EFiled: Mar 5 2012 4:20PM EST
Filing ID 42879999
Case Number Multi-case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

OPENING BRIEF OF
APPELLANT SOUTHERN COPPER CORPORATION

ASHBY & GEDDES
Stephen E. Jenkins (#2152)
Richard L. Renck (#3893)
Andrew D. Cordo (#4534)
F. Troupe Mickler IV (#5361)
500 Delaware Ave. 8th Floor
Wilmington, DE 19801
(302) 654-1888

Counsel for Appellant, Nominal Defendant Below Southern Copper Corporation, formerly known as Southern Peru Copper Corporation

Dated: March 5, 2012

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>

<u>Cases</u>

<u>Unreported Cases/Transcripts</u>

<u>Rules</u>

<u>Other Authorities</u>

NATURE AND STAGE OF THE PROCEEDINGS

This is an appeal from what is believed to be the largest award of attorneys' fees in the history of the Court of Chancery -- more than $304 million -- to counsel for Plaintiff-below/Appellee Michael Theriault, as Trustee for the Theriault Trust ("Plaintiff"). This award, which represents an effective hourly rate of more than $35,000 and a multiplier of 66 times the actual fees and expenses is unprecedented in this State.

The case arose from a merger between Appellant Southern Copper Corporation (then known as Southern Peru Copper Corporation) ("Southern Copper") and Minera México, S.A. de C.V. ("Minera"). In late 2004 several plaintiffs filed a derivative action in the Court of Chancery challenging the merger's fairness, and after many years of delay in its prosecution, the case went to trial in 2011. The Court of Chancery entered judgment in favor of Plaintiff in a post-trial opinion dated October 14, 2011 (as revised on December 20, 2011, (the "Opinion"), awarding damages in the amount of $1.347 billion plus pre-judgment interest.

After trial, Plaintiff's counsel sought attorneys' fees and expenses totaling 22.5% of the judgment, or over $457 million. Southern Copper objected to the request as unreasonable and not in line with Delaware precedent. At a hearing on the fee petition on December 19, 2011, the Court of Chancery awarded Plaintiff's counsel fees and expenses totaling 15% of the judgment. *See generally* Tr. of Oral Argument on Plaintiff's Petition for Award of Attorneys' Fees and

Expenses and Rulings of the Court (a copy of which is attached as Exhibit A).

The Court entered a final order and judgment on December 20, 2011 (as revised on December 29, 2011, the "Revised Final Order," a copy of which is attached as Exhibit B). The Revised Final Order set the fee award at $304,742,604.45 plus interest. Ex. B ¶ 4.

On January 20, 2012, Southern Copper filed a notice of appeal of the Revised Final Order and the Court of Chancery's rulings during the December 19 hearing. The other remaining defendants filed their own notice of appeal, and this Court has consolidated the appeals. Southern Copper's appeal is limited to the issue of attorneys' fees awarded to Plaintiff's counsel; Southern Copper does not take a position on the merits of the case. For the reasons that follow, if this Court affirms the judgment on the merits, it should nevertheless reverse the fee award, and in accordance with established precedent set a reasonable fee itself in order to provide the Court of Chancery with clear guidance on how to apply the *Sugarland* factors in cases resulting in large common funds and when a straight application of a "percentage of the fund" might result in an unreasonable fee.

SUMMARY OF ARGUMENT

1. This Court long has required trial courts to engage in a multifactor balancing approach to determine the amount of a reasonable attorneys' fee award. *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). Although the size of the benefit conferred by the underlying litigation has traditionally received the most weight in that analysis, it is not entitled to dispositive weight. Instead, under *Sugarland* courts must weigh the size of the benefit obtained against the time, effort and risk shouldered by counsel in obtaining that benefit, as well as counsel's skill and experience. *Id.* at 149. The goal of this approach is, among other things, to strike a balance between encouraging the vigorous prosecution of meritorious litigation and the interests of the other parties and society as a whole in not transferring an "unwholesome windfall" to counsel. Furthermore, *Sugarland* suggests that trial courts should perform a reality check on the results of their analyses to determine whether the results initially reached truly are reasonable.

2. The Court of Chancery's award of more than $304 million to Plaintiff's counsel for about 8,600 hours of work was unreasonable, contrary to *Sugarland* and an abuse of discretion. The fee award amounts to an effective rate of more than $35,000 for each hour worked by counsel's team, which is 66 times their hourly rate plus expenses. In its decision awarding the fee, the Court of Chancery made only *pro forma* reference to most of the *Sugarland* factors, instead placing excessive emphasis on the size of the benefit obtained by the litigation. The Court of Chancery's passing reference to the other

Sugarland factors did not explain how Plaintiff's counsel's time, effort, risk or skill could support such a massive fee award. The underlying litigation was not time consuming, difficult, complex or risky when compared to the majority of cases of this nature litigated in the Court of Chancery. The fee award constituted an inappropriate windfall.

3. The Court of Chancery also failed to confirm that its fee award was reasonable as *Sugarland* requires. Three core errors highlight the Court of Chancery's abuse of discretion in that regard. First, the Court of Chancery failed to consider whether the percentage of the benefit it determined to award should have been adjusted in recognition of the size of the judgment. Second, there is no precedent for conferring such a lavish premium upon counsel compared to the value of their services, regardless of the outcome of the litigation. Third, in awarding this fee, the Court of Chancery failed to weigh adequately the reasonableness limitations mandated by our Rules of Professional Conduct.

STATEMENT OF FACTS

A. The Underlying Litigation

1. The Merger and Subsequent Derivative Action

Southern Copper is a publicly traded corporation that mines, smelts and produces copper and various metals in Peru. Opinion at 9 (a copy of which is attached as Exhibit C). Grupo Mexico, S.A.B. de C.V. ("Grupo Mexico"), through its wholly owned subsidiary Americas Mining Corporation ("AMC"), was Southern Copper's majority stockholder. *Id.* at 5. In February 2004, Grupo Mexico proposed a transaction by which Southern Copper would purchase Minera, a private mining company also owned by AMC. *Id.* A special committee of the Southern Copper board of directors approved the merger on October 21, 2004. *Id.* at 5-6. The terms of the merger provided for Southern Copper to acquire the 99.15% of Minera stock owned by AMC in exchange for 67.2 million newly issued Southern Copper shares worth approximately $3.1 billion. *Id.* The deal was announced a short time later.[1] *Id.* at 39.

Three derivative suits challenging the merger were filed in the Court of Chancery between December 30, 2004 and January 7, 2005. A68-

[1] Concurrent with the filing of this appeal challenging the propriety of the trial court's fee award, certain other defendants have filed an appeal of the trial court's decision on the substantive merits of the case. *See* Notice of Appeal, *Ams. Mining Corp. v. Theriault*, No. 29, 2012 (Del. Jan. 20, 2012). The two appeals have been consolidated by this Court. Southern Copper respectfully refers to the Opening Brief filed in that appeal for a more complete statement of the factual background regarding the transaction at issue. Southern Copper will only highlight those facts that bear on the attorneys' fees issue.

69 at Nos. 1, 8, 11.[2] The cases were assigned to Vice Chancellor Lamb, who ordered them consolidated. A68 at No. 16. The first complaint, filed by Lemon Bay LLP, became the operative complaint (the "Complaint"). *Id.* The Complaint alleged that the merger was not entirely fair to Southern Copper and its minority stockholders, and asserted claims for breaches of fiduciary duty and self-dealing in connection with the deal. Compl. ¶¶ 52-64. AMC, the Grupo Mexico-affiliated directors of Southern Copper (together with AMC, the "AMC Defendants"), and the members of the special committee (the "Special Committee Defendants") were named as defendants.

On February 25, 2005, Southern Copper issued a proxy statement detailing the proposed merger, Ex. C at 24 n.32, which was approved by Southern Copper's stockholders one month later. *Id.* at 42. The transaction closed on April 1, 2005. *Id.* at 42. Plaintiff did not seek to enjoin the stockholder vote or the merger's closing.

2. Little Happens For Over Four Years

The four and a half years following the filing of the Complaint were marked by few attempts to prosecute the case. Plaintiffs served requests for documents on the various defendants in February 2005, A64 at No. 24, and on March 14, 2005, defendants filed their respective Answers to the Complaint. A63-64 at Nos. 27, 28, 29. In October 2005, plaintiffs sought and received subpoenas to take discovery from various third parties. A60-62 at Nos. 32-40. Shortly thereafter each

---

[2] Citations in the form "A__" are to the Appellants' joint appendix, filed contemporaneously with their opening briefs.

of the defendants provided written reponses and objections to discovery requests. A58-59 at Nos. 41-43.

The only activity reflected on the docket in the more than two years between October 2005 and November 2007 was the filing of two affidavits pursuant to Court of Chancery Rules 23 and 23.1. A58 at Nos. 49, 50. The stillness was briefly broken when the parties filed a stipulated protective order on November 7, 2007, *id.* at No. 52, but the case then relapsed into somnolence. Over the next eight months plaintiffs served a single subpoena -- which had been issued years earlier -- on the special committee's financial advisor. *Id.* at No. 55. Finally, in July 2008, well over three years into the case, the first proposed scheduling order was presented to the Court, which entered the order a few days later. A57 at Nos. 56-57. Plaintiffs then returned to hibernation. It was not until five months later, in December 2008, that plaintiffs served responses to discovery and filed a motion to substitute Michael Theriault for plaintiff Robert Theriault, who had passed away approximately *seven months before*. *See* Plaintiffs' Rule 25(c) Motion for Substitution of Michael Theriault for Plaintiff Robert Theriault (filed Dec. 10, 2008). A second plaintiff, James Sousa, died a short time later, and the third, Lemon Bay Partners (formerly Lemon Bay LLP), withdrew from the action. A55 at No. 63. Of the three plaintiffs who had commenced the case years before, none remained. *See* Ex. C at 6 n.5.

3. The Litigation Finally Escapes The Doldrums.

After more than fifty-two months (and only sixty-six docket entries), the case came back to life on May 15, 2009. The reason for that was simple: fact discovery was set to end in almost six weeks and essentially no depositions had been taken. Plaintiff noticed the depositions of twelve individual defendants, which were its first deposition notices in the case. A54 at No. 67. Plaintiff then filed a motion to require that the depositions be held in Delaware, although eleven of the twelve deponents resided in Peru or Mexico. A53 at No. 70; A746 at 19:1-9. The deponents objected, and on July 1, 2009 -- the day after fact discovery was scheduled to end -- the Court heard oral argument on the motion. *See* A728-48.

The Court denied the motion based on both the merits and the "substantial delays" resulting from Plaintiff's inaction in the case. A745 at 18:21 – A746 at 19:9. The Vice Chancellor explained that he "**[could not] strongly enough express [his] displeasure at how delayed this litigation ha[d] been and the fact that it wasn't prepared for trial two or three years ago**," A747 at 20:14-17 (emphasis added), and noted that it "**would color [his] view of the case that the plaintiffs ha[d] acted in such a thoroughly dilatory manner in its prosecution**." A748 at 21:3-5 (emphasis added).

The Court entered a revised scheduling order on July 7, 2009, A49 at No. 88, which was again amended on December 30, 2009, A43 at No. 131, and yet again on April 20, 2010. A41 at No. 139. Although the taking of depositions in this matter entailed travel to Mexico and Peru, the overall discovery burden was relatively light compared to the sums at issue. The entire document production of all parties totaled only 282,046 pages, *see* A2745, and Plaintiff took only ten depositions during the course of discovery. A1660 n.5.

On June 30, 2010, Plaintiff moved for partial summary judgment, and both the AMC Defendants and the Special Committee Defendants filed cross-motions in August 2010. A40 at No. 143; A34 at No. 187; A30 at No. 192. Following oral argument on December 21, 2010, the Court granted the Special Committee Defendants' motion for summary judgment and dismissed them from the case. A1503 at 128:7-15. The summary judgment motions of Plaintiff and the AMC Defendants, however, were denied. A1490 at 115:23 – A1491 at 116:2. During the hearing, the Court[3] noted that the case was the oldest on its docket. A1473 at 98:21. Plaintiff's counsel took "full responsibility," explaining that the "case was not pursued at the beginning the way it should have been . . . [b]ut there was a point in time where the fire was lit under us . . . ." A1413 at 38:17 – A1414 at 39:3.

4. Trial And Judgment

Trial was neither long nor complex. A four-day trial was held on June 21-24, 2011, and several of those days were only partial trial days. The parties called only six witnesses, consisting of four fact witnesses and two expert witnesses.

The Court of Chancery issued the Opinion on October 14, 2011. In it, the trial court ruled that the merger was unfair, and hence that defendants had breached their fiduciary duty of loyalty. Ex. C at 93. Damages in the amount of $1.347 billion, plus pre-judgment interest,

---

[3] After Vice Chancellor Lamb stepped down from the bench in July 2009, this case was briefly handled by various other members of the Court until it was assigned to then-Vice Chancellor Strine in Fall 2009.

were awarded for a total judgment of $2.0316 billion.[4] *Id.* at 104; Ex. B at 2. The Court noted that the record could arguably have supported "a damages award of $2 billion or more," but applied a "conservative" damages calculation due to what it referred to as Plaintiff's "pattern of litigation delay" and failures of proof. Ex. C at 3-4. This marks a reduction in the potential recovery to Southern Copper of at least $653 million, or 48%. Plaintiff's delay similarly caused the Court to grant simple, rather than compound, interest. *Id.* at 98. Finally, the Opinion directed the parties to confer in an attempt to arrive at a "responsible" fee, with the Court cautioning Plaintiff's counsel to "tak[e] into account the reality their own delays affected the remedy awarded and are a basis for conservatism in any fee award." *Id.* at 104 n.206.

B. Counsel's Fee Petition And The Fee Award

Plaintiff's counsel filed a petition for attorneys' fees and expenses on October 28, 2011 (the "Petition"). A2666-93. Despite the Court of Chancery's admonition regarding conservatism, the Petition sought 22.5% of the total judgment, including the significant amount of pre-judgment interest. A2667. Plaintiff's counsel reported approximately 8,600 hours of work on the case. A2674. This time was accumulated over the length of the litigation by 49 individual time-keepers, comprised of 12 partners, nine associates, 10 paralegals, seven "investigation department" members, six contract attorneys, and

[4] The Opinion initially set damages at $1.263 billion. The Court issued a Revised Opinion on December 20, 2011, adjusting this figure to $1.347 billion to reflect a dividend payment that had not been accounted for in the initial calculation. *See* Ex A at 62:13 - 4:23.

one professional staff member. A2678; A2685-86. The top five billing attorneys accounted for 5,556.35 hours (65% of the total), with only four accruing more than 500 hours over the course of the case. *Id.* Paralegals, the "investigation department," contract attorneys, and the professional staff member accounted for 2,084.17 hours (24% of the total), while 13 of the 21 full-time attorneys were responsible for less than 108 hours each. *Id.* Plaintiff's counsel also reported $1,117,816 in out-of-pocket expenses, the bulk of which were the fees of their expert witness. A2674.

One aspect of the Petition stands out. That is, nowhere in the Petition or the subsequent reply brief did Plaintiff ever state the actual dollar amount being sought. That reluctance was understandable since the amount was north of $457 million at the value of the revised judgment and would have reflected an aggregate implied hourly rate of more than $53,000 for each of the 49 individuals listed in the Petition.

Both Southern Copper and the AMC Defendants opposed the Petition. *See* A2694-2716; A2718-58. The Court of Chancery held a non-evidentiary hearing on December 19, 2011. *See* Ex. A. Following oral argument, the Court announced from the bench that it would award Plaintiff's counsel 15% of the judgment. *Id.* at 78:17-19. The fee award utilized a percentage of the benefit approach because the Court concluded that the litigation resulted in the creation of a common fund with a quantifiable benefit.[5] *Id.* at 65:3-15. The Court emphasized that the benefit obtained was significant, *id.* at 85:1-2, and the case involved difficult litigation and risk. *Id.* at 85:19 - 86:4. In particular, Plaintiff's counsel prevailed on a theory of the case that the Court initially viewed with skepticism. *Id.* at 84:17 - 85:2. The Court noted in passing that the time and effort expended were factors required to be taken into account under *Sugarland*, but did not analyze them further than noting that the award equaled an effective hourly rate of approximately $35,000. *Id.* at 78:15-19, 79:21-23.

Moreover, despite recognizing the magnitude of its award to Plaintiff's counsel, *id.* at 79:19-23, the Court specifically refused to apply a "sliding scale" or "declining percentage" approach in which the percentage of fees decreases as the size of the fund grows. *Id.* at 22:11-19, 77:2-9. The Chancellor stated that he did not believe such an approach had been accepted or was required by this Court. *Id.*

Much of the ruling focused on the fact that Plaintiff's counsel prosecuted the matter all the way through trial. *See, e.g.*, *id.* at 72:10-21, 24:2-8, 76:22 - 77:2. The Court also vigorously disagreed with Southern Copper's argument that the fee sought would constitute a "windfall"; the Court indicated that such a concept was primarily limited in the representative litigation context to early settlements producing large attorneys' fees and minimal to no benefit to the company or its stockholders. *Id.* at 71:24 - 72:21, 26:12 - 27:3. To

[5] As urged below, because AMC owns over 80% of Southern Copper's equity, the fee award almost equals the theoretical benefit to the minority stockholders. *See* A2692 n.1, A2698-99.

that end, the Court discussed the need to incentivize lawyers representing class or derivative plaintiffs to avoid unduly early or disclosure-only settlements, *id.* at 71:21-23, 85:2-15, before expressing its view that the risk of over-incentivizing such lawyers to try cases, or over-compensating them for doing so, was slight. *Id.* at 76:9-21.

Ultimately, the fee awarded appears to rest on a novel analysis that the Court of Chancery termed the "fundamental test of reasonableness" -- namely, whether a hypothetical plaintiff would have bargained with his counsel for the fee award in question. *Id.* at 73:17 - 76:21. Southern Copper respectfully submits that both the Court's test and its application here were in error. First, there was *no* evidence before the Court indicating that more than $300 million represented a market rate for contingent services in a case like this, but a host of information demonstrating that it was above what the market would in fact demand by at least a factor of ten. Second, attorneys are regulated professionals and thus subject to standards higher than those of the marketplace. As argued below, the fee awarded is unreasonable by any yardstick.

<u>ARGUMENT</u>

THE FEE AWARD OF $304 MILLION, WHICH COMES TO AN EFFECTIVE RATE OF OVER $35,000 PER HOUR (AND A PREMIUM OF 66 TIMES THE VALUE OF COUNSEL'S TIME AND EXPENSES), IS AN UNREASONABLE FEE AND THEREFORE SHOULD BE REVERSED.

A. Question Presented

Under long-standing Delaware precedent and the Rules of Professional Conduct, any award of attorneys' fees and expenses to counsel for plaintiffs in representative litigation must be "reasonable." Did the Court of Chancery abuse its discretion by granting an unreasonable fee award of over $304 million that pays Plaintiff's counsel over $35,000 per hour worked and 66 times the value of their time and expenses? A2718-58; *see generally* Ex. A.

B. Scope of Review

The legal principles applied by the trial court in granting a fee award are reviewed *de novo*. *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010); *Berger v. Pubco Corp.*, 976 A.2d 132, 139 (Del. 2009). The Court of Chancery's application of these legal principles is reviewed for abuse of discretion. *Loral Space & Commc'ns, Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 870 (Del. 2009). When, as here, the fee awarded by the Court of Chancery should be reduced, this Court may determine the appropriate fee rather than remanding for further proceedings. *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 151 (Del. 1980).

C. Merits of the Argument

1. This Court Has Consistently Rejected "Mechanical" Tests In Favor Of A Multifactor Balancing Test To Determine A Reasonable Attorney's Fee Award In Litigation Resulting In A Common Fund.

Our law is clear. The amount of any attorneys' fee award must be reasonable. *See Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1046 (Del. 1996) (holding that the trial court must independently determine the reasonableness of fee awards). A reasonable fee award will strike a balance between encouraging plaintiffs' attorneys to bring meritorious claims and avoiding "socially unwholesome" windfalls. *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010).

a. The Approaches To Determining A Reasonable Fee Award

For nearly 100 years (from 1881 to the 1970s) the traditional method used in most jurisdictions for calculating and awarding attorneys' fees under the "common fund doctrine" was by determining the fee as a percentage of the fund. *See Goodrich*, 681 A.2d at 1046 (cataloging the history of fee awards nationally in common fund cases). In the 1970s, however, many courts gravitated toward the "lodestar" method. *Id.* That method required a court to multiply what the court deemed to be a reasonable hourly rate by a reasonable number of hours expended to calculate the "lodestar." *Id.* The lodestar could then be adjusted up or down through the use of a "multiplier" that would account for factors such as the quality of counsel's work and the risk undertaken. *Id.*

In the 1980s, however, the lodestar method began to be criticized. *See id.* Two factors are commonly cited for its fall into disfavor. First, the United States Supreme Court, in distinguishing how courts should calculate fee awards under fee-shifting statutes from a similar calculation for awards under the common fund doctrine, "suggested that an award in a common fund case should be based upon a percentage of the fund." *Id.* (discussing *Blum v. Stenson*, 465 U.S. 886 (1984)). The second factor was a report issued in 1985 by a task force appointed by the Court of Appeals for the Third Circuit "to evaluate the practical effectiveness of the lodestar method in making attorney fee awards." *Id.* at 1047 (discussing Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237 (1985) (the "Task Force Report")). The ultimate recommendation in the Task Force Report was a return to the use of a percentage of the fund in awarding fees in common fund cases. *See id.*[6]

b. This Court Requires A Multifactor Approach.

In 1980, this Court was called upon in *Sugarland* to review Delaware's test for awarding attorneys' fees in representative litigation. *Sugarland* arose in the context of a party's invitation to drop Delaware's existing multifactor test in favor of the -- at that time -- burgeoning acceptance of the more mechanical lodestar

---

[6] Despite the recommendations of the Task Force, the Third Circuit has not fully rejected the lodestar method, but has instead held, much like this Court, that a lodestar analysis is an appropriate cross-check on the reasonableness of a percentage-based fee award. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995); *see In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 739, 742 (3d Cir. 2001) (holding that it was appropriate to use the percentage of the benefit method but nevertheless using the lodestar as a cross-check, and holding that the failure to do so "magnified" an abuse of discretion by the district court).

approach. In declining that invitation, and perhaps presaging the conclusions of the United States Supreme Court and the Third Circuit Task Force, this Court concluded that the lodestar method was needlessly mechanical and "elaborate," and incorrectly placed nearly exclusive weight on the amount of time spent on the litigation. *See id.* at 150. In so concluding, however, *Sugarland did not* relegate the lodestar to Delaware's scrap heap. To the contrary, this Court endorsed the lodestar as *part* of the analysis; it looked to counsel's hours expended and their hourly rate as an important check upon the reasonableness of the fee that was initially indicated by applying a percentage of the fund approach. *Id.* at 152, 153 n.2.[7]

In rejecting the lodestar approach as the sole test, however, *Sugarland* did not go to the other extreme and fully adopt the percentage of the benefit test either. Rather, this Court reaffirmed its expectation that Delaware's courts would continue to employ a flexible, multifactor test that borrows from both methods. *See Seinfeld v. Coker*, 847 A.2d 330, 337 (Del. Ch. 2000).

Specifically, the test reaffirmed by *Sugarland* mandates a case-by-case analysis of: (i) the benefits achieved in the litigation; (ii) the amount of time and effort dedicated to the case; (iii) the complexity of the litigation; (iv) the contingency risk; and (v) the skill and ability of counsel. *Sugarland*, 420 A.2d at 149 (quoting Court of Chancery decision). By adopting this approach, this Court has rejected the mechanical use of *both* the percentage *and* lodestar

---

[7] This Court has since reaffirmed this use of the lodestar method as a reasonableness cross-check. *See In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1273-74 (Del. 2005).

methods, recognizing that more nuance is necessary in light of both methods' various drawbacks and the equitable nature of the exercise. *Goodrich*, 681 A.2d at 1050; *Sugarland*, 420 A.2d at 150; *Seinfeld*, 847 A.2d at 336. The Court of Chancery is no more obligated "to award plaintiffs' counsel what might amount to a very high fee as expressed in terms of an hourly rate just because the percentage of the fund would yield such a result," *Seinfeld*, 847 A.2d at 336, than it is to arrive at a fee by looking only at the lawyers' lodestar. Instead, its obligation is to weigh *each* of the *Sugarland* factors to arrive at a reasonable fee award. *Id*. Southern Copper respectfully submits that the Court of Chancery failed to do that here.

2. The Court Of Chancery's Application Of The *Sugarland* Test In This Case Resulted In An Unreasonable Award Of Attorneys' Fees.

In contrast to *Sugarland*, the Court of Chancery gave essentially dispositive weight to the amount of the benefit without adequately considering the other *Sugarland* factors. If the judgment is affirmed, the amount of that benefit is subject to legitimate dispute no matter how it is paid.[8] There is little question, however, the benefit would

[8] Southern Copper argued below that a return of stock creates different economic effects than a cash award. The Court of Chancery appears to have understood this as an argument that a return of stock offers no benefit, *see* Ex. A at 44 - 51, and would not permit clarifying argument. *See id.* at 44:4-5, 45:20 - 46:7. As a matter of corporate finance, however, a repurchase of stock by a corporation, exactly like a dividend, provides no direct benefit to the corporation itself. Rather, a return of stock should benefit the *stockholders* by reducing the number of outstanding shares, thus increasing the value of their own shares. Here, however, the only stockholders who would be net beneficiaries are the public stockholders, who own less than 20% of Southern Copper's outstanding stock. Thus the net economic benefit was less than 20% of the nominal amount of the judgment. As

be substantial. The question is whether Plaintiff's counsel is entitled to over $304 million as a result. Southern Copper respectfully asks this Court to reaffirm that *Sugarland* is a multifactor test.

a. The Court Failed To Weigh *All* Of The *Sugarland* Factors Properly, And Placed Too Great An Emphasis On The Size Of The Benefit.

The Court of Chancery incorrectly applied *Sugarland* by making the size of the fund the dispositive factor in its analysis without considering whether the fee was reasonable given the other *Sugarland* factors. *See* Ex. A at 73:17 - 75:3 (concluding that the fee award was reasonable on the basis of a hypothetical bargain between a litigant and a lawyer to obtain a particular fee for a specific result -- no matter what effort or level of risk was involved in the endeavor). Indeed, the Court of Chancery appears to have given only a *pro forma* consideration to the other factors, without explaining how counsel's time, effort or risk could justify a fee of over $35,000 per hour or over 66 times counsel's lodestar rate. *See id.* at 78, 79; *see also Cendant*, 243 F.3d at 733-35 (finding an abuse of discretion where the district court gave only cursory attention to the requisite factors in crafting a fee award and failed to conduct a reality check).

Nor did the Court of Chancery do a "reality check" on the fee it awarded. Although Southern Copper provided the Court with a significant amount of data showing that successful, large class actions resulted in fees with far lower effective hourly rates, the Court took little notice of that data. *See infra* n.9. The Court of

---

noted in footnote 5 above, that amount is just barely larger than the fee that was awarded to Plaintiff's counsel.

Chancery's analysis did not meaningfully extend beyond the conclusion that 15% seemed a reasonable percentage of the fee award based upon the first *Sugarland* factor and the fact that the matter went to trial as opposed to settling early. The Court of Chancery thus committed error by failing to consider properly all of the *Sugarland* factors.

b. The $304 Million Fee Award Is Unreasonable In Relationship To The Time And Effort Invested By Counsel.

The amount of the fee awarded by the Court of Chancery is unreasonable by any measure because it exceeds by a factor of ten the fee necessary to carry out the purposes of such awards. In *Seinfeld*, Chancellor Chandler explained the economic bases for awarding attorneys' fees that include a premium in common fund cases. 847 A.2d at 337. The common benefit doctrine stems from the recognition that representative litigation plays an important and useful role in our system of corporate governance. *Id.* at 333. Shifting fees in favor of attorneys who confer a common benefit will encourage them to bring meritorious lawsuits, which, in turn, will deter unacceptable behavior. *Id.* "To make it economically rational for [plaintiffs' attorneys] to take future cases, the fee must give them their normal hourly rate (the lost opportunity cost), a risk premium, plus a modest 'incentive' premium . . . ." *Id.* at 337. In the absence of such incentives, plaintiffs' lawyers (arguably) will not pursue meritorious common fund cases. *See id.* at 333-34.

i. The Time And Effort Invested By Counsel Does Not Justify An Award Of Over $304 Million.

Here, Plaintiff's counsel was awarded more than $304 million, although their "opportunity costs" -- that is, fees at their ordinary hourly rates plus out-of-pocket expenses -- were only 1.5% of that amount, or about $4.58 million. No Delaware case has ever suggested that an attorneys' fees award of 66 times counsel's opportunity costs is necessary to provide adequate incentive to incur the risk of bringing cases of this nature and prosecuting them through trial. To the contrary, our precedent holds that far more modest awards are appropriate. In *Sugarland*, for example, this Court awarded a fee of less than ten times the lawyers' ordinary hourly rate, noting that such a rate was "generous by any standard." 420 A.2d at 153 n.2; *see also Abercrombie,* 886 A.2d at 1273-74 (affirming the Court of Chancery's award of 2.39 times counsel's normal rate, which constituted "a significant premium"); *Franklin Bal. Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *14 & n.74 (Del. Ch. Aug. 30, 2007) (referring to an effective hourly rate of $4,023 as "at the high end of the spectrum"); *In re Digex, Inc. S'holders Litig.*, Del. Ch., C.A. No. 18336, at 146-47, Chandler, C. (Apr. 6, 2001) (TRANSCRIPT) (Ex. F) (concluding that a multiplier of 19 was excessive and an award of 7.5 times counsel's lodestar would provide the necessary incentive); *Seinfeld*, 847 A.2d at 338 (awarding an hourly rate of $1,300, or 2.63 times counsel's lodestar, which "more than offsets the opportunity costs of plaintiffs' counsel, the cost associated with the risks involved in bringing the suit, as well as an appropriate incentive premium"). This same pattern is illustrated in the following chart showing fees awarded in certain non-Delaware "mega-fund" cases.[9]

[9] This chart is taken from Exhibit A to Southern Copper's brief

Case	Settlement/ judgment (in *millions*)	Total hours billed	Fee award as % of recovery	Effective hourly rate	Lodestar multiplier
AWARD HERE	**$ 2,031**	**8,597**	**15%**	**$35,447**	**66.43**
Allapattah	$ 1,075	140,479	31.33%	$ 2,550	8.41
Cendant	$ 3,200	35,000	1.72%	$ 1,571	6.88
ENRON	$ 7,227	289,593	9.52%	$ 2,375	5.21
NASDAQ	$ 1,027	129,628	14.43%	$ 1,143	4.09
Visa	$ 3,383	233,459	7.06%	$ 1,023	3.80
AOL	$ 2,650	135,185	5.69%	$ 1,116	3.22
Tyco	$ 3,200	488,000	15.40%	$ 1,010	2.87
WorldCom, 2004	$ 2,575	195,000	6.02%	$ 794	2.72
Royal Ahold	$ 1,100	147,896	12.17%	$ 905	2.63
WorldCom, 2005	$ 3,558	277,862	5.77%	$ 738	2.47
Nortel, CA 1855	$ 1,138	47,846	3.33%	$ 792	2.28
Nortel, CA 1659	$ 1,070	58,768	3.28%	$ 597	2.02

below in opposition to the Petition (with decimals truncated). A2752, A2765-68. As that chart shows, the fees in each of those cases were justified by the investment of tens or even hundreds of thousands of hours of attorney time and multiple millions of dollars of out-of-pocket expenses. In no case did the fee approach the $35,000 per hour effective rate or 66 times lodestar multiplier awarded here. The Court of Chancery erroneously distinguished the federal cases by asserting that the federal government (and not the lawyers) had done much of the investigative work in those cases. Ex. A at 72:15-18. In fact, the extent to which (if at all) government investigations had laid the groundwork for the litigation was factored into the fee award in several of those cases. *See, e.g.*, *In re Enron Corp. Secs., Deriv. & ERISA Litig.*, 586 F.Supp.2d 732, 787 (S.D. Tex. 2008); *In re AOL Time Warner, Inc. Secs. & "ERISA" Litig.*, 2006 WL 3057232, at *17 (S.D.N.Y. Oct. 25, 2006) ("Parallel government investigations were also undertaken, though the parties -- even at the settlement hearing -- disputed their relative significance."); *In re Worldcom, Inc. Secs. Litig.*, 388 F.Supp.2d 319, 357 (S.D.N.Y. 2005) (stating that facts discovered in government investigations were helpful to lead counsel in some aspects of the case, but were of little assistance in others); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 523-24 (E.D.N.Y. 2003) ("Lead Counsel did not benefit from any previous or simultaneous government litigation."), *aff'd*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005).

ii. The Award Of Over $304 Million Amounts To A Socially Unwholesome Windfall.

The fee awarded here is a windfall, not a reasonable incentive payment or compensation for risk borne. "[A] point exists at which [adequate] incentives [have been] produced [by a fee award] and anything above that point is a windfall." *Seinfeld*, 847 A.2d at 334. Courts should, when awarding fees, attempt to discern as nearly as possible the point at which an award transforms from an incentive into a windfall so as to avoid siphoning off the fruits of litigation from the stockholders to their lawyers. *Id.*; *see also Wal-Mart Stores*, 396 F.3d at 123 (referring to the need to weigh economic incentives against the policy of protecting against excessive fees); *AOL Time Warner*, 2006 WL 3057232, at *18 (setting the amount of the fee award so as to "strike a fair balance" between the interest of the lawyers and those of the class).

In its fee ruling here, the Court of Chancery also discussed the importance of incentivizing vigorous litigation. Ex. A at 75:21 - 76:8, 85:5-15.[10] The Court of Chancery, however, abused its discretion by failing to consider whether adequate incentives could have been provided by an award far more modest than the amount awarded here. *See Seinfeld*, 847 A.2d at 337 ("It simply cannot be the case that a

[10] The Court of Chancery explained the fee award in part by comparison to the unjustified, but large, fees sometimes awarded in cases in which the parties settle quickly or the benefit conferred was of dubious value. Ex. A at 71:20 - 72:9, 82:12-17. If the problem in those cases is that plaintiffs' lawyers are receiving excessive fees, then those awards should be curbed. Awarding Plaintiff's counsel an unreasonably large fee in this case by reference to unreasonably large fees in other, smaller cases compounds, rather than ameliorates, the Court of Chancery's concerns.

426 percent increase over hourly rates . . . is necessary to preserve the wholesome incentives with which we are concerned.”). In other words, the Court of Chancery had *no* evidence showing, and made *no* factual finding, that it was *necessary* to award Plaintiff’s counsel hundreds of millions of dollars in order to incentivize them to bring and vigorously litigate cases such as this.

Nor, for the reasons discussed above, could it have made such a finding, since we know what types of fee awards are necessary to motivate counsel. The chart above and past decisions of Delaware’s courts show what the rough market price for incentivizing representative litigation is, and the award here dwarfs that.

To put it another way, would counsel have been willing to take this case in return for an award one-tenth or one-twentieth the size of the Court of Chancery’s fee award? The answer is yes. Simply put, the award here is detached from what every other court has found to be reasonable, dwarfing even cases with higher recoveries.

c. The Relative Complexity Of This Case Does Not Justify The Magnitude Of The Fee Award.

Sugarland also requires consideration of the relative complexity of the litigation compared to similar cases. *See In re Plains Res. Inc.*, 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005) (“[T]he complexity and novelty of this case were commensurate with those often encountered in corporate litigation before this court.”). Like the time and effort factor, the purpose of this factor is to guide whether a higher or lower award is warranted by the circumstances.

There was nothing about this case that was so complex as to warrant an unprecedented fee award. In their Petition, Plaintiff’s counsel pointed to the "impressive resumes" of the Special Committee Defendants, the "complex" valuation issues involved, the need for international travel, and a vigorous defense from several law firms. A2674-75. Plaintiff's counsel offered no argument that any of those factors were substantially different from most Court of Chancery litigation, or that they demonstrated the existence of unusual complexity that would justify a $35,000 per hour effective rate. Nor could they. There was nothing unusually complex about this case; entire fairness litigation routinely involves each of these factors. Moreover, other factors, such as the number of depositions (10), documents produced (282,000 pages), experts (two) and trial exhibits, confirm that this case was not unusually complex. Indeed, at the argument on the fee petition, Plaintiff's counsel correctly acknowledged that this type of litigation "is what we do," and hence, did not involve litigation that was intellectually or procedurally outside the norm. Ex. A at 18:9-11. This was a normal entire fairness case that happened to place in issue large sums.

Thus, the only thing unique about this case was the amount of the judgment, which is unrelated to the complexity involved in litigating it. *See In re Cox Commc'ns, 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."); 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”).

Moreover, there is no comparison between the complexity of this action and that of other cases outside Delaware in which nine-figure fee awards have been granted. *See*, *e.g.*, *In re Tyco Int’l, Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249, 268 (D.N.H. 2007) (awarding $492 million in fees for obtaining a $3.2 billion settlement in litigation that entailed taking over 200 depositions and 82.5 million pages of documents to review); *Visa Check*, 297 F.Supp.2d at 523 (awarding $293 million in fees for obtaining a $3.83 billion settlement before opening statements in litigation that entailed 400 depositions, 21 experts, 54 expert reports, four rounds of class certification briefing going all the way to the U.S. Supreme Court, 16 summary judgment motions, 31 motions *in limine*, 230,000 pages of trial exhibits, 17,000 deposition designations, and involved almost every US bank and five million merchants); *see generally Cendant*, 243 F.3d at 739-41 (describing cases of unusual complexity). The absence of similar complexity militates against the record-setting fee award.

d. Plaintiff’s Counsel’s Contingency Risk Does Not Justify The Magnitude Of The Fee Award.

The contingency risk borne by Plaintiff’s counsel, like the other factors, does not suggest that a fee award of more than $304 million was warranted. Contingency risk is inherent in class and derivative actions, and each of the previously listed cases also was entirely contingent.

Moreover, here, Plaintiff’s counsel had not “bet the firms” on the outcome of this case. Quite the contrary, Plaintiff’s two firms invested about 8,600 hours and $1.1 million of out of pocket expenses over the course of six years. Again, these are not trifles, and we do not mean to minimize them. But that risk was moderated by the other opportunities those attorneys had in the last six years. The average annual time spent per full-time attorney on this matter was only 48 hours per year, thus allowing Plaintiff's counsels' firms to mitigate the risk of this litigation by prosecuting other matters, especially in the over four years during which Plaintiff took virtually no action to advance the case. Indeed, Plaintiff's two primary Delaware lawyers have been counsel of record in more than 125 different actions in the Court of Chancery since this case was filed. *See* Exhibit D hereto (string citation to such cases). The contingency risk here was thus significantly less than the risk in at least some of the cases in the chart above. *See Digex*, C.A. No. 18336, at 143 (observing that counsel's risk was great because they "heavily concentrated all of the resources of their firms" on the case); *Tyco*, 535 F.Supp.2d at 270 (citing the "massive resources and effort" counsel put into the case, including more than 488,000 hours and $29 million in expenses); *Allapattah Svcs., Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1214-15 (S.D. Fla. 2006) (giving great weight to the contingency risk because plaintiffs' counsel invested over $42 million of unreimbursed attorney time in the case over 14 years); *Visa Check*, 297 F.Supp.2d at 523 (finding significant contingency risk where lead counsel devoted 52% of its attorney resources to the case).

e. The Skill And Ability Of Plaintiff's Counsel Militates Against The Fee Award.

Southern Copper does not contest the skill, ability or reputation of Plaintiff's counsel. As noted above, they are experts at this type of litigation. The Court of Chancery, however, should have weighed more heavily Plaintiff's counsel's undoubted ability against the casual manner in which this case was litigated. This case languished on the docket for over six years, with plaintiffs taking no action for substantial periods of time. Indeed, counsel was admonished at least twice, by two different Vice Chancellors, to move the case along. A747 at 20:9 – A748 at 21:5; A1413 at 38:7-21; *see also* Ex. C at 3-4, 97-98, 104 n.206. The delay very nearly caused the case to be dismissed because all three of the original plaintiffs exited the case. *See id.* at 6 n.5. And even then, the trial court's award of damages to Southern Copper was cut by over 48%. This reduction in the award weighs heavily in favor of a reduced fee award.

3. The Court Of Chancery's Incorrect Application Of The *Sugarland* Factors And Failure To Conduct A Reality Check Resulted In Three Core Errors And Led To An Unreasonable Fee Award.

a. The Court Of Chancery Erred In Failing To Use A "Declining Percentage" Analysis.

The Court also erred in failing to apply correctly a "declining percentage" analysis -- that is, as the size of a judgment or common fund gets larger, the relative percentage of that fund that is a proper award of attorneys' fees should become smaller. *See* Ex. A at 22:14-19, 77:2-9 (noting the trial court's view that it did not believe precedent supported the application of a declining percentage). The Chancellor has criticized the use of declining percentages in the past,[11] and asserted at argument here that there is no support from this Court for the concept. In the end, though, and despite the opinions just noted, the Court of Chancery did reduce the percentage being awarded by a relatively small amount because "the amount that's requested is large. I did take that into account. Maybe I am embracing what is a declining" percentage. *Id.* at 83:6-8.

In so stating, the Court essentially acknowledged that while it opposes the use of a declining percentage as a concept, when faced with the reality of the numbers involved and the requirement that fees be reasonable and not confer a windfall, it is essentially impossible *not* to accept the use of declining percentages. Moreover, contrary to the Court's statements, the use of declining percentages is well supported by case law, including a decision of this Court.

In *Goodrich v. E.F. Hutton Group, Inc.*, this Court "acknowledged the merit of the emerging judicial consensus that the percentage of recovery awarded should 'decrease as the size of the [common] fund increases.'" 681 A.2d at 1048-49 (citing Task Force Report, 108 F.R.D. at 256); *accord Digex*, C.A. No. 18336, at 145 (*Goodrich* recognized that the declining percentage approach is "appropriate and reasonable"); *Gelobter v. Bressler*, 1991 WL 236226, at *3 (Del. Ch. Nov. 6, 1991) ("In cases involving substantial recoveries, this Court normally will award a lower percentage of the benefit."). As the Court of Chancery has noted in the past, the use of declining percentages is necessary because what might initially appear to be "a

---

[11] *In re Am. Int'l Group, Inc. Consol. Deriv. Litig.*, Del. Ch., C.A. No. 769-VCS, at 10, Strine, V.C. (Jan. 25, 2011) (TRANSCRIPT) (Ex. E).

reasonable fee percentage might produce an unreasonably high fee." *In re NCS Healthcare, Inc. S'holders Litig.*, 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003).

The necessity of using a declining percentage to arrive at a reasonable fee award in cases that produce extremely large common funds is grounded in the following:

> In such cases the scaling down of the percentage of the benefit represented by the fee award has occurred not out of any motive to penalize the beneficial and worthwhile efforts of counsel. Rather, consistent with the concept of reasonableness, it is designed to recognize the fact that beyond a certain point, the effort and risk required to produce a higher or incremental monetary benefit do not normally increase in proportion to the increase in the monetary benefit itself. Stated differently, experienced counsel do not invariably or [necessarily] have to expend twice the effort or incur twice the risk to achieve a $20 million settlement, as they would have to expend or incur to achieve a $10 million settlement.

Fox v. Chase Manhattan Corp., 1986 WL 673, at *4 (Del. Ch. Jan. 9, 1986) (citing *Sugarland*, 420 A.2d at 151).

Here, while the Court of Chancery did cut back the percentage of the fund by some amount, it incorrectly asserted that controlling law did not require such a procedure and failed to analyze what should be the appropriate percentage in cases involving billion dollar common funds. Given the unprecedented size of the common fund for litigation in this State, a proper percentage of the fund in this matter should have been measured in single digits in order to arrive at a reasonable fee. *See Digex*, C.A. No. 18336, at 145-46 (citing *Cendant* for the proposition that 3-7% is the typical range for fee awards in such cases); *In re N. Am. Philips S'holders' Litig.*, 1987 WL 28434, at *5 (Del. Ch. Dec. 16, 1987) (finding that the fee of 8.2% of the fund at an effective rate of $833 per hour was "appropriate"); compare the chart above.

b. The Court Of Chancery Erred By Not Considering The Reasonableness Of The Hourly Rate Represented By The Fee Award.

The second opportunity the trial court had to "check its math" was by looking at the resulting effective hourly rate. While the Court of Chancery determined that the effective hourly rate came out to approximately $35,000 per hour worked, it did not appear to have expressly weighed whether that hourly rate was reasonable under the circumstances. *See* Ex. A at 79:21-23. Southern Copper respectfully submits that the failure to take this necessary and crucial step was an abuse of discretion. *See Sugarland*, 420 A.2d at 151 n.10, 153 n.2 (testing the reasonableness of the hourly rate of the fee awarded); *see also Abercrombie,* 886 A.2d at 1273-74 (affirming the Court of Chancery's use of a lodestar calculation as a "backstop check" of the reasonableness of the award); *Goodrich,* 681 A.2d at 1047 (noting that the Third Circuit had held "that a lodestar analysis might be used to cross check the propriety of the award" calculated as a percentage of the fund); *In re Sauer-Danfoss Inc. S'holders Litig.,* 2011 WL 2519210, at *20 n.6 (Del. Ch. May 3, 2011) (noting that "[t]he time and effort expended by counsel serves as a cross-check on the reasonableness of a fee award" and that the court had traditionally "used hours worked to calculate an effective hourly rate that can be examined to guard against windfall compensation when awarding large fees"); *Seinfeld,* 847 A.2d at 338 ("In cases such as this one, . . . where the percentage of the fund corresponds to more than $2,500 per hour, [a] failure [to consider the hourly rates] may result in a windfall.”). Had the Court of Chancery done such a backstop check by looking at the effective hourly rate produced by this fee award, it could not have found that such a lavish hourly rate[12] was reasonable under the circumstances, and the failure to do so constitutes reversible error.

c. The Court Of Chancery Erred In Awarding Fees That Do Not Conform To The Principles Regulating Delaware Lawyers.

The third error was the Court of Chancery’s failure to evaluate the reasonableness of the fee award against the requirements of the Rules of Professional Conduct. In other words, the Court of Chancery should have considered whether our rules of ethics countenance awarding a lawyer a fee that works out to more than $35,000 per hour. *See Digex*, C.A. No. 18336, at 148 (referring to the Rules of Professional Conduct as imposing a cap on fee awards); *AOL Time Warner*, 2006 WL 3057232, at *19 (analyzing whether a fee “conforms to legal and ethical requirements that a fee be ‘reasonable,’ using prevailing standards in the legal community as a key measure.”). One of the factors animating the Court of Chancery’s ruling was its apparent view that lawyers, like investment bankers and hedge fund managers, should be free of ceilings on their compensation so long as that compensation is part of a bargained for exchange between lawyer and client. *See* Ex. A at 21:20-22 (asking “what is it about lawyers getting money that’s ickier than investment bankers or other people in society”), 82:1-4 (“there’s an idea that when a lawyer or law firms

[12] By comparison, according to the United States Census Bureau, the average *annual* per capita income of a Delaware resident in 2006-2010 was $29,007. http://quickfacts.census.gov/qfd/states/10000.html.

are going to get a big payment, that there's something somehow wrong about that, just because it's a lawyer").

There are important differences between lawyers and financial market participants, however. Among other things, in representative litigation there is no bargained-for exchange between the lawyer and the absent clients. Moreover, the privileges gained from bar admission come with a price. Lawyers are regulated and, unlike hedge fund managers and investment bankers, there are limits on the fees they may charge. The Rules of Professional Conduct provide that lawyers may not "collect an unreasonable fee or an unreasonable amount for expenses." Del. Lawyers' R. Prof'l Conduct R. 1.5(a); *see also Digex*, C.A. No. 18336, at 137 (referring during a fee award hearing to the Court of Chancery's "obligation to ensure that attorneys meet their ethical obligations" under Rule 1.5). In accordance with Rule 1.5(a), a contingency fee award must be reasonable in relation to the risk assumed by the lawyer in a given case. *See O'Brien v. IAC/Interactive Corp.*, 2010 WL 3385798, at *12 (Del. Ch. Aug. 27, 2010), *aff'd*, 26 A.3d 174 (Del. 2011). The fee award here does not satisfy the Rule. *See* 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 $25-30,000 per hour as unethical).

Vital public policy supports these limitations on legal fees. Lawyers have a shared monopoly -- only lawyers admitted to practice in a given jurisdiction may practice in that jurisdiction. That monopoly, though, is conditioned. Among other things, fees are regulated so that lawyers do not profit unfairly from their monopoly. *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 489 (N.Y. 1928) (Cardozo, C.J.) ("Membership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain." (internal citations and quotation marks omitted)). And in regulating lawyers this Court may -- and does -- consider public perception. *See Matter of Lassen*, 672 A.2d 988, 998 (Del. 1996) (giving "significant weight" to preserving the "integrity of the Bar and the public's perception of the Bar"). Whether one uses the Chancellor's colorful term "ickier" or some other modifier, there can be little doubt that the public will indeed see the award of $304 million to attorneys whose conduct in the litigation had previously been criticized by the trial court as a sign that the legal system has lost its compass. It is easy to become desensitized to large dollar figures in merger litigation, but a $304 million dollar attorneys' fees award remains shocking. Although drawing the appropriate line is neither easy nor precise there are reasonableness limits on court-awarded fees, and this fee far exceeds those limits.

CONCLUSION

The fee awarded here is simply not reasonable either under an application of the *Sugarland* factors, or by checking the award against the effective hourly rate. If the judgment on the merits is upheld, Southern Copper respectfully requests that this Court reverse the decision below on attorneys' fees and award a reasonable fee that is in keeping with this Court's prior decisions.

ASHBY & GEDDES

/s/Stephen E. Jenkins

Stephen E. Jenkins (#2152)
Richard L. Renck (#3893)
Andrew D. Cordo (#4534)
F. Troupe Mickler IV (#5361)
500 Delaware Ave. 8th Floor
Wilmington, DE 19801
(302) 654-1888

Counsel for Appellant, Nominal Defendant Below Southern Copper Corporation, formerly known as Southern Peru Copper Corporation

Dated: March 5, 2012

Exhibit A

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

- - -

APPEARANCES:

RONALD A. BROWN, JR., ESQ.
MARCUS E. MONTEJO, ESQ.
Prickett, Jones & Elliott, P.A.
-and-
LEE D. RUDY
JAMES H. MILLER, ESQ.
ERIC L. ZAGAR, ESQ.
of the Pennsylvania Bar
Barroway, Topaz, Kessler, Meltzer & Check, LLP
for Plaintiff

S. MARK HURD, ESQ.
KEVIN M. COEN, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
ALAN J. STONE, 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 Carrillo Gamboa, Jaime Fernando Collazo Gonzalez, Xavier Garcia De Quevedo Topete, Armando Ortega Gomez, and Juan Robolledo Gout

STEPHEN E. JENKINS, ESQ.
RICHARD I. G. JONES, JR., ESQ.
ANDREW D. CORDO, ESQ.
Ashby & Geddes, P.A.
for Nominal Defendant Southern Peru Copper Corporation (now known as Southern Copper Corporation)

- - -

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.)

\- - -

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

Exhibit B

GRANTED

EFiled: Dec 29 2011 8:36AM EST
Transaction ID 41607354
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

REVISED FINAL ORDER AND JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

(hereinafter the "Judgment").

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

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

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

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

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

____
Chancellor

APPROVED as to form:

[signatures follow]

---

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

PRICKETT, JONES & ELLIOTT, P.A.

By: /s/ Ronald A. Brown, Jr.
Ronald A. Brown, Jr. (DE Bar No. 2849)
Marcus E. Montejo (DE Bar No. 4890)
1310 King Street
Wilmington, Delaware 19801
(302) 888-6500
Attorneys for Plaintiff

OF COUNSEL:

KESSLER TOPAZ
MELTZER & CHECK, LLP
Marc A. Topaz
Lee D. Rudy
Eric L. Zagar
James H. Miller
280 King of Prussia Road
Radnor, Pennsylvania 19087
(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
Wilmington, Delaware 19801
(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:

MILBANK, TWEED, HADLEY &
McCLOY LLP
Alan J. Stone (DE Bar No. 2677)
Douglas W. Henkin
Mia C. Korot
One Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000

ASHBY & GEDDES

By: /s/ Richard I.G. Jones, Jr.
Richard I.G. Jones, Jr. (DE Bar No. 3301)
Richard L. Renck (DE Bar No. 3893)
500 Delaware Avenue, 8th Floor
Wilmington, Delaware 19801
(302) 888-5502
Attorneys for Nominal Defendant Southern
Peru Copper Corporation (now known as
Southern Copper Corporation)

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

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

/s/ Judge Leo E Strine

Exhibit C

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

OPINION

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

Ronald A. Brown, Jr., Esquire, Marcus E. Montejo, Esquire, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware; Lee D. Rudy, Esquire, Eric L. Zagar, Esquire, James H. Miller, Esquire, KESSLER TOPAZ MELTZER & CHECK, LLP, Radnor, Pennsylvania, *Attorneys for Plaintiff.*

S. Mark Hurd, Esquire, Kevin M. Coen, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; Alan J. Stone, Esquire, Douglas W. Henkin, Esquire, Mia C. Korot, Esquire, MILBANK, TWEED, HADLEY & McCLOY LLP, New York, New York, *Attorneys for Defendants.*

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

---

[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]

---

[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

---

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]

---

[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. <u>Goldman Begins To Analyze Grupo Mexico's Proposal</u>

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

---

[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

---

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

[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]

---

[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.

---

[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]

---

[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]

* * *

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

---

[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.

[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. <u>The Market Reacts To The Merger</u>

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

---

[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

---

[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.

---

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]

---

[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]

---

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

[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

---

[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

[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]

---

[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

[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

---

[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

---

[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. <u>Did The Burden Of Persuasion Shift Because Of The Stockholder Vote?</u>

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

---

[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,

---

[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.

---

[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

---

[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]

---

[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

---

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.

---

[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.

[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

---

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

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

---

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

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

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

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

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

---

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

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

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

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

---

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

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

Here, for instance, if the Special Committee had proposed to Grupo Mexico that it buy out Southern Peru at a premium to its rising stock price, it would have opened up the deal dynamic in a way that gave the Special Committee leverage and that was consistent with the Special Committee's sense of the market. Perhaps Grupo Mexico would have been open to the prospect and there would have been a valuable chance for all of the Southern Peru's stockholders to obtain liquidity at a premium to a Southern Peru market price that the Special Committee saw as was high in comparison to Southern Peru's fundamental value. At the very least, it would force Grupo Mexico to explain why it – the party that proposed putting these assets together under its continued control – could not itself be the buyer and finance such a transaction. Was that because it was cash-strapped and dealing with serious debt problems, in part because Minera was struggling? If you need to be the seller, why? And why are you in a position to ask for a high price? *If Minera is so attractive, why are you seeking to reduce your ownership interest in it?* Part of the negotiation process involves probing and exposing weaknesses, and as a result putting the opponent back on his heels.

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

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

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

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

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

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

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

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

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

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

[143] *See* Tr. at 49 (Palomino) ("[I]f you used these same numbers for Minera [ ] and Southern Peru [ ] and on the same parameters, then you were comparing apples to apples."); *see also* Def. Op. Post-Tr. Br. at 17 (explaining that one of the major reasons the Special Committee used relative valuation was that it allowed Southern Peru and Minera to be evaluated using the same set of assumptions, "*i.e.*, an apples-to-apples comparison.").
[144] *See* JX-74 (summary of Grupo Mexico/UBS/GS meeting (March 9, 2004)) at SPCOMM 010049 (noting that "mine studies have recently been completed by third party experts for all of [Minera]'s mines to support their life and quality arguments . . . [Grupo Mexico] is aware of no recent reports on [Southern Peru] mines"); *see also* Tr. at 355-56 (Beaulne) (discussing the differences between Minera's updated and optimized life-of-mine plan and the Southern Peru's stale life-of-mine plan).
[145] Parker Dep. at 41.

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

---

[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

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

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

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

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

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

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

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

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

---

[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

[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. <u>The Special Committee Did Not Update Its Fairness Analysis In The Face of Strong Evidence That The Bases For Its Decision Had Changed</u>

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

---

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.

[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

* * *

[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

---

[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

---

[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. <u>A Standalone DCF Value</u>

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. <u>The Value Of The Special Committee's July Proposal</u>

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. <u>A Comparable Companies Approach</u>

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

---

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

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

4. The Resulting Damages

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

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

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

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

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

V. Conclusion

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

Exhibit D

Citations To Court of Chancery Actions In Which
Ronald A. Brown, Jr., Esq. Or Marcus E. Montejo, Esq.
<u>Have Been Counsel Since January 1, 2005</u>

1. *Addis v. SSA Global Technologies Inc.*, C.A. No. 2305-VCS (Del. Ch.)
2. *Anderson v. Allis Chalmers Energy, Inc.*, C.A. No. 6594-VCN (Del. Ch.)
3. *Andrade v. AMR Corp.*, C.A. No. 4564-VCS (Del. Ch.)
4. *Augenbaum v. Indevus Pharm., Inc.*, C.A. No. 1093-VCS (Del. Ch.)
5. *Barnard v. Green Fuel Servs., LLC*, C.A. No. 3967-VCS (Del. Ch.)
6. *Berger Berkowitz v. Kraemer*, C.A. No. 6271-VCN (Del. Ch.)
7. *Berger Berkowitz v. Milastar Corp.*, C.A. No. 3372-VCP (Del. Ch.)
8. *Berger v. HB Fairview Holdings LLC*, C.A. No. 997-N (Del. Ch.)
9. *Berger v. Icahn Enter. L.P.*, C.A. No. 3522-VCS (Del. Ch.)
10. *Berger v. Intelident Solutions, Inc.*, C.A. No. 1527-VCL (Del. Ch.)
11. *Berger v. L Q Corp.*, C.A. No. 3363-VCS (Del. Ch.)
12. *Berger v. Loring*, C.A. No. 1789-VCS (Del. Ch.)
13. *Berger v. Pubco Corp.*, C.A. No. 3414–CC (Del. Ch.)
14. *Berger v. Pubco Corp.*, C.A. No. 4116–CC (Del. Ch.)
15. *Berger v. Regency Equities Corp.*, C.A. No. 602-N (Del. Ch.)
16. *Berger v. Strategic Distribution, Inc.*, C.A. No. 3125-VCL (Del. Ch.)
17. *Berkowitz v. Alternate Mktg. Networks, Inc.*, C.A. No. 1925-VCP (Del. Ch.)
18. *Berkowitz v. InfoNow Corp.*, C.A. No. 2598-VCN (Del. Ch.)
19. *Bren v. Capital Realty Group Senior Hous., Inc.*, C.A. No. 19902-NC (Del. Ch.)
20. *Brewing Invs. Co. Inc. v. Indep. Brewers United Inc.*, C.A. No. 5756 (Del. Ch.)
21. *Brisach v. The AES Corp.*, C.A. No. 4287-CC (Del. Ch.)
22. *Carcione v. Cingular Wireless LLC*, C.A. No. 1021-VCL (Del. Ch.)
23. *Catron v. ASA Int'l Ltd.*, C.A. No. 1225-VCL (Del. Ch.)

24. *Cede & Co. v. AXA Fin. Inc.*, C.A. No. 723-VCL (Del. Ch.)

25. *Cede & Co. v. Joulé, Inc.*, C.A. No. 696-CC (Del. Ch.)

26. *Chambers v. Genesee & Wyoming Inc.*, C.A. No. 354-VCS (Del. Ch.)

27. *Clark v. Esurance Inc.*, C.A. No. 2393-VCN (Del. Ch.)

28. *Dawson v. Pittco Capital Partners, L.P.*, C.A. No. 3148-VCL (Del. Ch.)

29. *Durham v. CLST Holdings, Inc.*, C.A. No. 2986-CC (Del. Ch.)

30. *EHS Partners, LLC v. Eden*, C.A. No. 2737-VCL (Del. Ch.)

31. *Ekman v. WWC Midland Corp.*, C.A. No. 18724-VCP (Del. Ch.)

32. *Ellerbeck v. Westel-Indianapolis LLC*, C.A. Nos. 18599-VCN, 18600-VCN (Del. Ch.)

33. *Enduro Capital, LLC v. Gibraltar Packaging Group, Inc.*, C.A. No. 3668-CC (Del. Ch.)

34. *Enzon Pharm., Inc. v. Dellacamera Capital Master Fund, LTD.*, C.A. No. 4538-CC (Del. Ch.)

35. *Erickson v. U.S. Cellular Corp.*, C.A. No. 1876-VCL (Del. Ch.)

36. *Erickson v. U.S. Cellular Operating Co. of Lacrosse, Inc.*, C.A. No. 3764-VCP (Del. Ch.)

37. *Evans v. Centennial Commc'ns Corp.*, C.A. No. 4625-VCS (Del. Ch.)

38. *Gilliland v. Motorola, Inc.*, C.A. No. 1441-VCL (Del. Ch.)

39. *Gilliland v. Motorola, Inc.*, C.A. No. 441-VCL (Del. Ch.)

40. *Goodman v. Watson*, C.A. No. 5024-VCN (Del. Ch.)

41. *Hamilton Partners, L.P. v. Baskind*, C.A. No. 2286-VCN (Del. Ch.)

42. *Hamilton Partners, L.P. v. Baskind*, C.A. No. 3776-VCL (Del. Ch.)

43. *Hamilton Partners, L.P. v. BF Enterprises, Inc.*, C.A. No. 1615-VCS (Del. Ch.)

44. *Hamilton Partners, L.P. v. Englard*, C.A. No. 4476-VCL (Del. Ch.)

45. *Hamilton Partners, L.P. v. Englard*, C.A. No. 5637-VCL (Del. Ch.)

46. *Hamilton Partners, L.P. v. Grand Havana Enterprises, Inc.*, C.A. No. 3038-VCS (Del. Ch.)

47. *Hamilton Partners, L.P. v. Highland Capital Management, L.P.*, C.A. No. 6547-VCN (Del. Ch.)

48. *Hamilton Partners, L.P. v. Lombardi*, C.A. No. 1721-VCL (Del. Ch.)

49. *Hamilton Partners, L.P. v. Michael Anthony Holdings, Inc.*, C.A. No. 2916-VCN (Del. Ch.)

50. *Hamilton Partners, L.P. v. Schneider*, C.A. No. 2599-VCL (Del. Ch.)

51. *Henry Partners, L.P. v. Ridings*, C.A. No. 5366-VCL (Del. Ch.)

52. *Herbst v. Authoria, Inc.*, C.A. No. 4251-VCS (Del. Ch.)

53. *Hernand v. Connexus Corp.*, C.A. No. 5783-VCS (Del. Ch.)

54. *Homburger v. Engle*, C.A. No. 987-VCS (Del. Ch.)

55. *In re A&L Invs., LLC*, C.A. No. 3297-VCN (Del. Ch.)

56. *In re Airvana S'holders Litig.* C.A. No. 5153-CC (Del. Ch.)

57. *In re Alfa Corp. S'holders Litig.*, C.A. No. 3104-VCP (Del. Ch.)

58. *In re Appraisal of The Orchard Enters., Inc.*, C.A. No. 5713-VCS (Del. Ch.)

59. *In re Bea Sys., Inc. S'holders Litig*., C.A. No. 3298-VCL (Del. Ch.)

60. *In re Emerson Radio S'holder Deriv. Litig.*, C.A. No. 3392-VCL (Del. Ch.)

61. *In re Fox Entm't Group S'holders Litig.*, C.A. No. 1033-CC (Del. Ch.)

62. *In re HealthSouth Corp. S'holders Litig.*, C.A. No. 19896-NC (Del. Ch.)

63. *In re MoneyGram Int'l, Inc.*, C.A. No. 6387-VCL (Del. Ch.)

64. *In re Netezza Corp. S'holder Litig,* C.A. No. 5858-VCS (Del. Ch.)

65. *In re PNB Holding Co. S'holders Litig.*, C.A. No. 028-N (Del. Ch.)

66. *In re Protection One, Inc. S'holders Litig.*, C.A. No. 5468-VCS (Del. Ch.)

67. *In re TD Banknorth S'holders Litig.*, C.A. No. 2557-VCL (Del. Ch.)

68. *In re Wayport, Inc. Litig.*, C.A. No. 4167-VCL (Del. Ch.)

69. *Jackmauh v. Wiley*, C.A. No. 3770-VCS (Del. Ch.)

70. *Jackson Walker L.L.P. v. Spira Footwear, Inc.*, C.A. No. 3150-VCP (Del. Ch.)

71. *JB Capital Partners L.P. v. Opinion Research Corp.*, C.A. No. 2745-VCS (Del. Ch.)

72. *JB Capital Partners L.P. v. Remy Int'l Inc.*, C.A. No. 5874-VCP (Del. Ch.)

73. *JB Capital Partners L.P. v. Remy Int'l Inc.*, C.A. No. 6025-VCP (Del. Ch.)

74. *JB Capital Partners L.P. v. Vertrue Inc.*, C.A. No. 3318-VCS (Del. Ch.)

75. *Jenner v. Trahan*, C.A. No. 4058-VCS (Del. Ch.)

76. *Johonson v. Arsenal Digital Solutions Worldwide, Inc.*, C.A. No. 3499-VCS (Del. Ch.)

77. *Joseph v. Accufacts Pre-Employment Screening, Inc.*, C.A. No. 2276-CC (Del. Ch.)

78. *Joseph v. Boston Rest. Assoc. Inc.*, C.A. No. 2783-VCS (Del. Ch.)

79. *Joseph v. Troy Group, Inc.*, C.A. No. 4676-VCS (Del. Ch.)

80. *Knight v. Caremark Rx, Inc.*, C.A. No. 1750-VCS (Del. Ch.)

81. *Krupa v. Comprehensive Neuroscience, Inc.*, C.A. No. 3759-CC (Del. Ch.)

82. *Latesco, L.P. v. Wayport, Inc.*, C.A. No. 3441-CC (Del. Ch.)

83. *Lazy River Inv. Co. v. Am. Land Lease, Inc.*, C.A. No. 6112-CC (Del. Ch.)

84. *Lazy River Inv. Co. v. Olian*, C.A. No. 4552-VCS (Del. Ch.)

85. *Leeward Capital, L.P. v. BF Enters., Inc.*, C.A. No. 6059-VCP (Del. Ch.)

86. *Leeward Capital, L.P. v. Meredith Enters. Inc.*, C.A. No. 2306-VCS (Del. Ch.)

87. *Low v. Genentech, Inc.*, C.A. No. 4751-VCS (Del. Ch.)

88. *Malone v. KPMG Peat Marwick, L.L.P.*, C.A. No. 15510-VCN (Del. Ch.)

89. *Matulich v. Aegis Commc'ns Group, Inc.*, C.A. No 2601-N (Del. Ch.)

90. *Mayerson v. Applied Graphics Techs.*, C.A. No. 20602 (Del. Ch.)

91. *McVey v. McVey*, C.A. No. 2746-VCN (Del. Ch.)

92. *Merlin Partners, LP v. Bronco Drilling Co.*, C.A. No. 6669-VCG (Del. Ch.)

93. *Merlin Partners, LP v. CPEX Pharm., Inc.*, C.A. No. 6345-VCL (Del. Ch.)

94. *Merlin Partners, LP v. Inspire Pharm., Inc.*, C.A. No. 6608-VCP (Del. Ch.)

95. *Merlin Partners, LP v. Novell, Inc.*, C.A. No. 6423-N (Del. Ch.)

96. *Merlin Partners, LP v. Optical Commc'n Products, Inc.*, C.A. No. 3267-CC (Del. Ch.)

97. *Messina v. Westwood Group, Inc.*, C.A. No. 20219-MC (Del. Ch.)

98. *Moton v. Davis*, C.A. No. 002-N (Del. Ch.)

99. *N. Am. Cellular Tel. Inc. v. AT&T Wireless Servs. Inc.*, C.A. No. 20299-VCS (Del. Ch.)

100. *N. Am. Cellular Tel. Inc. v. Celutel Inc.*, C.A. No. 4596-VCL (Del. Ch.)

101. *N. Am. Cellular Tel. Inc. v. Cingular Wireless LLC*, C.A. No. 947-VCP (Del. Ch.)

102. *Noble Equity Fund, LP v. NovaMed, Inc.*, C.A. No. 6498-CC (Del. Ch.)

103. *Numerica I, L.P., v. Lehman Bros. Holdings, Inc.*, C.A. No. 3846-VCL (Del. Ch.)

104. *Okla. Firefighters Pension & Ret. Sys. v. Larrea*, C.A. No. 5729-VCS (Del. Ch.)

105. *Opportunity Partners L.P. v. Loehmann's Holdings Inc.*, C.A. No. 1042-CC (Del. Ch.)

106. *Pearl v. Turnbull*, C.A. No. 6165-VCL (Del. Ch.)

107. *Predica Capital Fund I LLC v. CAM Commerce Solutions Inc.*, C.A. No. 3986-VCL (Del. Ch.)

108. *Predica Capital Fund I LLC v. ImClone LLC*, C.A. No. 4445-VCS (Del. Ch.)

109. *Predica Capital Fund I LLC v. Omrix Biopharm., Inc.*, C.A. No. 4543-VCN (Del. Ch.)

110. *Predica Capital Fund I LLC v. Packeteer Inc.*, C.A. No. 3988-VCL (Del. Ch.)

111. *Raider v. Burns*, C.A. No. 6835 (Del. Ch.)

112. *Raider v. Case Pomeroy & Co.*, C.A. No. 2664-VCL (Del. Ch.)

113. *Raider v. Dover Invs. Corp.*, C.A. No. 1180-VCS (Del. Ch.)

114. *Reis v. Hazelett Strip-Casting Corp.*, C.A. No. 3552-VCL (Del. Ch.)

115. *Sain v. AT&T Mobility Wireless Operations Holdings Inc.*, C.A. No. 5736-VCL (Del. Ch.)

116. *Skeen v. Milch*, C.A. No. 886-VCL (Del. Ch.)

117. *Skeen v. TUT Sys., Inc.*, C.A. No. 2960-VCS (Del. Ch.)

118. *Smith v. Curagen Corp.*, C.A. No. 4670-VCS (Del. Ch.)

119. *Teachers' Ret. Sys. of La. v. Scrushy*, C.A. No. 20529-NC (Del. Ch.)

120. *The Lion Fund, L.P. v. Crowley Maritime Corp.*, C.A. No. 3209-VCS (Del. Ch.)

121. *Valeant Pharm. Int'l v. Jerney*, C.A. No. 19947-VCL (Del. Ch.)

122. *Villari v. Elec. Data Sys. Corp.*, C.A. No. 3786-VCL (Del. Ch.)

123. *Wang v. Fulton*, C.A. No. 3409-VCL (Del. Ch.)

124. *Weil v. Morgan Stanley DW Inc.*, C.A. No. 791-VCS (Del. Ch.)

125. *Wheeler v. Milastar Corp.*, C.A. No. 2722-VCP (Del. Ch.)

Exhibit E

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE AMERICAN INTERNATIONAL GROUP, INC. CONSOLIDATED DERIVATIVE LITIGATION : Consolidated Civil Action No. 769-VCS

- - -

Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, January 25, 2011
2:03 p.m.

- - -

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

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

- - -

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

APPEARANCES:

STUART M. GRANT, ESQ.
MEGAN D. McINTYRE, ESQ.
Grant & Eisenhofer, P.A.
-and-
SCOTT M. TUCKER, ESQ.
Chimicles & Tikellis LLP
-and-
DANIEL W. KRASNER, ESQ.
PETER C. HARRAR, ESQ.
of the New York Bar
Wolf, Haldenstein, Adler, Freeman & Herz LLP
for Plaintiffs

PETER J. WALSH, JR., ESQ.
Potter, Anderson & Corroon LLP
for Defendants M. Bernard Aidinoff, Pei-Yuan Chia, Marshall A. Cohen, William S. Cohen, Robert Crandall, Martin S. Feldstein, Ellen V. Futter, Carla A. Hills, Frank J. Hoenemeyer, Richard C. Holbrooke, and Frank G. Zarb

MICHAEL W. ARRINGTON, ESQ.
Parkowski, Guerke & Swayze, P.A.
for Defendant Maurice R. Greenberg

MICHELLE L. DAVIS, ESQ.
SARAH T. RUNNELLS, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
for Defendant Edward E. Matthews

CHRISTIAN DOUGLAS WRIGHT, ESQ.
Young, Conaway, Stargatt & Taylor LLP
for Defendants Donald P. Kanak, Martin J. Sullivan, Thomas R. Tizzio, Edmund S. W. Tse, Jay S. Wintrob, Frank G. Wisner, Eli Broad, Barber G. Conable, Jr. and Kristian T. Moor

APPEARANCES: (Continued)

PATRICIA L. ENERIO, ESQ.
Proctor Heyman LLP
-and-
JEFFREY BURKE, ESQ.
DAPHNE MORDUCHOWITZ, ESQ.
of the New York Bar
Winston & Strawn LLP
for Defendant Howard I. Smith

KATHERINE J. NEIKIRK, ESQ.
Morris James LLP
for Defendant Michael J. Castelli

S. MARK HURD, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
DANIEL J. KRAMER, Esq.
AMY L. BARTON, Esq.
of the New York Bar
Paul, Weiss, Rifkind, Wharton & Garrison LLP
for Nominal Defendant American International Group, Inc.

\- - -

MR. GRANT: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Grant.

MR. GRANT: Your Honor, one brief introduction. At counsel table with me, Jerry Davis, the chairman of the board of trustees of the City of New Orleans Employees' Retirement System.

THE COURT: Good afternoon, sir.

MR. GRANT: And I've spoken to my colleagues, and I understand there are no other introductions.

This is the time that the Court has set for the approval of the settlement in AIG derivative litigation, consolidated litigation.

In thinking about this settlement, I realize that I have spent the far better part of the first decade of this millennium battling Hank Greenberg, a man who I like, for the benefit of AIG, a company I don't particularly like, with people who were supposed to be assisting us --

THE COURT: So have you been partying down with Hank Greenberg?

MR. GRANT: No, I have not been. I have not been. But only because of his choice, not because of mine.

THE COURT: He isn't one of the -- doesn't want to hang with you?

MR. GRANT: No.

But I was going to say, with people who were supposed to be helping us but were so paranoid about blowing insurance coverage, that I think they went far overboard to make it as difficult as possible.

Having said that, the settlement is really very good. It's a $90 million cash settlement. But it's really more than that, because AIG, apart from us, which is a real sore issue, because they met with Hank Greenberg and deliberately excluded us from that to negotiate a --

THE COURT: Especially given, you know, how fondly you feel towards Mr. Greenberg.

MR. GRANT: Yes. Well --

THE COURT: Exclusion has sort of a personal element to it.

MR. GRANT: Actually, the funny part is, Mr. Greenberg wanted us there. Mr. Greenberg and Mr. Boyce wanted us at that, and it was actually AIG who didn't let us in, which is why I said it's kind of bizarre, working with people who you're supposed to be working on their benefit and they say "Yeah, but we don't want you here; thank you very much." And -- and so --

THE COURT: Sounds like sort of -- if there's someone out there with an addiction to sort of, you know, twisted love tales involving really attractive people and you want to wean them off it, you can, like, show them this. It would be the same sort of thing, aside from you, of course, and Mr. Kramer, aesthetically, you know, not perhaps quite as desirable.

MR. GRANT: I -- I don't know how anyone could think that. But -- but Your Honor has been overseeing this dispute --

THE COURT: Well, how do you deal with the objections that I received this morning from Attorney General Holder and Governor Cuomo?

MR. GRANT: I --

THE COURT: I mean, they seem to raise some fairly substantial concerns.

MR. GRANT: I -- I would always find those -- those objections interesting.

THE COURT: You didn't receive a copy

of them?

MR. GRANT: No. No. And I was up in New York. So I expected the governor to just hand to it me.

THE COURT: I won't consider them, then.

MR. GRANT: Anyway, as Your Honor knows, there are no objections, which is very rare in -- in litigation.

THE COURT: Not even any of the -- no insurer at the last minute is going to, you know, charge the bench and ...

MR. GRANT: No. Mr. -- Mr. Kramer took care of that. So ...

THE COURT: So you're going to share some of the fee with him?

MR. GRANT: You know what?

THE COURT: Or you think he already -- you think -- you think Paul Weiss did all right out of this?

MR. GRANT: I am willing to put G&E's fee in a pool with the fee that -- that the Paul Weiss folks made from AIG and just split it down the middle with him. So I would have no problem with that.

THE COURT: Is there anything else you'd really like to add at this time?

MR. GRANT: Not unless Mr. Kramer wants to agree to my proposal, no.

THE COURT: I think he's demurring. I think he's content with the more modest fees that are -- an hourly rate biller gets, you know, in this kind of engagement.

MR. GRANT: Your Honor, I guess I would like to add one other thing. In going back and making sure that we have audited everything, there was an issue with one expense in the expense request that needs to be withdrawn. And so the actual expense number that we're asking for is $3,750.08 less. So the expense number we're asking for is 815,617.74.

THE COURT: Can you go over that slowly?

MR. GRANT: Yes. The new expense request is 815,617.74.

THE COURT: 16 ...

MR. GRANT: 6-1-7 ...

THE COURT: Right.

MR. GRANT: ... .74. And as I said, that's $37,050.08 less -- $3750.08 less due to a -- an error, that there was some double-counting and we were able to catch that, and want to make sure that we adjust that.

THE COURT: That was a reduction in the minibar, the minibar bill?

MR. GRANT: That might have been --

THE COURT: Someone got an extra large Snickers bar in a New York hotel.

Well, thank you, Mr. Grant.

In all seriousness, it's a lot easier to do this sort of thing when you've had the chance to kind of be a part of the process along the way. I'm not sure that in the final stages we -- we needed necessarily as much process as we had, but we certainly had that. And it's been a long history. And, you know, it's a big fee.

But I think sometimes 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. And the reality was there were other claims, even things that weren't settled today, which really, if you recall, the claims even against the insiders were resisted by AIG in the first instance. Plaintiffs had to fight through a motion to dismiss. They had to deal with the procedural tangles that come up in these sorts of situations and they had to be patient, as we all do, with our friends in the insurance industry, who are very careful about relinquishing nickels.

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 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.

So I understand that much hard work went into this, and I am not going to quibble at all with the fee.

I thank all the lawyers throughout the case for your patience and preparation. I asked a lot of hard questions at various times. And I'm sure that at times you found it exasperating. I never found you exasperating, despite impressions.

But, seriously, there was a lot of very high-quality lawyering in this case. It's been a long saga. And, you know, we hope -- I think that this largely -- most of the early stage of AIG's tumultuous existence has now been cleared out of the legal system, I think. Unfortunately, you know, there is another -- there is another round; but that's not been the subject of litigation in this Court, and it's pending elsewhere.

So I wish you-all well. It's a somewhat warmer day, but it's still cold enough to justify a hot toddy on the -- in the dining car of the Acela or if you're walking back in Wilmington and not endangering pedestrians or yourself.

So I have signed the order with the reduced minibar charge excluded -- you know, reflected. And so everyone have a good day and safe journey.

(Court adjourned at 2:13 p.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 4 through 11 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 31st day of January 2011.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent

Exhibit F

226

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE: DIGEX, INC. SHAREHOLDERS LITIGATION	: Consolidated : C.A. No. 18336

\- - -

Courtroom No. 106
Daniel L. Herrmann Courthouse
Wilmington, Delaware
Friday, April 6, 2001
1:02 p.m.

\- - -

BEFORE: HON. WILLIAM B. CHANDLER, III, Chancellor.

\- - -

HEARING ON SETTLEMENT AND AWARD OF ATTORNEYS' FEES

\- - -

APPEARANCES: STUART M. GRANT, ESQ.
MEGAN D. McINTYRE, ESQ.
Grant & Eisenhofer
-and-
JOSEPH A. ROSENTHAL, ESQ.
Rosenthal, Monhait, Gross & Goddess
-and
PAMELA S. TIKELLIS, ESQ.
Chimicles & Tikellis
-and-
DANIEL C. GIRARD, ESQ.
of the California Bar
Girard & Green
-and-
JAMES S. NOTIS, ESQ.
of the New York Bar
Abbey Gardy, LLP
for the Plaintiffs

01 APR 18 AM 11:53
REGISTER IN CHANCERY
DIANNE M. KEMPSKI

CHANCERY COURT REPORTERS
135 Daniel L. Herrmann Courthouse
Wilmington, Delaware 19801
(302) 577-2447

BC-506966-L4153603

ORIGINAL

APPEARANCES, Cont'd.:

KAREN L. VALIHURA, ESQ.
SEAN HORNBECK, ESQ.
Skadden, Arps, Slate, Meagher & Flom
-and-
STEPHEN C. NORMAN, ESQ.
Potter, Anderson & Corroon
for Defendants Intermedia Communications Inc., John C. Baker, Philip A. Campbell, George F. Knapp, Robert M. Manning and David C. Ruberg

HENRY E. GALLAGHER, JR., ESQ.
COLLINS J. SEITZ, JR., ESQ.
Connolly Bove Lodge & Hutz
-and-
STEPHEN R. REYNOLDS, ESQ.
of the New Jersey Bar
Gibbons, Del Deo, Dolan, Griffinger & Vecchione
for WorldCom, Inc.

WILLIAM O. LaMOTTE, III, ESQ.
Morris, Nichols, Arsht & Tunnell
-and-
KEVIN M. McGINTY
of the Massachusetts Bar
Mintz Levin Cohn Ferris Glovsky and Popeo
-and-
BRUCE METGE, ESQ.
General Counsel of Digex, Inc.
for Digex, Inc.

KEVIN G. ABRAMS, ESQ.
SRINIVAS M. RAJU, ESQ.
Richards, Layton & Finger
for the Special Committee of the Board of Directors of Digex, Inc.

* * * * *

(Recess at 3:45 p.m.)

THE COURT: I apologize that it took me a little longer than I thought that it would. I appreciate your bearing with me. I know some of you have come some distance. I wanted to try to rule from the bench today on all aspects of the question.

So my having already approved the proposed settlement, I'm now going to move into the fee award issue. Before I move into discussing the traditional factors that I think I'm obligated under Delaware law to apply in determining the reasonableness of a fee request, I want to comment briefly on the assertion concerning the deference that the Court should pay to the fee agreement between TCW and Grant & Eisenhofer.

Let me just say first -- and I think everyone would agree -- there is no precedent in Delaware which commands me to defer to that agreement. Even under the federal regime, the Private Securities Litigation Reform Act, and the empowered-lead-plaintiff concept that one finds at play there -- even there, the Court has the ultimate obligation and authority at the end of the case or at the settlement stage to review for both fairness and reasonableness of the fee that is being sought; even in an instance such as that, where a large shareholder has negotiated a fee with counsel to represent them in a federal action. So I want that to be noted first.

Second, as I think I've already said, this Court has a clear affirmative obligation to review all requests for attorneys' fees. In conducting that review, the Court is doubly empowered to scrutinize the proposed fee for reasonableness based on two distinct sources. One is Rule 23, and its command that the Court review it for reasonableness and to, in a sense, act as the fiduciary for the class, the absent class members.

But secondly, and equally importantly, this power flows from the Court's obligation to ensure that attorneys meet their ethical obligations, which for our purposes are described under the Model Rules of Professional Conduct -- I think Rule 1.5 -- to charge a reasonable fee. This affirmative obligation has also been repeatedly affirmed in our decisions.

The Supreme Court in fact has noted that this Court "must make an independent determination of reasonableness on behalf of the common fund's beneficiaries before making or approving an attorneys' fee award." That is the Goodrich versus E.F. Hutton decision of the Supreme Court.

Third, and finally, the Court must examine carefully ex ante fee agreements that are submitted to the Court, especially when the existence of that agreement is put before the Court after the settlement of the litigation. Here, the plaintiffs have submitted some information which attests to the integrity and the arm's length nature of the fee agreement. But in the end, I'm not convinced that the record on this aspect is as strongly developed as it could have been, or as it should be, perhaps, in future litigation in this Court.

Let me hasten to add that's through no fault of Mr. Grant or any of the plaintiffs' counsel in the matter. It's a recognition of the speed with which litigation occurs in this Court. I think that in the future, members of the bar and the Court are going to have to struggle with the practicalities of how these arrangements, to the extent they become more prevalent between institutional investors or other investors and plaintiffs' counsel, are put before the Court, and how soon they are put before the Court, and how they are tested against the market, to give comfort to the Court that in fact they deserve a great deal of consideration.

I say that with some care, because I think it's, again, an instance where it's the issue of the weight that should be accorded to those kinds of agreements, not the deference that should be accorded to them. I think there is a difference. It goes back to my earlier point about the role of the Court always being at the end of the case, determining what is fair and reasonable and in the interests of the class. So even the agreements that come before the Court in the early stage and have the earmarkings of being well negotiated, at arm's length, after appropriate beauty contests or other measures to assure that they are reasonable and fair -- even then, I think the Court still has to decide what weight to accord that in the end, when it makes a determination about fairness and reasonableness.

Now let me turn to the Sugarland

factors, the first being the result achieved or the benefit achieved. No question in this case that the plaintiff class has received a clear and significant benefit as a result of this litigation. The recovery in this case includes a settlement fund of $165 million in WorldCom stock, a $15 million reimbursement to Digex for costs and expenses that it incurred, various commercial agreements and various corporate governance changes, which collectively had been valued at over $400 million. That, perhaps is even a conservative valuation.

As the facts of the settlement negotiations bear out, however, plaintiffs' counsel can't be said to have been the sole cause of this benefit. Rather, the attorneys for the plaintiffs involved in this matter were a significant contributor. But as I said earlier, they weren't the only contributor. The special committee directors of Digex also played a vital role throughout the litigation and settlement discussions.

The question is not simply one of but-for causation. In fact, that formulation I think is confusing and potentially misleading in this context. Rather, the special committee here is not entirely responsible for the entire benefit conferred by the settlement, because that settlement could not have been achieved without the plaintiffs' counsel filing and prosecuting this lawsuit.

The special committee and plaintiffs' counsel, however, successfully coordinated their efforts and symbiotically achieved the result that the Digex minority shareholders may today call their own.

This is not a question of apportionment, either. Instead, it's enough for the Court to recognize that the efforts of both the special committee and plaintiffs' counsel were vital to achieve the benefits of this settlement. Let me turn, then, to the second factor, attorney time and effort.

In total, plaintiffs' counsel expended about 4,150 hours on this matter, and incurred approximately $580,000 in expenses, for which they have never been reimbursed. The value of the time expended when multiplied by the attorneys' hourly rates is approximately $1.4 million.

The Court understands, though, that due to the expedited nature of this case, this calculation understates the actual value of this work, and that premiums for attorney billing rates in expedited matters can change from 50 percent to as high as 400 percent in exceptional circumstances.

In that regard I note that even a 400 percent premium would here lead to a fee award of $5.6 million, meaning that the attorneys would receive five dollars for every one dollar they would normally bill, an amount that is far below that which has been actually requested by lead counsel for the plaintiffs.

I also note that the Court recognizes the substantial efforts this case required of the attorneys involved, and the significant demands made on the lives of those involved outside of the workplace. These considerations and unique efforts have figured strongly into my determination in this matter. Moving then to the contingent nature of the fee.

Clearly, this case involved a high degree of risk and was by no means assured of a positive outcome from the perspective of the Digex minority shareholders. Lead counsel agreed to represent the plaintiffs on a contingent basis, assumed their own costs and expenses throughout the litigation, and heavily concentrated all of the resources of their firms on seeking a positive result in this litigation. This was an all-or-nothing proposition for the plaintiffs' counsel.

Despite those efforts, I've said before I recognize the importance of the special committee, and the efforts that they played for the Digex minority. And in my view, those efforts went a long way toward not assuring a positive result, but making it possible for there to be a positive result for the minority shareholders. If there had been a different set of directors, not independent, or passive, who weren't willing to step up and do battle for the minority, we wouldn't be here today. I'm convinced of that, as well.

Then as to the complexity and difficulty of the case, it was a complex case. The issues were complex. The defendants and the plaintiffs and the Court struggled with them. In fact, as the parties are aware, I ultimately did not rule on the 203 issue, in part due to the nuances and the complexity of the issues, and the fluidity of the case at that moment in time.

Without engaging in a theoretical survey of whether this case was more complex than other cases in the Court of Chancery, I think it's enough to note that the Court recognizes that by any reasonable standard, this case involved complex legal questions and required acute legal skills on the part of all who participated. For that, like Mr. Clark, Mr. Jalkut, I commend all the attorneys who worked on this case for their superior effort, which was an extremely high quality.

Finally, the standing and ability of plaintiffs' counsel. I need not dwell long on this question. They are well-known to all of us here, and they are all respected for their efforts and for their abilities. In fact, all of the firms on all sides of this litigation appear frequently in this Court. These firms and these lawyers always perform to the very highest standards, standards that we have come to expect as normal for members of the Delaware bar.

Then I turn to the penultimate question: What is the reasonable fee to be awarded in this case for the result obtained? I believe a large fee is clearly merited, for the reasons that I have already alluded to. In determining what constitutes a reasonable fee to the satisfaction of this Court, I again emphasize the collaborative efforts of counsel with the special committee, which ultimately led, collectively and cooperatively, to the extraordinary result for the plaintiff class.

I want to turn for a moment to several other methods for determining fees as a way of cross-checking -- not of determining my outcome, but of cross-checking my outcome.

One is the common fund method. Now, 15 percent, which is the requested amount of the fund in this case, is in the middle of the typical common fund fee awards in Delaware. As the size of settlements increase, however, increase to the level seen in this settlement and some others, courts around the United States have consistently seen fit to award fees at a smaller percentage of the overall settlement. That's recognized in our own decision, by our own Supreme Court, in the Goodrich case as being appropriate and reasonable.

One could also point to the table of settlements and fee awards that is referenced in the Third Circuit's recent Cendant opinion, where the

Court in that table of settlements indicated that in mega-fund recoveries, of which this is an example, the typical common fund percentage awarded is in the range of anywhere from 3 to 7 percent.

So then turn to the load star calculation, simply as a cross-check, not as a determiner of the outcome. Even with a 400 percent premium, the plaintiffs' attorneys would still only receive about $5.6 million. There is no question that the contingent nature of this case and the quality of the attorneys' work suggests that the Court should consider a large multiplier.

To achieve the fee award requested by the plaintiffs, however, the Court would need to believe this matter was worthy of a multiplier approaching 19. The need to apply a multiplier of this size does not support the reasonableness of the fee request in this instance. Even a fee of 10 percent of the settlement fund would require the application of a high multiplier, on the magnitude of 12 or so.

Then turn to my other decision, in the Seinfeld versus Coker matter. In my reasonable review there, I also referenced several factors that

I think should be considered. There, I outlined that a reasonable fee award will incentivize shareholders and their counsel, one, to bring meritorious suits, and two, to litigate those lawsuits efficiently.

Here, a fee of 7-and-a-half percent of the settlement fund, which is approximately $12.3 million, will clearly provide these incentives, in my opinion. There is no reason for the Court to believe that a 7-and-a-half percent fee will provide a disincentive to plaintiffs' attorneys or their clients, or that it will cause them not to bring meritorious suits or litigate them efficiently. In fact, a fee of $12.3 million, roughly, would still be extraordinary when viewed within the context of earlier fee awards before this Court. With the exception of only one case, the Computer Associates decision, this fee would represent the highest fee awarded by this Court during my tenure.

In conclusion, I find and conclude that a fee of 7.5 percent of the settlement fund, which is equal, as I said, to roughly $12.3 million, is fair and reasonable in this Court's view, and under the prevailing dictates of the Sugarland factors.

To reiterate, the $12.3 million fee, inclusive of costs, is supported by the extraordinary results achieved in the lawsuit, the time and effort spent by the attorneys, the complexity of the litigation, the contingent nature of the litigation, and the superior standing of plaintiffs' counsel.

I needn't add more, but I want to be absolutely clear about this, so there is no misunderstanding. This is not driven or determined by a load star analysis. I referred to that only to cross-check my own analysis under Sugarland as to what is an appropriate fee.

In my judgment, the 15 percent that is the amount set in the fee agreement is too high. Under the dictates of both Rule 23 and my requirements under the Rules of Professional Responsibility, I think that is too high. If the fee agreement in a future case were to come to the Court under different circumstances, where the Court had more comfort about the negotiation of that agreement and the circumstances which led to it, it might lead to a result which would give greater weight, accord, greater influence, to the fee retainer agreement. But that, to me, was the ceiling, and that ceiling was too high.

On the other hand, what Mr. Abrams and the special committee urged me to do seemed too low. Even though 5 percent is consistent with the averages in the mega-fund cases that are referred to, for example, in the Cendant Prides case, here I thought that was unduly punishing or unfair to the plaintiffs, given certain other considerations that I told you earlier I had given weight to.

One, this was an extraordinary result. I think everyone deserves credit for it. But they don't deserve to be punished for it because it is extraordinary.

Second, it was prosecuted with speed and efficiency. I'm sensitive to Mr. Grant's point that we don't want to encourage the taking of depositions and the filing of motions and the spinning and churning of wheels simply to generate high fees. In fact, my reaction to Mr. Grant would be if that happened, again, the Court would recognize what is unnecessary in the way of discovery and motion practice. It would not accord it any weight.

Here, the case was prosecuted quickly and efficiently, with a wonderful result for the minority shareholders. But the other factor that I think caused me to think that 5 percent was too low was that here the plaintiffs were admitting, first of all, they were willing to make the fee request include all of their costs. They weren't asking for costs on top of the fee, which is customary in our court, for that to be added on top.

Secondly, they were not asking for this to be applied against the full amount of the recovery or the benefit that one arguably could say they were entitled to have their fee percentage apply against, the full 450 million. Those factors caused me to think that 5 percent was too low. As I said earlier, I thought 15 percent was too high.

I probably made everyone in the courtroom a little unhappy with me. And by my measure, that means I'm probably close to being right. And I don't say that to be flip or light with you. I thought very carefully about this. I do think that in my role of determining what is fair and reasonable at the end of the matter, this is the fair and reasonable fee that I have determined, applying the factors that I'm required to apply.

I've signed and dated the order. I'm

handing it down to the clerk of the Court. If there is nothing further, I wish everyone a good weekend.

(Recess at 4:49 p.m.)

\- - -

INDEX

DEFENDANTS' WITNESSES	Direct	Cross	Redr.	Recr.
Richard A. Jalkut	6	15	--	--
James J. Clark	23	31	46	--

		MARKED	REC'D.
1	--------------------------------	42	46
2	--------------------------------	42	46

\- - -

CERTIFICATE

I, WILLIAM J. DAWSON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 151 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 12th day of April, 2001.

William J. Dawson
Official Court Reporter
of the Chancery Court
State of Delaware

CERTIFICATE OF SERVICE

I hereby certify that, on March 5, 2012, a copy of the foregoing Opening Brief of Appellant Southern Copper Corporation, was caused to served upon the following counsel of record by LexisNexis File & Serve.

Ronald A. Brown, Jr.
Marcus E. Montejo
PRICKETT, JONES & ELLIOTT, PA
1310 N. King St.
Wilmington, DE 19801

S. Mark Hurd
Kevin M. Coen
MORRIS NICHOLS ARSHT & TUNNEL LLP
1201 N. Market St.
P.O. Box 1347
Wilmington, DE 19899

/s/Andrew D. Cordo
Andrew D. Cordo (#4534)