay, what's proposed really isn't  
5 fair. And Handelsman actually testified at trial, and we all  
6 fell down when he said it, and I remember, I'll never forget  
7 it, that well, it wasn't fair. We didn't think it was fair,  
8 but then we had the idea to tell them to do a discounted cash  
9 flow valuation and see if the stock - see if we could say the  
10 stock that we were getting was worth less than the market  
11 price. The real value was less than the market price. And that  
12 - and his comments, -- again, and it's all detailed in the  
13 opinion, so it's hard to quote it all --. But, I mean, he  
14 said, yeah, once we got them to say that the stock that we  
15 were getting was worth less than three billion dollars, we all  
16 got comfortable with it. And it was just a weird situation, I  
17 think, where there was a committee, even though they were all  
18 highly qualified, presumably, or seemingly independent people,  
19 for very strange reasons, they all were just desperate to get  
20 a deal done.

21           MR. MONTEJO: And it was, you know, either through  
22 that desperation, or otherwise, to delve into that, I mean it  
23 really required a tremendous amount of discovery on our part  
24 to understand what happened, it seems. So, if you, you know,

1 thinking back to this as you know, then Chancellor Strine had  
2 phrased it, that rationalizing a deal rather than negotiating  
3 one - this idea that a relative valuation is almost as if they  
4 were treating this as a merger of equals, right? And you know,  
5 then the question became, were they comparing apples to  
6 apples? And through the discovery, I mean what... How was  
7 Minera treated in preparing for this relative valuation as  
8 compared to, say, Southern Peru? #00:17:50#

9 MR. BROWN: Listen, to this day, I really don't  
10 understand this term, relative valuation. They're buying  
11 something. They were buying a business. They were paying -  
12 they weren't paying cash, but they were paying publicly traded  
13 - they were delivering publicly traded stock, which could - no  
14 one disputed that you could have sold the - or a public  
15 offering of that publicly traded stock, produced cash, and  
16 paid cash for the business. I mean, this was just a purchase  
17 by the controlling - by a controlled company of some assets  
18 they owned. And so, it always struck me as I'm not - I don't  
19 understand why you wouldn't just say what is it - you know,  
20 what are we buying and what is it worth? And it really was not  
21 - it was a different mining company from Southern Peru. Their  
22 operations were not tremendously successful. They were  
23 suffering. They had a bunch of employment disputes. There were  
24 strikes. Their equipment - we had pictures of their equipment

1 rusting, sitting in a rusted pile on the ground in Mexico  
2 versus Southern Peru mining operations, which were run  
3 beautifully and working great and producing money. So, I'm  
4 not, you know-

5 MR. MONTEJO: And that was really- #00:19:42#

6 MR. BROWN: And that's how - this is how it started  
7 because when Grupo Mexico made a proposal, their proposal was  
8 very simple. We want to give you - we want to deliver - sell  
9 you a business that we claim is worth, I forget the exact  
10 numbers, but you know, 3 billion, 3.1 billion dollars. And  
11 we're just - we want 3.1 billion dollars of stock measured at  
12 the market price. And the committee then looked at it, and  
13 their advisor said what we're buying is not worth 3.1 billion  
14 dollars; it's two billion or less. Actually, there were some  
15 valuations that it was two hundred million. But, you know,  
16 they - instead of actually negotiating like a third party  
17 would, they, for whatever reason, and I think it's because,  
18 you know, a lot of the committee members just were just  
19 anxious to have a transaction completed. At least that's what  
20 the opinions concluded. They sort of got diverted into a  
21 process where they didn't negotiate, really. I mean there were  
22 some minor changes to the transaction that actually made it  
23 worse, that actually made the price that Southern Copper paid  
24 higher, but that, you know, they tried to make some

1 adjustments. But, you know, that's I think, as the court said,  
2 that's not what a third party would have done. You know, a  
3 real third party would have said, no, we're willing to buy  
4 your business, but here is what we think it's worth, and so  
5 here's what we will pay you. And there was never any of -  
6 there was never a negotiation really in that way.

7 MR. MONTEJO: And I think that's, you know, as it  
8 comes across in the opinion, I think what was shocking to the  
9 Chancellor was, you know, while the defendants wanted to say  
10 look, you should value Minera Mexico the same way the market  
11 values Southern Peru, and, on a relative basis, if you do it  
12 that way, you know, we're worth, you know, as much as Southern  
13 Peru paid for us. But, you know, looking back at the  
14 scenarios, and, you know, this is like how - you can, you  
15 know, it was surprising to see the - I mean I don't think he  
16 believed us for a long time until, you know, finally, when the  
17 opinion comes out, if you recall, he even had in his - he had,  
18 in addition to everything we told him about the problem with  
19 comparing Southern Peru to Minera Mexico, he actually had laid  
20 out his own chart, which showed, you know, the deal  
21 anticipated that, you know, for every dollar of EBITDA, or  
22 whatever, you know, Southern Peru was going to generate,  
23 Minera Mexico was going to generate \$1.36, or something. But,

1 in actuality, on his own analysis, showed that what Minera  
2 Mexico could produce was a fraction of that. #00:23:14#

3 MR. BROWN: Right. And there were a lot of  
4 complicated valuation issues here, some of which, at one  
5 point, they essentially said - the defendants were saying  
6 Southern Copper is publicly traded, so we have multiples - we  
7 have actual ways to measure the value of that; let's just  
8 apply those. Their argument was well, you know, its multiples  
9 should just apply to Minera Mexico. And that was a silly  
10 argument because, even though they were both copper mining  
11 companies, they were in tremendously different situations. One  
12 was a very successful company; one was not. You know-

13 MR. MONTEJO: Right. And Handelsman even said at his  
14 deposition- #00:24:10#

15 MR. BROWN: And they admitted it. It was like I  
16 said, we had Google Earth shots of the absolute mess that  
17 Minera Mexico's operations were, and they were - and, you  
18 know, they were just a mess. And they had a lot of debt.  
19 Southern Copper had basically no debt. And there were a couple  
20 other big issues. Like, the one way, in the end, like the - to  
21 me, the core way the defense tried to justify this was to say  
22 well, you know, in valuing a mining operations, really, the  
23 key is what is the copper worth, you know, and, internally,  
24 Southern Copper valued - you know, had a projected long-term

1 value for copper of 90 cents a share. And that's what they  
2 used for all their valuations and all their plans. And the  
3 defendants then came in with an expert and said, no, it should  
4 be;, I forget the exact number, a dollar twenty or a dollar  
5 thirty-

6 MR. MONTEJO: A dollar thirty-five. #00:25:45#

7 MR. BROWN: A dollar thirty-five, okay; you remember  
8 better than me. And, which was sort of silly to me. I mean,  
9 you can't, you know, actually, both companies were, you know,  
10 for their internal purposes, were using 90 cents a share as,  
11 you know, the way to value the underlying assets. But the  
12 weird thing to me was, and I didn't really understand it until  
13 we got into the case and worked with experts and talked about  
14 it, but valuing a sort of resource company, it's not that  
15 everything that's in the ground. It's not all the copper or  
16 oil or whatever that's in the ground. You have to start with  
17 whatever you project the long-term reasonable price is,  
18 because it's what you can get out of the ground at a profit.  
19 Because there is more down deeper, but if you can't get it out  
20 and make a profit, it really isn't - doesn't count,. iIt's not  
21 worth anything. So, the weird part was, when the defendants  
22 came in and said, well, it should be a dollar thirty, you  
23 know, that's the value of the copper in the ground, you know,  
24 we went through the studies of the copper in the ground that

1 Southern Copper had, and that Minera Mexico had, and if it -  
2 you know if you did use a dollar thirty, you just couldn't use  
3 the same analysis that had already been laid out because,  
4 interestingly, Southern Copper had a lot more copper a little  
5 bit deeper that could be, you know, that could be gotten out  
6 at a dollar thirty. So, if it was a dollar thirty, the value  
7 of Southern Copper was tremendously higher. And they just  
8 ignored that and said, well, if we use a dollar thirty, you  
9 know, the Minera Mexico value goes up. And we did show, and I  
10 think this came out in the opinions, that okay, if you use -  
11 if you say the value of the copper is a dollar thirty per  
12 pound, then the whole analysis is completely different. The  
13 discounted valuation is through the roof for Southern Copper,  
14 and it's a little bit higher for Minera Mexico. So, it was  
15 just a really bizarre - to me, a bizarre situation. But trying  
16 to come in as a defense position and say we need to use a  
17 different valuation for your base metal that you are trying to  
18 extract from the ground, from the one both companies have used  
19 for - or are using and have used for a long time, is just - I  
20 don't know how a judge could possibly, or a jury could  
21 possibly accept that.

22 MR. MONTEJO: And it was worse than that, actually,  
23 because, if you recall, you know, Minera Mexico had been  
24 shined up, right? They had MinTech had come in and done a very

1 recent analysis on the best possible reserve report they could  
2 prepare at current copper prices. Whereas what they were  
3 looking at from Southern Peru, the most recent analysis that  
4 had been done was from, what? '98 or '99? So, again, this idea  
5 that they were trying to do things on a relative terms, they  
6 were never comparing apples to apples- #00:29:31#

7 MR. BROWN: Never.

8 MR. MONTEJO: I think, MinTech, even we found out in  
9 discovery, you know, this kind of got into a more complicated  
10 issue for the Chancellor to deal with on, I guess, evidence  
11 after the date of the transaction. But, after the fact,  
12 MinTech had - or I'm sorry, Southern Copper had hired MinTech,  
13 too, to do a similar analysis. And, at the lower copper prices  
14 that were in play, 90 cents, or whatever, I think Southern  
15 Copper's reserves increased by 87% or something to that  
16 effect. #00:30:02#

17 MR. BROWN: Yeah, so, there were a lot of  
18 complicated sort of details in the valuation. They're all in  
19 the opinion, and it's probably not the most interesting part  
20 of the case. But...yeah. I just - it was really surprising,  
21 the defense positions here, they were - they, honestly, they  
22 just struck me as silly from day one. But we did have - you  
23 know, there was a couple interesting.... - But I'd like to try  
24 to say some things that aren't in the opinion, because

1 everyone can read the opinion. But, we were at trial, and this  
2 was a case - this was an unusual case because this is not a  
3 settlement. This case was tried and then went on to appeal,  
4 and we won the appeal. And then, we had to collect the  
5 judgment. I mean, they had posted a bond. They were  
6 threatening not to pay it. So, this went all the way - I mean,  
7 this was complete litigation, litigated until the end, and a  
8 judgment was collected. But we were at trial, and it was a  
9 little weird because it was Vice Chancellor Strine when we  
10 started, and then he got promoted, and he was Chancellor  
11 Strine halfway through the trial. But Chancellor Strine called  
12 us over to the bench when, you know, after the first early  
13 witnesses, and basically said, you're not going to win. You  
14 know, you need - you're not convincing me. What is going on  
15 here?

16 MR. MONTEJO: Not a drop of blood on the floor, was,  
17 I think- #00:31:52#

18 MR. BROWN: Not a drop of blood on the floor,  
19 there's no - there's nothing. And that caused the case to be  
20 unable to be settled. The defendants became wildly confident.  
21 And I don't know why he did that, but that is what happened.  
22 And, you know, we redoubled our efforts after that to focus on  
23 our key points, but it was a strange thing to, you know, be  
24 called to the bench, and be told you're in deep trouble.

1           MR. MONTEJO: Well, and, you know, the lead attorney  
2 on the other side, Alan Stone, I mean you knew Alan - or know  
3 Alan very well over the years-

4           MR. BROWN: Yes, we had both clerked for the same  
5 Supreme Court justice, and he has been a friend of mine for,  
6 you know, or an acquaintance for a long time. And what was he  
7 supposed to do, honestly, you know, when he was told by the  
8 judge, basically, I think you're going to win. But we didn't  
9 give, you know, we did not give up. We tried to refocus the  
10 thing. And my idea was always, you know, let's just simplify  
11 it. Let's just keep the focus on: they are just buying a  
12 business, you know. What's the business worth, and what are  
13 they paying? And because they weren't paying cash, there was  
14 some issue - there was certainly an issue about - or the  
15 defense was trying to make an issue about what are they really  
16 paying? Like what is it - what are they really paying, and  
17 what's it worth? And, ultimately, we prevailed on that because  
18 they were trying to say, well, we're giving stock, but it's  
19 not worth the market price, so that's - you know, that ended  
20 up being their main argument. And that's really the basic  
21 reason that we won because the court said, no, you're paying -  
22 you're issuing stock of a publicly traded New York Stock  
23 Exchange company, and no one has presented...you know, you  
24 haven't presented evidence that it's worth something less than

1 the market price, or and any convincing evidence that it's  
2 worth something less than the market price, which is really  
3 where they turned as their focus on this thing.

4 MR. MONTEJO: So, you know, and this is kind of off-  
5 topic a little bit, but I still - it's always surprised me  
6 that, you know, here is Southern Peru, where very confident  
7 and reputable members of a special committee advised by world-  
8 class advisors really got it - were proved to have gotten it  
9 so wrong at trial. But, yet, after seeing that, you know, the  
10 Chancellor went on to pen MFW, which kind of created this, you  
11 know, new doctrine in Delaware law that allowed controlling  
12 stockholders to avoid entire fairness review. And that - I  
13 mean, did that surprise you? #00:35:09#

14 MR. BROWN: A little bit. I mean, to me, though, all  
15 these cases sort of turn on their facts. Because, even under a  
16 different standard, you know, if you are able to prove that  
17 the special committee really didn't function properly, based  
18 on the particular facts of your case, then I...you know, then  
19 you can win an entire fairness case-

20 MR. MONTEJO: Sure, if you get to discovery to prove  
21 your facts. #00:35:46#

22 MR. BROWN: And it's hard to get, and it is  
23 difficult. And we...you know, we - in a sense, we lost part of  
24 summary judgment, I think it's fair to say, right?

1 MR. MONTEJO: Sure-

2 MR. BROWN: He dismissed-

3 MR. MONTEJO: The special committee.

4 MR. BROWN: -- the special committee...you know,  
5 most of the directors and I personally think, you know,  
6 Chancellor Strine would have to - you'd have to talk to him, I  
7 think he regretted it in the end. Because once he really sat  
8 through the trial and understood what these committee members  
9 did, I think he would, in retrospect, not have dismissed them.  
10 But, as he said to us, it really doesn't matter; you're trying  
11 to recover the difference between what you paid and what you  
12 acquired. And that's coming - that money is coming from the  
13 controlling stockholder. So, who - why does it really matter  
14 if there's individual defendants? They're not going to be  
15 paying this judgment. It's coming from the controlling  
16 stockholder.

17 MR. MONTEJO: Which, of course, is true. But do you  
18 agree with the sentiment? Or do you think that independent -  
19 or purportedly independent directors that are involved --  
20 because prior to - I mean, it was, you know, we had argued, I  
21 believe, that, you know, you can't make that decision, you  
22 know, at this time and stage. You need the trial to determine  
23 whether or not these directors should be held liable. Do you  
24 think that, you know, directors that, you know, aren't

1 necessarily self-interested financially in the deal, do you  
2 think that they should face the potential liability as - along  
3 with the controlling stockholder? Or does it not matter?

4 #00:37:43#

5 MR. BROWN: I, frankly, am a realist. I don't think  
6 it matters because the money is coming from the controlling  
7 stockholder. So, having the individuals in there - it might  
8 help get, - you know, drive a resolution because they're  
9 afraid there will be a judgment against them. But it really,  
10 honestly, having done this for 30 years, it doesn't really  
11 matter. When there is a large controlling stockholder that is  
12 fully liquid - I mean, they were worth thirty billion dollars,  
13 or whatever, Grupo Mexico, so there was, you know, they can  
14 pay the judgment. To me, it didn't - in our case, you know,  
15 trying too hard to keep these individuals and the individual  
16 committee members in the case just didn't - it didn't strike  
17 me as something that was going to change the outcome-

18 MR. MONTEJO: No, no - yeah, I would agree. But it  
19 did matter...you remember Jimmy Brandt from Latham & Watkins?

20 MR. BROWN: Yeah.

21 MR. MONTEJO: Yeah, he was - he really wanted to get  
22 that partial judgment order in place to make sure that his  
23 clients were in the clear. #00:39:03#

1 MR. BROWN: Yes, and he was trying to settle the  
2 case. He couldn't get the money from the controlling  
3 shareholder. He wanted to get his people out. But it all  
4 worked out great because nobody wanted to settle. And it was  
5 an easy case for us, because we tried to settle the case for a  
6 number way less than the two billion dollar judgment that we  
7 obtained. And they wouldn't do it. So, we were lucky it worked  
8 out.

9 MR. MONTEJO: We were lucky they wouldn't negotiate  
10 with us. #00:39:40#

11 MR. BROWN: But there is one other - there are a  
12 couple other aspects of the case we should probably talk  
13 about. Like, I don't know what you want to-

14 MR. MONTEJO: This - I think that we could move on  
15 to whatever you want to talk about-

16 MR. BROWN: There was one really disappointing or  
17 upsetting aspect to the case to me. And the opinions mentioned  
18 that we delayed the case. We did not, absolutely, positively  
19 did not delay the case. What actually happened, and so, we  
20 didn't appeal those points because we were focusing on winning  
21 the case. And there was - but this suggestion that we delayed  
22 the case bothers me to this day. What actually happened was  
23 discovery was served, and the defendants just drug their feet.  
24 And so, yes, we could have filed motions to compel and had

1 been more aggressive on trying to get the discovery going. But  
2 it was, literally, I was in charge, it was my assessment that  
3 this is a big case. We're going to get interest on this. You  
4 know, they are delaying it, not me. And if they want to delay  
5 it, it wasn't clear to me why I needed to hurry up. And, so,  
6 that is really what happened. I mean there was never a time in  
7 the case where there wasn't something pending, where there  
8 wasn't, you know, document requests and interrogatories, and  
9 depositions that we were trying to schedule because they were  
10 international depositions. And, you know, it was very - the  
11 discovery was pretty complicated. And they were really  
12 dragging their feet. And I just - I looked at it, and it  
13 didn't, you know, it's a long-term, money damage case. And it  
14 just wasn't clear to me that it advantaged the company - the  
15 derivative case, to try to drag them in, you know, drag - to  
16 put all the effort into drag out the discovery...to push the  
17 discovery so that it was quicker.

18 MR. MONTEJO: Well ... even if you wanted to, I  
19 mean, we were - we took depositions all over this country. All  
20 over - I mean we went down to Peru, went to Mexico a number of  
21 times. Production was not only in English but in Spanish. We  
22 had to get things translated. We needed translators present at  
23 depositions. And not to mention your earlier point, coming  
24 into this is not any of us were experts in mining or valuing

1 mining companies. And, you know, I guess, what was the - there  
2 was one consultant that had been hired by the special  
3 committee, and I forget the - but they were located way out in  
4 Montana, where you had to take a number of flights just to get  
5 out there. And then, once you got there, you had to drive two  
6 hours. I mean- #00:43:12#

7 MR. BROWN: Exactly. So, you know, since it is not  
8 an expedited case, my approach was why - you know, they're -  
9 you know, they're not, they didn't ask for a scheduling order.  
10 You know, they didn't argue that it should move forward faster  
11 at any point. And so, I thought it advantaged us to take our  
12 time because of the complexities involved. And it took us a  
13 long time to find the proper expert and work with him to sort  
14 of put our side of the case together. And it's a long-term  
15 money damage case, what's the rush?

16 MR. MONTEJO: And it is a little odd to be told,  
17 when you have apparently taken the time to fully understand to  
18 present a case good enough to win so decisively, for you to be  
19 then told that you took too long to put that case together.  
20 #00:44:18#

21 MR. BROWN: Yeah, and I wasn't involved in all of  
22 the cases, you know, for my firm. But there were other cases,  
23 Weinberger vs. UOP, Smith vs. Van Gorkom. They were large,  
24 famous cases. And they took a long time, you know. And

1 sometimes, you know, these longer-term cases, where you are  
2 asking for money, just take a little longer to play out. And  
3 so, it was a little frustrating to - for the defendants to  
4 sort of kind of win on the argument that, gee, you should have  
5 hurried up when they were the ones that slowed the case down,  
6 in my opinion. And it was - all we were doing was taking  
7 advantage, you know, of a gift they were throwing our way to,  
8 you know, to let it play out in a slower course. And it worked  
9 is the thing. I mean, taking that extra time to really let the  
10 record really develop and to - for, on our part, to really  
11 understand, because the court did find that the proxy  
12 statement was misleading, so you couldn't just read the proxy  
13 statement and get an understanding of what was going on. It  
14 had to be, you know, it had to be developed through a bunch of  
15 discovery and documents and depositions and, like you said,  
16 translating documents and understanding their financial  
17 analysis and fighting off their experts and-

18 MR. MONTEJO: It was a long process. #00:46:20#

19 MR. BROWN: I mean the case started in 2006 and  
20 ended in ... approximately, I think, and ended in 2012. So, it  
21 was six years.

22 MR. MONTEJO: So, you know, that's I guess one, I  
23 guess downside of - or, I guess, hit against us. What would be  
24 another frustrating aspect of the case that, at least, sitting

1 back ten years from now, you kind of - it still rubs you?

2 #00:46:51#

3 MR. BROWN: You tell me. I can't...I mean, honestly,  
4 I don't - that was the thing that bugs me about it. But, you  
5 know... . Another comment I would have was so, you know, we  
6 won at trial. And there is a hundred-plus page opinion, or  
7 whatever it is. And it's, you know, you can disagree with it,  
8 but it's well-reasoned. I mean, you know, he explained - the  
9 Chancellor explained what he - what his reasoning was for  
10 everything because, obviously, the Chancellor was - is  
11 extremely competent and intelligent. And, you know, the  
12 opinion is just as - to me, as well-reasoned as you could hope  
13 for. And, then, there was an appeal, and they made five  
14 arguments. And they made five arguments that they admitted  
15 were subject to the abuse of discretion standard of review.  
16 And I couldn't believe when I read their brief-

17 MR. MONTEJO: Why not? Tell me - from your  
18 perspective as a, you know, I mean you've done as many of  
19 appeals here in Delaware as any - what, in your view, is the  
20 problem with that? #00:48:16#

21 MR. BROWN: You don't - the way you win an appeal is  
22 not to argue there is an abuse of discretion where there is a  
23 150-page opinion that is, you know, well-articulated. There is  
24 - even if you're - to me, even if you are a Supreme Court

1 justice, and you don't agree, there is a gigantic reasoned  
2 opinion. So, to say it is an abuse of discretion... And the  
3 arguments they made on appeal were unbelievable to me, like  
4 saying they should have gotten another witness from Goldman  
5 Sachs? I mean, that's the best they could do. They literally  
6 argued, you know, actually what had happened was, just one  
7 example, the main person at Goldman Sachs that was  
8 representing the special committee and doing most of the work  
9 - we deposed him. There was some doubt about whether he would  
10 be able to come to trial, so we videotaped the deposition.  
11 And, you know, in Chancery Court, it is not uncommon to use a  
12 deposition at trial if a witness can't come, and he-

13 MR. MONTEJO: And even when a witness can come,  
14 sometimes. #00:49:48#

15 MR. BROWN: Even when they can come, it's just  
16 sometimes it's easier. He, I believe, he got nervous when he  
17 realized that this is a big mess. And he refused to come to  
18 trial. And they initially said, well, we're not going to have  
19 a - we're not be able to have a - we're not going to have a  
20 Goldman Sachs witness at the trial. And then, literally, like  
21 a week or two before trial, they came in and said well, we  
22 want to bring this guy from Goldman Sachs, who had nothing to  
23 do with the transaction, and really didn't know anything about  
24 it, - we need him to come and testify. And, by the way, he

1 can't actually come to trial. We want him to come two weeks  
2 after trial, or some period of time after the trial is over,  
3 and testify. And you can depose him some other time. I mean,  
4 you know, and the court, I think, properly said that's pretty  
5 silly. He doesn't have anything relevant to say, first of all.  
6 And we are not going to have you, the defense, sort of have a  
7 trial and then have a guy you can bring in afterward to try to  
8 fix up whatever - once you know what the record is, try to fix  
9 up any mistakes that you made, which is essentially what their  
10 plan was. And so, the Chancellor properly, I think, said no,  
11 you know, we've got the - we've got a videotaped deposition of  
12 the lead banker at Goldman Sachs, you know. Everyone had a  
13 chance to examine and cross-examine him. And it's not even a  
14 paper record, it's videotape; I'll look at that. And that's,  
15 you know, I am not excluding if you want to bring someone,  
16 fine. But we're not going to have you bring a witness two  
17 weeks after the trial. But that was their lead argument on  
18 appeal.

19 MR. MONTEJO: Which, if you recall, post-trial,  
20 they- #00:52:12#

21 MR. BROWN: It's a ludicrous argument. The counsel  
22 here, I mean, the defense counsel, I think you should - law  
23 students should read this opinion, because this is an example  
24 of how not to do it. I mean, this is an example of how to lose

1 a case on the defense side, if you ask me. I mean, look at -  
2 if you look at the five arguments they made on appeal, you  
3 know, if you want to win on appeal, you don't just make abuse  
4 of discretion arguments in the face of an opinion that is 105  
5 pages long, or a hundred-plus pages long. Because abuse of  
6 discretion means you didn't - the judge didn't consider it or  
7 something. Like he considered everything and gave an  
8 explanation of why he rejected it. And so, that's, to me,  
9 that's the definition of not abuse of discretion.

10 MR. MONTEJO: It was surprising, I mean this is,  
11 again, they - you know, they had Milbank defending the case at  
12 trial. And then, you know, on appeal, they had engaged Simpson  
13 Thacher- #00:53:29#

14 MR. BROWN: Yeah, so what happened was, I talked to  
15 Alan Stone about this, you know. So, they lost big at trial,  
16 so they fired their trial counsel, and hired new counsel for  
17 an appeal. And that was another, to me, another weird - just a  
18 weird situation because they didn't - it's just hard to get  
19 familiar, no matter how good a lawyer you are, to be brought  
20 in after the fact and try to go through six years of discovery  
21 and briefing and the opinion and figure out what to argue. And  
22 so, they brought them in and they - at one point, it was clear  
23 they were trying to position the thing to have a federal  
24 question, to get a cert appeal-

1 MR. MONTEJO: And that was after firing Simpson  
2 Thacher and bringing in Munger Tolles. #00:54:27#

3 MR. BROWN: Yes, yes, and so, it was just, really, I  
4 am not criticizing - I don't mean to criticize anyone, but it  
5 was just - it struck me as a, you know, just not the way to  
6 handle the defense of a case at that point. And they - it was  
7 weird because another thing that happened was there was a big  
8 issue in the case about the attorneys' fee. Since it was a two  
9 billion dollar judgment, we were awarded at 15%...you know,  
10 and we worked very hard on the case. We had invested, you  
11 know, a million dollars of actual cash from our firm, and the  
12 other firms that were working with us, and we don't have a  
13 very big firm. I mean, a million dollars is hundreds of  
14 thousands of dollars of partners' money that they could use to  
15 pay their kids' tuition, or, you know, pay their bills. And  
16 so, it's real money at risk. It was real money at risk for us,  
17 not to mention the six years of work and all the hours and  
18 everything. So, we, you know, go all out when we get a case,  
19 and we did here. And we were awarded, you know, a very, very  
20 large attorneys' fee. It was 15% of the judgment, but it was  
21 300-ish million dollars. That was a lot of money. And it did  
22 seem like, on appeal, they were more concerned with getting  
23 that than even the judgment - getting that - trying to get  
24 that stricken down.

1 MR. MONTEJO: But just - did they even try to settle  
2 that aspect with us ever? #00:56:36#

3 MR. BROWN: No. There was never any - at one  
4 point...maybe I am disclosing what I am not supposed to  
5 disclose, but, at one point, there was an offer of pennies to  
6 settle the case, I will say, in effect, pennies. But there was  
7 - it was a strange case because there was never any effort to  
8 settle any aspect of the case, which is not how you - I don't  
9 think that's the way to do things. When you're, you know, in  
10 an entire fairness case, it - I just - you know, we try to  
11 settle them when we're - if we're working on the other side.  
12 It's -- those are risky cases. Better to settle it - just get  
13 a resolution you can live with and move on, because they could  
14 have settled this case for way less than two billion dollars,  
15 right? I mean, I think we would have taken something-

16 MR. MONTEJO: Well, I mean, at some point you have  
17 to, right? I mean at the time, the largest settlement, you  
18 know, in the Court of Chancery, was less than a hundred  
19 million dollars. #00:57:54#

20 MR. BROWN: That's right. And, in fact, a weird - it  
21 was a weird circumstance, and I don't want to get anyone in  
22 trouble either on this, but one of our senior partners came  
23 into my office and said - because when he saw what we were  
24 doing, he said, you can't - you cannot go in and ask for two

1 billion dollars. Or it was a billion dollars, or whatever it  
2 was. You need to figure out a way to make what you are asking  
3 for a hundred million, because the court is never going to  
4 award two billion dollars. And I just said, you know what?  
5 This is what the facts of this case are. And this is what we  
6 are going argue...you know, maybe we'll lose, but this is what  
7 we are going to ask for because it's - the core of it, even  
8 though there is complexity in the valuation and in some other  
9 stuff, but the core is simple. They're buying something. We  
10 know what they are paying. And they weren't even arguing that  
11 what they were buying was worth something different from what  
12 we said it was. That was the - another strange aspect of this  
13 case. The, you know, there really never was much of a dispute  
14 about the value of Minera Mexico - the Mexican mining  
15 operations that were being delivered to Southern Copper. A  
16 little bit, but it was - that was never the issue. It was all  
17 about whether you devalue the stock. That's what the case  
18 turned into, and that's why it struck me as an unbelievably  
19 strong case, in my eyes. But the, you know, it seemed like the  
20 defense and the defendants were just consumed with this idea  
21 of relative valuation, which I just, it never made any sense  
22 to me.

23 MR. MONTEJO: And you know, we kind of started with  
24 this, I guess, but, you know, as I understood it, you know,

1 they were basically comparing this to a merger of equals and  
2 coming about it, when they were unable to value Minera Mexico  
3 at anything close to three...I mean, really, that's the fact  
4 pattern that killed them is they originally tried to value  
5 Minera Mexico at three billion dollars and just couldn't do  
6 it. No matter what assumptions they made, no matter how  
7 aggressive those assumptions were, they just couldn't do it.  
8 So, you know, they came at it as if this was a merger of  
9 equals without really testing whether they were valuing each  
10 entity in similar ways. But I guess, you know, this discussion  
11 about the delay and everything, one of the things that did  
12 happen during that delay was the case was originally assigned  
13 to Lamb, and it ended up - we ended up in trial before  
14 Chancellor - at the time, Chancellor Strine. You know, do you  
15 think it would have come out differently if Lamb had decided  
16 the trial? #01:01:20#

17 MR. BROWN: Yes.

18 MR. MONTEJO: And why is that?

19 MR. BROWN: He told us he would have. I mean, that  
20 was another issue. We were not - we certainly weren't judge  
21 shopping, but I mean - maybe a tiny bit of our willingness to  
22 not try to rush the case along, since the defendants were  
23 trying to slow it down, was I mean, we knew Vice Chancellor  
24 Lamb was near the end of his career. And he had, in a number

1 of conferences, expressed some - I don't know how to say it -  
2 unoptimistic views about our case, a little bit.

3 MR. MONTEJO: But so did Strine. #01:02:20#

4 MR. BROWN: And so did Strine, so, but we were.... -  
5 I just thought, you know, Chancellor Strine is bold. And he  
6 would not be afraid, in the right case, with the right facts,  
7 to grant the two billion dollar judgment. I think, you know,  
8 Vice Chancellor Lamb may well have been willing to do it too,  
9 under the right facts, but I just thought it was, you know -  
10 we didn't know which judge the case would be reassigned to,  
11 either. But, you know, I mean the fact was that Vice  
12 Chancellor Lamb was, you know, nearing what everyone expected  
13 to be his retirement and moving back into private practice.  
14 And so, yeah, I mean, there was just a tiny bit of  
15 consideration of that. But, you know, I don't - you know, I  
16 would hope that it would have been the same outcome. I know it  
17 should have been the same outcome, but it probably helped -  
18 actually, and I do believe he even mentioned to me way after  
19 the fact that he would never have awarded a fee of 15% of - he  
20 would never aware a 300 million dollar fee.

21 MR. MONTEJO: Right. That's right; he says he  
22 wouldn't - may not have, you know, come to the same conclusion  
23 on the judgment. But, I mean, you've had other cases in front  
24 of Lamb that were very successful on damages-

1 MR. BROWN: Yes.

2 MR. MONTEJO: Is it fair to say that he ended up  
3 where the facts led him? #01:04:17#

4 MR. BROWN: Yes. And I think we've learned that he  
5 was never afraid to - or reluctant to -- give whatever  
6 judgment seemed appropriate under the facts at all. But, you  
7 know--

8 MR. MONTEJO: On the fee, I could see he would  
9 probably--

10 MR. BROWN: I don't know, you know, and it's - it  
11 was a large fee, obviously. I don't know if there has been a  
12 bigger fee, but, I mean, he was - it's - who knows what other  
13 judges would have been willing to, you know, award a fee like  
14 that. I don't know.

15 MR. MONTEJO: So, thinking about the fee and,  
16 really, the Sugarland factors that were in play that - you  
17 were in play., I mean, do you think it's right that Delaware  
18 focuses on the benefit achieved rather than, like, lodestar in  
19 federal jurisdictions? #01:05:20#

20 MR. BROWN: Absolutely. Because my opinion is the  
21 lodestar thing is really misplaced because all that does is  
22 incentivize you to churn hours, to build up hours, to try to  
23 justify a fee. And that's not the right incentive. I mean, the  
24 proper approach is the Delaware approach, which is you get

1 paid based on what you produce. And, if you can produce  
2 something in a more efficient way, with less hours, you don't  
3 get punished for that. It's a factor, but sort of having a  
4 lodestar approach where you - just - where the goal is just  
5 have everyone work hours that are pointless on the case, or  
6 that's the incentive - people don't - maybe people don't do  
7 it, but that's the point of the lodestar that, you know, just  
8 stack up hours. I just think that's the wrong approach. It's,  
9 you know, you should be paid like everyone else in the world  
10 is paid based on your results, not, you know... . - If you can  
11 get a fabulous result in less time and with less waste, isn't  
12 that what we should be encouraging?

13 MR. MONTEJO: You would think. #01:07:15#

14 MR. BROWN: Versus saying you're paid based on the  
15 hours that you put in. Again, and, you know, it's complicated  
16 because it's a consideration in each approach, the amount of  
17 hours you put in. But, I think, you know, the opinion, in this  
18 case, explaining that Delaware doesn't prefer the lodestar  
19 approach. We prefer to focus on the performance, you know, is  
20 clearly, to me, the better approach.

21 MR. MONTEJO: Right. I would agree 100%. You know,  
22 looking back, and I realize we're ten years away from this,  
23 but, you know, it was a big case, right? I mean, looking back,  
24 was there like a moment in trial where, notwithstanding

1 Chancellor Strine's no blood on the floor comment after the  
2 first day of trial - was there a moment in trial where you  
3 felt differently? #01:08:30#

4 MR. BROWN: Yes, absolutely. And you, I'm sure you  
5 remember it too. They - their - I think their - I would  
6 consider their lead witness or main witness to be Mr.  
7 Handelsman, who was the chairman of the special committee, or  
8 the lead person on - or one of the lead people on the special  
9 committee. He was asked, you know, the 67 million shares that  
10 are being issued to the controlling stockholder to buy these  
11 Mexican mining operations, are they worth the market price? I  
12 mean, you know, because, if it were us, I think we would have  
13 said there is no way we could sell those, that large a block  
14 of stock, for the market price. He said, but his answer was,  
15 "Absolutely. They're worth the market price." And we all -  
16 honestly, we all fell out of our chairs because that was what  
17 we, you know, that was the key-

18 MR. MONTEJO: That was the two billion dollar  
19 question. #01:09:43#

20 MR. BROWN: That was the two billion dollar  
21 question. It was like, you know, it solved all of our  
22 litigation problems because then, you know, based on that  
23 testimony, and I think it comes through in the - it was a  
24 focus of the opinions, you know, in connection with these

1 valuation issues, that what was - and they always talked about  
2 the give and the get. And that nailed down what the give was  
3 worth. There was no more issue that - about what the give -  
4 what the 67 million shares were worth. So-

5 MR. MONTEJO: And they knew it was our position.

6 #01:10:34#

7 MR. BROWN: -- that was a gigantic surprise. It was  
8 really surprising to get that testimony. And that's why, when  
9 you go to trial in a case, you just have to keep an open...you  
10 have to keep your eyes open and keep your ears open because  
11 you kind of never know what someone is going to say, even if  
12 they are - you know, everyone is coached, and some witnesses  
13 are better than others. But, sometimes they throw it - they  
14 just - it's they just hand it to you. And, for us, you know,  
15 that point was...that was just a dramatic issue, thing that we  
16 really weren't - we certainly weren't counting on it, and, you  
17 know, I would say I wasn't expecting it. What we were kind of  
18 expecting, as we were preparing for this, even though, you  
19 know, they had - the defense positions were fluctuating  
20 around, we were prepared for them to say and we had responses  
21 to say that this block of 67 million shares that's being  
22 issued to you, can't possibly be sold, you know, for the  
23 market price. It would - it's, essentially, its actual market  
24 value was well below because if we tried to sell it, there

1 would be all kinds of expenses and it would have to be broken  
2 up, and we wouldn't be able to - and Goldman would take a lot  
3 of the money and, you know, or a lot of the proceeds to try to  
4 move a block that big. And that given that this was a  
5 controlled company, you know, a - I think it would have been a  
6 minority position, but you know that - a minority position  
7 would not be worth - we wouldn't - but he said, in no  
8 uncertain terms, it's, of course, it's worth the market price.

9 MR. MONTEJO: And they never did anything to try to  
10 rehabilitate that or put another witness on to say  
11 differently. #01:12:57#

12 MR. BROWN: Yeah. That was, to me, that was the  
13 biggest surprise in the case because - I mean, I think if we  
14 were doing it on their side, the focus would have been the  
15 67... instead of doing a discounted cash flow valuation in  
16 saying it's worth less than that, you could just say, wait -  
17 you have an expert come in and say, if you tried to sell 67  
18 million shares, you would not get three billion dollars, or  
19 whatever. It ended up being 3.7 billion dollars. You would be  
20 getting two billion dollars. To me, that would have been a  
21 better argument, but you know, it's all hindsight. I mean  
22 they, you know, I don't - we don't.... - Their lawyers looked  
23 at it and did the best they could. And, you know, you can say,

1 well, you should have done it differently, but I mean, it was  
2 - these were their arguments, and-

3 MR. MONTEJO: These were some of the best-paid  
4 lawyers in the world. I mean, that's - so, best respected. I  
5 mean, it's hard to, you know, get into their heads, right? I  
6 mean- #01:14:21#

7 MR. BROWN: Yeah, we're not criticizing them at all.  
8 It's easy after the fact to say, gee, when it's all done and  
9 said ten years later, you should have done something  
10 different. And I am sure they can go through, pick through  
11 what we did and say, you know, here's the things you should  
12 have done differently because you could have gotten more  
13 money, or you could have gotten a bigger recovery, but, you  
14 know, you're in the heat of the moment; you do what you think  
15 is best. And-

16 MR. MONTEJO: And Alan Stone had just come off of a  
17 case, entire fairness trial, where he was, - you know, he was  
18 victorious for his client. So, I mean, very good attorneys on  
19 the other side. It's just that, you know- #01:15:03#

20 MR. BROWN: I mean it worked. Just this is how this  
21 one played out. And, but we did try to keep it simple. Like,  
22 our focus was, or our decision was, let's just try to sort of  
23 ignore the relative valuation argument or try to get it  
24 disregarded and say, no, the way to look at this transaction

1 is you're buying these assets, and you're paying something.  
2 And we know what you're paying, and, as we discussed, there  
3 wasn't a huge argument about - or there wasn't a big  
4 difference in the argument about what the assets were that  
5 were being bought by the controlling shareholder, or sold by  
6 the controlling shareholder to its controlled entity. So-

7 MR. MONTEJO: The rest is history. #01:16:14#

8 MR. BROWN: It's over. It's been ten years now; it's  
9 history. And it really was, to me, I mean there's some aspects  
10 of the Supreme Court opinion that set some rules about - or  
11 that tried to set some rules at the time about the burden of  
12 proof in an entire fairness case. But, for the most part, this  
13 was a factual case. This was - an agreed entire fairness case,  
14 and it had a lot to do with valuation - or it was, to me,  
15 mostly about valuation and the special committee process that  
16 were - it was driven by the particular facts of the case.

17 MR. MONTEJO: Right. It's not a case where new law  
18 came out of it, really, except for this burden shift issue.  
19 But, it's interesting, though, because you know, how  
20 important, in your view, is this burden shift issue?

21 #01:17:19#

22 MR. BROWN: I've said this before. I think it's  
23 irrelevant. I mean and we've talked about this. The burden  
24 shift - and as it says in the opinions here, who has the

1 burden in an entire fairness case only makes a difference if  
2 the evidence is, as they say in here, in equipoise. Like, if  
3 it's 50—if the evidence is 50% that it's fair and 50% that it  
4 is unfair, you know, the burden, or you lose. Whoever has the  
5 burden then loses. But I just can't - it's just hard to  
6 imagine - I mean, we would never go into a case hoping to be  
7 50/50. I mean, we're trying to get 51/49 or better. And so, it  
8 seems pretty - you know, relatively insignificant to me. So,  
9 that's why the whole thing is it strikes me as sort of a  
10 distraction. But, I mean, maybe it will matter somewhere along  
11 the line.

12 MR. MONTEJO: Right. But I don't think if it does  
13 matter, that anybody is going to get a two billion dollar  
14 judgment. #01:18:49#

15 MR. BROWN: I mean, you know, I think if you're  
16 going to win big, or if you're going to get, you know, you  
17 have to - our approach, from the plaintiff side, is, we have  
18 to prove this is unfair. And we're doing everything we can to  
19 prove that this - that a transaction has happened that is  
20 wildly unfair. So... And we were lucky enough to do that here.  
21 It was an unusual case where it, it, in fact, was pretty  
22 wildly unfair. And, again, there's so many weird facts, but  
23 the idea that, in the end, they paid three - the opening offer  
24 was pay us 3.1 billion dollars. And it ended up they paid them

1 3.7 billion dollars. So, I mean, that's always what seemed  
2 crazy to me. They paid more than the - they could have just  
3 accepted the first offer and been done and paid a lot less.  
4 And there was another issue, too. I don't want to drag this  
5 on, but they could have put a collar on this. You know, they  
6 were issuing shares, and so-

7 MR. MONTEJO: And they - did they propose - I mean,  
8 this - and we didn't really get into the back and forth, but  
9 the special committee had proposed a collar, which was  
10 rejected. But, I mean, in your view, why was that so  
11 important? #01:20:47#

12 MR. BROWN: No. I...you know, I don't - I thought  
13 they didn't propose a collar. Because I thought Handelsman's  
14 testimony at trial was we wanted to lock in the number of  
15 shares. We didn't want to take a chance that we would have to  
16 issue more shares.

17 MR. MONTEJO: So, and they did propose a fixed  
18 ratio, right? That was - but, in connection with that-  
19 #01:21:08#

20 MR. BROWN: They wanted a fixed number of shares,  
21 which made no sense because - and again, you've got to read  
22 the opinion,; it's in there. Their argument was, you know,  
23 this company is valuable. Its price is going to - you know,  
24 it's going up. It's going up and up and up. So, why would you

1 not collar this number of shares so that you don't have to  
2 issue more - shares with more and more and more value. It was  
3 strange to not ask for a collar. I think, to me, a collar is  
4 pretty standard so that you are issuing a certain amount of  
5 money. Like, if you decide Minera Mexico is worth X dollars,  
6 to have a fixed number of shares means that, you know, what  
7 you're paying is fluctuating. You know, lock in the value of  
8 what you're paying. There was another thing that the  
9 Chancellor mentioned, and the Supreme Court focused on a  
10 little bit, too, that it was just the special committee did a  
11 number of things that just struck an independent judge, I  
12 think, as odd and unfair. And it wasn't, you know, it was like  
13 I said, we were never able to prove exactly why they were  
14 doing this or why they, in effect, bungled these negotiations  
15 in the court's view. But that's - those were the facts.

16 MR. MONTEJO: Right. So, I guess with your ten  
17 years' worth of hindsight, is there anything that you would  
18 have done differently in litigating this case? Besides having  
19 better help here at the firm? #01:23:03#

20 MR. BROWN: No. We had, obviously, we had great  
21 people working with us. No, like I said, I think I would do it  
22 the same. But, you know, because of the criticism that we went  
23 too slow, I guess I would try to have tried to move it along a  
24 little quicker. But, in the end, it worked out for us, I

1 think, to not push it because we were not delaying the case.  
2 We were not delaying the case. It was just a situation where  
3 the defendants weren't pressing to move forward. They were  
4 delaying discovery and our conclusion - I mean, we talked  
5 about it here, was let's - then, let's just let it - let them  
6 do it their way. Let's let it go slowly. Because they're - it  
7 didn't seem like we would be advantaged by hurrying up.

8 MR. MONTEJO: Yeah. It's one of - I'll say, you  
9 know, from, you know, being a young attorney coming up through  
10 this, one of the things that comparing expedited litigation to  
11 working on this case, I mean, one of the big differences for  
12 me was getting into a case that you had time to actually  
13 understand all of the facts. #01:24:33#

14 MR. BROWN: You know, I think, and that's what I  
15 have learned is like it takes - a lot of these cases take  
16 time. The more time you have to sort of stew over it and go  
17 back over it, get - have more detailed meetings with your  
18 experts and not have to rush on it, I think you can do a  
19 better job because the most important thing in trying these  
20 cases is preparation. Preparation. Preparation. Prep... You  
21 got to know - if you know everything, and you sort of know  
22 every line of every deposition, you know, it's - and that  
23 takes time. So that when you're cross-examining a witness at  
24 trial, and he says something, and, you know, okay, I know what

1 he said at his deposition, and you can just pull it out and  
2 say, but didn't you say the opposite thing at your deposition?  
3 That type of preparation is what really helps to win cases.  
4 And time helps get - to get that preparation done because we  
5 all aren't just working on one case. We have a lot of cases to  
6 do. So, I mean, I understand the point that maybe it would be  
7 better to move it quicker, but not in a case like this that  
8 was complicated, that it involved documents in another  
9 language and all these different depositions and experts and,  
10 you know, a proxy statement that was found to be misleading,  
11 so we couldn't really tell what was going on, clearly from the  
12 proxy statement. But, anyway.

13 MR. MONTEJO: Well, I think that it's always nice to  
14 come back and revisit and discuss your victories. We'll save  
15 some of the losses for another day. But I appreciate you  
16 coming in and talking-

17 MR. BROWN: It was nice to be here. Thank you so  
18 much.

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20 **#01:26:56#**

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