IN THE

# Supreme Court of the State of Delaware

**Nos. 29, 2012 and 30, 2012**

AMERICAS MINING CORPORATION, *et al.*,

*Defendants-Below,*
*Appellants,*

—v.—

MICHAEL THERIAULT, as Trustee for the Theriault Trust,

*Plaintiff-Below,*
*Appellee.*

**CD-ROM VERSION**
**TO BE FILED**

ON APPEAL FROM
CHANCERY COURT
OF THE STATE
OF DELAWARE
HON. LEO E. STRINE, JR.
CONS. C.A. NO. 961-CS

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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.*

ON APPEAL FROM
CHANCERY COURT
OF THE STATE
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HON. LEO E. STRINE, JR.
CONS. C.A. NO. 961-CS

## PLAINTIFF-BELOW, APPELLEE'S COMBINED ANSWERING BRIEF

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## NATURE OF PROCEEDINGS

This is an appeal from a post-trial decision in which the Court of Chancery held that Defendants, the controlling shareholder and affiliate directors of Southern Copper Corporation ("Southern Peru" or the "Company"), breached their fiduciary duty of loyalty to Southern Peru and its minority stockholders by causing Southern Peru to acquire the controller's 99.15% interest in a Mexican mining company for far more than it was worth.

Plaintiff challenged the transaction (the "Merger") derivatively on behalf of Southern Peru. A trial was held in June 2011. After post-trial briefing and argument, the Court of Chancery entered judgment in favor of Plaintiff. The reasons for the judgment were set forth in a 105-page opinion dated October 14, 2011, which was revised on December 20, 2011 (the "Opinion" or "Op."). In the Opinion, the Court of Chancery explained in detail how the trial evidence established that the controller, Grupo México, S.A.B. de C.V. ("Grupo Mexico"), through its subsidiary Americas Mining Corporation ("AMC"), "extracted a deal that was far better than market" from an ineffective special committee (the "Special Committee"). The trial court held that Grupo Mexico received Southern Peru shares with a "real, market-tested value of over $3 billion," in exchange for Minera México, S.A. de C.V. ("Minera"), a private company 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." Op. 3-4.

To remedy Defendants' breaches of loyalty, the Court of Chancery awarded the difference between the value Southern Peru paid for Minera in the Merger ($3.7 billion) and the amount the Court of Chancery determined Minera was worth ($2.4 billion). Thus, the Court of Chancery awarded damages in the amount of $1.347 billion plus pre- and post-judgment interest. Two months later, after briefing and argument, the Court of Chancery also awarded Plaintiff's counsel attorneys' fees and expenses in the amount of 15% of the recovery.

The Revised Final Order and Judgment ("Judgment") was entered on December 29, 2011. On January 20, 2012, the Defendants appealed the Opinion, the Judgment, and all rulings and orders incidental thereto. In their opening brief ("AMC OB"), they claim the Chancellor abused his discretion by (i) excluding a surprise trial witness, (ii) not adopting their suggested valuation of Minera, (iii) not allocating the burden of proof before the trial began, (iv) calculating damages, and (v) awarding excessive attorney fees.

Southern Peru also appeals. Though content to sit on the sidelines while Plaintiff obtained for it a $2 billion judgment against its controlling stockholder, Southern Peru now appeals the Chancellor's award of attorneys' fees to Plaintiff's counsel for securing this result. Southern Peru's opening brief ("SPC OB") simply repeats the same arguments it made below. Southern Peru's appeal characterizes the trial court's rejection of these arguments as an abuse of its discretion.

Both appeals lack merit.

## SUMMARY OF ARGUMENT

### IN RESPONSE TO DEFENDANTS

1. Denied. The trial court exercised sound discretion in excluding a surprise witness from Goldman, Sachs & Co. ("Goldman") on the eve of trial. The new Goldman witness was not available to testify or even to be deposed until weeks after the trial was scheduled to have concluded. Just days before they moved to modify the trial schedule to accommodate this new witness, Defendants told Plaintiff they were content to have "no live Goldman witness." The new Goldman witness had not advised the Special Committee, and therefore would not have offered relevant trial testimony. The Goldman witness who had personally advised the Special Committee was deposed during the litigation, and the videotape of this deposition (which Defendants attended) was part of the trial record. Finally, in post-trial argument before the trial court, Defendants took the position that the "record here is replete with evidence showing what Goldman Sachs did and why."

2. Denied. The trial court exercised sound discretion in rejecting Defendants' "relative valuation" of Minera. The trial court heard the live testimony of Plaintiff's and Defendants' expert witnesses. The trial court carefully and methodically reviewed the record, and made orderly and logical factual findings that Defendants' proposed valuation methodology should be rejected. None of the trial court's findings were arbitrary or capricious, and each was fully supported by the record.

3. Denied. Defendants improperly argue for the first time on appeal that the trial court was required to determine which party bore the burden of proof before trial. To the extent Defendants appeal the trial court's denial of their motion for partial summary judgment to shift the burden of proof to Plaintiff, the trial court exercised sound discretion by denying the motion. In any event, the trial court specifically concluded in its Opinion that "this transaction was unfair however one allocates the burden of persuasion under a preponderance of the evidence standard." Op. at 3-4.

4. Denied. The trial court exercised sound discretion in fashioning a remedy for Defendants' breaches of loyalty. The trial court considered all of the evidence, including the testimony of Plaintiff's expert witness, in calculating a damage award that it repeatedly described as "conservative." *Id.* at 101, 103.

5. Denied. The trial court exercised sound discretion in determining an appropriate award of attorneys' fees and expenses.

**IN RESPONSE TO SOUTHERN PERU**

1. Denied. The trial court exercised sound discretion in applying the well-settled factors under *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980), to determine an appropriate award of attorneys' fees and expenses.

2. Denied. The trial court exercised sound discretion in determining that an award of attorneys' fees and expenses in the amount of 15% of the recovery for Defendants' breaches of loyalty did not constitute a windfall.

3. Denied. The trial court's exercise of sound discretion under *Sugarland* to award attorneys' fees and expenses in the amount of 15% of the recovery in an entire fairness case litigated on an entirely contingent basis is consistent with our Rules of Professional Conduct.

## STATEMENT OF FACTS

### I. THE PARTIES

Southern Peru is a mining company with smelting and refining facilities located in Peru. Op. at 9. Southern Peru produces copper and molybdenum, and small amounts of other metals. *Id*. Before the Merger, Southern Peru had two classes of stock: common shares that were traded on the New York Stock Exchange ("NYSE"); and high-vote "Founders' Shares" owned by Grupo Mexico, Cerro Trading Company, Inc. ("Cerro") and Phelps Dodge Corporation ("Phelps Dodge," and collectively with Grupo Mexico and Cerro the "Founding Stockholders"), which had five votes per share. *Id*. Grupo Mexico owned 43.3 million Founders' Shares, which constituted 54.17% of Southern Peru's outstanding stock and 63.08% of the voting power. Cerro owned 11.4 million Founders' Shares, which constituted 14.2% of Southern Peru's outstanding common stock. Phelps Dodge owned 11.2 million Founders' Shares, which constituted 13.95% of Southern Peru's outstanding common stock. *Id*. at 9-10. At the time of the Merger, Southern Peru was in strong financial condition and virtually debt-free. *Id*. at 10.

Grupo Mexico is a Mexican holding company listed on the Mexican stock exchange. *Id*. at 10. Grupo Mexico is controlled by the Larrea family, and at the time of the Merger, defendant Germán Larrea Mota Velasco ("Germán Larrea") was the Chairman and CEO of Grupo Mexico as well as the Chairman and CEO of Southern Peru. *Id.*

Defendants Germán Larrea, 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 are Grupo Mexico affiliated directors of Southern Peru. *Id*. at 8 n.6.

Minera is a mining company that mines and processes copper, molybdenum, zinc, silver, gold and lead through its Mexico-based mines. *Id*. at 10. Before the Merger, Grupo Mexico owned 99.15% of Minera's stock. *Id*. At the time of the Merger, Minera was mired in financial difficulties. *Id*.; B70; A1916. A physical inspection of its facilities revealed "large pieces of equipment that were parked because they were broken down and there weren't spare parts to repair them." Op. at 10 n.9; B648. For the years leading up to the Merger, Minera stopped "all but critically necessary capital expenditures" to preserve cash. Op. at 10 n.8; B80. Indeed, in the year leading up to the announcement of the Merger, Minera defaulted on its credit facilities, forcing it to restructure its heavy debt load and commit to substantial repayments if metal prices rose. Op. at 27 n.39; *id*. at 85-86; B116.

## II. GRUPO MEXICO'S PROPOSAL AND THE FORMATION OF THE SPECIAL COMMITTEE

On February 3, 2004, Grupo Mexico proposed that Southern Peru acquire its interest in Minera for approximately $3.1 billion of Southern Peru's NYSE-listed stock. Op. at 1 and 11; B4 n.1.

In response to Grupo Mexico's proposal, the Special Committee was established to evaluate the proposal. Op. at 12. The resolution creating the Special Committee provided that the "duty and sole purpose" of the Special Committee was "to evaluate" the Merger. The resolution did not give the Special Committee power to negotiate, nor did it authorize the Special Committee to explore other strategic alternatives. *Id.*; B29.

After certain resignations and appointments, the makeup of the Special Committee as it was finally settled on March 12, 2004 was Harold S. Handelsman ("Handelsman"), Luis Miguel Palomino Bonilla ("Palomino"), Gilberto Perezalonso Cifuentes ("Perezalonso") and Carlos Ruiz Sacristán ("Ruiz"). Op. at 12-13; A1774 at ¶ 15.

Handelsman was Cerro's appointee to the Southern Peru board. Op. at 12; A1957. Cerro is a business owned by the Pritzker family. Op. at 12; A1957. Handelsman has been employed by the Pritzker family since 1978. Op. at 12; A1954. It is undisputed that both Cerro and Phelps Dodge wanted to monetize their investment in Southern Peru. Op. at 29-31; A1986. The Chancellor found that "Cerro wanted to *sell* and *sell then and there*." Op. at 34. Grupo Mexico controlled whether Southern Peru would agree to make the Founders' Shares marketable under applicable securities regulations. *Id.* at 29 and n.46. Handelsman therefore played double-duty: while the Special Committee was negotiating the terms of the Merger, Handelsman was negotiating Cerro's exit from Southern Peru. *Id.* at 30. The Chancellor found that "it is clear that Handelsman knew that registration rights would be part of the deal from the beginning." *Id.* Thus, the Chancellor found that Handelsman "was less than ideally situated to press hard." *Id.* at 33. To the contrary, the Chancellor found that Cerro did not "have a rational incentive to say no to a suboptimal deal if that risked being locked into its investment." *Id.* at 34.

## III. THE SPECIAL COMMITTEE'S CONTROLLED MINDSET

After its formation, the Special Committee retained Latham & Watkins LLP ("Latham") as its legal advisor and Goldman as its financial advisor. Op. at 13. The Special Committee also retained Mexican legal counsel and Anderson & Schwab ("A&S") as a specialized mining consultant to help Goldman with the technical aspects of a mining valuation. *Id.*; A192-98, A1775 at ¶¶ 20, 22.

Notwithstanding the experience and credentials of its members and advisors, the Chancellor found that from its inception, the Special Committee "fell victim to a controlled mindset and allowed Grupo Mexico to dictate the terms and structure of the Merger." Op. at 64. As a result, the Special Committee's "approach to negotiations was stilted and influenced by its uncertainty about whether it was actually empowered to negotiate." *Id*. at 63-64; A1832, A1961-62.

The Special Committee began discussions with Grupo Mexico by asking Grupo Mexico for clarification about, among other things, the pricing of the proposed transaction. Op. at 14; A1839; B41. The Special Committee apparently "did not get the rather clear message that Grupo Mexico thought Minera was worth" approximately $3.1 billion. Op. at 14. In response, on May 7, 2004, Grupo Mexico sent to the Special Committee what the Special Committee considered to be the first "proper" term sheet. *Id*. at 14-15; B43-49.

The May 7 term sheet echoed Grupo Mexico's original proposal, but increased Grupo Mexico's ask from $3.05 billion worth of Southern Peru stock to $3.147 billion. Op. at 14-15. Grupo Mexico also proposed a "floating" exchange ratio, where the number of Southern Peru shares to be issued would be calculated by dividing the equity value of Minera by the 20-day average closing share price of Southern Peru beginning 5 days prior to closing of the Merger. *Id.*; B44. The Chancellor found the structure of the proposal showed Grupo Mexico's focus was on the dollar value of the stock it would receive. Op. at 15.

After receipt of the May 7 term sheet, the Special Committee's advisors conducted due diligence of Minera. *Id*. As part of this process, A&S visited Minera's mines and tested Minera management's projections and operation plans for reasonableness. *Id*. at 15 and 72; B639.

### A. The Standalone Valuation of Minera Could Not Justify the Merger

Goldman was never able to value Minera at anything close to Grupo Mexico's $3.1 billion ask. Op. at 1, 70; A335-42, A413-17. Most of Goldman's valuations in fact pegged Minera's value at less than $2 billion. A336-42, A414-17. Even using Minera's unadjusted management projections Goldman could not value Minera at more than $2.8 billion, no matter what valuation methodology it used. Op. at 78; A299, A414.

Goldman made its first presentation to the Special Committee on June 11, 2004. Op. at 15. Goldman performed various analyses and summed them up in an "Illustrative Give/Get Analysis." A342. The Chancellor found this analysis "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." Op. at 17.

The Defendants concede that Goldman performed a number of financial analyses of Minera to determine its value, including a standalone DCF analysis, a sum-of-the-parts analysis, a contribution analysis, a comparable companies analysis and an ore reserve analysis. *See*, *e.g.*, AMC OB at 4. All of these analyses yielded valuations that were substantially lower than Grupo Mexico's asking price of $3.1 billion. Op. at 78-79. But instead of pushing Grupo Mexico into a range suggested by Goldman's analysis of Minera's fundamental value, the Special Committee engaged in intellectual gymnastics to eventually accede to Grupo Mexico's $3.1 billion demand, which the Chancellor found "*never really changed*." *Id*. at 71 (italics in original); *see also id*. at 11, 14-15, 24, and 28; B4, B44.

The record is clear that the Special Committee's focus was "on finding a way to get the terms of the Merger structure proposed by Grupo Mexico to make sense." Op. at 70. Rather than actually negotiating with Grupo Mexico, the Special Committee looked for a way to be "comforted" while saying yes to the deal. *Id*. at 19. The Chancellor found that "[r]ather than . . . do[ing] 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 [Grupo Mexico]." *Id*. at 2 and 70.

In sum, while Grupo Mexico's $3.1 billion demand was a very "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," *id*. at 1, the Special Committee never concluded that Minera was actually worth $3.1 billion. *Id*. at 70. The cash value of the "give" was known and not at issue. *Id*. The Defendants conceded at trial "whatever block of stock Southern Peru gave to Grupo Mexico could have been sold for its market price in American currency, i.e., dollars." *Id*. at 76; *see also id*. at 17 n.19. "Grupo Mexico itself relied on the market price of Southern Peru all along," *id.* at 76, asking again and again to be paid approximately $3.1 billion worth of Southern Peru stock, measured at its market price. *Id*. Yet the Special Committee abandoned a focus on whether Southern Peru would get $3.1 billion in value in exchange. *Id*. at 1-2.

### B. The Mystical Relative Valuation

The Special Committee instead embarked on a "relative valuation" approach that involved comparing the DCF values of Southern Peru and Minera. *Id*. at 1-2 and 5. On June 23, 2004, Goldman informed the Special Committee that Southern Peru's DCF value ($2.06 billion) was approximately $1.1 billion shy of Southern Peru's actual NYSE market capitalization at that time. *Id*. at 19; A373. The Special Committee did not use this valuation gap to question the relative valuation methodology. Instead, the Special Committee was "comforted" by the analysis, which allowed them to conclude that Southern Peru stock (the "give") was not really worth its market value of $3.1 billion. Op. at 19; A1977. In other words, the Special Committee was "comforted" by the fact that they could devalue the deal currency and justify paying more for Minera than they originally thought they should. Op. at 21; A1860, A1974-75.

The Chancellor found that 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." Op. at 71. "Blithely" is an apt description. The Special Committee jumped right to a relative valuation comparing a DCF value of Southern Peru to a DCF value of Minera without regard to whether it was truly making an "apples-to-apples" comparison of the two companies. *Id*. at 72.

Minera was cash-strapped and could not pay its bills. Southern Peru was thriving and nearly debt-free. These facts were slighted by the Special Committee. *Id*. at 2. Minera's cash flows were optimized to make Minera an attractive acquisition target. *Id*. at 72; B38; A2173-74. Grupo Mexico hired two mining engineering firms, Winters, Dorsey & Company ("Winters") and Mintec, Inc. ("Mintec") to analyze and optimize Minera's life-of-mine plans and mining operations. Op. at 72. When A&S knocked down the most aggressive of Winters' and Mintec's work on Minera, Mintec again revised its analyses to produce a new optimization plan for Minera's Cananea mine ("Alternative 3") that added material value to Minera's projections. *Id*. at 72-73; A411, A540.

No comparable effort was made on behalf of Southern Peru. Op. at 73; B642. No additional analyses were performed on Southern Peru despite A&S advising 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." Op. at 73; B53.

Accordingly, the Chancellor found "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 engaged in a similar exercise regarding its own company's value despite using a relative valuation approach, where that mattered." Op. at 74.

### C. The Fixed-Exchange Ratio

Whereas Grupo Mexico repeatedly adjusted the number of shares it demanded to account for Southern Peru's stock price movement, the Special Committee inexplicably counter-proposed a fixed number of Southern Peru shares in the Merger. *Id*. at 22-23; B55. Handelsman testified that "it was the consensus of the [Special Committee] that a floating exchange rate was a nonstarter." Op. at 23; A1973. The Special Committee members testified that the fixed exchange ratio was necessary to protect Southern Peru's stockholders if the price of Southern Peru's stock went down. Op. at 23. But all of the Special Committee members believed that copper prices (and thus Southern Peru's stock price) were headed up, not down. *Id*. at 79; A1866. Indeed, the Chancellor found the Special Committee members' testimony difficult to square with their purported simultaneous "bullishness about the copper market in 2004." Op. at 24.

### D. Grupo Mexico Sticks To Its $3.1 Billion Demand

In late July or early August, Grupo Mexico responded to the Special Committee's counterproposal by demanding more than 80 million shares. This demand was again worth approximately $3.1 billion, "basically the same place where Grupo Mexico had started." *Id*. On September 8, 2004, Grupo Mexico demanded 67 million shares, which were, again, worth approximately \$3.1 billion. *Id*. at 25; B290-91.

On September 15, 2004, Goldman updated its analysis and made another presentation to the Special Committee. Op. at 25; A483-518. In addition to the relative DCF analyses of Southern Peru and Minera, the presentation also included a multiples analysis at different EBITDA scenarios. Op. at 25; A506. The multiples analysis was a comparison of Southern Peru's and Minera's market-based equity values, as derived from multiples of Southern Peru's 2004 and 2005 estimated (or "E") EBITDA. Op. at 25. The Special Committee's willingness to value Minera, a non-public Mexican mining company in financial distress, using Southern Peru's hard-earned NYSE market multiple was, as the trial court found, "a charitable move." *Id*. at 75. Moreover, the multiple "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," *id*. at 25 n.36, which was materially higher than Southern Peru's market-derived multiple. The Chancellor referred to this contrived multiple as yet "another dollop of multiple crème fraiche." *Id*. at 3.

The range of shares to be issued at the 2004E EBITDA multiple (5.0x) was 44 to 54 million shares of Southern Peru stock. A506. The range of shares to be issued at the 2005E EBITDA multiple (6.3x) was 61 to 72 million shares of Southern Peru stock. Op. at 25; A506. 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. Op. at 25.

To narrow the gap, Goldman shifted from using Southern Peru's 2004E EBITDA multiple to its 2005E EBITDA multiple (*id*. at 74) and proposed a new term sheet to Grupo Mexico on September 23, 2004. *Id*. at 26; B333-338. 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). Op. at 26; B333.

The Special Committee's new proposal also contained two terms intended to protect the minority stockholders of Southern Peru: (1) a 20% collar around the purchase price; and (2) a "majority of the minority" voting provision. Op. at 26; B333-34. The proposal also called for Minera's net debt to be capped at \$1.105 billion at closing, and various corporate governance provisions. Op. at 26; B334.

### E. The Parties Make A Deal

On September 30, 2004, Grupo Mexico responded to the Special Committee's new proposed term sheet by insisting on 67 million shares, rejecting any collar on the fixed-exchange ratio, and rejecting the "majority of the minority" vote provision. Op. at 26; B393-94. Grupo Mexico accepted the Special Committee's proposed debt limit, but the Chancellor found that this 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." Op. at 27; *see also* B116 ("when the prices of copper, zinc and silver exceed $0.88 per pound, $0.485 per pound, and $5.00 per ounce, respectively, we will pay an amount equal to 75% of the excess cash flow generated by the sales of such metals at the higher metal price, which will be applied first, to amortization of Tranche B, then to the amortization of Tranche A"); *id*. (Minera was also contractually obligated to pay 100% of any net working surplus capital that exceeded $240 million towards its debt).

The parties then reached agreement on certain corporate governance provisions to be included in the terms of the Merger. Op. at 27. Notably, Grupo Mexico did not regard any of the provisions as differing from the "status quo," *id*. at 86; B285, and the Chancellor found that none of these provisions "provided any benefit above the protections of default law that were economically meaningful enough to close the material dollar value gap that existed." Op. at 27.

On October 5, 2004, members of the Special Committee met with Grupo Mexico to work out the final deal. *Id*.; *see also* A588. 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 demands. Op. at 27-28; A1781 at ¶ 43. The Chancellor found that "the Special Committee justified paying a higher price through a series of economic contortions." Op. at 28. Specifically, the Special Committee was able to "bridge the gap" 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. *Id*. In addition, of course, $54 million of the $100 million dividend went right into Grupo Mexico's pocket. *Id*. at 28 and 86; A1994. Based on Southern Peru's October 5, 2004 closing price, 67 million Southern Peru shares had a market value of $3.56 billion, which was higher than Grupo Mexico requested in its February 2004 proposal or May 7 term sheet. Op. at 28.

On October 8, 2004, the Special Committee gave up on its demand for a "majority of the minority" vote provision and agreed to the approval of two-thirds of the outstanding common stock of Southern Peru. *Id*. at 29; *see also* A1782 at ¶ 45. This meant that Grupo Mexico could obtain a two-thirds vote if either Cerro or Phelps Dodge voted in favor of the Merger. Op. at 29. Simultaneously with Grupo Mexico closing out these remaining deal terms, Germán Larrea also agreed with Handelsman that Southern Peru would grant Cerro registration rights if Cerro agreed to vote for the Merger. *Id*. at 32. Handelsman responded by suggesting Cerro would vote with the Special Committee's recommendation. *Id*. With the terms of the Merger already in place, Grupo agreed. *Id*. *See*, *generally*, B403-28. Shortly before the parties agreed on the final deal terms, Grupo Mexico apparently realized that it actually owned 99.15% of Minera rather than 98.84%, and bumped up the price by an additional 200,000 shares without objection. Op. at 34.

### F. The Special Committee Approves the Merger

On October 21, 2004, the Special Committee met to consider whether to recommend that the Board approve the Merger. *Id*. At that meeting, Goldman made a final presentation to the Special Committee. *Id*.; A519-55. No standalone equity value of Minera was included in the October 21 presentation. Op. at 35; A519-55. Instead, the presentation included pages of matrices within matrices, portraying hypothetical numbers of Southern Peru shares to be issued to Grupo Mexico for Minera under various relative DCF analyses and multiples analyses at different EBITDA scenarios. Op. at 35; A546-49. The DCF analyses generated a range of 47.2 million to 87.8 million shares to be issued in the Merger. Op. at 35; A546-49. Based on Southern Peru's October 18, 2004 stock price of $46.41, this translated to $2.19 billion to $4.07 billion in cash value. Op. at 35.

Goldman's multiples analysis generated a range of 42 million to 56 million shares to be issued in the Merger based on an annualized 2004 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). *Id*. at 36; A549. Notably, the 2004E EBITDA multiples did not support the terms of the Merger. Op. at 36. Instead, 67.2 million shares fell at the higher end of the range using Southern Peru's 2005E EBITDA multiples, far above the median for comparable companies identified by Goldman (4.8x). A536.

After Goldman made its presentation, the Special Committee voted 3-0 to recommend the Merger to the Board. Op. at 36. At the last-minute suggestion of Goldman, Handelsman decided to recuse himself from the Special Committee vote. The Chancellor found that this late recusal could not remove his hands from the "dough of the now fully baked deal." *Id*. at 36-37.

The Board then unanimously approved the Merger and Southern Peru entered into the Merger Agreement. *Id*. at 37. Also on October 21, 2004, Cerro and Southern Peru entered into an agreement granting Cerro its registration rights. *Id*. at 31; B422-28.

### G. The Special Committee Does Nothing Between the October 2004 Signing and April 2005 Closing Despite Strong Evidence that the Basis for Its Recommendation Was Flawed

There were five months between the date the Merger was signed and the date of the stockholder vote on the Merger. The Special Committee negotiated for the freedom to change its recommendation in favor of the Merger if its fiduciary duties so required, and it had Cerro's 14% vote tied to any withdrawal of its recommendation. Op. at 88. But the Special Committee treated the Merger as a foregone conclusion. *Id.* And on December 22, 2004, Grupo Mexico assured passage of the Merger when it negotiated a registration rights agreement with Phelps Dodge 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. *Id*. at 32; B460-65.

The Chancellor found strong evidence that several bases for the Special Committee's recommendation of the Merger proved false by the time of the stockholder vote on the Merger (Op. at 88-93):

- Southern Peru's stock price was steadily rising in the months leading up to the stockholder vote. *Id*. at 39 and 89. By March 2005, Southern Peru stock was trading more than 20% higher than at the time of signing. *Id*. at 39. Having failed to negotiate either a floating exchange ratio or a collar, the Merger consideration to be paid to Grupo Mexico had therefore risen by approximately $600 million. *Id*.
- Southern Peru had also smashed through its 2004E EBITDA projections. *Id*. at 39 and 89. Southern Peru's actual 2004 EBITDA was $1.005 billion, 37% higher and almost $300 million more than the projections used by Goldman. *Id*. at 40. 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. *Id*. By contrast, Minera's

> actual 2004 EBITDA was $681 million, 0.8% less than the optimized projections used by Goldman. *Id*.

The Chancellor found "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." *Id*. at 89-90. Indeed, the Chancellor found that the "inaccuracy of Southern Peru's estimated 2004 EBITDA should have given the Special Committee serious pause." *Id*. at 40. The Chancellor explained:

> 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.

*Id*.

The Chancellor further criticized the Special Committee for failing to get a fairness update from Goldman before the closing, because Cerro had agreed to vote against the Merger if the Special Committee changed its recommendation. *Id*. at 41. Because the Special Committee failed to obtain a majority of the minority vote requirement, the two-thirds vote requirement was only meaningful if the Special Committee took the recommendation process seriously. *Id*. However, the Chancellor found that there was "no evidence of such a serious examination" (*id*. at 42) and, to the contrary, that "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." *Id*. at 87.

### H. Grupo Mexico Materially Misleads Southern Peru Investors, Who Vote to Approve the Transaction

Grupo Mexico, on the other hand, was very active during the period between the signing of the Merger Agreement and the stockholder vote on the Merger. The Chancellor found that Grupo Mexico materially misled investors in two ways. First, in November 2004, before Southern Peru filed its preliminary proxy, Grupo Mexico inflated its copper production projections in roadshow materials presented to investors, bankers and other members of the financial community. *Id*. at 61. Grupo Mexico did this so that it could represent to the market that a "Key Term" of the Merger was that Minera was being valued at a 5.6x 2005E EBITDA rather than the much higher median multiple of 6.4x that Goldman relied on in its financial analysis. Op. at 62; *compare* B433 *with* A549. The production levels presented by Grupo Mexico to the market were not only higher than A&S's adjusted projections for Minera, but were also higher than Minera's own unadjusted projections. *Id*.; *compare* B439 *with* A541. "Put bluntly, Grupo Mexico went out to investors with information that made the total mix of information available to stockholders materially misleading." Op. at 62.

Second, the Chancellor found that the Proxy Statement failed to disclose material information. Specifically, the Chancellor found that the Proxy Statement failed to disclose:

- a material step in the negotiation process that revealed "how deep the value gap was in real cash terms." *Id*. at 58-59.
- the standalone implied equity values for Minera generated by 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. *Id*. at 59.
- the standalone implied equity values for either Southern Peru or Minera that were implied by the inputs used in Goldman's relative DCF analysis underlying the fairness opinion. *Id*. at 59.
- the full range of EBITDA multiples for Southern Peru that Goldman actually used in its contribution analysis. *Id*. at 60.

The Chancellor found that the omissions regarding standalone values and implied equity values obscured the fact that the implied equity value of Southern Peru that Goldman used to anchor the relative valuation of Minera was nearly $2 billion less than Southern Peru's actual market value at the time of signing. *Id*. at 59-60. The Chancellor also found that the omissions regarding EBITDA multiples obscured material facts from stockholders. Although the Proxy Statement listed a Wall Street consensus EV/2005E EBITDA multiple for Southern Peru of 5.5x in Goldman's comparable companies chart, it did not disclose the full range of EV/2005E EBITDA multiples for Southern Peru that Goldman actually used in its contribution analysis. *Id*. at 60. *Compare* A598 *with* A549. The bottom of Goldman's multiples range was 5.6x, Southern Peru's multiple listed in the comparable companies analysis adjusted for the $100 million dividend. A549. This 5.6x multiple was much higher than the median comparable companies multiple, which was listed at 4.8x. Op. at 60; A536. The range of multiples actually used by Goldman then proceeded northward, to 6.3x, 6.4x and 6.5x, with a median of 6.4. Op. at 60; A549.

At a stockholder meeting held March 28, 2005, the stockholders of Southern Peru voted to approve the Merger. Op. at 42. At the time of closing, 67.2 million shares of Southern Peru had a market value of $3.75 billion. *Id*. Notably, if the Special Committee had simply accepted Grupo Mexico's May 7, 2004 term sheet, Southern Peru would have issued approximately 14.5 million fewer shares to purchase Minera than it did after the Special Committee was finished "negotiating." *Id*. at 88, n.176

## IV. THE LITIGATION

This derivative action challenging the Merger was commenced in December 2004, after Southern Peru filed its preliminary proxy materials for the Merger with the Securities and Exchange Commission. A69. By agreement of the parties, depositions of relevant fact witnesses were taken between October 2009 and February 2010. In accordance with the stipulated scheduling order entered by the Court of Chancery, fact discovery closed on March 1, 2010, and expert discovery closed on June 18, 2010. On June 30, 2010, Plaintiff moved for partial summary judgment on the fairness of the price paid for Minera. A40. Defendants cross-moved for partial summary judgment to shift the burden of proof to Plaintiff. A34. Both motions were denied. Op. at 43.

On February 10, 2011, the parties stipulated to a trial schedule providing for a weeklong trial beginning June 20, 2011. The trial schedule also required the parties to file a pre-trial order by 3:00 p.m. on June 14, 2011. Twenty-four hours before the pre-trial order was due, Defendants for the first time proposed that they would call James Del Favero ("Del Favero") of Goldman as a trial witness, though Del Favero was unavailable to be deposed before or to testify at trial during the dates set by the Court of Chancery five months earlier. As detailed below, Plaintiff objected to this new proposed witness for a number of reasons. At the pre-trial conference held on June 15, 2011, the Chancellor denied Defendants' request to include Del Favero as a trial witness.

The trial lasted from June 21 until June 24, 2011. Following trial the parties submitted post-trial briefing. Post-trial arguments were heard by the Court of Chancery on July 12, 2011. The Chancellor invited further letter submissions regarding various issues raised during post-trial arguments. The parties obliged with submissions on July 15, 2011. B707-22.

On October 14, 2011, the Chancellor issued his post-trial opinion, and issued the revised Opinion on December 20, 2011 (correcting a mathematical error). The Opinion found that the Merger was not entirely fair to Southern Peru, that Defendants had breached their fiduciary duties, and found damages of $1.347 billion, plus pre- and post-judgment interest. The Opinion held each of the Grupo Mexico affiliated directors jointly and severally liable for the judgment.

## V. THE FEE AWARD

After meeting and conferring with Defendants as directed by the Chancellor, Plaintiff's counsel petitioned the Court of Chancery for attorneys' fees and expenses. Plaintiff's counsel sought 22.5% of the judgment including interest as a reasonable fee. Defendants and Southern Peru opposed the fee request, and recommended that a fee of $13.5 million (approximately 1% of the judgment excluding interest) "would be more than enough to compensate and incentivize plaintiffs' counsel." A2699. After argument, the Chancellor considered each of the five *Sugarland* factors, and ultimately awarded Plaintiff's counsel a fee of 15% of the judgment. A2854.

The Chancellor agreed with Defendants' and Southern Peru's observation that the fee was a lot of money. A2855. But he forcefully rejected their characterization of the award as a "windfall." As the Chancellor explained:

> 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.

A2860:16-2861:5.

## VI. FINAL JUDGMENT AND APPEAL

On December 29, 2011, the Court of Chancery entered the Judgment. On January 20, 2012, Defendants and Southern Peru each filed a Notice of Appeal. The appeals were consolidated by Order dated February 21, 2012. Defendants and Southern Peru filed their opening briefs on March 5, 2012.

## ARGUMENT

### I. THE COURT OF CHANCERY EXERCISED SOUND DISCRETION IN EXCLUDING JAMES DEL FAVERO AS A TRIAL WITNESS

#### A. Question Presented

Did the Court of Chancery exercise sound discretion by refusing to modify the stipulated trial schedule in order to permit a new Goldman witness to testify weeks after the trial was scheduled to have concluded, when a video-taped deposition of the Special Committee's actual Goldman advisor was already in the record?

#### B. Scope of Review

The decision whether to admit or exclude evidence rests in the trial court's discretion, and the trial court's decision to exclude evidence may be reversed only for abuse of that discretion. *Capano v. State*, 781 A.2d 556, 586 (Del. 2001). A trial court's decision to disallow a party to amend the trial schedule in order to call late-identified witnesses unavailable during the scheduled trial dates is likewise reviewed for abuse of discretion. *Goode v. Bayhealth Medical Center, Inc.*, 931 A.2d 437, 2007 WL 2050761, at *3 (Del. July 18, 2007) (TABLE). "A trial judge has broad discretion to control scheduling and the court's docket. Scheduling and pretrial orders govern discovery by establishing deadlines and also guide trial management." *Id.* "When a party does not comply with the discovery rules and pre-trial orders, it is not an abuse of discretion for the trial judge to exclude testimony not properly identified." *Id.*

#### C. Merits of Argument

The Chancellor properly exercised his discretion by refusing to modify the stipulated trial schedule and allow Del Favero to testify for three reasons. <u>First</u>, as Defendants themselves argued post-trial, the record was "replete" with relevant Goldman testimony. *See* A2394 ("the record here is replete with evidence showing what Goldman Sachs did and why"). <u>Second</u>, Del Favero's testimony would not have been relevant. <u>Third</u>, Del Favero was not available even to be ***deposed***, let alone to offer trial testimony, until ***after live testimony of every other trial witness concluded***. Thus Defendants' request to modify the long-standing trial dates would have significantly prejudiced Plaintiff's ability to present his case at trial for no reason. The trial court did not abuse its discretion.

### 1. Defendants Omit from Their Brief Material Facts Respecting the Exclusion of Del Favero

Defendants mischaracterize the entire sequence of events leading up to the pre-trial conference.

Plaintiff obtained commissions for three of the six members of the Goldman team identified in Goldman's pitch book to the Special Committee. A48, A76. Plaintiff also obtained a commission for a Goldman 30(b)(6) witness. A54. By agreement, Plaintiff deposed Martin Sanchez ("Sanchez") because he was the "head member of the [Goldman] team" that advised the Special Committee. A2035:10-15. Sanchez was the "guy" the Special Committee spoke to most. *Id*. Though Sanchez was deposed on October 21, 2009, he had not worked at Goldman since 2006. A757. Thus, at the time of Sanchez's deposition, Defendants were fully aware that neither they nor Goldman could control whether Sanchez would appear at trial.

The trial schedule was stipulated to by the parties and set by order of the Court of Chancery on February 10, 2011. However, it was not until May 31, 2011 that Defendants first alerted Plaintiff that Sanchez may not appear at trial. A1804. On appeal, Defendants claim that they immediately began a search for an alternative Goldman witness, but that witness was not Del Favero. Rather, on June 9, 2011, when Defendants finally informed Plaintiff that Sanchez was "definitely not showing up," they proposed that they would put forward Martin Werner ("Werner"), another member of the Special Committee advisory team, for deposition and trial testimony. A76, A1808. Plaintiff sought to confirm that he would be able to depose Werner before trial, to which Defendants responded, "Of course. I am not optimistic that we will get him to trial, <u>in which case we will have no live Goldman witness</u>." *Id*. (emphasis added).

On Monday, June 13, 2011, just twenty-four hours before the pre-trial stipulation was due and one week before trial was scheduled to commence, Defendants proposed for the first time that they call Del Favero. A1809. Unlike Sanchez or Werner, Del Favero was not offered to testify to the advice Goldman provided to the Special Committee, but rather to Goldman's internal processes relating to issuing fairness opinions. A1798:15-19 ("We know that Your Honor had commented on at the summary judgment hearing the fairness opinion review process at Goldman Sachs and had some questions about that. We believe that he would be in a position to answer those questions.").

Del Favero was neither available to testify at trial nor to be deposed before trial. A1798. Instead, Defendants suggested that Del Favero be deposed after every other trial witness was scheduled to testify, and that the trial schedule be modified to allow Del Favero to take the stand sometime ***in July***, weeks after the trial was scheduled to conclude. *Id*.

At the pre-trial conference, Plaintiff objected to Defendants' proposal for a number of reasons. First, Plaintiff argued that allowing Del Favero to be deposed and then testify after every other trial witness had testified and the trial was all but concluded would have been completely unfair. A1805. Second, Plaintiff objected to Del Favero's testimony because it was not relevant to the issues presented in the trial as Del Favero was not a member of the Goldman team that advised the Special Committee, and had only attended a single Special Committee meeting, during which Goldman did nothing but pitch its services. *Id*.; A76; B36-37. Third, Plaintiff objected to the subject matter to which Del Favero would testify because it was the very subject matter into which counsel for Goldman and the Special Committee blocked Plaintiff from inquiring at Sanchez's deposition. A793:17-794:22. Defendants' counsel attended Sanchez's deposition and asked questions, but similarly did not inquire into Goldman's "fairness opinion review process." A752, A921-923.

The Chancellor agreed that Del Favero's inability to testify during the scheduled trial dates, or even to be deposed before the trial began, would unfairly prejudice Plaintiff. A1800. To the extent Defendants now claim that a Goldman witness was central to their defense in light of the Chancellor's comments made at the December 2010 summary judgment hearing, the Chancellor noted that if his comments had caused Defendants to reconsider their witness selection,

> then I expect that you would have promptly identified this gentleman as a relevant witness and made him available for deposition. It's simply not fair to the plaintiffs.
>
> Because the other thing about people who want to be witnesses is they get deposed, and when they get deposed, you learn things, and you might ask other people or shape your trial strategy differently. It just adds an unfair element of surprise. . . .
>
> * * *
>
> So I'll watch the video and we'll deal with it then. . . .

A1800:21-22.

Notably, Plaintiff did not object to Del Favero's testimony on the grounds that Defendants had waited until such a late date to suggest that he testify. Plaintiff had no objection to Werner's testimony, A1808, and in fact had no objection to the testimony of Raul Jacob, who was first proposed by Defendants as a trial witness just two weeks before trial. A1811-12. Plaintiff took Mr. Jacob's deposition just six days before trial, and his testimony was admitted at trial with no objection. A1804.

### 2. Argument

The Chancellor's decision to exclude Del Favero as a trial witness and not to modify the trial schedule was not an abuse of discretion. This decision was clearly based in conscience and reason, as opposed to capricious or arbitrary action. As this Court made clear nearly 60 years ago, where a

> court has not exceeded the bounds of reason in view of the circumstances, and has not so ignored recognized rules of law or practice, so as to produce injustice, its legal discretion has not been abused; for the question is not whether the reviewing court agrees with the court below, but rather whether it believes that the judicial mind in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made.

*Pitts v. White*, 109 A.2d 786, 788 (Del. 1954) (citations omitted). Here, the Chancellor's decision was well reasoned, ignored no rules of law or practice and worked no injustice on Defendants.

The cases Defendants rely upon to support their argument are completely inapposite. In both *Drejka v. Hitchens Tire Services Inc.*, 15 A.3d 1221 (Del. 2010) and *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011) this Court held that the trial court abused its discretion by excluding plaintiff's ***expert*** testimony. In *Drejka*, this resulted in a judgment against the plaintiff because without an expert, she could not make a *prima facie* claim of negligence. 15 A.3d at 1223-24. In *Sheehan*, the court precluded plaintiff from laying a foundation upon which he could build his case for proximate cause. 15 A.3d at 1254-55. By contrast, here the Chancellor properly refused to allow Del Favero to offer belated ***factual*** testimony, which would have added little or nothing of value to the trial record, at great strategic prejudice to Plaintiff.

<u>First</u>, the trial court did not "exclude[] trial testimony from the Special Committee's financial advisor." AMC OB at 13. Sanchez was deposed, and the Chancellor specifically stated he would "watch the video" of the deposition. Indeed, Defendants argued to the Chancellor ***after trial*** that "the record here is replete with evidence showing what Goldman Sachs did and

why." A2394; *compare* AMC OB at 18 (arguing the Chancellor excluded "important testimony" about Goldman's analyses). As Defendants previously admitted, the record contained ample Goldman testimony for the Chancellor to rule at trial.

Second, Del Favero's testimony was not "directly and vitally relevant to the most critical issue" at trial. *Sheehan*, 15 A.3d at 1254. Defendants assert that Del Favero "could have answered the questions the trial court identified." AMC OB at 14 and 18. However, Del Favero never advised the Special Committee in its evaluation of Grupo Mexico's proposal and he attended just a single Special Committee meeting—and then, not to advise the Special Committee, but to pitch Goldman's services. B36-37. Defendants have failed to show how Del Favero's testimony would have had any probative value. Moreover, during discovery, Goldman and the Special Committee vigorously objected to Plaintiff's attempts to take testimony regarding Goldman's typical practices in evaluating similar transactions. A1817-18. Defendants stood with Goldman in solidarity over the (lack of) relevance of this testimony at that time. A762:6-8. Del Favero's proffered testimony regarding the internal operations of Goldman's "fairness committee" thus represented a significant 11th-hour departure from Defendants' prior positions.

Third, Defendants sought to modify the stipulated trial schedule by requesting that the trial proceed on June 20-24, but then be continued ***for weeks*** until "sometime" in July; and that Del Favero be deposed after every other trial witness had testified. Defendants would then have the ability to use Del Favero to sweep up and rehabilitate the rest of Defendants' witnesses. The Chancellor appropriately ruled this was "simply not fair to plaintiffs." A1800. Among other reasons, the Chancellor correctly noted that when witnesses "get deposed, you learn things, and you might ask other people or shape your trial strategy differently." *Id.* Moreover, as the Chancellor properly reasoned, if Defendants had truly been concerned about having a live Goldman witness testify at trial, they could "have promptly identified this gentleman as a relevant witness and made him available for deposition." A1800. Indeed, just six days earlier, Defendants said they would be content to let the Court of Chancery rely on the videotaped deposition of Sanchez. A1808. Defendants simply ignore the actual record when they argue that Plaintiff and the Chancellor provided no basis to exclude Del Favero from belatedly testifying at trial. AMC OB at 16.

The Chancellor plainly did not abuse his discretion in refusing to alter the trial schedule to allow Del Favero to testify after trial. Accordingly, the Chancellor's ruling must be affirmed.

## II. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION BY REJECTING DEFENDANTS' "RELATIVE VALUATION" OF MINERA

### A. Question Presented

Did the Court of Chancery act within its discretion by concluding that Defendants' "relative valuation" of Minera failed to establish that the Merger was entirely fair to Southern Peru?

### B. Scope of Review

This Court imparts a high level of deference to the Court of Chancery's valuation findings. *Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 174-75 (Del. 1991). The Court of Chancery abuses its discretion only when its valuation is clearly wrong. *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 219 (Del. 2010). This high level of deference is a "formidable standard" and is given because the Court of Chancery "has developed an expertise in cases of this type." *Id.* (quoting *In the Matter of the Appraisal of Shell Oil Co.*, 607 A.2d 1213, 1219 (Del. 1992)). So long as the Court of Chancery's determination of value is based on the application of recognized valuation standards, its acceptance of one expert's opinion, to the exclusion of another will not be disturbed. *Kahn v. Lynch Commn'cns Sys., Inc.*, 669 A.2d 79, 87-88 (Del. 1995) ("*Lynch II*"). The Court of Chancery, however, is entitled to draw its own conclusions from the evidence when faced with differing methodologies or opinions. *Id.*; *Kahn v. Household*, 591 A.2d at 175.

### C. Merits of Argument

On appeal, Defendants rehash their contention that the only way to compare the values of Minera and Southern Peru is by using their "relative valuation" methodology. AMC OB at 19-24. Defendants claim that the Chancellor rejected their relative valuation of Minera without an evidentiary basis and that the Chancellor did not understand Goldman's analysis. *Id.* at 20. These arguments are without merit. In making them, not only do Defendants ignore the Chancellor's factual findings and make baseless attacks on the Chancellor for "acting as his own expert witness," they also ignore the fact that they put an expert witness on the stand at trial to explain their "relative valuation" of Minera to the Chancellor. The Chancellor heard competing experts testify live before him and rejected Defendants' proposed valuation methodology. Defendants have no basis for arguing that this conclusion did not rest solidly on the trial record or that it was otherwise an abuse of discretion.

### 1. The Chancellor's Rejection of Defendants' "Relative Valuation" of Minera Was Supported Fully By the Record

The Chancellor's rejection of Defendants' "relative valuation" of Minera was the result of an orderly and logical deductive process supported fully by the record.

Defendants claim that "Goldman first used a DCF model to calculate a value for Minera based on projections of Minera's annual cash flows for the years 2004 through 2013." AMC OB at 20. This is not true. Goldman's DCF models for Minera were based on projections prepared by Minera management using life-of-mine plans prepared by Winters and Mintec. Op. at 72; A330, A411, A500, A540. Throughout 2004, Mintec continued to optimize Minera's life-of-mine plans to add material value to Minera. Op. at 72; A411, A500, A540. The projections ran the full life of the mines, which extended in some instances for more than 50 years. A330, A411, A500, A540. As a consequence, the DCF models were fundamentally different than typical DCF models based on 5 year projections, in that there was substantial value in the "tail" years. The long-term copper price was the key driver of value for the "tail" years and was the pricing assumption for years 2008 until the close of the mines. A542. In rendering its fairness opinion, Goldman used its "best estimate" of a $0.90 per pound long-term copper price (Op. at 82; A542), which was the median of Goldman's Wallstreet Research Commodities Price Forecast (A554), and the long-term copper price used by Southern Peru for internal planning purposes at the time of the Merger and for several years after the Merger. Op. at 82; B524.

Defendants claim that "[o]nce the same type of information for [Southern Peru] became available, Goldman performed the same analysis on [Southern Peru]." AMC OB at 20. Again, this misstates the record. Handelsman testified that the Special Committee asked Goldman to perform a DCF on Southern Peru because there was more than a billion dollar value gap between the "give" and the "get" of Grupo Mexico's proposal. A1975:21-1976:6. The Special Committee, however, did not bother to obtain the "same type of information" for Southern Peru that was used to value Minera.

Southern Peru's projections were prepared by management. A369, A419, A542. They were based on life-of-mine plans that had not been certified by an independent mining engineer since 1998 and 1999. A2141:10-13. The Special Committee was even advised that "there [was] no doubt" the very same optimizations that were being performed on Minera's mines could be performed on Southern Peru's mines and would "add value at lower capital expenditures." Op. at 73; B53. Still, contrary to Defendants' assertions (AMC OB at 23-24), no similar analyses were performed for Southern Peru. Op. at 73. Instead, the Special Committee continued to rely on management projections, with "relatively minor" adjustments by A&S. Op. at 73. The Special Committee continued to rely on management's projections for Southern Peru even after it became clear that the projections were far too conservative. *Id*. at 74. For 2004, while Minera hit its projected mark, Southern Peru outperformed its projections by 37%. *Id*. at 40. The disparity in performance between the two companies only grew in 2005. Indeed, in the first-quarter of 2005 alone Southern Peru earned 52% of its projected 2005 EBITDA. *Id*. at 40.

The Chancellor weighed the evidence presented at trial and set forth in detail why it did "not persuade [him] that the Special Committee relied on truly equal inputs for its analyses of the two companies." *Id*. at 72. To further support his finding the Chancellor dug even deeper into the record and independently reviewed Southern Peru's post-Merger annual reports submitted as joint exhibits at trial. *Id*. at 92. The Chancellor compared the actual performance of the Southern Peru and Minera businesses to the assumptions relied upon by Goldman in its final presentation to the Special Committee. *Id*.; A541, A543. The Chancellor's independent review of this information confirmed his "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." Op. at 92.

There was nothing arbitrary and capricious about the Chancellor's rejection of Defendants' "relative valuation" of Minera. *Compare* AMC OB at 22. Nor did the Chancellor "reach outside the trial record . . . to conclude that the relative valuation process was flawed." *Compare id*. Rather, the Chancellor carefully and methodically reviewed the record to make his factual finding that the data inputs used for Southern Peru in Defendants' relative valuation model for Minera were unreliable. Op. at 72. Nowhere in the Opinion does the Chancellor suggest that a relative valuation is an invalid valuation methodology in and of itself. To the contrary, as he fully explains (*id*. at 7), that "relative valuation" was nothing more than a comparison of the DCF values of Minera and Southern Peru, and therefore, only as reliable as the input data used for each company. *See Doft & Co. v. Travelocity.com Inc.*, 2004 WL 5366732, at *5 (Del. Ch.) ("The utility of a DCF analysis, however, depends on the validity and reasonableness of the data relied upon."); *S. Muoio & Co. LLC v. Hallmark Entm't Inv. Co.*, 2011 WL 863007, at *18 (Del. Ch.), *aff'd*, 35 A.3d 419 (Del. 2011) ("Even if the generally-preferred DCF valuation approach is used, it is only reliable when it can be verified by alternative methods to DCF or by real world valuations."); *compare* A969 (Plaintiff's expert using multiple generally accepted valuation methodologies to derive a value for Minera).

Having found Defendants' relative valuation of Minera unreliable, it was well within the Chancellor's discretion to give no weight to it and to rely entirely on Plaintiff's expert's opinion. *Lynch II*, 669 A.2d at 87. Instead, the Chancellor exercised his discretion to craft a valuation model using more conservative inputs than those proposed by Plaintiff. Op. at 85 n.168 ("Out of conservatism, I adopt a different valuation for remedy purposes, but, if I had to make a binary choice, I would favor [plaintiff's expert's] DCF analysis as more reliable . . . ."); *accord Kahn v. Household*, 591 A.2d at 175 ("when faced with disparate valuation evidence from experts for both parties, [the Court of Chancery] was entitled to draw its own conclusions from the evidence"). Defendants criticize the Chancellor for acting as his own "expert witness," but they seem to forget that the Chancellor is a judge of equity in an expert business court. *Golden Telecom*, 11 A.3d at 219. The Chancellor critically analyzed the record and made determinations supported by credible evidence. Thus, his rejection of Defendants' relative valuation of Minera must be affirmed.

### 2. Defendants' Expert Witness Fully Explained Defendants' "Relative Valuation" Methodology

Defendants argue that the Chancellor would have understood that "relative valuation" was the "appropriate way" to compare the values of Southern Peru and Minera if a Goldman witness had testified. AMC OB at 20. Defendants overlook that their own expert witness testified at trial. Indeed, Prof. Schwartz used the very "same relative valuation methodology as Goldman did." Op. at 80 n.159.

Defendants explained in their pre-trial opening brief that Prof. Schwartz's job at trial was to "explain that the most reliable way to compare the value of [Southern Peru] and Minera for purposes of the Merger was to conduct a relative valuation." A1645. Prof. Schwartz's testimony would demonstrate that "based on relative valuations of Minera and [Southern Peru] using a reasonable range of copper prices . . . the results uniformly show that the Merger was fair to [Southern Peru] and its stockholders." *Id*.

Post-trial, Defendants posited that "<u>as explained at trial</u>, among the chief reasons the Special Committee used a relative valuation was that it allowed [Southern Peru] and Minera to be compared using the same set of assumptions, *i.e.*, an apples-to-apples comparison. Therefore, even if copper prices fluctuated, the value of each company relative to each other (and as a part of a merged entity) could be reasonably estimated." A2334 (emphasis added). In fact, an assumed higher copper price was at the very heart of Defendants' valuation of Minera. At trial, Prof. Schwartz testified that the difference between Southern Peru's DCF value and its market value was that the market was valuing Southern Peru's stock "at an implied copper price of $1.30." A2279:5-16 ("if I use $1.30, it gives me the market price of [Southern Peru] and it gives me a market price of Minera Mexico which still makes the transaction fair."). In other words, it was fair to "give" Grupo Mexico $3.7 billion of Southern Peru stock because Minera's DCF value, using an assumed long-term copper price of $1.30, implied a "get" of more than $3.7 billion.

Amazingly, Defendants make the same argument on appeal—that "the market's view of future copper price increases" accounted for the difference between Southern Peru's DCF value and its market capitalization—without even mentioning their expert witness. AMC OB at 21. The reason is clear. The Chancellor agreed with Plaintiff that Defendants' expert's opinion was academic bunk. Op. at 82 ("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.").

Indeed, in addition to the unreliable data inputs for Southern Peru, the Chancellor recognized other fundamental flaws in Defendants' "relative valuation" of Minera. <u>First</u>, "there [was] no evidence in the record that <u>anyone</u> at the time of the Merger contemplated a $1.30 long-term copper price." *Id.* at 84 (emphasis added). Southern Peru's own public filings referenced $0.90 per pound as the appropriate long-term copper price. B524. <u>Second</u>, the Special Committee did "no serious analysis of the differential effect, if any, on Southern Peru and Minera of higher copper prices." Op. at 83. Defendants' relative valuation model assumed that production would remain constant as long-term copper prices increased. This was not so. *Id.* at n.166. Southern Peru's public filings evidenced that when long-term copper prices increased from $0.90 to $1.261 per pound, Southern Peru's reserves increased by 116% while Minera's increased by only 44%. A2360-61; *compare* B510 *with* B508. Thus, Defendants' "relative valuation" of Minera made assumptions without any factual basis relating to how a change in long-term copper prices would affect the values of the two companies. Op. at 83; A2288:13-23. The Chancellor's expert focus on this level of factual detail makes abundantly clear that the he fully understood Defendants' "relative valuation" methodology, and that his rejection of this methodology here was well supported by the record. Accordingly, the Chancellor's decision to reject Defendants' proposed valuation must be affirmed.

### 3. The Chancellor's Criticism of Goldman Was Deserved

Having lost the battle of the experts, Defendants fabricate an issue for appeal, arguing the Chancellor must have misunderstood Goldman's work because of his "unfounded criticism" of it. AMC OB at 22. Defendants offer the Chancellor's criticism of Goldman's multiples-based valuation as a "prime example." *Id.* at 23 n.15. On appeal, Defendants present this valuation as nothing more than applying Southern Peru's 2005E EBITDA multiple to Minera to derive a value. *Id.* But, as discussed above, the multiple at issue was not Southern Peru's market EBITDA multiple, it was a multiple internally derived using the same dismal projections used in Goldman's relative valuation model—that is, "dollop[s] of multiple crème fraiche." Op. at 2. The Chancellor plainly understood this. Tellingly, Southern Peru's 2005 market EBITDA multiple indicated Southern Peru was overpaying for Minera by at least 12.5 million shares. A549. The Chancellor found that the Special Committee members should have known well before the Merger closed that Southern Peru had vastly exceeded its projected performance for 2004 and was on course to blow through its 2005 projected performance within just two quarters. Op. at 89-90. Yet, the Special Committee never did anything to revisit their recommendation of the Merger.

Defendants' other examples of the Chancellor's "unfounded criticism" are just as dubious. Indeed, it is Defendants' suggestion that the inputs into Goldman's relative valuation model were equal that is "unfounded." Moreover, Defendants pretend that Minera was on equal footing with Southern Peru to rehash another argument rejected by the Chancellor: that copper companies were trading at a premium to their DCF values. AMC OB at 21; *but see* A2361-65 (discussing Plaintiff's expert's conclusions that Minera would not trade in the market at a premium to its DCF value and that Grupo Mexico could not sell Minera in the market at a premium to its DCF value).

Even if some copper companies were trading at a premium, Defendants presented no evidence that Minera would sell for a premium to its DCF value. Southern Peru was a money-making machine, operating on an extraordinary low cost basis and able to turn a profit on even depressed copper prices. *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 307 (S.D. Texas 2008) ("Even in the midst of this prolonged copper price down-turn, the SPCC operations remained profitable—this being another indication of the quality of the Peruvian operation.”). In contrast, Minera’s operations were decimated in 2004. “[S]uppliers were repossessing trucks in the mines.” A1916:16-19. “There were large pieces of equipment that were parked because they were broken down and there weren’t spare parts to repair them.” B648. Tellingly, the life-of-mine plans for Minera optimized by Winters and Mintec were forward-looking and required significant capital expenditures to execute. Op. at 73-74. As Handelsman testified, “the whole premise of the transaction was to use the fisc of Southern Peru and its pristine balance sheet to develop the mining assets of Minera Mexico.” A2037:11-15. Thus, the Chancellor’s characterization of Goldman’s decision to apply Southern Peru’s multiple to Minera as “questionable in the first place” is fully supported by the record. Op. at 75.

In short, the Chancellor’s criticism of Goldman for adopting a “relative valuation” model for valuing Minera was entirely well-founded. Each of the Chancellor’s factual findings set out in his 105-page Opinion is well supported by the record, and his ultimate determinations were logical and well reasoned. Accordingly, his Opinion below must be affirmed.

## III. THE COURT OF CHANCERY PROPERLY ALLOCATED THE BURDEN OF PROOF TO DEFENDANTS

### A. Question Presented

Did the Court of Chancery properly allocate the burden of proof to Defendants?

### B. Scope of Review

This Court precludes a party from attacking a judgment on a theory which was not advanced in the court below. *Danby v. Osteopathic Hospital Ass'n of Del.*, 104 A.2d 903 (Del. 1954); *see also* Sup. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review . . . .").

This Court reviews a trial court's denial of a motion for summary judgment for abuse of discretion. *Empire Financial Services, Inc. v. Bank of New York*, 900 A.2d 92, 97 (Del. 2006). A trial court's denial of summary judgment is entitled to a high level of deference and is, therefore, rarely disturbed. *Id.*; *see also Brunswick Corp. v. Bowl-Mor Co., Inc.*, 297 A.2d 67, 69 (Del. 1972) ("application for summary judgment is always addressed to the discretion of the Trial Judge, and ordinarily the denial of such a motion . . . will not be disturbed on appeal except in rare circumstances, absent which the denial of summary judgment is not appealable.").

### C. Merits of Argument

Defendants make three arguments relating to the Court of Chancery's allocation of the burden of proof in this entire fairness case. First, Defendants argue (for the first time) that the Court of Chancery erred because it did not definitively allocate the burden of proof before trial. Second, Defendants seem to argue that the Court of Chancery erred by not granting their cross-motion for partial summary judgment to shift the burden of proof to Plaintiff before trial. Third, Defendants argue that the Court of Chancery's failure to allocate the burden of proof to Plaintiff before trial constitutes a reversible error. Each of Defendants' arguments is without merit and the Court of Chancery's allocation of the burden of proof to Defendants should be affirmed.

### 1. Defendants' Argument That the Burden of Proof Must Be Allocated Before Trial Was Not Fairly Raised Below and Should Not Be Entertained on Appeal

Defendants never argued below that the Court of Chancery must allocate the burden of proof before trial. Defendants make a number of citations suggesting the issue was preserved for appeal, but an examination of each of those citations demonstrates the contrary. The first citation (A1165-1220) is to Defendants' briefing in connection with cross-motions for summary judgment—that is, the citation refers to Defendants' entire answering/opening brief. Notwithstanding the vagueness of the citation, nowhere in the entire brief do Defendants argue that the burden of proof must be allocated before trial. In Defendants' own words, they argued that "[b]ased on the undisputed facts, the Court should hold that the burden is on [Plaintiff] to prove that the Merger was not entirely fair rather than on the Defendants to prove that the Merger was entirely fair." A1200. The second citation (A1330-52) simply refers to Defendants' entire reply brief in connection with the cross-motions for summary judgment. Here again, what Defendants argued in their own words is that "Plaintiff has not shown any genuine issues of material fact that would preclude shifting the burden." A1338.

Their motion to shift the burden of proof to Plaintiff was denied because the Court of Chancery disagreed that the relevant facts were "undisputed." As discussed below, this was an exercise of sound discretion.

The third citation (A1600-49), in similar fashion, references Defendants' entire pre-trial opening brief. Again, nowhere in their pre-trial opening brief do Defendants argue that the Court of Chancery must allocate the burden of proof before trial. Again, to the contrary, what Defendants argued in their own words was "[g]iven that Plaintiff cannot establish a material disclosure claim and given the existence of a well functioning Special Committee, Plaintiff, for each of these independent reasons, has the burden of proving that the Merger was not fair." A1625. Indeed, Defendants claimed this is exactly what they would "demonstrate at trial." A1625. Nothing in Defendants' pre-trial opening brief indicated that Defendants believed the Court of Chancery must allocate the burden of proof before trial. Defendants did not object at the summary judgment stage when the Court indicated it would wait to decide this issue until the trial. A1496 ("you know, at a trial, I may give you the burden shift"). Defendants did not raise the issue at the pre-trial conference, nor is the issue even referenced in the Joint Pretrial Stipulation and Order. A1769-93.

Defendants' remaining citations are to their entire post-trial opening brief (A2314-45), their entire post-trial answering brief (A2383-97), and the Opinion (Ex. A at 62). Obviously, raising the argument for the first time post-trial would have been just as untimely as raising the argument for the first time on appeal, but even there, nowhere do Defendants argue that the Court of Chancery should have shifted the burden of proof before trial.

In sum, the record is clear that Defendants did not fairly present to the Court of Chancery the argument that the burden of proof <u>must</u> be allocated before trial. Quite the opposite, Defendants' pre-trial briefing reveals that not only did Defendants accept that the allocation of the burden of proof would not be determined before trial, but that it was their intent to "demonstrate" <u>at trial</u> that the burden should be shifted to Plaintiff. A1625. Defendants plainly understood the "rules of the game." Only now, after a decisive and costly loss, are Defendants trying to change them. This Court should not entertain this new, unpreserved argument.

### 2. The Court of Chancery's Denial of Defendants' Cross-Motion For Summary Judgment to Shift the Burden of Proof to Plaintiff Was an Exercise of Sound Discretion

Defendants confusingly argue that the Court of Chancery erred by not shifting the burden of proof to Plaintiff before trial while simultaneously claiming that the Court of Chancery's decision not to do so was based on reasoning set forth in the Chancellor's post-trial opinion. AMC OB 27-28. The argument is nonsense. The only sensible way to understand Defendants' question on appeal is to look to the arguments Defendants actually made before trial. As discussed above, what Defendants argued before trial in their motion for partial summary judgment was that the "undisputed facts" warranted a shift of the burden of proof to Plaintiff.

The Court of Chancery exercised its sound discretion and denied Defendants' partial summary judgment motion. As the Chancellor explained, "I have too many questions to conclude that under the *Tremont* standard, this special committee works a burden shift." A1496. Defendants claim that, at the summary judgment stage, the Chancellor determined that the Special Committee "was not a mere illusion." AMC OB at 27. But again, that mischaracterizes the record. At the summary judgment stage, all the Chancellor decided was that he did not "believe the record contains evidence supporting a rational inference of a non-exculpated breach of fiduciary duty claim" against the Special Committee members. A1504. That is, the Special Committee was not grossly negligent in discharging its duties.

A1499. That is a far cry from the "exercise[] of real bargaining power" required under *Tremont* to shift the burden of proof. *Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997).

The summary judgment record reflects the Chancellor's questions and concerns with regard to the Special Committee. Among others were:

- the lack of a stand-alone valuation of the target (A1443, A1496);
- the failure to value the acquisition currency's value (A1496);
- that only 14 of 24 minutes of purported special committee meetings had been produced, and none were produced for the critical months leading up to and for the approval of the Merger (A1487, A1496);
- the timing of Grupo Mexico's agreement to provide Cerro with registration rights (A1463-65, A1496); and
- whether the disclosures to stockholders respecting the Merger were materially misleading (A1493).

The Court of Chancery went so far as to say that "there were some fairly basic questions, <u>fundamental questions</u>, about whether the special committee . . . actually simulated genuine arm's-length bargaining." A1497-98 (emphasis added). A determination on the burden shift cannot be made on such an unresolved factual record. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1120 (Del. 1994) ("*Lynch I*") ("A condition precedent to finding that the burden of proving entire fairness has shifted in an interested merger transaction is a careful judicial analysis of the factual circumstances of each case."). Thus, in a sound exercise of its discretion, the Chancellor denied Defendants' motion. As he explained:

> I'm not making any prejudgment. I just think one of the great things about the trial is I get to hear from everybody. I get to hear in a full-bodied way about what they took into account. I don't have to narrowly draw inferences in favor of one or the other. I can have people explain to me. I'm much more comfortable on even the burden shift issue doing it.

A1498:14-21.

Requiring a fuller record before making a determination of which party will bear the burden of proof is plainly within the Court of Chancery's sound discretion and cannot possibly constitute reversible error. *See Brunswick*, 297 A.2d at 69 ("[I]f summary judgment upon any particular issue is denied on the ground that a trial on the merits is desirable to determine the issue, the Order denying summary judgment on that issue is clearly not appealable."). Accordingly, the Chancellor's denial of Defendants' motion for partial summary judgment to shift the burden to Plaintiff before trial must be affirmed.

### 3. Even if the Court of Chancery Erred with Respect to the Allocation of the Burden of Proof, Any Such Error Was Harmless

The Chancellor could not have been clearer when stating that which party had the burden of proof had no bearing on his trial verdict. "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." Op. at 3-4; *see also id*. at 56 ("Regardless of who bears the burden, I conclude that the Merger was unfair to Southern Peru and its stockholders."); *id*. at 62 ("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."). Thus, in this case, where the evidence of unfairness was so overwhelming, who shouldered the burden of proof at trial was meaningless.

Defendants argue the Chancellor committed reversible error because (i) had Defendants known they had the burden of proof before trial, they would have tried harder at trial; (ii) if Plaintiff had the burden of proof, the Chancellor would have realized that Plaintiff's case was a "complete failure"; and, most ironically (iii) failing to allocate the burden of proof to Plaintiff on these facts would discourage the use of special committees (apparently including ineffective special committees). Plainly, none of these reasons constitutes reversible error.

The idea that Defendants were prejudiced by not knowing they had the burden of proof going into trial is ridiculous. It is unimaginable that with virtually inexhaustible resources, including an army of attorneys hailing from among the most prestigious firms in the world, Defendants struggled with "the most basic ground rules that were essential to determining, among other things, which evidence to present and which witnesses to call." AMC OB at 28. Defendants—like many controlling stockholders before them—went into trial knowing that the burden of proving the entire fairness of the Merger may ultimately fall on them. At stake were billions of dollars in damages. It is unfathomable that Defendants' top-rate legal counsel would be paralyzed with uncertainty in determining how much effort to exert in defending this action. But even if Defendants were so cavalier as to not put what they believed to be their best defense on at trial, such a grave lapse in judgment does not create reversible error.

But actually, at trial, the parties adapted seamlessly to the Chancellor's deferring the question of who bore the burden of proof by how they agreed to structure the trial. By agreement of the parties, each witness other than Plaintiff's expert was called in direct examination by Defendants, and then was cross-examined by Plaintiff. Indeed, Defendants fail to cite a single strategic decision they might have made differently at trial had they known in advance that they shouldered the burden of proof.

In any event, regardless of who bore the burden of proof at trial, Plaintiff in fact affirmatively proved that:

- the Special Committee was not authorized to "negotiate" the transaction, Op. at 63-64;
- a key member of the Special Committee was materially conflicted, *id*. at 65-68;
- the Special Committee rationalized an unfair transaction rather than negotiate on behalf of the minority stockholders, *id*. 72-76;
- Defendants materially misled Southern Peru stockholders in the Company's proxy materials, *id*. at 56-62; and
- the Merger price was wildly unfair to Southern Peru and its minority stockholders, *id*. at 104.

In sum, there is nothing in the Chancellor's 105-page Opinion that indicates in any way that a different outcome would have resulted if either Plaintiff had been allocated the burden of proof, or Defendants had been told in advance that they bore this burden. As the Chancellor stated, this is not a case where the evidence of fairness or unfairness stood in equipoise. Rather, he held that the evidence of unfairness was overwhelming, rendering the question of who had the burden of proof at trial irrelevant to the outcome. As such, even if the Chancellor erred by not allocating the burden of proof before trial, that error can only be harmless.

Finally, Defendants argue, apparently without irony, that absent a reversal of the Chancellor's allocation of the burden of proof to them, companies will be dissuaded from forming special committees. This argument apparently includes committees that do nothing more than rationalize unfair deals with controlling stockholders, commit to deals which pay the controlling stockholder hundreds of millions of dollars more than they even asked for, and allow their investors to be materially misled in approving such transactions.

It is not the policy of Delaware to encourage the use of ineffective special committees. Defendants do not, nor should they, get a burden shift because of the "mere existence of an independent committee." *Lynch I*, 638 A.2d at 1117; *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1179 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000). Rather, the special committee must demonstrate real bargaining power. *Tremont*, 694 A.2d at 429; *see also Lynch I*, 638 A.2d at 1120-21 (reversing burden shift where special committee rejected three initial offers from controlling stockholder but ultimately surrendered to controlling stockholder's demands). Here, the Chancellor found that the Special Committee demonstrated no such power. A2840. Instead, the Chancellor found that the Special Committee relied on "innovative valuation moves" to justify the wildly unfair terms of the Merger dictated by a controlling stockholder. Op. at 2; A2840. Burden shifts which would condone such ineffective special committees should certainly not be encouraged.

Accordingly, the Chancellor's decision to place the burden of proof on Defendants should be affirmed.

## IV. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN FASHIONING A REMEDY

### A. Question Presented

Did the Court of Chancery act well within its considerable discretion in fashioning a remedy following trial in this entire fairness case?

### B. Scope of Review

Determinations of remedy and/or damages by the Court of Chancery after trial in an entire fairness case are reviewed only for abuse of discretion. *International Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000). The Court of Chancery's discretion in this situation is particularly broad. "[T]he Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983); *see also Bomarko*, 766 A.2d at 440 ("In determining damages, the powers of the Court of Chancery are very broad in fashioning equitable and monetary relief under the entire fairness standard as may be appropriate, including rescissory damages."). As such, this Court will "defer substantially to the discretion of the trial court in determining the proper remedy—in this case the damages—to be awarded for a found violation of the duty of loyalty by a corporate fiduciary." *Bomarko*, 766 A.2d at 439. Moreover, fixing a remedy in an entire fairness case is different from the more exacting process of arriving at "fair value" in an appraisal case. *Id*. at 440-441; *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996). "The Court of Chancery has greater discretion when fashioning an award of damages in an action for breach of the duty of loyalty than it would when assessing fair value in an appraisal action." *Bomarko*, 766 A.2d at 441.

### C. Merits of Argument

The Court of Chancery devoted twelve pages of its written Opinion to explaining the applicable remedy/damage standards and its reasoning and rationale for its ultimate damage award. Op. at 93-105. After articulating and evaluating the parties' contentions, the Court of Chancery determined to "craft . . . 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. In other words, I will take the difference between this fair price and the market value of 67.2 million shares of Southern Peru stock as of the Merger date." *Id*. at 97-98 (footnote omitted). Clearly, there was no abuse of discretion in awarding damages based on the difference in value between what was paid (the "give") and the value of what was received (the "get").

Consistent with the evidence presented, the Chancellor valued the "give" of 67.2 million shares of Southern Peru stock at its market price. *Id*. To determine the value of what Southern Peru received in exchange (Minera, *i.e.*, the "get"), the Court of Chancery balanced three values in equal proportion: (1) Plaintiff's expert's DCF valuation (after first modifying this value to make it more favorable to Defendants); (2) the value implied in the Special Committee's 52 million share counter-offer made in July 2004; and (3) the value derived from a comparable companies valuation methodology. *Id*. at 99-100. The Chancellor repeatedly articulated that in selecting these data points and in making necessary modifications to them, he made "conservative," "defendant-friendly assumptions." *Id*. at 101, 103.

Despite the voluminous record and the Court's 105-page Opinion, Defendants contend that "Plaintiff failed to offer any evidence proving damages." AMC OB at 30. This argument is hard to fathom. Plaintiff argued at trial that Southern Peru's overpayment for Minera should be measured by the difference between the market value of the 67.2 million shares paid and the DCF value of Minera. Op. at 93. Plaintiff offered expert testimony to establish the value of the overpayment, which testimony was largely followed by the Court of Chancery (after making "conservative" modifications) in crafting a damages remedy. *Id.* at 100-101.

Defendants also complain that the Court of Chancery abused its discretion by factoring in the value of Minera implied in the Special Committee's July 2004 counter-offer as one of the data points in valuing Minera. AMC OB at 31. The Court of Chancery's reason for including this data point was logical and fair and plainly not an abuse of discretion:

> 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.

A2840:1-18.

Moreover, the value of Minera under this data point ($2.388 billion) was not materially different from the values under the other two data points the Court considered ($2.452 billion and $2.45 billion). Op. at 100-104. As such, its inclusion did not have a material impact on the ultimate damage award.

In sum, the Court of Chancery clearly did not abuse its broad discretion in fixing damages after trial in this entire fairness case.

## V. THE COURT OF CHANCERY EXERCISED SOUND DISCRETION IN AWARDING PLAINTIFF'S COUNSEL'S FEES AND EXPENSES

### A. Question Presented

Did the Court of Chancery exercise sound discretion in awarding Plaintiff's counsel attorneys' fees and expenses in the amount of fifteen percent (15%) of the judgment?

### B. Scope of Review

This Court reviews an award of attorneys' fees for abuse of discretion. *Loral Space & Commc'ns., Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 870 (Del. 2009) (affirming post-trial award of attorneys' fees). In awarding attorneys' fees the Court of Chancery considers the five *Sugarland* factors: "1) the results achieved; 2) the time and effort of counsel; 3) the complexity of the issues; 4) whether counsel were working on a contingent fee basis; and 5) counsel's standing and ability." *Id*. So long as the Court of Chancery considers these factors in exercising its discretion, this Court will not find an abuse of discretion and will not reverse or modify the Court of Chancery's fee award. *Id.*

### C. Merits of Argument

Though Southern Peru did nothing to obtain the benefit of the judgment, it claims that it should keep more than 99% of it, lest Plaintiff's counsel receive a "windfall." Actually, if Southern Peru's argument is accepted on appeal and Southern Peru keeps virtually all of the $2 billion benefit that Plaintiff's efforts have created, it is Southern Peru that will have received a "windfall." Southern Peru was content to sit on the sidelines and watch Plaintiff recover more than $2 billion from its controlling shareholder. As a result of the trial, in essence, $2 billion "fell into [Southern Peru's] lap[]." *Cf*. A2869. Southern Peru does not devote a single page of its brief to preserving the $2 billion judgment; rather, it notes that it "does not take a position on the merits of the case." SPC OB at 2. But Southern Peru now jumps into the game only to criticize Plaintiff for not recovering more and to minimize the fees Plaintiff's counsel should be paid for achieving this historic recovery on Southern Peru's behalf.

The premise of Southern Peru's argument, however, is demonstrably false. Southern Peru argues that the "Court of Chancery gave essentially dispositive weight to the amount of benefit without adequately considering the other *Sugarland* factors." SPC OB at 18. The record clearly demonstrates that the Chancellor considered each of the five *Sugarland* factors carefully before concluding that a 15% fee award reasonably compensated Plaintiff's counsel here. The Chancellor had watched first-hand while Plaintiff's counsel achieved this historic result: convincing a "skeptical" judge, defeating "major league" defense counsel, and "invest[ing] six years on this case on an entirely contingent basis" to ultimately create "an immense economic benefit." A2847, A2860-61.

While Southern Peru claims that the Chancellor gave "dispositive weight" to the size of the benefit, SPC OB at 3, Southern Peru instead urges that Plaintiff's counsel's "lodestar" be elevated to a position that is completely unsupported by Delaware law. The Chancellor knew quite well that the fee it awarded amounted to "approximately $35,000 per hour, if you look at it that way." A2855:21-23. But while Southern Peru accuses the Chancellor of making only "*pro forma* reference to most of the *Sugarland* factors," SPC OB at 3, in fact Southern Peru only pays lip service to the first *Sugarland* factor—the size of the benefit—while repeating no less than eight times in 35 pages that the fee amounts to $35,000 per hour.[1] Southern Peru repeats this mantra despite acknowledging (as it must) that "the size of the benefit conferred by the underlying litigation has traditionally received the most weight in [the *Sugarland*] analysis." *Id*. at 3.

Finally, Southern Peru cites the Chancellor's prior criticisms of "declining percentages" for fees in large cases, *id*. at 28-29 n.11, and argues, nonsensically, that the Chancellor "erred in failing to apply correctly" such an analysis. *Id*. at 28. In fact, the Chancellor <u>did</u> apply a declining percentage here, and the Chancellor's decision <u>not</u> to award a fee consistent with his prior statements about fees in large, post-trial damages cases demonstrates that he carefully and conscientiously applied the law to the facts before him in crafting an appropriate and fair fee. *Compare* A2671 ("If some plaintiff's lawyer goes to trial and wins a $10 billion recovery, I will say right now, that's when I am most likely to award 33 percent."). The Chancellor's fee award was certainly not a "straight application of a 'percentage of the fund,'" SPC OB at 2, but rather a reasoned application of each of the *Sugarland* factors.

At bottom, while Defendants and Southern Peru may disagree with the relative significance that the Court of Chancery assigned to each of the

[1] SPC OB at 1, 3, 12, 14, 19, 22 & n.9, 25, 31, 32. Defendants also repeat this refrain four times in their much shorter fee argument. AMC Br. at 2, 32, 33, 34.

*Sugarland* factors, the Chancellor clearly considered each factor in an orderly, reasoned manner. His fee ruling was therefore not an abuse of discretion. This Court is not called upon to substitute its judgment for the Court of Chancery. The fee award should be affirmed.

#### 1. The Chancellor Properly Exercised His Discretion in Making the Fee Award by Appropriately Considering and Weighing Each of the *Sugarland* Factors

The Chancellor considered and applied each of the *Sugarland* factors in a thoughtful and reasonable manner. In rendering his decision on the fee award, the Chancellor began with well-settled principles:

> 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. . . . And determining the percentage of the fund to award is a matter within the Court's discretion.
>
> The aptly-named *Sugarland* factor[s], perhaps never more aptly-named than today, tell us to look at the benefit achieved, the difficulty and complexity of the litigation, the effort ex pended, 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.

A2841:9-2842:8. *See also* SPC OB at 12 (acknowledging the Chancellor's consideration of the *Sugarland* factors).

The Court of Chancery then proceeded to discuss its consideration of each of the *Sugarland* factors, both individually and collectively, which resulted in its decision to award Plaintiff's counsel attorneys' fees and expenses in the amount of 15% of the amount of the judgment.

##### a. The Benefit Achieved

With regard to the first of the *Sugarland* factors, the benefit achieved, the Chancellor found that "[t]he plaintiffs here indisputably prosecuted this action through trial and secured an immense economic benefit for Southern Peru," and that "anything that was achieved . . . by this litigation [was] by these plaintiffs." A2847:7-2848:20. *See also* A2798:4-5 ("the company doesn't get this benefit without the plaintiff's lawyers"), A2823:14-16 ("there's a huge corporate benefit that's perfectly in accordance with the board's own demonstrated stock buyback program").

The benefit created by Plaintiff's efforts here is obviously enormous. Including interest, the benefit achieved through the litigation amounts to more than $2 billion. Post-judgment interest accrues at more than $212,000 per day. And the large damage award is not merely reflective of the size of the deal. A2786:12-17. *Compare* SPC OB at 25-26 (citing cases in which "the size of the supposed benefit is largely a product of the size of the transaction"). Rather, Plaintiff established at trial that Southern Peru had agreed to overpay its controlling shareholder ***by more than fifty percent*** ($3.7 billion compared to $2.4 billion). As the trial court held, "this isn't small and this isn't monitoring. This isn't a case where it's rounding, where the plaintiffs share credit." A2856; *compare In re Cox Commc'ns, Inc. S'holder Litig.*, 879 A.2d 604, 609-612 (Del. Ch. 2005) (cited at SPC OB 25) (describing shared credit "Kabuki Dance"). In making his award, the Chancellor exercised his broad discretion and appropriately considered "the whole benefit" achieved. A2846:5-6.

Among other things, Defendants take issue with the fee including pre-judgment interest because, in their view, Plaintiff took too long to win at trial. AMC OB 32-33. But the Chancellor considered the totality of the facts and circumstances, including his criticism of the slow pace of the litigation, in making the fee award. *See* A2854:19-2855:2 ("I'm not going to do what Mr. Jenkins says and exclude interest altogether. I get that argument . . . 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."). The Chancellor ignored no rule of law in exercising his broad discretion, and in fact, Defendants offer no legal support at all for their contention that the Chancellor should not have included pre-judgment interest in his determination of the benefit achieved. The Chancellor's decision was not arbitrary or capricious, but rather was "the product of a logical and deductive reasoning process." *Chicago Milwaukee Corp. v. Eisenberg*, 560 A.2d 489, 1989 WL 27743, at *1 (Del. 1989) (TABLE).

While Southern Peru and Defendants concede the benefit achieved is the most important *Sugarland* factor (SPC OB at 3; AMC OB at 33), they attempt to downplay the size of the benefit. For its part, Southern Peru asserts that the judgment is not a common fund because the Chancellor gave the Defendants the option to satisfy the judgment by the payment of cash or the return or cancellation of stock. In doing so, Southern Peru ignores the Chancellor's reasoning and the record entirely.

The Chancellor described Defendants' payment option as "trying to give the defendants an efficient way to satisfy the judgment, not then have them use it to make arguments like this." A2782:21-23. As the Chancellor explained, "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. . . ." A2841:15-21, *see also* A2782:9-10 ("It's a fund of stock and I gave them charity. I mean, I can take that back."). But never mind the Chancellor's actual reasoning, Southern Peru asks this Court to find an abuse of discretion because, in their unsupported view of corporate finance, "a return of stock creates different economic effects than a cash award." SPC OB 18-19. The Chancellor considered the argument below, along with evidence that Southern Peru regularly spends large sums of money to repurchase stock at market prices, and appropriately rejected it. As he explained:

> 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.

A2842:17-A2843:3. The Chancellor's consideration of the benefit achieved for Southern Peru was plainly well-reasoned and supported by the record and therefore an appropriate exercise of discretion.

Still without any legal support, Defendants repeat their argument made below that the benefit achieved here should only be measured in terms of the minority shareholders' interest in the recovery. AMC OB at 32. Far from "ignor[ing]" this argument, *id.*, the Chancellor appropriately considered and rejected this argument because it is not supported by the law:

> 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.

A2844:11-24; *see also Sugarland*, 420 A.2d at 147 ("results accomplished for the benefit of all shareholders . . . is the common yardstick by which a plaintiff's counsel is compensated in a successful derivative action.") (internal quotations omitted).

The Chancellor's rejection of Defendants' "look-through" approach to the recovery in this derivative action is supported by more than three-quarters of a century of case law. *See*, *e.g.*, *In re Emerson Radio S'holder Derivative Litig.*, 2011 WL 1135006, at *4 (Del. Ch.) (holding that plaintiffs were entitled to fees and expenses based on the full derivative recovery); *Carlson v. Hallinan*, 925 A.2d 506, 544 (Del. Ch. 2006) (same); *Wilderman v. Wilderman*, 328 A.2d 456, 458-59 (Del. Ch. 1974) (rejecting look through approach to awarding fees in derivative action); *Levien v. Sinclair Oil Corp.*, 1975 WL 1952, at *3 (Del. Ch.) (refusing to treat a multi-million dollar derivative judgment as only a recovery of the minorities' 3%); *Taormina v. Taormina Corp.*, 78 A.2d 473, 476 (Del. Ch. 1951) ("The relief to be obtained in a derivative action is relief to the corporation in which all stockholders, whether guilty or innocent of the wrongs complained of, shall share indirectly."); *Keenan v. Eshleman*, 2 A.2d 904, 912 (Del. 1938) (court will not permit recovery in derivative case to be diminished by an amount in proportion to defendants stockholdings); *see also* A2667-71. As this Court stated long-ago, disregarding the corporate form in the context of a derivative action "would tend to weaken, if not to destroy, the efficacy of a stockholder's action to correct a corporate wrong. . . ." *Keenan*, 2 A.2d at 912.

In line with this bedrock principle of Delaware corporate law and policy, the Chancellor further noted the inconsistency that would exist if "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." A2846:7-15. The Chancellor fully considered all aspects of Defendants' argument, and his determination to reject it is plainly well reasoned and consistent with well-settled law and therefore an appropriate exercise of discretion.

#### b. The Time and Effort of Counsel

The heart of Southern Peru's and Defendants' challenge to the Chancellor's award of attorneys' fees is the hourly rate it implies. The Chancellor was mindful of this. A2855:21-23 ("I get it. It's approximately—on what I awarded, approximately $35,000 an hour, if you look at it that way.").

But the Chancellor quite reasonably did not "look at it that way." Instead, "[m]ore important than hours is effort, as in what plaintiffs' counsel actually did." *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *13 (Del. Ch.) (emphasis added). In applying this *Sugarland* factor, the Chancellor correctly understood that "you have to look at the hours and effort expended," while mindful of the general principle that "[t]he time (*i.e.*, hours) that counsel claim to have worked is of secondary importance." *Id.*, at *12. *Sugarland* does not require, as Southern Peru contends, that the hourly rate implied by a fee award must alone establish the reasonableness of the fee award, independent of the benefit conferred. Indeed, in refusing to adopt the lodestar methodology, this Court has held that "we conclude that our Chancery Judges should not be obliged to make the kind of elaborate analyses called for by the several opinions in Lindy I and Lindy II." *Sugarland*, 420 A.2d at 150. Under *Sugarland*, the Chancellor only needed to consider Plaintiff's counsel's "time and effort" among the other secondary *Sugarland* factors, after first considering the benefit conferred. That is exactly what the Chancellor did.

The Chancellor carefully deliberated in balancing *Sugarland*'s first and second factors and set a reasonable fee based on the facts of the particular case before it. A2847:7-19 ("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."); A2853:12-A2854:14 ("one of the things . . . the defendants got credit for in this case was that the plaintiffs were slow . . . I also took that into account in how I approach interest in the case . . . also, I have to take that into account in the percentage I award for the plaintiffs . . . And I took that into account. I took some cap factors into account, setting interest in what I did . . . I have to take some away from the plaintiff's lawyers on that . . . 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. . . .").

The Chancellor gave thoughtful consideration to the time and effort of counsel and, in its discretion, weighed and balanced this factor among all the other *Sugarland* factors. Consequently, there is no basis to disturb the Chancellor's discretionary award of attorneys' fees and expenses.

Still, Southern Peru and Defendants repeat on appeal, almost verbatim, the same "windfall" arguments they made below. First, they argue that the Chancellor abused his discretion by failing to consider the hourly rate implied by the fee award as a "backstop check" on the reasonableness of the fee. This argument is baseless. The Chancellor explicitly acknowledged that he had to "look at the hours and the effort expended and the total amount" (A2854) and that "this is a big amount of money . . . It's approximately—on what I awarded, approximately $35,000 an hour, if you look at it that way." A2855. Fully aware of the hourly rate it implied, the Chancellor nonetheless concluded that "in this case I think an award of 15 percent of the revised judgment, inclusive of expenses . . . is appropriate." A2854. That Southern Peru and Defendants, or even this Court, may have reached a different conclusion provides no basis to overturn the Chancellor's considered decision. *See Dover Historical Soc'y, Inc. v. City of Dover Planning Com'n*, 902 A.2d 1084, 1089 (Del. 2006) ("When an act of judicial discretion is under review the reviewing court may not substitute its own notions of what is right for those of the trial judge. . . .").

Notably, in *Sugarland*, this Court rejected an argument virtually identical to the one Southern Peru and Defendants make here. In *Sugarland*, the corporation opposed the fee the Chancellor had awarded for Phase I of that case. "The thrust of the argument [was] that petitioners had expended only $122,881 worth of time at their regular hourly rates, and that the percentage approach adopted by the Chancellor was arbitrary under the circumstances." 420 A.2d at 149. As here, the corporation asserted on appeal that in assessing the reasonableness of the fee the Chancellor should have given more weight to plaintiffs' counsel's hours and hourly rate. This Court rejected that argument and awarded a fee of 20% of the benefit solely attributable to plaintiffs' counsel. *Id*. at 150. Not only did this Court say it did not even need to determine how much time was spent on the various phases of the litigation in order to fix a reasonable fee, *id*. at 151-152, it specifically held that a lodestar analysis was not required at all. *Id*. at 150. Here, the entire benefit was indisputably achieved solely by the litigation, and the Chancellor clearly considered the time and effort of Plaintiff's counsel in awarding a fee equal to 15% of the judgment. Accordingly, the Chancellor's award of attorneys' fees here should be affirmed.

Second, Southern Peru and Defendants argue that the fee award was greater than "necessary" to incentivize counsel to prosecute litigation of this type. The hourly-rate lawyers representing Southern Peru and Defendants do not specify what fee they think would have served as an adequate "incentive" to bring a billion dollar case to trial, with the risk of receiving nothing for their efforts and losing millions of dollars of time and out-of-pocket expenses. They do say that "one-tenth or one-twentieth" of what the Chancellor awarded (between 0.75% and 1.5%) would clearly have sufficed. SPC OB at 24. And Defendants and Southern Peru recommended that the Chancellor award a fee of $13.5 million. A2725. The Chancellor, in his discretion, determined that a fee award of 15% of the judgment "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." A2861. Southern Peru and Defendants obviously disagree, but this disagreement does not render the Chancellor's decision an abuse of discretion. Instead, the Chancellor's decision was clearly "based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Dover Historical Soc'y*, 902 A.2d at 1089.

Though this Court is not called upon to substitute its judgment for that of the trial court, the fee-setting policy considerations advocated by Southern Peru and Defendants here would actually create perverse incentives for shareholder plaintiffs' counsel.

According to Southern Peru and Defendants, to properly incentivize plaintiffs' counsel to bring and vigorously prosecute contingent cases courts need only compensate counsel for their "opportunity costs," regardless of the amount of damages at stake. In fact, such a policy would severely misalign the interests of the attorney and the client. When a shareholder plaintiff's lawyer, working on contingency, elects to take a case to trial, rather than settle, his or her interests should be perfectly aligned with those of the shareholders. Southern Peru and Defendants, however, would have this Court incentivize the attorney only to seek as much of a recovery as the attorney could be compensated for based on his or her "opportunity costs." No economically rational attorney would take a $2 billion case to trial (and risk receiving <u>nothing</u>) if upon victory he or she would only be compensated as if it were a $100 million case. A rational plaintiff's attorney would instead settle the case for a fraction of its value while engaging in "churning of wheels and devoting unnecessary hours to litigation in order to be able to present larger numbers to the Court." *In re Pullman Co. Shareholders Litig*., Del. Ch., Consol. C.A. No. 10013, Berger, V.C. (Nov. 29, 1988), Tr. at 11-12. As the Chancellor pointedly observed, "[t]here's precious little example of an overincentive on the part of plaintiffs' lawyers to really take risks and align their interests with the class" (A2852), and the court did not want to create "more of an incentive for early settling"

(A2847). Southern Peru and Defendants' "opportunity costs" argument would do just that.

In this case, for example, Southern Peru would apparently not characterize the fee award as a "windfall" if Plaintiff's counsel had somehow managed to spend more than 185,000 hours (equaling approximately $75 million in "lodestar" and a "multiplier" of four) in achieving the same benefit. SPC OB at 22; A2848:10-21. Why, however, if the exact same benefit is instead achieved by a more efficient team of lawyers, who employ "an Occam's razor approach" to the litigation, A2810:23-24, should the fee award become a "windfall"? This is not Delaware law. Nor should this Court encourage gamesmanship and deliberate inefficiency by plaintiffs' lawyers who want to try a big case, simply to justify their potential fees. *Cf.* A2813 (in response to Southern Peru's demonstrative chart, "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.")

Third, and most brazenly (or desperately), Southern Peru and Defendants appear to accuse the Chancellor of violating Rule 1.5(a) of the Rules of Professional Conduct in making the fee award. SPC OB at 33. This argument is at once outrageously inappropriate, totally irrelevant, and patently meritless. Rule 1.5(c) of the Rules of Professional Conduct expressly contemplates fees that are based on a percentage. Moreover, Comment [3] to the Rule provides that the determination of whether a particular contingent fee is reasonable is to be based on the relevant factors and applicable law. The Chancellor made that reasonableness determination based on the relevant factors specified by *Sugarland*.

In sum, Southern Peru and Defendants made each of these same arguments below, and after extensive briefing and argument on these questions, the Chancellor squarely rejected them in an orderly and logical manner. Southern Peru and Defendants offer no rule of law which was ignored, nor a single salient fact which was not considered. They merely disagree with how the Chancellor balanced each of the *Sugarland* factors, and explicitly ask this Court to do what it has repeatedly held it will not do—substitute its judgment for that of the Court of Chancery.

### c. The Difficulty and Complexity of the Case

The Chancellor carefully considered the difficulty and complexity of the case, weighing the fact that Plaintiff had succeeded in presenting complex valuation issues in a persuasive way before a skeptical court:

> 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.
>
> * * *
>
> 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. . . .

A2860:18-A2862:2; *see also* A2847 (plaintiffs had to "deal with very complex financial and valuation issues" while being "up against major league, first-rate legal talent."). While Southern Peru argues (again) that this was a "normal" or "routine" entire fairness case that was not "unusually complex," SPC OB at 25, it cannot dispute that the Chancellor weighed the difficulty and complexity factor in its deliberations regarding the fee award.

#### d. The Contingent Nature of the Representation

The Chancellor carefully considered the contingent nature of the representation. With regard to the fourth *Sugarland* factor, the Chancellor acknowledged that the fee award was "going to be a lot per hour to people who get paid by the hour" (A2856), and found that the fee award was reasonable in light of the risk taken by Plaintiff's counsel in prosecuting the case through trial on a fully contingent basis:

> 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 plain-

> tiffs' 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 then—and did they have to—did [Plaintiff's Counsel] 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.

A2856:7-A2857:4, A2862:2-12.

In sum, the Chancellor carefully considered the fourth *Sugarland* factor in awarding fees and expenses in this case.

#### e. The Standing and Ability of Counsel

The Chancellor repeatedly acknowledged that it is quite familiar with Plaintiff's counsel and has the utmost respect for their skills and record of success. A2856-62.

In sum, to the extent Southern Peru and Defendants argue that the Chancellor considered only the benefit achieved and disregarded the other *Sugarland* factors, the argument is demonstrably false. While the Chancellor ultimately quantified the fee award as 15% of the benefit, he reached that percentage not by any mechanical or mathematical rule, but by considering all the *Sugarland* factors. Southern Peru admits as much, acknowledging that the Chancellor considered the significance of the benefit, the difficulty and risk of the litigation, the skill of Plaintiff's counsel in prevailing on a theory the Chancellor initially viewed with skepticism, and the time and effort expended, including that the award equaled an effective hourly rate of approximately $35,000. SPC OB at 12. Southern Peru also admits that the Chancellor considered that Plaintiff's counsel had prosecuted the matter through trial and that the Chancellor considered but rejected Southern Peru's and Defendants' "windfall" argument. The record conclusively disproves Southern Peru's and Defendants' contention that the Court of Chancery considered the size of the benefit as the sole "dispositive factor." Accordingly, the Chancellor's reasoned and considered weighing of the *Sugarland* factors in making the fee award was plainly a proper exercise of his broad discretion and should be affirmed.

### 2. The Court of Chancery Was Not Required To, But Did in Fact, Apply a "Declining Percentage" in Awarding Fees

Southern Peru also argues that the Chancellor abused his discretion by failing to apply a "declining percentage." The argument is mystifying because Southern Peru acknowledges that "the Court of Chancery did reduce the percentage being awarded" due to the large size of the judgment. SPC OB at 29. Southern Peru is really just complaining that the percentage did not "decline" enough.

Regarding the legal requirement for applying a "declining percentage" as judgments grow larger, Southern Peru simply states that "controlling law . . . require[s] such a procedure," without actually citing to any such "controlling law." The Chancellor accurately noted that "I don't understand [such a procedure] to be dictated by our Supreme Court." A2853:6-7. This Court has never mandated that courts balance the *Sugarland* factors in any particular manner, nor should it, because to do so would abrogate the Court of Chancery's broad discretion in fixing the amount of attorneys' fees to be awarded. *See Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1050 (Del. 1996) ("The adoption of a mandatory methodology or particular mathematical model for determining attorney's fees in common fund cases would be the antithesis of the equitable principles from which the concept of such awards originated. New mechanical guidelines are neither appropriate nor needed for the Court of Chancery.") (citations omitted).

Nevertheless, in explaining the basis for his fee award, the Chancellor in fact reduced the attorneys' fee award from the 22.5% requested by Plaintiff to 15% based, at least in part, on his consideration of Southern Peru's suggestion that the percentage should be smaller in light of the size of the judgment:

> 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.

A2859:4-15.

#### 3. The Chancellor Did Not Apply a "Novel Analysis" in Making His Fee Award

Based almost exclusively on a single passage from the 87-page transcript, Southern Peru and Defendants argue that the Chancellor abused his discretion when he posited that a hypothetical plaintiff would probably find a 15% fee in this case to be reasonable. Their suggestion that the Chancellor considered only this "hypothetical bargain" to the exclusion of the *Sugarland* factors simply ignores the record. As explained above, the Court of Chancery gave thoughtful consideration to all of the *Sugarland* factors and weighed and balanced them to determine the ultimate fee award. That the Chancellor reasoned that on these facts a 15% contingent fee would be a bargain for a hypothetical client hardly demonstrates an abuse of discretion. Rather, it demonstrates that the court was not "mechanistically" applying the *Sugarland* factors without regard for the outcome of his analysis.

In light of the foregoing, there can be no legitimate argument that the Chancellor abused his discretion in making the fee award. On the contrary, the Chancellor's discretionary findings are undeniably "the product of a logical and deductive reasoning process" and are well-supported by the record. *Chicago Milwaukee*, 560 A.2d 489. Regardless of whether this Court agrees or disagrees with his reasoning or the award resulting therefrom, there can be no question that the Chancellor's "judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Dover Historical Soc'y*, 902 A.2d at 1089. Accordingly, just as it has done in every shareholder derivative and class action since *Sugarland*, this Court should affirm the Court of Chancery's fee award.

## CONCLUSION

For the reasons set forth herein, the Judgment and Court of Chancery's Opinion and all rulings and orders incidental thereto should be affirmed.

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## CERTIFICATE OF SERVICE

I, Ronald A. Brown, Jr., do hereby certify on this 4th day of April, 2012, that I caused a copy of Plaintiff-Below, Appellee's Answering Brief to be served via eFiling through LexisNexis File and Serve to counsel for the parties as follows:

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