

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN RE SOUTHERN PERU COPPER CORPORATION : Consolidated
SHAREHOLDER DERIVATIVE LITIGATION : Civil Action
: No. 961-VCS

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Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, July 12, 2011
10:02 a.m.

- - -

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

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POST-TRIAL ARGUMENT

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CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
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Copper Corporation

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1 THE COURT: Good morning, everyone.

2 MR. BROWN: Good morning, Chancellor.

3 MR. STONE: Good morning, Chancellor.

4 MR. BROWN: Good morning, Your Honor.

5 I am kind of assuming we are dispensing with the
6 introductions, since we have been through this.

7 THE COURT: Sure, unless someone has
8 had an identity change or, you know, feels --

9 MR. BROWN: Your Honor, this is the
10 time set by the Court for the post-trial argument in
11 this case following trial and pretrial and post-trial
12 briefing. We are now ready to have our final argument
13 and get the decision.

14 I will just sort of get right into it,
15 Your Honor. Obviously, it is an entire fairness case.
16 The issues are price and process. With respect, you
17 know, price always does seem to be a big issue in
18 these type of cases, and I do think here there is a
19 preliminary question, issue. Whether it is a legal
20 issue, an expert issue or factual issue, I am not
21 entirely sure. But, I mean, to me the real question,
22 the starting point is how do you evaluate whether a
23 transaction like the one at issue here is economically
24 fair.

1 And so what is the transaction? I
2 mean, the transaction is a large New York Stock
3 Exchange company issuing shares of its common stock to
4 its controlling shareholder to acquire a business
5 owned by the controlling shareholder. And so how do
6 you determine whether that was a fair deal?

7 And there is sort of three
8 methodologies that are argued or floating around. One
9 is ours, which I consider to be sort of the obvious
10 way. And it was the way Grupo was approaching it
11 through its presentation of the transaction, which is
12 you take the value of the shares. They are New York
13 Stock Exchange shares. Their value on the valuation
14 date that the defendants want to use about when the
15 transaction was approved in late October of 2004 was
16 \$3.1 billion. And you compare that to the value,
17 applying generally accepted valuation techniques, of
18 the company to be acquired. And so our expert did
19 that, and you come up with a fairly big disparity.

20 The value, you know, under a
21 discounted cash flow valuation and a comparable
22 company valuation of Minera Mexico, they are coming
23 in, you know, no more than 2 billion, and that doesn't
24 equal \$3.1 billion worth of stock. And so, you know,

1 that's how it was done in Associated Imports. And we
2 think that is the appropriate approach to --

3 THE COURT: Yes. Your expert, though,
4 blinded himself to an application of his valuation
5 methodology to Southern Peru itself; correct?

6 MR. BROWN: No. And "blinded" is kind
7 of a pejorative term, so that's -- I mean, he did not
8 do, obviously, a discounted cash flow valuation of
9 Southern Peru. That is correct.

10 THE COURT: You know, what would you
11 call -- I used it as a verb because it seemed to be
12 what he intentionally did to himself. And so, I mean,
13 if you want to call it pejorative or not, he seems to
14 have -- for example, what was his explanation, if any,
15 for the reason that Southern Peru's stock was trading
16 at the level it was?

17 MR. BROWN: The reason it was trading
18 at the level it was? I am not sure there is a reason.
19 That is the market price.

20 THE COURT: Well, you see, no. These
21 things matter because there was a market price for one
22 company; right?

23 MR. BROWN: Correct.

24 THE COURT: One of the things we got

1 clarity about, this is not a situation where your
2 friends are contending that Southern Peru is
3 overvalued in the market; right?

4 MR. BROWN: In fact, Mr. Handelsman
5 testified it is undervalued.

6 THE COURT: Right. So what I am
7 saying is they are not disputing that the shares that
8 were paid to Grupo Mexico were not worth, you know,
9 essentially taking whatever the trading price was
10 times the number of shares. That's not something I
11 need to -- my mind is easily confused, but I get to
12 start with that level of I don't need to worry about
13 that.

14 The problem is you have got to look at
15 what you are buying on the other side of this; right?

16 MR. BROWN: Exactly.

17 THE COURT: And what you say is, oh,
18 it doesn't matter why Southern Peru's stock was worth
19 \$3 billion. It doesn't matter; that even if you apply
20 in some consistent way your own expert's approach to
21 the DCF model and applied it to Southern Peru and it
22 would suggest a market -- a value for Southern Peru
23 materially less than the market price, that has no
24 bearing on the fairness of this transaction. And

1 that's where I am not sure you have got me.

2 And where I am also -- I want to hear
3 what you have to say about this. For you then to
4 write in your briefs things like the reason why what
5 your friends did and what the committee did can't be
6 considered is because really Southern Peru should have
7 had its cash flows updated, there should have been all
8 this other sorts of stuff, you brought in, you know,
9 someone you believe to be a qualified valuation
10 expert, and he said not one, as I recall it, not one
11 helpful word about that subject matter. You know, you
12 don't address whether some of those factors were
13 considered in the market.

14 And I am just trying to figure out, is
15 it just this is some sort of, I guess, law school moot
16 court or -- you know, and they have some of the
17 willful blindness kind of issue on their side a little
18 bit, too. But, you know, your expert here didn't
19 apply his methodology to both sides of the
20 transaction.

21 MR. BROWN: Well, and his testimony
22 was that in the financial community that's not what
23 you would do, because from Southern Peru's
24 perspective, regardless of why the market is attaching

1 that value to their shares, they are. You know, if
2 this was a cash transaction, we would be just valuing
3 Southern Peru. But the currency, because the currency
4 is not cash, it is stock, you don't do a different
5 analysis --

6 THE COURT: Well, that's again -- what
7 is his name? Beaulne?

8 MR. BROWN: Beaulne.

9 THE COURT: Beaulne.

10 MR. BROWN: B-O-N-E is how you
11 pronounce it.

12 THE COURT: I am not really sure that
13 is expert testimony that this is the way the market
14 does it, because again, it is a listed-company
15 acquisition of a nonlisted company. So I am not
16 applauding -- I mean, I have serious questions about
17 things I am going to ask of Mr. Stone.

18 And it is an odd transaction, and I am
19 in no way, you know, naive to the powerful
20 self-interest involved. But the idea of symmetrically
21 looking at common factors that affect the valuation of
22 each company and making sure that you have equalized
23 them doesn't seem to be something that Warren Buffett
24 would probably blind himself to. Mr. Beaulne might,

1 and appears to have intentionally done so, and I don't
2 really get that.

3 MR. BROWN: But can I ask --

4 THE COURT: For example, the
5 comparable companies. If you apply the comparable
6 company multiple that you applied to Southern Peru --
7 I mean, that you applied to Minera Mexico, did you
8 apply that to Southern Peru itself? Or was that one
9 of the multiples you used?

10 MR. BROWN: That's one of the comps.

11 THE COURT: Where was that level of --
12 where was that at?

13 MR. BROWN: 1.8 billion.

14 THE COURT: For Minera?

15 MR. BROWN: The comparable company
16 valuation, you know, there is four pure-play copper
17 companies, and they were -- the proxy statement admits
18 they are comparable. I mean, the defendants are sort
19 of really trying to say they are not really
20 comparable, but it says in the proxy they are
21 comparable.

22 THE COURT: Right.

23 MR. BROWN: And so the multiples they
24 trade at, the EBITDA multiples were in a pretty tight

1 range. And so it wasn't -- that's not a complicated
2 analysis. I mean, you apply that to Minera Mexico and
3 you don't get, you know -- and one of the criticisms
4 was, well, you should have -- those are minority
5 multiples. You need to add 20 percent. I mean, even
6 if you do that, it is still far off.

7 There were two valuations done of
8 Minera Mexico. Our expert's position was the
9 approach, the appropriate approach is even if you did
10 a discounted cash flow valuation or some other
11 valuation of Southern Peru and it was way below the
12 market price, that wouldn't matter in the analysis
13 because the value to Southern Peru of its stock is its
14 market price. The value to Grupo of getting that
15 stock is its measurable value. And so when you are
16 analyzing whether it is fair to Grupo, I mean, you
17 look at what they are getting.

18 And why, you know, the market is
19 valuing it at that honestly doesn't really matter,
20 except -- now, I understand the point that where -- I
21 think one of the arguments that is kind of floating
22 out there is, well, if you did a discounted cash flow
23 valuation of Southern Peru and it turns out it is
24 nowhere even close to the market price even

1 manipulating it the best you can, then that somehow
2 shows that Minera Mexico must be worth more than its
3 discounted cash flow valuation, too. I mean, I think
4 that's where this is headed; right?

5 THE COURT: No, no. I think part of
6 the issue that we heard from your friends on the other
7 side, their witnesses, was this: This was a good
8 space to be in. The underlying metal at issue seemed
9 to be one that humans were going to demand more of;
10 that Minera Mexico had a lot of potential to extract
11 that, and that if you looked at both companies on
12 similar metrics, they had a lot of similar valuation
13 things, and that they weren't focused -- what they
14 were focused on was was this going to be a good deal
15 for Southern Peru from this following perspective:
16 Can we capitalize -- can we make money by bringing
17 Minera Mexico in and capitalize on these growing
18 markets?

19 And you are right. One of the
20 oddments of this is they sat around and did things
21 with a 90-cent -- right? -- copper price.

22 MR. BROWN: Long-term copper price
23 assumptions that the company used and that were used
24 in the --

1 THE COURT: Right. Which turns into a
2 bizarre analysis, because if I understand, what you
3 are saying is if you kind of untangle the analysis --
4 right?

5 MR. BROWN: Yes.

6 THE COURT: -- what Goldman Sachs
7 opined was fair was paying \$3.1 billion for something
8 worth 2 billion; right?

9 MR. BROWN: It is --

10 THE COURT: Because what it is is what
11 they said was -- I mean, another way of saying it is
12 they should have also bargained, frankly, for them to
13 have to suffer some of their discount in the
14 negotiations because they hadn't proven that they
15 would get the same market multiple as Southern Peru;
16 right?

17 MR. BROWN: Yes. I mean, there is
18 about 15 points in the things you said that I --

19 THE COURT: Yes. I want to hear your
20 take on it. But I also need you to take on what they
21 say they did in a sophisticated way. And Mr. Beaulne
22 just saying that no one would ever look at it this
23 way, that's a very confident position. I hope he
24 cites, you know, a lot of bigtime investors for it.

1 But it is not necessarily the most deeply engaging
2 refutation of what they did.

3 MR. BROWN: Well, it is -- but
4 wouldn't you agree, Your Honor, it is the obvious
5 approach? It is the approach that Goldman took at
6 first. You know, we are a big company. We have got
7 these shares. They are worth 3.1 billion. That's
8 what they are asking for. Grupo is asking for the
9 shares to be valued at the market price. They want
10 3.1 billion. They have come to us with a sort of
11 weird terminology, I think, saying and we are giving
12 you -- essentially we are delivering a company with an
13 equity value of 3.1 billion. That's our valuation of
14 what we are giving you.

15 And so to analyze it that way, it
16 doesn't seem unfair to Grupo. That's how they were
17 presenting it. And so, you know, Goldman applied
18 generally accepted valuation techniques or tried to,
19 and they didn't come up with a value -- and they had
20 A&S come in because, you know, Grupo was in sale mode.
21 They had gotten Mintec to come in and do updated
22 certifications of the mines, and, you know, they came
23 up with their aggressive projections. They are
24 sellers. And the committee got A&S to come in and

1 said some of this stuff is just indefensible, so we
2 have to make some corrections to it. But the
3 valuation you get if you value Minera Mexico is not
4 close to 3.1 billion. That's just -- I don't think --
5 there is no one here --

6 THE COURT: If, if you used a 1.30
7 copper price, was it?

8 MR. BROWN: No. Now, let me explain
9 that. And that's a big issue in this case. And I
10 think it is important to understand, like, how it
11 slots into the arguments as they sequence.

12 THE COURT: Okay.

13 MR. BROWN: And so, you know, our
14 argument is -- you understand our argument. You know,
15 this is the appropriate approach --

16 THE COURT: Right.

17 MR. BROWN: -- to assessing whether it
18 is fair. They have done -- now, Grupo, it is odd,
19 because this is a case against Grupo. The committee
20 is out. They are not the defendants here. But Grupo
21 didn't come, and there was no Grupo witness saying --

22 THE COURT: You find that odd?

23 MR. BROWN: I do. They were the ones
24 that put out a proposal, Your Honor --

1 THE COURT: Well, you could have
2 called them, I guess; right? Or, I mean, these are
3 the defendants. The defendants are obviously going to
4 put on the people that they viewed most central, and
5 they are going to make the argument the special
6 committee had bargaining power and tell the committee
7 story. I don't know that it is anything odd other
8 than that.

9 If you want to put the evil controller
10 on, that's probably more your case.

11 MR. BROWN: But if you are the
12 defendant in an entire fairness case and you either
13 might have the burden or have the burden and you
14 offered up a \$3.1 billion valuation, that's the
15 position you took, wouldn't you want to come and say,
16 "Well, here is how we came up with that and it is
17 reasonable, and that's what we are arguing"?

18 They didn't do that. They dropped the
19 argument they were making during the negotiations and
20 they now switched to what the special committee's
21 advisors were doing. So to me that's a little odd.

22 So in response to our argument, Grupo
23 comes in with an expert witness that essentially has
24 done something very similar to what Goldman did, which

1 is do -- he only did a discounted cash flow valuation.
2 He didn't do any other methodologies to check them,
3 which is also flawed, I think, as he admitted at
4 trial, that, you know, normally you would want to do
5 other -- apply some other methodologies as checks.
6 But he did, you know, a discounted cash flow valuation
7 of Minera, came up with a value that was less than --
8 actually less than our expert did, and he did a
9 discounted cash flow valuation of Southern Peru.

10 Now, the critical assumption to make
11 that work is that changes in the price of copper
12 affect both companies equally, and that is just not
13 true. The one tagline they have left off is changes
14 in the prices of copper affect both companies equally
15 or benefit Southern because Grupo's value changes
16 more, assuming you hold production constant.

17 And the big -- there is all this talk
18 of reserves, reserves, reserves. Reserves are
19 inextricably related to your long-term copper price
20 assumption.

21 THE COURT: Because -- and this is
22 what we talked about at trial. This is because the
23 higher the price is, the more things that might not be
24 characterized as reserves at a lower price, the more

1 they become reserves, and the more economically viable
2 it is to actually go out to them and extract them.

3 MR. BROWN: And it is not more
4 economically -- the definition of reserves -- and
5 there was a lot of trial testimony about this -- is
6 copper that can be extracted from the ground at a
7 profit. So the company is required to make its best,
8 you know, long-term copper price assumption and
9 disclose what its copper reserves are under that
10 price. And actually, you know, the rules were
11 changing as to what copper price assumptions and what
12 other alternative scenarios they are required to
13 disclose in their SEC filings --

14 THE COURT: And part of this you are
15 making here. This is both the process and a price
16 point, isn't it?

17 MR. BROWN: Yes, yes. Let me just
18 say --

19 THE COURT: I mean, I take it what you
20 are saying about your friends is they want to have it
21 both ways a little bit, which is they did these
22 metrics at the time that they did them and it doesn't
23 yield anything close to the market price of Southern
24 Peru. What they say, though, is, well, what you have

1 got to really do is pump in other metrics.

2 But what we can't recreate in time is
3 when they were creating these metrics, that on the
4 things like updated reserve estimates, all those sorts
5 of things, they intensely focused on the Minera Mexico
6 side of the equation -- I mean on the Minera Mexico
7 side of the equation to get those things updated, with
8 an incentive on the part of Grupo Mexico to make
9 Minera's picture as profitable -- but what they didn't
10 do is do the same analysis on Southern Peru and say if
11 we are going to really look at these metrics and apply
12 them in a way and this is going to be what drives our
13 process, then let's genuinely do it equally on each
14 side of the equation.

15 MR. BROWN: Right. And really, again,
16 I would like to put all these different arguments in
17 what I think is the sequence that it takes to really,
18 at least for me, to understand them. But that point
19 goes to -- you know, when they say, well, you know,
20 the DCF of Southern Copper is less than the market
21 price, well, there is one obvious reason it could be
22 less: That the projections are conservative. And the
23 evidence actually showed it, Your Honor, because in
24 2004 Southern blew away their projections. They

1 couldn't even project one year. Minera was basically
2 spot on.

3 So, you know, the reality is there is
4 a reason to believe --

5 THE COURT: Can I look at that? I
6 mean, I am tempted to actually make you all write me a
7 five-page letter on temporal blinders.

8 MR. BROWN: This was done before the
9 closing.

10 THE COURT: Okay. Because each of
11 your briefs have some stuff that peeks into the
12 future.

13 MR. BROWN: And that's a whole 'nother
14 issue, and we will talk about that. But there is kind
15 of a weird issue here, because the defendants have
16 argued that the valuation date should be October 21,
17 but the closing was April 1, so I think things --
18 honestly, I think things that happened that were
19 knowable on April 1 kind of ought to be fair game. I
20 mean, that was before the deal closed.

21 Mr. Handelsman testified that he went
22 back to Goldman and asked them to tell him it was
23 fair. That's a whole 'nother issue.

24 But back to the 90-cent issue; okay?

1 The critical assumption for this so-called relative
2 valuation analysis to work is that copper prices
3 affect both companies equally. And, I mean, we have
4 explained, I tried to explain, reserves are not just
5 some scan of what is in the ground and so we know what
6 is there. It is an analysis of what is there and how
7 much it cost to get it out --

8 THE COURT: Right.

9 MR. BROWN: -- and what we expect to
10 be able to sell it for, you know, into -- for the life
11 of the mine and --

12 THE COURT: And so it matches up in a
13 way. That in some ways becomes your projections,
14 assuming a certain estimate of long-term copper price.

15 MR. BROWN: Right. So -- because the
16 projections are built on some long-term copper price
17 assumption. I mean, in the projections --

18 THE COURT: And investment banks we
19 know have all these things, certainly Goldman Sachs
20 did, where they could do sensitivity analysis when
21 they have an updated thing --

22 MR. BROWN: But here --

23 THE COURT: -- where they could
24 take -- as I take it, the moving parts would be here

1 is the potential different quality; right? In oil,
2 they have different levels of, you know, proven,
3 probable, all this kind of stuff. I take it this is
4 slightly different. But I am assuming you could, when
5 you did the necessary work on it, you can match up --
6 you can take Minera Mexico, you can take Southern
7 Peru, you can look at their reserves on an updated
8 basis, sort of the quality of the things, and then you
9 can apply a sensitivity analysis of different
10 assumptions about copper pricing -- right? -- to come
11 up with your projections.

12 MR. BROWN: It is a little more
13 complicated, because if you change -- but let me
14 explain. I wanted to get my point out.

15 THE COURT: Okay.

16 MR. BROWN: It is a little more
17 complicated because you have to change a production
18 plan. And so the investment bankers can't just --
19 like Mr. Beaulne testified, "I can't just change a
20 production plan."

21 THE COURT: Because what you are
22 saying --

23 MR. BROWN: Here is what happens. At
24 90 cents, the reserves are disclosed. That's the

1 copper in the ground they can take out at a profit.
2 For Minera Mexico it was about 20 million tons. For
3 Southern Peru it was about 13 million tons. Those
4 were the reserves, and that's at the 90-cent level
5 that the company uses for its long-term planning. It
6 is disclosed in the proxy, and, you know, those are
7 the reserves.

8 If you say, well, what if we plug in
9 \$1.30, well, if you plug in a \$1.30 long-term copper
10 price assumption, the reserve profile changes. And it
11 was in our brief, but the defendants helpfully put it
12 in an exhibit to their post-trial answering brief. It
13 is the very, very last page.

14 But the relative reserves change
15 dramatically. And if you assume -- here it is \$1.26
16 because that is what was disclosed in the SEC filings.
17 They are required to do a 20 percent -- show 20
18 percent up and down off the base number in the SEC
19 filings, which they did. And reserves go for Southern
20 Peru from 13 million tons to 28.3 million tons, for --
21 and this is in 2005, and for Minera Mexico, 20 to 29.
22 So it goes from, you know, Minera having a lot more
23 reserves -- and again, this means copper you can take
24 out of the ground at a profit -- to being the same.

1 The relative values, if you change
2 your long-term copper price assumption, cannot stay
3 the same. I mean, their expert testified that, you
4 know, valuing a copper company, it is about the
5 reserves. That's what they have. So you -- and what
6 they are saying is, well, but we are assuming you
7 don't change the production plan. But that is, I have
8 to say -- I mean, I hate to use my own perjorative
9 words, but it is kind of ridiculous, because if you
10 are a business --

11 THE COURT: Right.

12 MR. BROWN: -- and you went from 13
13 million tons of copper you can take out of the ground
14 at a profit to more than double that, you wouldn't
15 take it out or change your plan at all?

16 And so -- and Minera went up, too, but
17 by a much smaller percentage.

18 So the whole relative valuation
19 analysis has a gigantic factual flaw, which is -- and
20 I think it is critical to understanding the case.

21 THE COURT: What we don't know is, you
22 know -- and this is where your guy Mr. Beaulne getting
23 into the game a little bit would have been somewhat
24 helpful to me -- is are there industry metrics or

1 other things that -- you know, what you say here is if
2 you use this -- you know, there is actually a bigger
3 Minera is what you are saying in the first year of
4 this chart; right? Southern Peru reserves go up at a
5 much higher clip than Minera Mexico's; right?

6 MR. BROWN: Well, that's what they are
7 arguing. They are saying -- I mean, here is where it
8 fits in. The other years --

9 THE COURT: Is that what they are
10 saying?

11 MR. BROWN: No.

12 THE COURT: I think that's your
13 argument.

14 MR. BROWN: They said we will just use
15 \$1.30.

16 THE COURT: What I am saying is that's
17 your best -- that year is actually good for you, as I
18 understand.

19 MR. BROWN: But I don't know where the
20 other -- honestly, I don't know where the other
21 numbers came from, and I don't think they were -- they
22 weren't disclosed or knowable on the valuation date.

23 THE COURT: No. No. I mean, you do
24 know because there is a note, and they weren't -- I

1 mean, you may have, again, chosen not to -- you may
2 not have read beyond the 2005, but it basically looks
3 like it is from, you know, their annual --

4 MR. BROWN: I know, but their point
5 is --

6 THE COURT: What I am trying to do,
7 and I am trying to understand your argument as it goes
8 along here. And I thought this was something that was
9 helpful to you.

10 What you are pointing out to me is,
11 okay, you know, the reserves go up a lot; right?

12 MR. BROWN: In proportion --

13 THE COURT: Well, let me get my point
14 out so you can -- because I think it relates to
15 exactly what you are saying, but I need your help here
16 to translate it into something if I am going to, you
17 know, make it as something, a criterion in my
18 decision-making.

19 You are saying here, okay, you have
20 gone up to \$1.26 in your assumption about the price of
21 copper. That more than doubles Southern Peru's
22 reserves. What did you do, special committee, to take
23 into account that increased production? And you are
24 saying, as I understand it, you are saying my expert

1 couldn't come up with that, but they are clearly going
2 to produce a lot more copper because you can do that
3 productively, and this is twice as much in terms of
4 reserves.

5 Is that -- I mean, I take it that is
6 part of your point; right?

7 MR. BROWN: Yes.

8 THE COURT: And what I am asking is,
9 you know, what are the metrics about how much an
10 increase in reserves turns into production. Do you
11 know?

12 MR. BROWN: No.

13 THE COURT: Is there an industry
14 knowledge out there or anything? I mean, or is that
15 part of your point, that the committee didn't do that?

16 MR. BROWN: The committee didn't do
17 it. Their assumption in their model is that is the
18 basis for the whole model, and if that assumption is
19 wrong, the model is not valid, and that is, copper
20 price changes affect both companies equally, and they
21 do -- or they benefit Minera more if you hold
22 production constant, according to them.

23 But our response to that argument is
24 but you --

1 THE COURT: But that's why -- that's
2 the whole basis why they become reserves --

3 MR. BROWN: Yes.

4 THE COURT: -- is because you can now
5 produce them profitably, and so production is what
6 wouldn't remain constant.

7 MR. BROWN: Exactly. And so really,
8 we are not -- I didn't -- this was in the sequence of
9 things, you know, we made our argument. They come
10 back with a relative valuation, and then our point
11 about the relative valuation is, well, there is
12 something seriously flawed with this because your DCF
13 value is way off the market price. You have got to --
14 there has got to be some explanation of that. Anytime
15 a valuation person does a DCF, you know, you at least
16 check it against the market to see what -- see where
17 it stands. And it is way off. And we said it is way
18 off. You haven't checked it against anything. You
19 haven't given any explanation for it.

20 Our explanation is you are using
21 conservative projections compared to optimized
22 projections for the seller. But their response is,
23 well, you know, the market must be using a \$1.30
24 copper price. That's the explanation. And that's not

1 correct, because if you change -- and they say, well,
2 if we use \$1.30 copper prices in both models, you
3 know, it is still fair. But you can't just make that
4 one change, because a change in your long-term copper
5 price assumption is inextricably related to the
6 calculation of your reserves. So the whole model
7 changes, and it is not valid anymore.

8 So where this came into the argument,
9 as far as I was concerned, was, you know, in response
10 to their arguments, their expert's point, well, just
11 use \$1.30. You can't just use \$1.30. There is other
12 reasons, too, why you can't just use \$1.30, which is
13 the company wasn't using it. It is all over their SEC
14 filings and the limited SEC filings Minera made that
15 they were using it to assist and it is the analysts'
16 consensus and that is how valuation people do it.

17 Now, they point out, well, there is,
18 you know, reasons copper prices are higher. Well,
19 that is accounted for in the model. I mean, in the
20 first few years higher prices are used based on
21 different issues. But one big point is what is the
22 long-term copper price to use.

23 THE COURT: Well, and one of those
24 points is what they might say, though, in terms of

1 reconciling Southern Peru's market price to the DCF is
2 that in some ways the copper price thing does it for
3 you alone because, you know, in a complex dynamic the
4 market values that. The market does the translation
5 in its head that you are talking about -- right? --
6 which said at \$1.30 their reserves are going up, their
7 production is going up, and that explains why, you
8 know, the market was valuing Southern Peru at what it
9 did. You get my drift.

10 MR. BROWN: Well, that's just a guess.

11 THE COURT: Well, it is, but, you see,
12 the things with Mr. Beaulne -- experts, most of the
13 time what they do is a guess, and I have got to deal
14 with someone who chose not to guess on a rather
15 critical part of the case.

16 MR. BROWN: But I understand that Your
17 Honor thinks that that's critical, but here is why I
18 don't think it is. And this is my best argument.

19 THE COURT: You know, I am not saying
20 it was critical or not. I am saying it is unhelpful.

21 MR. BROWN: Because in an entire
22 fairness case -- that's why I get back to the question
23 of how do you decide if it is fair, because really
24 what you are saying is in this transaction we know

1 what the fiduciary got. They got 3.1 billion. I
2 mean, it is no different from getting cash, honestly.
3 That's my approach.

4 I mean, I think their whole approach
5 assumes you have to do a different analysis versus
6 cash and stock, and I don't think that's legally
7 defensible.

8 We know what they got, so whether --
9 why it is worth that doesn't matter. That's what it
10 is actually worth. That's what it is worth to
11 Southern Copper. I mean, they could do a public
12 offering, generate the 3.1 billion in cash or
13 something around there, maybe more, according to
14 Handelsman. And, you know, so that's what the value
15 of these shares are to the company that is issuing
16 them, and that's what the value is to Grupo, and
17 that's the value -- in fact, they attached --

18 THE COURT: Again, you are assuming
19 that they looked at it that way, because it is not
20 clear that they looked at it at all like it was, you
21 know -- they are looking at the upside of what they
22 are getting from Minera Mexico; right?

23 MR. BROWN: I don't think so. I think
24 they did a valuation of Minera Mexico -- I mean, what

1 Mr. Handelsman testified to I think to me was somewhat
2 remarkable. You know, their initial reaction, I think
3 everybody looking at something like this is, well,
4 they are asking for 3.1 billion in stock at the market
5 price. Let's do a valuation of Minera. It is not
6 coming out anywhere near it, instead of saying let's
7 go back to Minera and argue about this valuation and
8 try to figure out --

9 THE COURT: Right.

10 MR. BROWN: -- what is wrong with
11 Minera.

12 THE COURT: We can only get to 2.2
13 billion. That's what we will give for you.

14 MR. BROWN: We will give you 2.2. If
15 you were authorized to make counteroffers -- and two
16 of the committee members thought they weren't.

17 Let me just ask a hypothetical, Your
18 Honor. If you or me or anyone else was the 55 percent
19 shareholder of Southern Peru and the rest was public,
20 and Grupo, who is now a third party, came to you and
21 made the same proposal, "We would like to sell you
22 Minera Mexico, its mining operations. Now, there is
23 no synergies for you. It is in a totally different
24 part of the world, but it is what you do. And, you

1 know, we would like to move it out of, you know, the
2 Mexican stock market into the U.S. stock market. And
3 our valuation is 3.1 billion. We will do it if you
4 will issue us \$3.1 billion of stock," I mean, is there
5 any thought that you would do a discounted cash flow
6 valuation, try to justify it on the basis that my
7 stock is really only worth half of the market price?
8 No. You would say, "Right. The consideration going
9 out is 3.1 billion. Let's talk about -- let's argue
10 this and negotiate this based on the value of Minera."
11 You apply generally accepted valuation techniques.

12 Now, there is this one argument that
13 is kind of floating out there that I did want to
14 address a little bit on this point, which is -- and it
15 kinds of relates to your argument -- your questions on
16 the DCF on both sides. I mean, they sort of point out
17 based on one document that is kind of hearsay, but
18 that one of their bankers sort of did an analysis and
19 said, "Well, these copper companies, they are trading
20 at a premium to their DCF, and so that's really what
21 is going on here. There is a DCF, but it is just
22 being valued in the market more than that."

23 And again, there is two flaws in that.
24 One, you can't just compare unknown DCFs. The one we

1 know about and that has been scrutinized by the
2 committee and the lawyers and in the litigation is the
3 Minera DCF. And, you know, it was optimized, and it
4 was real aggressive, and they even tried -- it was
5 even stepped back by the committee. So that's the
6 real DCF, you know.

7 But the fundamental point is that's
8 not a valid valuation methodology. I mean, all they
9 are doing in that argument is a comparable company
10 valuation. But the metric they are using isn't
11 EBITDA. It is, you know, 1.5 times your DCF
12 valuation. And as Mr. Beaulne testified, "And I have
13 never seen in any financial literature or in any case
14 that that's a methodology you use." If you want to
15 value Minera by looking at comparable companies, the
16 metric you use isn't something times the DCF. It is
17 something times its EBITDA.

18 THE COURT: Plus if you were doing
19 that on that logic, one would hope you would look at
20 the sustainability of something like that. I mean, I
21 remember what was it? Web, Webvan? What was the one
22 that was going to deliver Mars bars to yuppies in
23 Greenwich Village when they had the munchies for
24 whatever reason at 2:00 a.m? I am sure it was trading

1 at some ginormous multiple to its DCF.

2 If you were buying a company when you
3 thought the only reason to buy it at that point was to
4 see whether you could take advantage of the bubble for
5 some period of time and then sell it -- right? -- you
6 would actually be kind of suspicious of, you know,
7 being a victim of what you are currently benefiting
8 from, if you get my drift, which is typically you
9 would want to buy something at a discount to its DCF
10 or something like that and not a multiple.

11 I think, though -- how do you deal
12 with -- what if they were just using the 90 cents as
13 just a conservative leveler to make sure that the
14 assets were kind of equally valuable, but in their
15 mindset they actually believed that the market was a
16 more bullish one, that the value of copper was \$1.30,
17 that when you applied that metric, Minera Mexico's
18 value would equal or exceed the value of the currency
19 being used, and that because of the positive direction
20 of the marketplace, putting together these two assets
21 and being able to combine them and take advantage of
22 them in the public marketplace at their valuation is a
23 really good deal.

24 MR. BROWN: Well, first, that's not

1 what the committee did. I mean, if you want to say,
2 well -- if you are having an intellectually honest
3 approach to this and acting as if you are a third
4 party, you know, you may say, gee, 90 cents, you know,
5 but it is a complicated analysis. If you just
6 increase the price, the long-term price to \$1.30, I
7 mean, you have to change everything in the model,
8 so -- and they didn't do that. And I don't know what
9 it would have come out to be, whether it would be more
10 than 3.1 billion or not. You know, I think you just
11 can't do that. But --

12 THE COURT: Isn't it the case, though,
13 in terms of Southern Peru, when you look at its own
14 metrics, though, something has to explain the market
15 price? And one of the things that explains the market
16 price is that the market had more bullish expectations
17 for Southern Peru than were reflected in Southern
18 Peru's publicly disclosed reserve plan or projections,
19 and that what the market believed was that, frankly,
20 the demand for copper was going to grow such that the
21 price would get higher, that Southern Peru would
22 benefit from that because its reserves would increase
23 and its production would go up, and that the gap --
24 you know, you are clinging to the market price as the

1 evidence of its real value; right?

2 MR. BROWN: Well, that's -- no.

3 THE COURT: But wait. You are
4 suggesting -- you are not suggesting that Southern
5 Peru was somehow trading at a discount to intrinsic
6 value. I hate that term. You know, to some sort of
7 measure of --

8 MR. BROWN: Yes, that's what
9 Mr. Handelsman testified to.

10 THE COURT: No. But your side of the
11 V and Mr. Beaulne are not pushing that point.

12 MR. BROWN: Because here is our
13 argument, and it has to do with going back to my
14 initial question or theory, which is how do you
15 analyze it, because this is a transaction where the
16 controlling shareholder got something of a measurable
17 economic value, and so we are trying to decide if
18 that's fair. And so what it is worth and what they
19 are -- that's why I don't think --

20 THE COURT: But, see, again, I mean,
21 just for future cases, gentlemen -- and I will note
22 for the record that it is all gentlemen -- actually,
23 men. I don't know if they are gentlemen or not. I
24 suppose some of them are rogues or fancy themselves

1 so.

2 But it is not the most helpful way to
3 present a case to a court, because, news to you all, I
4 am not on either side of the V. And you have left me
5 in a situation where you are not trying to argue --
6 you don't embrace -- for example, you do not
7 embrace -- I think you just parodied and believe it is
8 not true -- the multiple to DCF; right?

9 MR. BROWN: Correct. It is not a
10 valid methodology.

11 THE COURT: See, you know, everybody
12 can get in little rigid boxes. Here is something.
13 Valuation people are not scientists. The idea that
14 this market necessarily trades on long-term expected
15 cash flows is ridiculous given trading velocities.
16 Cash flows change just by the moment. It trades on
17 the greater fool theory and what people think
18 something is going to sell at in a month.

19 MR. BROWN: Or some other crazy stuff.
20 I mean, who can explain Internet stocks --

21 THE COURT: Fine. But there has to be
22 something. And the Internet, people expect the
23 Internet to -- generally demand is going to go up, but
24 they also know generally people get excited about this

1 in the early stages; that if you can get in early and
2 get in at the right time, you can make a lot of money,
3 and people get excited about that sort of thing, which
4 is why I think there tends to be some evidence out
5 there that markets tend to overvalue things rather
6 than undervalue them.

7 But you have ultimately got to win not
8 only the case but you have got to have me come in with
9 a remedy, and I have got to measure that remedy. And
10 you don't like -- you don't think Southern Peru was
11 trading at one and a half times its genuine -- its
12 best estimate of future cash flow value; right? You
13 don't think that's right.

14 MR. BROWN: Correct.

15 THE COURT: But you also don't embrace
16 the defendants' basic perception that the marketplace
17 seems to have been likely looking at Southern Peru and
18 others believing that there was more demand for copper
19 than was used in the business plans of these
20 companies, perhaps the business plans being
21 conservative, because you want to -- you would rather
22 err on the, you know, low side.

23 You know, you want to play the Jack
24 Welch technique -- right? -- which is I would rather

1 always deliver more. You know, for 27 years I have
2 always delivered more than I promised, every
3 quarter -- right? -- which made me -- I wasn't really
4 promising all of what I could probably deliver. I was
5 holding some back so that you would be surprised
6 rather than disappointed -- right? -- every quarter.
7 You know, it is difficult to be so, you know,
8 predictively, you know, delivering wonderful, you
9 know, gains to people.

10 But I am just trying to figure
11 substantively what is wrong with their argument. I
12 mean, it seems to be right.

13 And the market also -- one of the
14 great things about the market is it doesn't have to
15 actually think about reserves different from increases
16 in production different from increases in copper
17 prices. What the market does, or people who focus on
18 it, is a \$1.30 copper price. That's going to provide
19 a lot more room for companies like Southern Peru to
20 produce more at a profitable level.

21 You look at the reserves for the same
22 reason. The reserves are measured as an economic
23 thing; right? What is the amount of copper -- what is
24 the copper, you know, ore that is profitable to

1 produce? So the market is making a general
2 assessment. And what they are saying is if you look
3 at a \$1.30 copper price, if you want to focus on a
4 single variable, that alone does an awful lot to
5 explain, you know, the market price of Southern Peru.
6 And if you apply that same metric to Minera Mexico --

7 MR. BROWN: It is not fair --

8 THE COURT: Okay.

9 MR. BROWN: -- because, you know,
10 their expert came in, Your Honor, and he is not -- it
11 is not fair by a lot. It isn't fair by 67 point
12 something million shares. I mean, it is real close to
13 where it is. So a little difference in the relative
14 value and it is not fair, according to their expert.

15 And so if you change the assumption
16 about copper prices, you have to redo the model. And
17 again, he testified that the model isn't valid unless
18 you are having this same effect. And it doesn't have
19 the same effect.

20 THE COURT: Now, do I have some
21 version of Gonzales here from you in terms of a
22 remedy, which is were I to conclude that they have the
23 ultimate -- they have the burden of fairness -- and I
24 guess there will be issues about whether we did this

1 sort of fairness L-I-T-E shifting. We should spend
2 some time on that before you get down in terms of
3 whether you are really mounting some process challenge
4 to the committee or whether you are just saying,
5 frankly, they weren't that wise, because I am not sure
6 that that's -- I don't think -- I am not sure we
7 should talk about it the second way, that you don't
8 get a burden-shift just because you don't think
9 somebody was -- as I said, let's stick to Warren
10 Buffett as opposed to somebody else.

11 But how do I -- what I mean by
12 Gonzales, as you remember, Chancellor Allen said in
13 Gonzales we get all these men and women in valuation
14 science, they supposedly apply the same thing, and
15 they come in with these ridiculously disparate
16 approaches to valuation. What he just said -- that
17 was in an appraisal context -- "I am just going to
18 pick one. I am going to make a decision about who was
19 more credible in the end, and I am not going to play
20 games with all of it. I am going to pick one over the
21 other." And the Supreme Court said, "You can't do
22 that. You have got to come up with your own estimate
23 of value."

24 To some extent what you are telling

1 me, Mr. Brown, is if they were going to do what they
2 did, you had to be -- you know, you had to play it
3 straight. You need to get updated reserve estimates
4 and all that kind of stuff for Southern Peru and do
5 everything that you could on the Southern Peru side of
6 the equation if you are the special committee to make
7 sure that you had accurate and responsibly optimistic
8 in the sense of we are representing the stockholders
9 of Southern Peru, the minority stockholders. We need
10 to be responsibly aggressive about that and make sure
11 that we are at least as responsibly aggressive, if not
12 more so, than the other side of this analysis, and
13 that that was not done.

14 MR. BROWN: Correct. It was --

15 THE COURT: Okay. If that is the
16 case, if I were to find, for example, that your rather
17 simplistic thing that doesn't sway me, that they are
18 stuck with their 90 cents and that the real damages
19 here are the difference between the undisputed -- what
20 they now say the undisputed market value of what they
21 gave up -- right? -- and their DCF, as they did it, as
22 you can unpack it from their analysis -- right? -- I
23 mean, isn't that kind of a Gonzales choice? I mean,
24 because you are not giving me anything --

1 MR. BROWN: No.

2 THE COURT: -- that is more nuanced.

3 MR. BROWN: Well, and I know. And
4 because of the -- we shortchanged ourselves on the
5 briefs. You know, we were focusing on liability.

6 THE COURT: But I am not sure there is
7 anything in the record. Again, this is where
8 Mr. Beaulne and you all decided to really --

9 MR. BROWN: Go all or nothing?

10 THE COURT: Yes, and also almost
11 purposely avoid, you know, some of the more
12 interesting gray areas.

13 MR. BROWN: There was no purposeful
14 intent to avoid it.

15 THE COURT: Okay.

16 MR. BROWN: This was -- if it was
17 not -- it turns out to be, you know, a strategy,
18 litigation plan that doesn't work out -- I mean, we
19 make a good-faith effort to sort of figure out how to
20 present our case in the best way we can, and, you
21 know, this is what was done. And --

22 THE COURT: Sure.

23 MR. BROWN: -- obviously, you know, in
24 every case, if we had the comments of the Court and we

1 knew that --

2 THE COURT: No. I am saying --

3 MR. BROWN: -- we would do it
4 differently.

5 THE COURT: But embedded in your own
6 arguments, though, coming out from your own arguments
7 is the obvious question that someone like me would
8 ask, which is, okay, you say that this should have
9 been done on the Southern Peru side of the analysis.
10 Now having held discovery and experts, how would it
11 have affected the analysis if it had been done?

12 MR. BROWN: But that's the problem for
13 us, because we can't do it. I mean, we can't, you
14 know, change the copper price assumptions and optimize
15 the model and figure out what the different
16 production -- it is just not possible for us to do.
17 You know, nobody other than the company with all their
18 personnel and knowledge could do that.

19 So what we are pointing out --

20 THE COURT: No, but you had
21 Mr. Beaulne. For example, the multiples. You are
22 telling me there is no way of using, you know, a
23 multiples analysis looking at different copper prices
24 and how the markets tended to react over time when

1 copper prices go up or down in terms of what people --
2 you know, how people view these kind of companies?

3 MR. BROWN: You are going a little
4 over my head. I mean, I don't know what that analysis
5 would be. I mean --

6 THE COURT: Well, what I am saying is
7 if you expect -- if you have got companies that are,
8 say, pure-play copper companies, multiples are just an
9 indirect way of -- you know, if you believe in the
10 capital asset pricing model, everybody is supposed to
11 be looking at the companies to see what their
12 production of long-term cash flows will be; right?
13 And then you discount it back to present value.

14 One way the market does that, the one
15 way you can measure the market's expectation is
16 multiples. The multiples are supposed to embed --
17 right? -- the optimism you have about future cash
18 flows. So if you have a higher copper price --
19 right? -- expectation in the marketplace, you might
20 think that the copper companies would be trading at a
21 higher multiple than if you had a more bearish outlook
22 for copper pricing; right?

23 MR. BROWN: Okay.

24 THE COURT: Don't you think?

1 MR. BROWN: Okay.

2 THE COURT: I mean, does that make
3 sense to you?

4 MR. BROWN: Well --

5 THE COURT: And if it does -- what I
6 am trying to yearn for here is, like, this is a case,
7 pretty obviously, where there are vulnerabilities for
8 both sides, but measuring -- and maybe you should feel
9 good that you are up here and the judge is actually
10 inquiring into the things that may get into remedial
11 aspects of the case. Like, obviously, if I don't rule
12 for you, I don't have to get into any of this. But if
13 I do, there is the possibility that, frankly, I am
14 just not as starkly convinced by the other side's
15 recitation as you would like, and that with respect to
16 measuring the level of any unfairness, I am going to
17 look at these sorts of things.

18 And part of what I am yearning for --
19 and I don't think it is because the briefs are
20 shorter -- is where in the record do I find anything
21 helpful from your side on this.

22 MR. BROWN: Well, we have presented
23 the analysis that we think is appropriate. And I hate
24 to fall back on this, but obviously, and we

1 acknowledge, the Court has broad discretion to fashion
2 any form of relief the Court thinks is appropriate.
3 So you don't have to mix -- you can sort of do
4 anything you want really: If you say, "I think they
5 haven't passed the entire fairness test, but, you
6 know, I am not going to say that they have to give
7 back 26 million shares." You can say that it was --
8 you know, it was inappropriate to ignore the market
9 price, and so the valuation here, the valuation that
10 was used shouldn't have been, you know, 100 percent,
11 the DCF valuation of Southern Peru. It should have
12 been 5 percent or 10 percent of the market price. And
13 if you use that, you know, the share issuance is off
14 by a little bit or whatever. I mean, it is hard for
15 us to sort of give all different alternatives of what
16 you can do, because you can look at it and say --
17 essentially come out wherever you want by saying, you
18 know, different things.

19 And, you know, one fundamental point
20 here is -- and they dispute it, but their relative
21 valuation analysis does not really give any weight to
22 the market price.

23 By the way, on the \$1.30 point, the
24 market believed that, well, it is equally plausible

1 that the market simply believed that Southern's
2 projections were conservative. I mean, that's why
3 when we are all talking about --

4 THE COURT: But, see, here is one of
5 the problems I am having with this, which is you are
6 doing a really good job, I mean, of helping someone
7 who is not that complex a thinker about these things
8 kind of understand the relationship between these
9 reserves and future profitability. Where I think we
10 are talking past each other is I am not sure that you
11 are not speaking exactly the same language as,
12 substantive economic language, as your friends, but
13 they have just used a sort of simple metric to explain
14 an interrelated phenomenon, which is, as I understand
15 it, what you say is higher prices equals higher
16 reserves equals a more aggressive production plan;
17 right? So you put those three together. Higher
18 prices increases your reserves, translates into more
19 aggressive production plan, results in, bottom line,
20 higher future expected cash flows.

21 MR. BROWN: Right. And it changed.

22 THE COURT: And what your friends say
23 is even if you are right -- and part of the premise of
24 their case is you are right. Their own witnesses said

1 you are right in this regard, and this may be a
2 shocking insight, but I believe confessed you are
3 right in this. They can't be justifying this on the
4 basis that the price of copper at that time they
5 really believed was 90 cents, I don't think, because
6 then it was a stupid deal.

7 I mean, one thing that has gotten in
8 my dullard mind for sure, this would be a genuinely
9 dumb deal if you were bearish on copper, because you
10 would have been -- instead of capitalizing on the
11 market multiple you were getting and monetizing it and
12 doing a special dividend, you would have essentially
13 bought into something you knew was overpriced.

14 MR. BROWN: You are --

15 THE COURT: But, see, let's isolate
16 this. I am really focusing here for you, I mean, part
17 of it, there are elements of this case that there are
18 a lot of questions asked about the defendants. But if
19 I am going to get to a remedy for you, you know me
20 well enough that it is probably unlikely to be as
21 usefully simplistic for you as you would like. And I
22 might hunger to actually follow up on exactly what you
23 said they should have done, which is a more
24 sophisticated dynamic analysis of the effect of higher

1 copper prices on the actual future cash flows of the
2 two companies involved. That strikes me as something
3 that, you know, I am going to ask about. It seems to
4 me, frankly, something quite plausible for a banker
5 suggesting a valuation move of the kind they made to
6 have actually insisted upon if they were giving a
7 fairness opinion to a special committee.

8 Where in the record, though -- say I
9 go with you on that. Then you make -- and your brief
10 does make this argument. I am then supposed to go
11 with you and saying if you do that, that would
12 comparatively turn out better for Southern Peru than
13 what Goldman Sachs did. Where do I find evidence for
14 that in the record that is helpful?

15 MR. BROWN: Of the quantification of
16 it?

17 THE COURT: Quantification, the
18 reason. I mean, really, I hunger for --

19 MR. BROWN: That's why -- there isn't
20 the specific evidence that you are asking for. But
21 let me try to explain where it fits in, because,
22 again, I think the sequence of the arguments is
23 important to understand what is being asserted for
24 what reason.

1 We have our analysis. They have their
2 relative valuation. We point out that it is flawed.
3 It is so far off from the market, there is something
4 wrong with it. Their response is, well, we could use
5 \$1.30, and our response to that is you can only use
6 \$1.30, you can only change copper prices in your
7 relative valuation model -- and this is your own
8 theory -- if it affects both companies equally. Now,
9 and we can show that it doesn't. It changed -- the
10 reserves change out of proportion to each other. And
11 so the whole -- the argument is made to take down
12 their analysis.

13 We were not capable of saying but, you
14 know, if you had done the analysis, I mean, if you
15 really thought \$1.30 was the appropriate price to use,
16 you know, here is what you would have come out with.
17 We just were not capable of doing that. And so there
18 isn't any evidence in the record of that. But the
19 point --

20 THE COURT: Well, are there things --
21 what I was trying to ask you about the multiples
22 analysis and other things like that is this: Are
23 there things from which I can derive from market
24 evidence general rough judgments about how the

1 marketplace views the effect of higher, you know,
2 reserves or higher, you know, copper prices on
3 multiples? I doubt the market knows -- the market is
4 stuck with what you have, what you said, which is they
5 don't know exactly what the increased production plans
6 are going to be; right?

7 And, you know, one of the things we
8 will get into is, you know, there is all kinds of
9 complexity, the difference between mining in Mexico
10 and its political environment and its climate and
11 geography versus mining in Peru versus mining in West
12 Virginia. Markets probably, though, have some, you
13 know, translation, some rough sorts of things. They
14 smooth out things. You know, it is not exactly
15 comparable but pretty close.

16 And, I mean -- and I will let you sit
17 down, too. What I am saying is I do need, you know --
18 one of the things I admire about you as a practitioner
19 is you are admirably candid, and you seek an economic
20 objective for your client, which is what you should
21 get if you are entitled to it, because that's what
22 your client wants. I mean, to turn around to your
23 client, Vice Chancellor Strine or now Chancellor
24 Strine -- it is hard for me. As most of you know, the

1 vice will never come entirely out of me. It is just
2 not something that is likely to happen.

3 You know, you want to equally get an
4 award that you think compensates your client fairly
5 for the unfairness, and, you know, I am going to need
6 to come up with a remedy for you then. And I don't
7 like to guess. I mean, one of the reasons I don't
8 like about appraisal cases, because it is a lot of
9 guess, and so you know that.

10 And what I am saying -- when you sit
11 down, you may want -- and I may give you some
12 follow-up in a letter. But this is really kind of a
13 gap that kind of concerns me. And you know they are
14 going to pile into this in a second on you.

15 MR. BROWN: I know. And honestly, as
16 I am standing here, I am being handed pieces of paper.
17 I really don't know the answer to that --

18 THE COURT: Okay. That is fine.

19 MR. BROWN: -- as I am standing here.
20 I mean, we can --

21 THE COURT: It is tough now doing it
22 without -- do you want to talk a little bit about the
23 process?

24 MR. BROWN: Let me talk about the

1 process, Your Honor. And I mentioned something at the
2 beginning, you know, a little bit before, what I
3 consider to be the basic test of process going back to
4 Weinberger, which is have you done something that
5 approximates what would have occurred in an arm's-
6 length transaction, and if you set up a process and
7 did it actually work. You don't just look at the
8 resumes of the committee. You have to look at what
9 they did. I mean, otherwise, in Van Gorkom, there
10 never would have been a liability. They had the
11 longest list of the most qualified people, and, you
12 know, sometimes people make mistakes.

13 Now, here, so really the question
14 is -- I mean, I think you ought to start off with,
15 well, if I was the owner, would I have done it this
16 way. And clearly, I don't think -- you know, and a
17 third party wouldn't be turning to a valuation, you
18 know, or a methodology that valued its stock at that
19 time less than its market price. They would be
20 focusing on the Minera valuation, which really wasn't
21 done here.

22 But I think the ultimate test, you
23 know, of the process is let's talk about the facts of
24 what happened. Their main point is they thought they

1 did a fantastic job. They got a lot of things. And
2 so there is basically five things that they say they
3 got that show that they were an effectively
4 functioning committee, an informed committee. And
5 really, when you go through them -- it is not going to
6 take me all that long, but when you go through them,
7 they didn't get anything of all that great
8 significance. I mean, giving them the benefit of the
9 doubt, even if you consider some of the things they
10 got to have some value, they really don't amount to
11 anything. So this was not a committee that functioned
12 properly, that obtained anything.

13 And the most important point,
14 obviously, is the price. I mean, this has been
15 mentioned ad nauseum. They asked for 3.1 billion.
16 They got on -- at the time the defendants contend is
17 the valuation date, October 21, they got 3.1 billion.

18 THE COURT: And so the ask there --
19 one of the things, you know, what judges always love
20 is the ability of parties to disagree on just
21 virtually anything. And as I understand it, your
22 point is they actually did basically the same or
23 slightly worse than if they had just accepted the
24 initial bid; right?

1 MR. BROWN: Yes. It is not slightly
2 worse. I mean, actually --

3 THE COURT: But isn't here what you
4 place an emphasis on is the value, the economic value
5 that Grupo Mexico referred to in its offer; right? Is
6 the difference between you and the defendants that
7 they focus on the indicative number of shares?

8 MR. BROWN: Yes. And let me try to
9 explain it, because there is a lot of sort of people
10 talking about different numbers.

11 THE COURT: Right. But just so I --
12 you are saying -- their ask really was, you know,
13 \$3 billion and 50 million. You know, it wasn't even
14 3.1. It was 3 -- it was a very specific economic
15 number. And that was their ask; right?

16 MR. BROWN: To be valued at the market
17 price during a window right before closing.

18 THE COURT: Right.

19 MR. BROWN: That was the --

20 THE COURT: And so when you are
21 talking about the difference between if they had just
22 simply signed up that deal; right?

23 MR. BROWN: Or if they had accepted
24 that pricing term. Obviously, other terms would be

1 negotiated. But that was the pricing term they were
2 proposing. The methodology determined the number of
3 shares. If it accepted the pricing term, it said we
4 will do that pricing term, and, you know, here is the
5 other things --

6 THE COURT: And, I mean, this is a
7 very -- I am going to ask Mr. Stone the same thing.
8 You argue that if they had accepted that, that would
9 have been better off -- they would have been better
10 off than if they did the deal they did. Mr. Stone
11 says no, we actually did a lot better than that,
12 because what they asked for was 72.3 million shares,
13 and they ultimately only got 67 million; right?

14 MR. BROWN: Right.

15 THE COURT: And what I am saying is
16 the explanation there is he is focused on the 72.3
17 million indicative figure, and you are focused on the
18 economic number and saying that indicative is
19 indicative of the fact they weren't focused on the
20 number of shares. They were focused on an economic
21 value, and that's really what matters here.

22 MR. BROWN: Yes. And the 72 million
23 is just 3.1 billion divided by the market price
24 earlier.

1 THE COURT: Right. And that's why --
2 exactly.

3 MR. BROWN: Our point is -- you know,
4 and this requires some explanation. But really, they
5 asked for 3.1 billion in stock and valued at the
6 market at a certain time, and they wanted to do it
7 during a 20-day window before the closing. The
8 committee said from the outset that's a nonstarter.
9 We don't like this fluctuating. It is not really
10 fluctuating. It is just we don't like that date for
11 setting the value because it is far in the future and
12 we don't know how many shares it will be. And so they
13 ultimately agreed to 67 million shares, which is all
14 it is is a difference in timing of when you are
15 valuing them, because 67 million shares at, you know,
16 October 21 or, you know, the price around that time
17 was 3.1 billion. And so, you know, I mean, they
18 didn't change the price.

19 In fact, our point is if they had
20 accepted that term, which was 3.1 billion valued at
21 the 20-day average above the closing, there would have
22 been 52 million shares issued versus 67. I mean, they
23 cost them 15 million shares by going -- by this
24 change.

1 Now, you can say, Your Honor, well,
2 just because, you know -- it is not ipso facto.
3 Because in the negotiations they did something that
4 didn't work out, that doesn't mean they did something
5 wrong. I agree. So the real issue is why did they do
6 it and did they have an informed basis for doing it
7 and was it a reasonable decision to want to change
8 this pricing term in this way that worked out to be a
9 disaster on the price. And I know they said, well,
10 there is other things, and I will get to those. But
11 they didn't. From Day One they said it is a
12 nonstarter.

13 Well, you only are concerned about the
14 so-called floating exchange ratio if you expect the
15 stock price to go down. If it is going to go up, it
16 works to your advantage and you want it. And they
17 brought Raul Jacobs in here, and he testified that the
18 stock price was trending up and we expected it to
19 trend up.

20 THE COURT: Right. So what you are
21 saying is now there is a little cognitive dissonance
22 there because you are saying the committee is getting
23 this relative valuation analysis, and the copper
24 pricing numbers that they are using are south of a

1 dollar, but the sell to -- I don't mean that
2 pejoratively, but the sell to me about the rationale
3 for this was copper is going gangbusters.

4 We are now dealing with the
5 controller. The controller has been pretty rigid
6 about what it says Minera is worth. But we decide to
7 do a floating exchange ratio, which can only --

8 MR. BROWN: Fixed.

9 THE COURT: Okay. We do a fixed.

10 MR. BROWN: It is sort of -- I think
11 the floating versus fixed is kind of a misnomer. It
12 is the date you use to set the number of shares --

13 THE COURT: Right.

14 MR. BROWN: -- the date you divide the
15 market price by to figure out the number of shares.
16 But that is our point. It is an inexplicable
17 decision. If you think copper is going gangbusters,
18 obviously --

19 THE COURT: Well, they are going to
20 make -- aren't they going to make the argument about
21 their way of looking at the world is that -- because
22 they viewed these companies so similar that there
23 really isn't any --

24 MR. BROWN: Well, but the third party,

1 what would a third party do, Your Honor? They made a
2 proposal that they wanted to have 3, whatever the
3 number is, 3.1 billion of stock valued at the market.

4 THE COURT: If this was so junky, if
5 this was such a junky deal -- and this gets back to
6 the merits, because I do want to stay on process and
7 let you finish and ask our good reporter if she wants
8 a five-minute break before we come to Mr. Stone and
9 his stentorian comments.

10 If the market -- if this was so
11 materially mispriced, why didn't that blunt the stock
12 price momentum for Southern Peru?

13 MR. BROWN: Well, and because we don't
14 know that it didn't is my answer. Because that's --

15 THE COURT: I mean, I understand that.
16 And again, I know that you are going to say this is a
17 fairness thing and all. But, you know, it is quite
18 common for the buy side of these type of deals to
19 suffer, you know, a durable diminution in their stock
20 price for some time when they announce this sort of
21 acquisition. Let's go to the late '90's-style CEO
22 love match mergers of equals -- right? -- where they
23 were all -- you know, the relationship could not be
24 torn asunder, all this stuff. You know, they could

1 each go on "The Bachelor" and they would never be
2 unfaithful to the other, that kind of, you know, late
3 '90's thing. There was typically a market discount.

4 Here you have got one of these things
5 where you could easily see the market going, "Well,
6 wait a minute. You are buying this from the
7 controller. You know, we are really high on you, and
8 you are just way overpaying."

9 And what you are saying is we don't
10 know that there wasn't because there wasn't an events
11 study or anything done; right?

12 MR. BROWN: Right.

13 THE COURT: You didn't do an events
14 study either; right?

15 MR. BROWN: Your Honor, it is not
16 possible to do an events study of that nature over a
17 four-month window or longer. You could do it over a
18 day or two. You can't factor out all the other
19 information that is affecting this company other than
20 this transaction over a four-month period.

21 THE COURT: Well, all we are saying,
22 though, if we had a durably -- you are talking
23 about -- the high end of what you say -- I mean, what
24 is your high ask here from me?

1 MR. BROWN: Do you mean on the remedy?

2 THE COURT: Yes.

3 MR. BROWN: It is they were overpaid
4 by 26 million shares. They should be given back.

5 THE COURT: Okay. Tell me about that,
6 what that translates into in dollar terms. A billion?

7 MR. BROWN: It is into the billions,
8 yes.

9 THE COURT: Yes. So, I mean, it is
10 not the sort of thing where you should say, like, a
11 one-day price drop and a billion-dollar loss in value.

12 MR. BROWN: Well, let me kind of
13 address this, come at this a different way. Really
14 what you are saying is there is the third methodology
15 to decide whether it is fair, which is it turned out
16 good. Okay? And I think there is two problems with
17 that at least. One is we are not saying that they
18 shouldn't have done this transaction under any
19 circumstance. It was required to be fair. The
20 question is, you know, of the value that was created,
21 was it shared in a fair proportion between Grupo and
22 the minority shareholders.

23 THE COURT: But what we are saying is,
24 you see, for it to be -- you know, again, we credit

1 markets with this thinking that they obviously don't
2 do. But they do do some rough thinking.

3 If you overpaid for Minera Mexico to
4 the tune you are talking about, the deal shouldn't
5 make sense. That if what you are saying is you bought
6 something, you know, at a billion dollars above its
7 expected cash flows, there is still enough difference
8 between zero and a billion to have an effect on a
9 market float of this nature. A half-billion-dollar
10 impact would still be a pretty big drag on a stock
11 price. We don't see any over the period that you are
12 talking about, even putting aside turning out well,
13 turning out good, whatever it is. I don't really know
14 how it turned out, and that's why you guys can send me
15 letters about that.

16 But I am saying even over the period
17 you are talking about -- right? -- between when they
18 sign up the deal and the announcement, there is very
19 positive stock growth, stock price growth.

20 MR. BROWN: Twenty percent.

21 THE COURT: Yes.

22 MR. BROWN: Twenty percent.

23 THE COURT: And --

24 MR. BROWN: And the comps all went up

1 by 24, 25 percent.

2 THE COURT: Went up by less.

3 MR. BROWN: It went up by less during
4 that window, yes. That's correct.

5 THE COURT: Well, and is that a
6 measure? And what would that translate into?

7 MR. BROWN: I don't know. We can do
8 that calculation.

9 THE COURT: No. That's what I am
10 talking about. Because it could obviously have been a
11 drag but not to the billion-dollar level; right?

12 MR. BROWN: Yes.

13 THE COURT: And now get back to
14 process. Kahn v. Lynch, burden-shifting lite. The
15 special committee had a lot of process. Obviously,
16 they had some weird things where they had meetings
17 where they did a minimum, but they met a lot of times.
18 They didn't hire your typical advisors, the typical,
19 you know -- I should not say "typical." That's not
20 the right word. Let's just say they hired some fancy
21 type of advisors who tend to, you know, often advise
22 controllers themselves or things like that. They
23 seemed to be pretty smart folks. They made some
24 judgments that you don't believe were wise, but they

1 had good answers for them, why they did them. They
2 had explanations.

3 Do you not get a fairness -- do you
4 not get a burden-shift based on a post hoc assessment
5 of effectiveness, or is it really in the first
6 instance is this a credible special committee? Did
7 they have bargaining power? Did they have quality
8 advisors? Did they have the proper motivations? And
9 if they did, you get the burden shift. And you still
10 get the chance to show, frankly, under a favorable --
11 a preponderance standard, but you still get the
12 substantive chance to get right into fairness.

13 If I am looking back and in order to
14 determine the burden-shift I am looking into things
15 like fixed versus floating, you know, things about
16 this valuation --

17 MR. BROWN: Well, I think here is --
18 first of all, the structure, you are talking about
19 sort of the structure of it versus what they actually
20 did. I mean, they are arguing both. They are saying
21 we had the proper structure and we obtained real
22 benefits, so we actually had a meaningful
23 contribution.

24 Our argument on the structure is, I

1 mean, the structure was flawed from the beginning. I
2 mean, they didn't have a resolution setting up a true
3 third-party situation where they were authorized to
4 negotiate and reject the transaction. Like I said, it
5 says "evaluate" in the resolution. Two of the
6 committee members testified that they didn't think
7 they had authority to make counteroffers. I mean,
8 that's not the kind of committee that approximates
9 arm's-length negotiation. And I will tell you --

10 THE COURT: So you are saying actually
11 the confusion about their mandate is one of the issues
12 about the burden-shift to begin with.

13 MR. BROWN: And that creates an issue.
14 I mean, that is not a giant point. That is not my
15 main point, but that is that point. There is a fact
16 here that I have never seen, honestly. One of the
17 committee members, one of the four abstained from
18 voting on the transaction that he worked on. I mean,
19 at the end --

20 THE COURT: No. I get that. I am not
21 sure what to make of that, because you get these
22 skittish members of our profession with skittish
23 members of the investment banking community, and so at
24 this end of the process they say let's just make this

1 as Ivory Soap as we can by having that person not vote
2 so that it is clear that his vote didn't carry the
3 day, even though you have never excluded him from the
4 process, even though he has been substantively part of
5 the discussions. You know, what does that really do?

6 MR. BROWN: I don't know, but to me it
7 is bizarre. And that's the --

8 THE COURT: Is it bizarre or is it
9 just easily explainable by -- lawyers, we get
10 sometimes caught up in things, and so what we do is,
11 you know, we can't disqualify him but let's make
12 sure -- look, there are instructions on this in
13 Sarbanes-Oxley, like excuse the people from the
14 meeting. Some of those things are real. I don't know
15 whether they voted for the deal in his absence. I
16 mean, if you were actually going to worry about
17 something like this, you probably should have an
18 executive session without the person and you should
19 talk about the issue of concern, about whether anybody
20 has any concerns about this, if there is any reason to
21 believe that the process has been tainted by this
22 person's involvement.

23 Did he leave the room? Do we know?

24 MR. BROWN: I don't know. He didn't

1 vote on it.

2 THE COURT: Right. But was he sitting
3 in the room? Because, I mean, even under the
4 psychological theories under which this stuff matters,
5 having him sit there in the room still doesn't really
6 cleanse the issue, because nobody could talk about the
7 problem that gave rise to the abstention, to the
8 extent it was a problem. But how much of a problem
9 was it?

10 MR. BROWN: Well, I just think it is
11 another factor.

12 THE COURT: But was the substance of
13 it a problem? Because --

14 MR. BROWN: It was because -- here is
15 why. He is the guy that at the same time he is
16 supposedly negotiating, you know, the deal to acquire
17 Minera Mexico, he is negotiating his client's exit
18 from the company. And so that's not a conflict that
19 creates a loyalty issue. Your Honor has already held
20 that. But it is an issue. This is not a clean --
21 this was not a pristine committee.

22 You know, there was a guy that has a
23 different agenda, and the extent to which it really
24 conflicts with the minority's goals, I mean, can be

1 argued about, but there is a difference. And I think
2 I have to get back to -- I don't think you can just
3 not look at what they did.

4 I mean, on price, our point is they
5 didn't get anything. They lost ground.

6 THE COURT: No, no. I am looking --
7 this is on the burden-shift point? I am trying -- you
8 know, sometimes the law makes you do things, and I
9 have got this -- one of my whole issues with Kahn v.
10 Lynch is I have really never quite understood the
11 burden-shift and what all the momentum is about, you
12 know, who gets the win if I land on the -- you know,
13 if I fall off my bike seat onto the bar and I get
14 stuck there, besides it being very painful to be stuck
15 there, if I am stuck there, which way -- if the wind
16 blows, which side of the bike I fall off depends on
17 who wins. I mean, it is a preponderance standard.
18 But our law purports to do this; right?

19 And, you know, the first thing I am
20 supposed to do in the analysis is determine who has
21 the burden of proof.

22 MR. BROWN: But I don't think you -- I
23 think, Your Honor, if you can go through the evidence
24 and say the preponderance of the evidence here

1 indicates unfairness to me, then it doesn't matter if
2 the burden has shifted. Then you can assume it
3 shifted. The preponderance has under either standard,
4 you know --

5 THE COURT: Yes. Analytically, as a
6 person who grew up as a pretty traditional jurist who
7 believes that standards of review are used to decide
8 cases and not labels, it just always is frustrating
9 for me to just not know. And I think formally
10 speaking, I am supposed to go through this kind of --
11 they have applied for a burden-shift; right? I
12 believe there has been an application for a --

13 MR. BROWN: Correct.

14 THE COURT: -- burden-shift.

15 MR. BROWN: I mean, my view of it is,
16 honestly, I mean, I kind of -- I think I have a
17 similar approach to Your Honor, which is it doesn't
18 seem all that significant. You know, if you are going
19 to say it is 50-50, you lose, because you had the
20 burden, I mean, I don't think we would have won
21 anyway. You know, in a case where we are seeking
22 this, I mean, you have to be convinced.

23 THE COURT: I know, and that's why I
24 am really -- I mean, I am taking up your time mostly

1 for my own purposes, because again, I do have a
2 different role. And I think one of the things about
3 the burden-shift part of Kahn v. Lynch is that nobody
4 really tends to want to spend a whole lot of time on
5 it because the effect of it in the end is so minimal.

6 But why don't I let you stand down. I
7 think it probably does make sense for everybody to
8 stretch their legs and take a break. Can we come
9 back -- is ten minutes long enough?

10 (Recess taken.)

11 MR. STONE: Good morning, Your Honor.
12 Your Honor, I just want to frame, I think, the
13 analysis here, and then I want to go to some of the
14 specific points that Your Honor discussed with
15 Mr. Brown.

16 First, I really think the plaintiffs
17 both in their briefs and in their presentation today
18 really shied away from, if not ignored, the process
19 part of this test. I think the starting point for
20 this analysis has to be the process, because not only,
21 as Your Honor mentioned in the latter part of
22 Mr. Brown's argument, does it determine who has the
23 burden here, but it also colors the pricing inquiry.

24 And I think the question here today is

1 whether we are going to find that four highly
2 qualified independent directors who acted in good
3 faith, who relied on a leading investment advisor to
4 determine fairness, did so in error and whether they,
5 in fact, missed by billions of dollars. And the fact
6 that there really is no discernible motive, there is
7 no evidence in the record that they had any motive
8 other than to get the best price possible I think is
9 key to answering the question about whether this was a
10 fair deal. So I think we need to make sure that we
11 view the evidence through that prism.

12 There is one point, Your Honor, that I
13 want to address first, because I think it is really a
14 misconception, as I hear it from Your Honor's
15 questions, about what was done with respect to SPCC.

16 THE COURT: Yes. I mean, that is
17 important, because I do think, you know, we have all
18 been around enough to see things shift in how you look
19 at a valuation analysis, and they always tend to shift
20 in a certain way. Even when there is no discernible
21 motives, there seems to be a tendency to justify the
22 deal. And there are some powerful incentives even for
23 high-quality advisors to come out with a deal. And,
24 you know, so I do want to hear about that, because as

1 I understand it, it is conceded that, you know, your
2 clients didn't really buy 90 cents as the copper
3 price; right? Correct?

4 MR. STONE: Well --

5 THE COURT: That the company was using
6 that -- you know, as I said, there is always kind --
7 but we always create a certain amount of cognitive
8 dissonance in life. That the company is using 90
9 cents as its planning metric, that that is a
10 conservative assumption, and that is not the basis on
11 which the deal got done. And if that was the basis of
12 looking at the world, this was a really dumb deal;
13 right?

14 MR. STONE: No.

15 THE COURT: No?

16 MR. STONE: No.

17 THE COURT: Okay. Then --

18 MR. STONE: On a relative basis 90
19 cents works. Ninety cents is fair.

20 THE COURT: On a relative basis, if I
21 have an overvalued asset and I know it to be
22 overvalued and I can turn it into cash, I would not
23 buy another similar asset and then jack its value up
24 by what I believe to be market foolishness and,

1 instead of monetizing my good fortune to be holding
2 onto an asset that the market is improvidently
3 valuing, engaging in the same foolishness, unless I
4 thought I could then turn around and sell immediately
5 the combined thing for an even more foolish thing.

6 So that's why I really don't get the
7 90-cent story, because it can't cohere with your
8 clients believing that the market price of Southern
9 Peru was real, which means you could have gone out and
10 done a secondary offering of stock and gotten
11 3 billion bucks. And if you do a deal where you give
12 away 3 billion bucks to get back two, that is stupid;
13 right?

14 MR. STONE: Right, Your Honor.

15 THE COURT: And that's why
16 Mr. Handelsman, who is a sharp cookie, who has been
17 hired by really -- he worked for very sharp cookies in
18 Chicago; right?

19 MR. STONE: Right.

20 THE COURT: They don't hire -- I don't
21 think the Pritzker family is kind of keeping a fool
22 around for decades. And his sell to me, and again,
23 not being pejorative, but his sell to me was, no, it
24 wasn't 90 cents. This is a bull market for copper.

1 Minera Mexico is even -- is probably even more
2 undervalued than us. This is a great chance to buy an
3 undervalued, you know, asset that we can bring
4 together with us and take advantage of a great ride in
5 the copper market. That was his sell; right?

6 And if that's his sell, he is not
7 saying he ever evaluated this deal like 90 cents per
8 share was the right copper price, and it makes sense.
9 I mean, I understand how people can get into --

10 MR. STONE: No, no. That's correct,
11 Your Honor. You are right. We hoped that, certainly
12 the directors hoped 90 cents would not be the price.
13 I think they believed, as Your Honor said, that demand
14 for copper was increasing.

15 Our point is that the deal works if
16 you use that 90 cents. But let me get back to the
17 point that I was trying to address on SPCC. So it is
18 not the case that the advisors didn't look at SPCC.

19 THE COURT: Okay.

20 MR. STONE: So two things about that.
21 Number one, first of all, Minera was controlled by
22 Grupo. The advisors had to be more skeptical of their
23 projections and their numbers and everything else, and
24 they spent a lot more time on it. No question about

1 it. They had confidence in people like Raul Jacob,
2 who they dealt with every day, who was in charge of
3 projections for SPCC, so they had a certain level of
4 confidence going in. But certainly --

5 THE COURT: Grupo Mexico already
6 controlled Southern Peru, though, too.

7 MR. STONE: They did, indeed. They
8 did.

9 THE COURT: And Raul Jacob, I mean,
10 again, you are an independent director of a controlled
11 company.

12 MR. STONE: Right.

13 THE COURT: That doesn't mean you
14 should be hostile --

15 MR. STONE: Right.

16 THE COURT: -- to management.

17 MR. STONE: But they were separately
18 managed entities. There is no question about that.
19 But the real point is Anderson & Schwab went in and
20 did the same analysis as they did on Minera and they
21 did on SPCC, and I can show you --

22 THE COURT: Okay. Yes, where in the
23 record is that?

24 MR. STONE: Okay. This is the

1 deposition of Thomas Parker, who was the main copper
2 analyst with Anderson & Schwab. And the plaintiffs
3 asked him a number of questions about his due
4 diligence, and they were focusing mostly on the Mintec
5 reports for Minera, and he was talking about the fact
6 that they went through and analyzed those in detail,
7 taking geologic information, ore reserves, designing a
8 pit, looking at the assumptions underlying these
9 things.

10 And he was asked a question on page 41
11 of his deposition: "So is it fair to say that your
12 work was focused more on assessing the reliability of
13 the geostatistical program that Mintec was using?"

14 "Answer: I wouldn't characterize it
15 as the reliability of the program. The programs are,
16 you know, they are commercial software. What we were
17 doing, the geostatistical package and hence the ore
18 reserves that drives the mine plan was just one piece
19 of what we were reviewing. In a general sense we were
20 verifying that the assumptions that go into the
21 forward plans for both companies were reasonable and
22 supported by historical data."

23 And that's just one example of his
24 testimony.

1 And Goldman Sachs, there is testimony
2 from Mr. Sanchez as well that they did due diligence
3 on SPCC. So it is not as if they didn't do the same
4 level of analysis on SPCC, and I am not sure where
5 that misconception arose.

6 THE COURT: Well, I mean, you know,
7 obviously, in litigation misconceptions can arise, you
8 know, I mean, obviously, the point of no incentives to
9 share your conceptions of the world or vice versa.

10 MR. STONE: The only thing --

11 THE COURT: But what I am saying is
12 were there reports generated on the reserves, the
13 changes in reserves, on the reserve levels at Minera
14 Mexico and other aspects of what is going on at Minera
15 Mexico which were not done at Southern Peru by
16 independent people?

17 MR. STONE: We don't know the detail,
18 but we only know that they looked at both. And I
19 don't think the record reflects any particular --

20 THE COURT: What you are saying is the
21 plaintiffs can't stand up with a report in their hand
22 and say, "Look, this is a fully updated report from
23 Minera Mexico done by independent advisors employed by
24 the special committee specifically for that purpose,

1 and there is no comparable report for Southern Peru
2 itself"?

3 MR. STONE: That's right. And, in
4 fact, the record reflects that A&S made adjustments to
5 both the projections of Minera and the projections of
6 SPCC, and those were accepted by Goldman and by the
7 special committee. So they certainly looked at both
8 companies.

9 And one of the things also, Your
10 Honor, I think it is important to understand is -- and
11 this goes back to a question that Your Honor asked our
12 expert on the stand, which I want to make sure Your
13 Honor understands what he was saying. You asked
14 Professor Schwartz whether he had reviewed the
15 projections of SPCC in detail, and he said, "No, I
16 haven't." He relied on A&S. And he had to. And the
17 reason is these studies take six years. I think Your
18 Honor can take judicial notice of what is in the 10-K.
19 It took six years for them to update the reserves at
20 SPCC. They are longitudinal studies. They do
21 drilling programs. They analyze those. They do
22 seismic data. They do lots of geological studies. It
23 takes six years.

24 Now, I suppose Professor Schwartz

1 could have done that. He would have needed an army of
2 people to go in and do that to make sure that he in
3 detail had confidence in the projections of either of
4 the companies. But it is just not possible in the
5 time -- I guess we have been at this six years, so
6 maybe if he started at Day One, he could have done it.
7 But it is not as simple as the typical DCF that you do
8 when you look at the projections and you get behind
9 the assumptions. And, I mean, it is not that kind of
10 a company. It is much, much more complicated than
11 that.

12 And so Professor Schwartz certainly
13 did all the economic analysis, and that's reflected in
14 his report. He looked at those projections. He just
15 didn't get down to the level of detail that he as a
16 mining expert and someone who worked with a mining
17 company for ten years could have done but didn't have
18 the time to do.

19 THE COURT: But what I am really, I
20 think, focused on is symmetry. And so you are telling
21 me there is really no "there" there when it comes to
22 the plaintiff's assertion that there was this big
23 update of everything that was done at Minera by
24 independent advisors to the special committee and,

1 frankly, with Grupo Mexico pushing a valuation of
2 Minera that's aggressive and that there was nothing
3 done comparable on the Southern Peru side. This is
4 not the case.

5 MR. STONE: This is not the case. And
6 there were independent consultants at SPCC working,
7 just as there were at Mintec, on updating reserves.

8 THE COURT: Were they the same
9 consultants?

10 MR. STONE: I don't know if it was
11 Mintec that was hired at SPCC as well that --

12 THE COURT: Who were they under the
13 control of, these people being hired?

14 MR. STONE: Well, they are paid
15 ultimately by SPCC or by Minera.

16 THE COURT: So Mintec was working for
17 Minera Mexico.

18 MR. STONE: Correct. I don't know who
19 the consultant was at SPCC. But the plaintiffs make a
20 big point of the fact that the reserve estimates --

21 THE COURT: I think what your friends
22 are saying is Grupo Mexico is trying to, you know --
23 imagine it is a house; right? They have hired the
24 expert to go in and, like, go through and say let's

1 make the house look as spiffy as we can when we are
2 going to sell it. And they have got people under
3 their control doing that.

4 What comparable effort is there of the
5 special committee to say, "Well, that's nice that you
6 are doing that, but if we are going to be apples to
7 apples here and we are going to look at everything
8 current, then our currency is even more valuable,
9 because if you look at our reserves, if you look at
10 what we have to offer, we get more valuable under
11 those things, and so you shouldn't be -- you can't
12 justify this ask."

13 MR. STONE: Right.

14 THE COURT: That's what I think they
15 are saying.

16 MR. STONE: That's what they are
17 saying, and I think what they are saying is completely
18 unsupported by the record. In fact, what is in the
19 record is that Anderson & Schwab did due diligence on
20 both companies, and there is no evidence that they did
21 a deeper level of --

22 THE COURT: And who was Anderson &
23 Schwab working for? The special committee?

24 MR. STONE: The special committee.

1 They were independent consultants hired by the special
2 committee.

3 The other point I wanted to make with
4 regard to that is Your Honor had several questions
5 about, okay, so how do I translate reserves into
6 production. And I think that's an excellent question,
7 but it is a very complicated question. It is not,
8 again -- it is true that, you know, Goldman in their
9 sensitivity analysis did not take into account what
10 would happen at higher copper prices. But again, that
11 is a very, very complicated analysis, and it has to
12 take into account things like capital expenditures and
13 capacity.

14 I think you heard some testimony, and
15 I forget whether it was from Professor Schwartz or
16 from one of the directors, these companies are
17 capacity-constrained. They can only produce so much
18 copper. So as the reserves go up, they may have lots
19 of reserves that they can tap, but they can only tap
20 so much if it is filling up the capacity in their
21 plant every single day. And the only option then is
22 to build a new plant, which is huge capital
23 expenditures and several years.

24 So it is not as easy as, you know,

1 saying that, oh, we are necessarily going to change a
2 production plan, because, in fact, it may not change
3 at all.

4 THE COURT: Right. It may not. But
5 it might well.

6 MR. STONE: It might well.

7 THE COURT: And the definitions of
8 reserves are really set to some sort of economic
9 viability factor; right?

10 MR. STONE: Correct. They are.

11 THE COURT: And that's determined a
12 lot by pricing, isn't it?

13 MR. STONE: It is determined by
14 pricing, but when the price goes up -- for instance,
15 every year when the company has to do its SEC filings,
16 they have to go back to their production people and
17 they have to say, "All right, at this new price that
18 the SEC is requiring us to use, how does that change
19 your production plan?" And it may not change it at
20 all. It depends. It just depends on what the
21 circumstances are.

22 So you can make assumptions about
23 that, but, you know, what we do have in the record?
24 The only evidence in the record on increase in

1 reserves I think is Mr. Sanchez in his deposition
2 saying that Minera Mexico increases faster than
3 Southern Peru; the directors, who both testified,
4 Minera Mexico increases faster than Southern Peru; and
5 then we have the 10-Ks, which we have summarized in a
6 chart, that shows that, in fact, Minera Mexico
7 increases faster.

8 And, Your Honor, just so it is clear,
9 that chart also takes into account the update in
10 reserves on the Southern Peru side as of 2006, which
11 had not yet happened at the Minera Mexico side. So,
12 in fact, without that updated study and if you
13 would -- or alternatively, if you have included Minera
14 Mexico's updated study, which I think came out several
15 years later, you would see that Minera actually
16 increases even faster.

17 THE COURT: Talk to me about how
18 much -- it is almost a philosophical discussion, but
19 how much of this chart can I consider?

20 MR. STONE: Well, Your Honor, I think
21 that if this were a point that we were talking about
22 that, for instance, if this were an input into a DCF,
23 I think we would have trouble, based on the current
24 case law, considering it, because it certainly is not

1 something that was known or knowable as of the time of
2 the valuation.

3 THE COURT: No. That's right. So we
4 have this where we say, look, the committee has got to
5 justify -- as I understand, your point on this is the
6 following: My clients, I mean -- or you represent
7 somebody else. But the special committee had a way of
8 looking at this, and they have explained what they did
9 based on what they knew at the time.

10 MR. STONE: Right.

11 THE COURT: The plaintiffs want to say
12 it caused grievous harm and that the committee had no
13 basis to make any rough judgments about this. Well,
14 so long as the committee has -- if you are just trying
15 to -- if you are trying to sort of get to the point
16 where you say, you know, something unfair was done and
17 the committee has a basis for what it is saying and
18 what it knew at the time, why should the Court blind
19 itself to the fact that, frankly, the way things
20 turned out were consistent with what the committee's
21 assumptions are?

22 MR. STONE: That's what I am getting
23 to, Your Honor. This is corroborative of the advice
24 that the committee was given by Goldman Sachs and

1 ultimately of the view that the committee formed. And
2 the fact we had price increases --

3 THE COURT: But what I am talking
4 about -- and I did this to Mr. Brown, and it is a
5 difference between ultimately our roles and the way it
6 affects you, because there is ultimately an appellate
7 court that looks at these things. Where in the law is
8 this distinction? Because intuitively it makes sense
9 that you say he is not going to give a damage award to
10 someone without considering whether there is any
11 damage.

12 You know, we wouldn't say like a
13 doctor says, "Here is all the things I took into
14 account," and the patient has another credible side of
15 the story, but then it turns out that the doctor's
16 treatment plan pans out, and, you know -- but where in
17 our law do we get this distinction? Are there cases
18 that make it?

19 MR. STONE: Well, there are cases
20 certainly, Your Honor, that would hold that for
21 valuation purposes, the valuation analyst in an
22 appraisal action or in entire fairness actions needs
23 to look at what is known or knowable as of the
24 valuation date.

1 THE COURT: Right.

2 MR. STONE: And I think that's pretty
3 well established. I do think, however, that if you
4 are going to present post-transaction evidence that is
5 designed not necessarily to an evaluation as it is to
6 corroborate or support other types of evidence, I
7 don't think there is anything wrong with that.

8 And what we are doing here, even
9 though I understand this has numbers and it is
10 arguably economic, is showing -- and, look, if there
11 had been price increases leading up to the time of the
12 transaction, we may have had some pre-transaction data
13 to make precisely the same point. The problem is that
14 the copper prices were in the doldrums for several
15 years, and we didn't have any recent data that would
16 be indicative of this point, but lo and behold, since
17 this case has taken six or seven years, we had
18 post-transaction data to show the same point. And so,
19 I mean, my view is philosophically that this ought to
20 be accepted and viewed and considered by the Court.

21 THE COURT: Well, and I get that, and
22 that's a plausible thing. But there is not a case or
23 something that you can cite to for that proposition.

24 MR. STONE: I think that there are

1 cases where courts have taken into account
2 post-transaction information. I don't know that there
3 is a case that would precisely articulate a standard
4 that says it is not okay for valuation but that it is
5 okay for other types of things.

6 THE COURT: Well, how do -- don't I
7 really do have -- don't I have to look at this as if
8 the special committee -- that Mr. Handelsman's story
9 is the story, which is that, you know, Goldman -- that
10 this 90-cent thing was not what anybody believed; that
11 what they believed was when you had the appropriately
12 bullish perspective on the marketplace, Minera Mexico
13 was a good deal to buy.

14 Why isn't Goldman doing an analysis
15 that actually is based on the underlying premise given
16 by the committee for its actions? Well, because as I
17 understand it, the relative valuation used a 90-cent
18 copper price.

19 MR. STONE: It used prices between 90
20 cents and \$1.20.

21 THE COURT: Right. But it yields --
22 when you, you know, untangle it all, it yields values
23 for Minera Mexico which don't support the deal being
24 particularly apt, being a good deal; right?

1 MR. STONE: No.

2 THE COURT: Well, then walk me through
3 why at 90 cents per share -- tell me what Minera
4 Mexico is worth. And I don't want to hear about this
5 relative stuff.

6 MR. STONE: Okay. I am not going to
7 tell you about relative stuff. I am going to tell you
8 about a DCF analysis of SPCC; okay? So Goldman did
9 one, but they weren't the only ones who did analyses
10 of SPCC. Analysts did them as well. And you know
11 what? Goldman's numbers came out very similar to what
12 the analysts' numbers came out at. And they were
13 about half of the market price. The analysts' numbers
14 were 21 and \$20 a share when the stock was trading at
15 40. That's something that Goldman took a look at.
16 That's something that UBS took a look at. That was
17 shared with the special committee.

18 THE COURT: Okay. And what I am
19 saying there, you know, because you are an excellent
20 lawyer, and you know a little bit about the business
21 side of things because you have been an excellent
22 business lawyer for years, is the committee had to be
23 believing that the DCF was wrong, that it was not an
24 appropriately realistic assessment of the future of

1 Southern Peru and that it was artificially low,
2 because otherwise, if it believed that Southern Peru
3 was trading at twice -- you said it to be twice its
4 DCF.

5 MR. STONE: It was its NAV, yes.

6 THE COURT: They should have
7 immediately done a secondary offering and never bought
8 another company, much less take your market valuation
9 and let's buy another company for twice its DCF value?

10 MR. STONE: Right. But, Your Honor, I
11 think --

12 THE COURT: But, see, this is
13 important. Your clients conceded that they could
14 monetize what was given to Grupo Mexico at the market
15 price, that you could get \$3 billion.

16 MR. STONE: Not all at once maybe, but
17 yes.

18 THE COURT: Well, but even getting
19 close, it is not -- even Strine doesn't give
20 \$3 billion -- tell me, I have got a piece of paper
21 that the market is valuing twice as much as what it is
22 worth. I could go get the market price. Somebody
23 else is in my situation, but they don't have any
24 market for what they have, and I know this is the

1 situation. So rather than sell my asset at twice its
2 fundamental earnings worth, I buy someone else.

3 That's called charity. And when it is done towards
4 the controlling stockholder, it is called unfairness.

5 So your client's story can't work at
6 90 cents because at 90 cents Mr. Brown's case, it is
7 pretty slam dunk. You can't do that. No matter how
8 nice the CEO of Grupo Mexico is, you know, and however
9 excited you are about Mexico winning the under-17
10 World Cup, they cannot be rewarded with public company
11 stockholders' money in that way. And that's why I am
12 saying I don't understand your committee's story to
13 hold up at 90 cents per share and why they weren't
14 asking the banker, "This is really weird. Why haven't
15 you -- if we believe that the market -- if
16 Mr. Handelsman really believed the long-term copper
17 price was \$1.20, \$1.30, why aren't we doing the
18 relative valuation on those metrics? And if we can't
19 and, Goldman, if you are telling us you won't give us
20 a DCF value at that level, then we are not doing the
21 deal."

22 How do you answer that? Why isn't --

23 MR. STONE: I mean, I think that's in
24 some ways precisely consistent with what happened,

1 because Goldman first did a DCF of Minera, and the
2 committee looked at it and they said, "Wow, that's
3 really a lot lower than the 3.1 billion that Grupo
4 pegged it to. How do you explain that?" And the
5 number they came out with was 1.7 billion or something
6 like that. And, in fact, Goldman explained that to
7 them, and they said a billion dollars of the
8 difference is due to assumptions about copper price.
9 If you use the \$1 that is in Minera Mexico's
10 projections, it accounts for a billion dollars. You
11 are almost up to the \$3 billion.

12 THE COURT: All right. Wait a minute.
13 Let's start with that.

14 MR. STONE: Okay.

15 THE COURT: So if you use the \$1, you
16 said you are almost up to -- you close the gap.

17 MR. STONE: Almost.

18 THE COURT: So what that means is in
19 normalizing the way you look at this, they are saying
20 we are paying with this. This is our market multiple.
21 We are paying with this. We know the cash value of
22 this. Minera Mexico is only a billion-seven under a
23 buck --

24 MR. STONE: No. No. Under 85 cents,

1 which is what Goldman used.

2 THE COURT: Okay. If you bring it up
3 to a buck --

4 MR. STONE: If you bring up to a buck,
5 you are at 2.7 billion.

6 THE COURT: You are at 2.7.

7 MR. STONE: Right.

8 THE COURT: And the market at that
9 time for Southern Peru would be what; about 3? Do we
10 know?

11 MR. STONE: The market capitalization?

12 THE COURT: Whatever the ask was.

13 MR. STONE: Yes, 3.1 billion; that's
14 right. And the other two factors which took it
15 actually well over 3.1 billion were an assumption
16 about taxes and the downward adjustments that
17 Anderson & Schwab had made on the projections of
18 Minera. And if you add all of those up, you actually
19 get up to \$3.7 billion. So --

20 THE COURT: No. The Anderson &
21 Schwab, that's your own advisors.

22 MR. STONE: I understand. That's our
23 own advisors. So you take that out of the equation,
24 though; you are still up over the 3.1 just with the

1 tax assumption, which is something that, as we found
2 out, came true. So I think that was Step 1.

3 Then they went to doing a DCF of SPCC,
4 and they came out with numbers, as Mr. Handelsman
5 testified, that were well below the market price that
6 were again sort of within the range of Minera Mexico.
7 And they said, "What is the deal here?" And they
8 looked at it and said this is the way the market is
9 treating these companies. This is the way it is
10 trading.

11 THE COURT: But how do they get to
12 where -- how do I get to what their belief is?
13 Because 2.7 is still a fairly big gap from 3.1.

14 MR. STONE: There is no gap if you
15 take into account the tax credit that Minera had.

16 THE COURT: Well, how did the special
17 committee treat the tax credit?

18 MR. STONE: Well, Goldman did a
19 sensitivity analysis on it in the end, but -- and they
20 actually did it in their DCF of Minera as well. It
21 was worth, in the middle, half a billion dollars.

22 THE COURT: If the committee -- at a
23 dollar what was the DCF model for Southern Peru?

24 MR. STONE: If they did it at a

1 dollar?

2 THE COURT: Yes. What was Southern
3 Peru worth --

4 MR. STONE: I can look it up.

5 THE COURT: -- under the Goldman
6 model?

7 MR. STONE: At a dollar it looks like
8 it was about \$2-1/2 billion. All right? And it was
9 trading at roughly 3.1 at the time.

10 THE COURT: And then at a dollar
11 Minera Mexico they are saying is worth more than the
12 DCF value of Southern Peru?

13 MR. STONE: Correct.

14 THE COURT: But not as much as the
15 market value of Southern Peru.

16 MR. STONE: Correct.

17 THE COURT: And it is still not a good
18 deal to do that deal; right?

19 MR. STONE: At a dollar?

20 THE COURT: Your clients testified
21 that, you know, you can factor all the things --
22 basically, you could get the market price.

23 MR. STONE: I think what my client
24 testified was for the whole company.

1 THE COURT: Well, see, a control
2 overlay doesn't help.

3 MR. STONE: I know it doesn't help. I
4 am just telling you that's what the testimony was.

5 THE COURT: No. I mean, constraining
6 options. I mean, this was a very large block of --
7 you know, and no one -- it would be very strange to
8 think it was selling at a control premium.

9 MR. STONE: I am not saying that it
10 was. I am just saying -- what he is saying is the
11 price was what it was and he believed it, yes.

12 THE COURT: Exactly. Which meant that
13 you could do a secondary offering of some kind.

14 MR. STONE: Well, I don't know that
15 anyone opined on that, Your Honor, because there are
16 lots of --

17 THE COURT: All I am saying is --

18 MR. STONE: There are lots of factors
19 that go into whether a secondary offering with
20 dilution will actually get you the benefit that you
21 expect from it.

22 THE COURT: I understand that
23 dilution -- you know, one of your arguments, as you
24 know, out of this case is the float. And so I am not

1 really understanding how having a more diversified
2 stockholder base with a bigger, you know, public float
3 is going to be worse for everybody than what was done.
4 And it gets back to the point is if your clients
5 basically tell me the market price is the market
6 price, and the market price is 3.1 billion and you are
7 only up to 2.7 billion, and you are trading at a
8 multiple to DCF and you are buying something else at a
9 multiple to DCF, that sounds like a pretty classic
10 dumb deal.

11 MR. STONE: That's not what my clients
12 believed.

13 THE COURT: Well, that's what I am
14 trying --

15 MR. STONE: They believed, as they
16 testified, that they were getting a bargain; that
17 Minera was worth more than the consideration that
18 Grupo received.

19 THE COURT: And I thought that's what
20 I was -- I thought I was engaging you on your own
21 argument by saying that's why your clients must have
22 believed -- right? -- that really the long-term copper
23 price was higher, materially higher than 90 cents per
24 share.

1 MR. STONE: I don't think there is any
2 doubt about that. I think --

3 THE COURT: But that's why -- why
4 didn't they say to their advisors, "Get this straight
5 and figure it out" and say to Southern Peru and,
6 frankly, to Grupo Mexico, "We are not getting it. We
7 are telling the public that our long-term prospects
8 are 90 cents per share -- the long-term copper price
9 is 90 cents per share. We are not doing this. If you
10 want to do this relative valuation, if you are really
11 telling us we are trading at twice DCF, then we are
12 not going to be a buyer at twice DCF because I am
13 Mr. Handelsman and I work for the Pritzkers."

14 MR. STONE: Your Honor --

15 THE COURT: And I want to get this
16 straight. And that's where I am trying to figure out,
17 you know, he has got liquidity issues. There is this
18 issue, and you mentioned about liquidity. They are
19 locked up; right?

20 MR. STONE: Not locked up.

21 THE COURT: What are they?

22 MR. STONE: Restricted.

23 THE COURT: So how much can they sell,
24 you know --

1 MR. STONE: I don't know. They could
2 dribble it out over time.

3 THE COURT: Over a long time.

4 MR. STONE: Yes.

5 THE COURT: As long as this case;
6 right?

7 MR. STONE: Maybe longer.

8 THE COURT: Maybe even longer.

9 MR. STONE: Your Honor, this really
10 goes back to the same point. And it is a good
11 question. But from a negotiation standpoint -- and I
12 think Mr. Palomino made this very clear -- the
13 committee considered it to be in their best interest
14 in the negotiations to push for lower copper prices.
15 And the reason that they did that is because they
16 believed that as you increase the copper prices, the
17 value of Minera goes up faster than SPCC.

18 So maybe they were wrong about that.
19 They were advised that by their advisors, and they
20 held that firm belief. And so in the negotiations
21 they didn't want to say, "Hey, let's do the DCF at a
22 buck 20."

23 THE COURT: Well, we are not at this
24 level of subtlety. It brings to mind Bismarck or

1 Kissinger or something.

2 What you are saying is that from a
3 business standpoint, the strategic rationale for this
4 deal was, frankly, very bullish copper prices, much
5 great demand for copper. Get another asset that will
6 be able to take advantage of that and get it at a good
7 price. That's their ultimate business objective.

8 MR. STONE: Right. Get reserves.

9 THE COURT: In order to do that,
10 because the target of that objective was actually more
11 price-sensitive than the buyer and would value --
12 would benefit in negotiations more from a more bullish
13 thing, incurs the use of valuation metrics that on
14 their face look really idiotic. Well, they look
15 idiotic in this way is what we talked about. It tends
16 to suggest that the market -- that this was a great
17 time to monetize whatever you had in Southern Peru or
18 some of it, because if you are getting twice what a
19 DCF is in the market and it is not something new, you
20 probably ought to get some cash out of it at this
21 point.

22 MR. STONE: And, Your Honor, I mean --

23 THE COURT: But then it gets to this
24 thing, so okay; say I am indulging that and I don't

1 have any conflict. The committee -- explain to me the
2 floating exchange ratio.

3 MR. STONE: The floating exchange
4 ratio.

5 THE COURT: Or whatever it was.

6 MR. STONE: They wanted a fixed
7 exchange ratio.

8 THE COURT: The fixed. Explain to me
9 that part of the deal.

10 MR. STONE: Okay. So Grupo Mexico
11 originally offered 72 million shares. They said
12 that's what they wanted the consideration to be. But
13 they said it is a floating exchange ratio, so it is
14 going to rise --

15 THE COURT: Right.

16 MR. STONE: -- or fall depending on
17 the stock price of SPCC.

18 The committee said no. We would like
19 to have a fixed number of shares so that we are not
20 subject to the vagaries and the volatility, frankly,
21 of the market. Nobody knew when this first started
22 out where the market was going to go. As it turned
23 out, it started going up pretty rapidly. But even
24 then, as of the time of the closing, nobody knew how

1 sustainable that was. So, you know, their idea was
2 let's get a fixed number of shares so we are not
3 subject to the ups and downs of the marketplace.

4 THE COURT: And what was ultimately
5 done, though, was what?

6 MR. STONE: A fixed exchange ratio.

7 THE COURT: But then the value went
8 up.

9 MR. STONE: The value went up
10 significantly, because copper prices went up
11 significantly.

12 THE COURT: That's my point. Which
13 is --

14 MR. STONE: Right. They couldn't --

15 THE COURT: I want to unwind the
16 analytical road with your clients.

17 MR. STONE: I am sorry?

18 THE COURT: Well, Step 1 was
19 strategically this deal only makes sense economically
20 if you have got a bullish sense of copper pricing.

21 MR. STONE: Well, you can do that,
22 but -- okay.

23 THE COURT: Well, again, then you are
24 back to you don't pay \$3 billion that's real

1 \$3 billion for something --

2 MR. STONE: If you are paying \$3
3 billion. In other words, if during the term of the
4 due diligence and the negotiations the copper price
5 had gone down and the stock price had gone down --

6 THE COURT: Let me just say my
7 simplistic view of this is if your clients are not
8 going to challenge, as they did not challenge, the
9 market value of Southern Peru stock, then Southern
10 Peru, the stock they gave up was basically worth the
11 market price with some sort of factoring discount that
12 nobody in the case has come up with, but I am not
13 going to price it hundreds of millions of dollars.

14 MR. STONE: Right. And that went up
15 and down over time.

16 THE COURT: It went up and down. But
17 the first premise has to be -- so my first premise is
18 you don't give \$3 billion for overpriced assets that
19 you think are trading at an artificially high price.
20 You know, when the market is artificially high-valuing
21 assets, you monetize them. You don't go deeper into
22 that asset class.

23 MR. STONE: But that's not --

24 THE COURT: Right. So the premise was

1 these were not dumb people.

2 MR. STONE: Right.

3 THE COURT: So the first step is no,
4 we are bullish on copper.

5 MR. STONE: Well, they were somewhat
6 bullish on copper, but I think everyone was uncertain
7 about it. But, Your Honor, in terms of the market
8 being --

9 THE COURT: Again, if they are --

10 MR. STONE: In terms of the market
11 being --

12 THE COURT: If they are not bullish on
13 copper, this deal makes no sense; right? They have to
14 be bullish on the prospects of Minera Mexico, and the
15 primary thing that you focused on here with that is
16 their copper.

17 MR. STONE: And getting the copper at
18 a price --

19 THE COURT: And so Step 1 that
20 that's --

21 MR. STONE: Getting the copper at a
22 price that makes sense makes this deal make sense, and
23 that depends --

24 THE COURT: And your second point --

1 MR. STONE: -- and that depends on
2 your view of the world going forward.

3 THE COURT: But what I am saying is
4 the second subtle thing is the deal -- at least the
5 way I am seeing it is the only thing that makes sense
6 is what Handelsman said. In a bullish world the deal
7 makes sense.

8 MR. STONE: Okay.

9 THE COURT: The second step is
10 negotiating dynamic. Though we may not necessarily
11 want to be so transparent about what -- how we look at
12 this, and then when we bargain, we actually -- let's
13 use lower copper price metrics because that's actually
14 better for us, because it obscures the fact that we
15 think Minera Mexico in a world of increased copper
16 prices is actually going to increase in value even
17 more than we will on a relative basis.

18 MR. STONE: Right.

19 THE COURT: Step 2.

20 MR. STONE: Yes.

21 THE COURT: Step 3 is this exchange
22 thing where, you know, they get a fixed number of
23 shares; right?

24 MR. STONE: Right.

1 THE COURT: And we are the public
2 market company, which means if our Premise 1 is bought
3 by the marketplace, then we are going to rise in
4 value, not fall in value. Therefore, as our price
5 rises during the course between signing this up and
6 closure, we pay more. And we should do -- we should
7 lock this in now. What was the thinking around that?

8 MR. STONE: The thinking was, as the
9 directors testified, they wanted to protect the
10 downside. It is okay to be optimistic. It is okay to
11 say we think that SPCC and Minera and every other
12 copper company are using conservative long-term copper
13 prices. We actually think the price is higher. But
14 it is also okay at the same time to say I want to
15 protect my downside. What if the price goes down? I
16 can't predict it. Copper is volatile. Yes, we are
17 enjoying an increase in copper now. Yes, we hope it
18 continues. Yes, this deal makes sense if it continues
19 to go up. But if between the time of signing and
20 closing it goes down, I am going to look like a real
21 idiot if I haven't done something to protect myself.

22 THE COURT: Well, did they negotiate
23 for -- I mean, you could do asymmetrical collars. Did
24 they negotiate for one?

1 MR. STONE: Well, they asked for a
2 collar, but they already had their fixed exchange
3 ratio, and they believed that that combined with the
4 fact that they thought that these two companies would
5 rise and fall relatively the same would protect them.

6 THE COURT: Well, that's what I said.
7 So that's another -- so if you are assuming an
8 artificial world, I mean, again, we are back to World
9 1, where we, see, in our heart of hearts believe that
10 the price of copper is going up, that actually Minera
11 Mexico is actually becoming comparatively more
12 valuable even though our actual cost of acquisition is
13 going up. But our negotiating adversary, you know,
14 originally was willing to take just a chunk fixed;
15 right?

16 MR. STONE: No.

17 THE COURT: No?

18 MR. STONE: They wanted a floating
19 number. They originally offered 72 million shares
20 as --

21 THE COURT: So we will go --

22 MR. STONE: And that 72 million shares
23 on the date of the closing was worth over 4 billion.

24 THE COURT: But that's why you

1 can't -- and that gets back to another issue I asked
2 Mr. Brown about. You two fundamentally disagree on
3 whether the committee made any progress from the
4 opening bid.

5 MR. STONE: Correct.

6 THE COURT: He focuses on the economic
7 number. You focus on the indicative number of shares.

8 MR. STONE: Correct. And I, frankly,
9 find his argument silly. I mean, it is a coincidence
10 that the market price was such that ultimately those
11 67 million shares were worth \$3.1 billion,
12 approximately. And the fact is that this was a robust
13 process. There were 24 meetings. People attended
14 them.

15 THE COURT: But if it is silly, it is
16 silly in both directions, isn't it?

17 MR. STONE: Well, no, no. Because
18 ultimately the amount of SPCC -- the chunk of the
19 equity that SPCC had to give up in order to get Minera
20 Mexico was smaller.

21 THE COURT: Well --

22 MR. STONE: Yes. It was 67 million
23 shares instead of 72. That's a reduction in the
24 amount of equity that they gave up. And I think

1 that's the appropriate way to look at it.

2 THE COURT: But I think what Mr. Brown
3 was saying is what they were focused on was saying
4 Minera Mexico was worth approximately the \$3.1
5 billion.

6 MR. STONE: That's what Grupo said.

7 THE COURT: Well, that's a deal, and
8 Grupo wanted 3 to 3.1 billion, and what they
9 ultimately got was between 3 and 3.1 billion in your
10 stock.

11 MR. STONE: Right. And that's
12 coincidental.

13 THE COURT: And that the reason why it
14 is called an indicative figure is that the key focus
15 was, from Grupo Mexico, is we want \$3.1 billion. What
16 turns out to equal 3.1 billion -- I am just figuring
17 why it is indicative -- is the number of shares.

18 MR. STONE: Right.

19 THE COURT: And at the end of the
20 negotiation they got pretty much exactly their ask.

21 MR. STONE: They got a smaller amount
22 of the equity of Southern Peru Copper Company.

23 THE COURT: So you are translating
24 their ask --

1 MR. STONE: I am not translating their
2 ask. I am saying that's what they got.

3 THE COURT: What was their ask was --

4 MR. STONE: 72 million shares on a --

5 THE COURT: But their ask was -- you
6 are then translating it by a future market price for
7 something.

8 MR. STONE: No.

9 THE COURT: The 72.3 million shares
10 was come up with by Grupo Mexico by saying we have
11 something we consider to be worth between 3 and 3.1
12 billion and we want currency from you equal to that
13 value.

14 MR. STONE: Okay.

15 THE COURT: Right?

16 MR. STONE: Right. But as a
17 percentage of the equity, that was a smaller --
18 ultimately what was given was a smaller number.

19 THE COURT: Well, ultimately, yes,
20 because the stock price had gone up.

21 MR. STONE: That's right. So now the
22 company was more valuable.

23 THE COURT: Well, right. But there is
24 not -- and what I have to assume about that is Minera

1 Mexico's value went up, too; right?

2 MR. STONE: That's correct.

3 THE COURT: So it is still the same
4 deal.

5 MR. STONE: It is not, Your Honor.
6 The percentage of the equity that Grupo ultimately
7 received from Minera Mexico was smaller than what they
8 asked for originally.

9 THE COURT: So you are saying actually
10 this is a really good deal because a fewer number of
11 shares equaled the 3 billion, and Minera Mexico
12 actually probably increased in value above 3 billion,
13 and therefore, we got a better deal.

14 MR. STONE: We certainly did. But,
15 Your Honor, again, I mean, all of this focus on the
16 back and forth and the idea that Mr. Handelsman and
17 Mr. Palomino and the other two directors who didn't
18 testify, who are also very sophisticated investment
19 bankers, who took their jobs very seriously, went
20 through eight months and 24 meetings of window
21 dressing to arrive in the same place is just
22 preposterous. I mean, what were they doing? They
23 spent hours and hours analyzing this, meeting with
24 their investors, several presentations from Goldman

1 Sachs. I mean, this was not window dressing. This
2 was an actual negotiation.

3 And getting back to another point
4 about the process, which is, I think Your Honor called
5 it, you know, they misconstrued their charge or
6 something, I don't think they misconstrued anything.

7 THE COURT: Well, then why doesn't the
8 committee charter plainly say that they have the
9 ability to negotiate?

10 MR. STONE: I think the committee
11 charter -- I don't know why. The answer is I don't
12 think that the record reflects why exactly those words
13 were used, but --

14 THE COURT: Well, but see, one of the
15 things that special committees can ask for is clarity
16 in their mandate and bargaining power. And there is
17 some deposition testimony, is there not, where the
18 special committee members are not exactly necessarily
19 all on the same page about what flexibility they have?

20 MR. STONE: I don't know. I would
21 disagree with that. I think that they all had
22 understood that they had the right to say no, and the
23 evidence is consistent that they said no over and over
24 and over again. And, in fact, they made a

1 counteroffer at the end once they got within striking
2 distance. That was their strategy.

3 And I don't know that there is a huge
4 difference between someone offering you something and
5 you saying no or making them bid against themselves
6 and instead negotiating in a way where they give you
7 an offer, you give them a counteroffer, and you go
8 back and forth. Those are two different ways of
9 negotiating. And I don't think that our courts have
10 come to the point where they are going to micromanage
11 the way that independent directors on a special
12 committee determine to negotiate.

13 But the fact is regardless of what the
14 charge said in the resolution --

15 THE COURT: I think, when you are
16 talking about micromanage, I mean, I don't think the
17 Court micromanages -- I mean, it is a weird kind of
18 '80's term that we came up with that does violence to
19 the English language's beauty.

20 But for the Court in evaluating
21 whether to give credence to a special committee to
22 expect clarity about that it has the power to
23 negotiate and is not just expected to evaluate
24 specific proposals, I mean, I don't really think

1 that's if you want to use the term micromanaging.

2 And I think there was some deposition
3 testimony where the committee wasn't exactly clear
4 whether they could bargain; right? They couldn't
5 consider alternatives. You agree with that; right?

6 MR. STONE: Yes. They could not
7 consider alternatives.

8 THE COURT: The only alternative is
9 this one.

10 MR. STONE: Right, right. But they
11 clearly -- again, regardless of what the resolution
12 said, the fact is that they did negotiate.

13 THE COURT: Why this change in rubric
14 by Goldman from the original look? Don't you think
15 Goldman would have done this on a pretty simple basis
16 if it could have generated a DCF for Minera Mexico
17 that was equal to the market price of Southern Peru?

18 MR. STONE: I don't know the answer to
19 that, Your Honor. I don't know what was in their mind
20 in terms -- I mean, it is a complete hypothetical.

21 THE COURT: Well, they did take --
22 that was their first --

23 MR. STONE: They were very methodical.
24 Their first step was to do a DCF of Minera. The

1 second step was to do a DCF of SPCC. And they were
2 very methodical about it.

3 THE COURT: Right. But their first
4 step wasn't to jump to a relative valuation, was it?

5 MR. STONE: No, it was not. But I am
6 not sure where that goes, Your Honor, simply
7 because --

8 THE COURT: Well, I think where it
9 goes --

10 MR. STONE: -- simply because they
11 ultimately arrived at it and decided that was the
12 right way to do it --

13 THE COURT: Well, again, that's where
14 you get into incentives. See, the right way to do
15 it --

16 MR. STONE: What incentive? What
17 incentive did they have to do it in any other way?

18 THE COURT: Well, there is a huge
19 incentive. I mean, what was the bulk of the
20 compensation of the bankers in the case?

21 MR. STONE: I frankly don't know, Your
22 Honor.

23 THE COURT: How much of it was
24 contingent on a deal?

1 MR. STONE: I don't know that either,
2 Your Honor.

3 THE COURT: All I know is if your
4 first step is to do it the right way, and since most
5 banks start with their football field looking
6 approximately like their final fairness opinion and
7 they just tweak the inputs as they get closer --
8 frankly, their first presentation to the special
9 committee looks a lot like their pitch book, and they
10 all ultimately look the same, and that's why you get
11 into these things, you have got to look very carefully
12 at how the numbers move. Where in the first
13 presentation to the special committee was this is a
14 relative valuation case and the first thing we need to
15 do is get a DCF value of each of these companies?
16 That wasn't their first move; right?

17 MR. STONE: It was not their first
18 move.

19 THE COURT: And the first move they
20 made was fairly simple, which is let's see whether the
21 target -- what the target is worth, because we know
22 what our currency is worth. And it was only when the
23 target DCF value was astonishingly lower than the
24 currency that we move into relative valuation

1 territory; right?

2 And what evidence is there that the
3 committee used its negotiating leverage with the
4 controller to say, "Hey, pal, you are going to pay a
5 discount for this. We have a proven market for our
6 currency. You don't have a proven market for what you
7 are. Under a very traditional way of valuing this, if
8 we were paying cash for this, Grupo Mexico, we
9 wouldn't do a DCF of the cash"?

10 MR. STONE: Well, Your Honor, there is
11 evidence that after they did the first DCF of SPCC,
12 the one that was lower, and then they asked for an
13 explanation, those same minutes talk about the fact
14 that Mr. Ruiz was going to go back to Mr. Larrea and
15 tell him that the \$3.1 billion price on Minera was
16 much too high, and he did.

17 THE COURT: Okay.

18 MR. STONE: And so --

19 THE COURT: And what Mr. Brown is
20 going to say is in the end he went back and he said
21 3.1 billion is too high, and then when the transaction
22 was approved --

23 MR. STONE: Right.

24 THE COURT: -- the special committee

1 apparently agreed that 3.021 billion --

2 MR. STONE: Right.

3 THE COURT: -- was just right.

4 MR. STONE: And two significant
5 things, Your Honor. Copper prices were very
6 different, number one, and number two, it was a
7 negotiation. In other words, Mr. Ruiz knew that you
8 could make up most of that difference by using a \$1
9 copper price assumption. So this was a negotiation.
10 They were using their leverage. That was the question
11 that Your Honor had.

12 THE COURT: Yes. But, I mean, if he
13 went back and he focused on a dollar figure, then you
14 are right back to Mr. Brown saying, okay, they didn't
15 negotiate. I mean, there is no doubt there was a lot
16 of motion.

17 MR. STONE: Right. And --

18 THE COURT: I mean, there are
19 things --

20 MR. STONE: -- ultimately they agreed
21 to a \$3.1 billion price at a time --

22 THE COURT: Ultimately --

23 MR. STONE: -- when Minera was worth
24 even more, because copper prices had gone up.

1 Circumstances had changed.

2 THE COURT: Right. Which gets me back
3 to my -- copper prices were up. The valuation models
4 were never updated to reflect them being up. The
5 public markets were never told about that assumption
6 being up; right?

7 MR. STONE: The public was well aware
8 of copper prices being up.

9 THE COURT: Okay. But had Southern
10 Peru done anything to look at its own -- you know,
11 what it was telling the marketplace?

12 MR. STONE: It is required to every
13 year by the SEC.

14 THE COURT: Right, but --

15 MR. STONE: And in terms of what the
16 committee knew, they had a sensitivity analysis that
17 went all the way up to \$1.20 at least. So they knew
18 what that relative valuation looked like at \$1.20,
19 which was even more fair than it was at lower prices.

20 THE COURT: Okay.

21 MR. STONE: All right? Okay. I am
22 just -- I guess I didn't know, Your Honor, the Goldman
23 Sachs fee was not contingent on the deal being done.

24 THE COURT: It was not?

1 MR. STONE: It was not.

2 THE COURT: So they got the same fee
3 regardless of whether there was a deal or not? They
4 didn't get a percentage of the deal?

5 MR. STONE: Goldman Sachs's fees for
6 its services to the special committee are payable
7 regardless of whether the merger is consummated.

8 THE COURT: That's what I am saying.
9 Okay. That's good to know. It is not a typical -- so
10 they got some sort of flat fee?

11 MR. STONE: Yes.

12 THE COURT: No success fee?

13 MR. STONE: No success fee.

14 THE COURT: Okay. That is helpful.

15 MR. STONE: Just checking my notes,
16 Your Honor.

17 THE COURT: Don't ever let that
18 banker, whoever negotiated that term, do that again.

19 MR. STONE: He has left the company.

20 THE COURT: I know I have never seen
21 one. I mean, it is unusual.

22 MR. STONE: I think that's all I have,
23 Your Honor, unless Your Honor has any other questions.

24 THE COURT: Tell me about the burden-

1 shift. I assume you are asking for one.

2 MR. STONE: Yes, Your Honor. I mean,
3 I don't think that there is any serious challenge to
4 independence, disinterestedness, and, I mean, I do
5 think that this was a pristine process. I just
6 don't --

7 THE COURT: See, I want to hear what
8 pristine -- you mean pristine from the sense of not
9 untainted by improper motive.

10 MR. STONE: Correct.

11 THE COURT: Not, you know, Gomer Pyle
12 versus Warren Buffett.

13 MR. STONE: Right.

14 THE COURT: It is just --

15 MR. STONE: Right. And, Your Honor, I
16 do think that the appropriate thing in looking at the
17 burden shift is -- I mean, the Court can consider all
18 the circumstances, but I think that a post hoc look
19 should be far less important than looking at what the
20 process was that was followed here.

21 THE COURT: No. I am just trying to
22 think, because there is also the other Kahn case.

23 MR. STONE: Tremont?

24 THE COURT: Yes.

1 MR. STONE: Yes.

2 THE COURT: Which seems to --

3 MR. STONE: Tremont, though --

4 THE COURT: -- go fairly deeply. And
5 when you use terms like an "effective" special
6 committee --

7 MR. STONE: Right.

8 THE COURT: -- you are bleeding
9 together the substantive analysis of whether there was
10 a fair process and price with whether to give -- how
11 to start to apply the standard of review.

12 MR. STONE: Right. And Tremont says
13 that the special committee must have functioned in a
14 manner that indicates that the controlling shareholder
15 did not dictate the terms of the transaction and that
16 the committee exercised real bargaining power. And we
17 think both of those things are true.

18 THE COURT: Real bargaining power
19 being distilled down to not that you use the
20 bargaining power that you had.

21 MR. STONE: They used -- what they had
22 was the power to say no.

23 THE COURT: It is if you have the
24 power and have displayed a knowledge of having the

1 power and having no apparent motive not to use it in
2 good faith.

3 MR. STONE: Well, I think that's true,
4 but I think the committee here used it.

5 THE COURT: No, no. I understand.

6 MR. STONE: Yes.

7 THE COURT: What I am trying to
8 separate out in my own mind is to be useful, this
9 burden-shift has to involve an analytical assessment
10 of the special committee, which is, in fact, different
11 from the actual fairness analysis itself. When one
12 starts using words like "effective" or "real
13 bargaining," you know, an effective, you know, such
14 that it look -- that's when you start going -- I
15 understand the idea of looking at the committee and
16 saying are they qualified people. Can they do this
17 sort of thing? Yes. Absence of improper motive, I
18 get that. Look at it, yes. High-quality advisors,
19 yes. Demonstrated commitment to the process such
20 that -- you know, I don't want to denigrate motive.
21 Motive is important. Motion, there is meetings.
22 There is consideration. Appreciation that they had
23 the power to say no and bargaining, yes, but not
24 getting into the qualitative assessment of whether

1 they were good at it, whether they yielded a high
2 price, you know, whether they -- because then it just
3 becomes one blur. And it is not clear why you
4 actually have any burden-shifting device separate from
5 just saying, frankly, the controller met its entire
6 fairness burden.

7 MR. STONE: Yes, I think we can go
8 back to Tremont and look at what the Supreme Court
9 looked at there, and you can quibble about whether
10 they were reading the evidence the way they should
11 have. I mean, I thought Chancellor Allen did a fine
12 job below. But the Supreme Court in Tremont was most
13 worried about the fact that two of the three members
14 they found just abdicated their responsibility. I
15 mean, they didn't show up for the meetings. There
16 were only three meetings, and they didn't show up for
17 them. And the one guy who actually did show up and
18 hired the advisors, both the lawyers and the banker,
19 was a guy who had been paid millions of dollars by the
20 company. That was their concern. That's the way they
21 read the evidence.

22 So I think it is those types of
23 factors that you have to analyze when you are looking
24 at the burden-shift question.

1 THE COURT: Okay. All right.

2 MR. STONE: All right?

3 THE COURT: Thank you, Mr. Stone.

4 MR. STONE: Thank you.

5 THE COURT: Mr. Brown.

6 MR. BROWN: Your Honor, I think there
7 are a couple factual things that I think we disagree
8 with but I think were wrong. First, Mr. Stone said
9 the Minera Mexico DCF analysis that Goldman did, if
10 you use a dollar, it gets to 3 billion. I mean, it is
11 just not true. For the record I will say it is JX-101
12 at SPCC3375. It has got the two sensitivity analyses
13 at a dollar, and using the Minera Mexico case, it is
14 2.3 to 3 billion. But that's the Minera Mexico case,
15 depending on the different discount rates from --

16 THE COURT: Well, and what I am going
17 to do, just to ease anybody's concerns and also for my
18 own purposes, which is make these points, and I will
19 say to both you and to Mr. Stone give me short,
20 nonargumentative letters. Now, if there are some
21 things that came up at argument and you want to say,
22 "Here in the record is what it is, Your Honor," please
23 do that. And maybe we can agree to do that by Friday
24 or by Monday, whatever you agree on.

1 Don't make them argumentative. Just
2 say on this point that came up at argument we refer
3 Your Honor to this, you know.

4 MR. BROWN: Okay. And there was a
5 whole bunch that I won't try to mention --

6 THE COURT: No. Go through it now.
7 But what I am saying is rather than me have to pick it
8 out -- I am going to read the transcript again, but
9 rather than pick it out, sometimes it is convenient to
10 have that kind of compilation of some --

11 MR. BROWN: So there is the Minera
12 Mexico case and then there is the A&S case. Again,
13 Minera Mexico gave them those aggressive projections.
14 A&S knocked them down a little bit. And a dollar per
15 share for A&S, it is 1.8 to 2.4. I mean, it is not
16 3.1. You only get close to 3 if you use the
17 projections as provided.

18 Now, the --

19 THE COURT: And if you are saying even
20 in the price; right?

21 MR. BROWN: So even if you said we
22 will take their projections at face value, we won't
23 even adopt any of the modifications that A&S is
24 recommending to us, recommending to the committee,

1 because it is just where they thought the projections
2 were unrealistically aggressive, you know, you get to
3 3 billion only on the highest discount rate and sort
4 of it is the metric at the far right at the bottom of
5 the chart. But, I mean, on the A&S case, you don't
6 get close to it. So this dollar a share thing gets
7 you to 3 billion, that is just factually wrong.

8 There was the argument that, well,
9 there is really no proof that the Southern Peru, you
10 know, model wasn't sort of optimized and there is
11 really no proof that the Minera Mexico model was
12 optimized. I mean, it is just wrong. I mean, let
13 me -- I mean, we will quote it in our letter, but I
14 guess it is JX-75, A&S said, "There is expansion
15 potential at both Toquepala and Cuajone." Those are
16 the two Southern Peru mines. "If time permits, the
17 conceptual studies should be expanded, similar to
18 Alternative 3 at Cananea," which is what -- that's the
19 optimization plan, and I will get to the quotes for
20 those in a minute that they did for Minera Mexico.
21 "There is no doubt optimization can be done to the
22 current thinking that will add value at lower capital
23 expenditures."

24 So A&S looked at it and they said

1 look, it is okay, but you have to know it is
2 conservative. It is not optimized like Minera is.

3 And then for Minera in JX-103, which
4 is one of the Goldman presentations, that's when the
5 sort of optimization plan started being, you know,
6 pushed, and it says, "New optimization plan for
7 Cananea," which they call Alternative 3, "recently
8 developed by GM and Mintec was not included in the
9 projections at this point. According to Mintec, such
10 plan could yield 240 million in" nominal "value on a
11 pre-tax. . .basis. . . ." And then later on in
12 subsequent presentations they explain that, you know,
13 the analysis and the projections do include the
14 optimization plan for Cananea, Alternative 3,
15 developed by Grupo Mexico. So they were polishing up
16 the house, you know, putting out their best foot
17 forward, and that wasn't happening with Southern Peru
18 when they are doing these two discounted cash flow
19 valuations.

20 THE COURT: Well, how do you deal with
21 Mr. Stone's point that the same -- that the special
22 committee had an independent advisor along with
23 Goldman Sachs that was, you know, looking at these
24 things?

1 MR. BROWN: Yes, A&S was looking at
2 them, and what they said in their analysis were the
3 Minera optimization plan, it is aggressive, and we
4 recommend knocking it down in these ways. With
5 respect to the Southern Peru stuff, they said it is
6 not optimized. It could be. We recommend that you do
7 it. But, you know --

8 THE COURT: So they recommended
9 optimizing it and it didn't get done.

10 MR. BROWN: I mean, I just read it to
11 you. And so it is not that they were -- he said,
12 well, they looked at it and they thought it was
13 reasonable. Well, you know, they looked at it and
14 they said these aren't aggressive projections. I
15 mean, they are what they are.

16 THE COURT: And you are saying in the
17 ultimate fairness opinion they used the more
18 aggressive new one.

19 MR. BROWN: For Minera Mexico, yes.
20 But as -- and A&S, you know, recommended, you know,
21 modifications to it, and they usually showed both, the
22 Minera Mexico model and the A&S model.

23 THE COURT: Does the deal come out
24 fair under either scenario?

1 MR. BROWN: No, it didn't come out to
2 3.1 billion.

3 THE COURT: No. Under the -- within
4 their rubric, did it come out fair?

5 MR. BROWN: I am telling you, if
6 you -- you know, there is a big record here. If you
7 go back and look at the last Goldman Sachs
8 presentation, it is actually really helpful to look at
9 them all, because it is the strangest thing. You
10 know, at first it is the way you expect it to look and
11 they are spelling everything out. By the last book
12 you can't tell what the valuations are. There is
13 nothing but these matrixes of numbers of shares. They
14 don't tell you they took out all the numbers that show
15 what the underlying valuations are. So fair, I mean,
16 they have a giant matrix.

17 I mean, under the Goldman Sachs
18 valuation, you know, the way they were doing it, any
19 number of shares -- I mean, there was a gigantic
20 range. Any number of shares almost would have been
21 fair, I mean, anything from, you know, 30 to 90 or
22 whatever.

23 Now, let me -- I just want to try to
24 make it as clear as I can on this, what we are calling

1 the floating versus fixed issue. And Mr. Stone
2 mentioned 72 million. No. And there was testimony
3 about this by the special committee members. The
4 first presentation that they thought or the first term
5 sheet that was real that they could respond to --
6 before then there was sort of talk and stuff, but
7 there was nothing specific. And at some point, you
8 know, they mentioned 3.1 billion and then the 72
9 million. But the first term sheet they got that they
10 could respond to, to me that's the opening bid, and
11 that asked for \$3.1 billion in stock valued at the
12 market price during a 20-day average before the
13 closing. And so that's what they wanted, \$3 billion
14 of stock valued at the market price later on.

15 And, you know, the committee
16 immediately said, and the testimony was, that was a
17 nonstarter. And again, that's -- if you think copper
18 prices are going to go up, which is the whole basis
19 for the deal, you don't immediately reject something
20 that is going to work to your benefit.

21 Now, our point is if they had accepted
22 that pricing term -- that is, let's set the number of
23 shares based on the market price during a 20-day
24 window before the closing that equals 3.1 billion --

1 about 52 million shares would have been issued versus
2 the 67. And, you know, they say 67 is a coincidence.
3 Actually, if you look -- and we tried to spell this
4 out in our brief -- pretty much every time the number
5 of shares changed, you know, from Grupo, if you did
6 the math using the market price about the time -- and
7 we have the whole market price sheet -- it comes out
8 to around 3 billion.

9 I mean, they were sort of duped -- the
10 committee was focusing on numbers of shares, which
11 really to me that's -- the question is what they are
12 worth. And Mr. Stone says, well --

13 THE COURT: You are saying that Grupo
14 Mexico had a fixed idea, which is we want \$3.1
15 billion.

16 MR. BROWN: Yes, as if it was
17 almost -- as if it was cash currency. And he says,
18 well, they got a lower percentage of the entity. If
19 you have a smaller percentage of an entity with a
20 greater value, you have the same thing as a bigger
21 percentage of a smaller entity. I mean, it is value
22 that was the issue.

23 THE COURT: Especially because they
24 already had voting control; right?

1 MR. BROWN: Right. Now --

2 THE COURT: But go through your 52
3 million, how they would have gotten to 52 million.

4 MR. BROWN: The original pricing term
5 in the first term sheet -- and we can get that -- was
6 give us \$3.1 billion of stock --

7 THE COURT: Right.

8 MR. BROWN: -- calculated by taking
9 the 20-day average starting five days before the
10 closing, which was April 1, 2005. And if you do
11 that -- and the stock prices are in the chart -- you
12 get the number of shares based on the stock price at
13 that time would be 52 -- we have it in our brief. It
14 is 52 million shares. It is 15 million shares less
15 than they ended up issuing.

16 And really what happened was, the way
17 I think of it is, the first real proposal was 3.1
18 billion of stock valued at the market price but at the
19 market price later on. And what the committee ended
20 up doing was in effect saying, well, we will give you
21 3.1 billion in stock, but we want to peg it, you know,
22 not at the closing but at the time we are approving
23 the transaction. And to me that was almost an
24 unforgivable mistake, because then the way it was

1 structured, that put all the risk on Southern Peru,
2 because if the stock price went down --

3 THE COURT: They got more.

4 MR. BROWN: Well --

5 THE COURT: No, you didn't get more.

6 MR. BROWN: It is fixed. If the stock
7 price went down, you would say, well, gee, that would
8 work for us, because we are issuing less value. No.
9 They had the right to vote it down.

10 THE COURT: Oh, because they could
11 walk.

12 MR. BROWN: So they had no fear of
13 downside loss. You know, locking in the number of
14 shares to them, because they wanted 3.1 billion, they
15 knew they were going to get at least 3.1 billion and
16 probably more, because by that point everyone was
17 expecting it to go up, so -- but if there was some
18 disaster, they could vote against it.

19 Southern Peru, from the special
20 committee's perspective, you know, if it went down,
21 they didn't get the benefit of that because --

22 THE COURT: Remind me why there was a
23 delay anyway.

24 MR. BROWN: A delay in the closing?

1 THE COURT: Yes.

2 MR. BROWN: Well, the agreements were
3 signed, you know, on October 21. I mean, it takes
4 three months or so to get a proxy statement done and
5 have a meeting. I mean, that's my understanding.

6 THE COURT: Oh, that's right, because
7 of the vote.

8 MR. BROWN: They had a vote. So it is
9 kind of weird. And if you look, you know, the
10 committee minutes and the testimony was, you know,
11 that they recognized, and they all, I think, testified
12 a collar is critical if we are going to do this, and
13 they asked for a collar, and the answer was "No. Go
14 away." And so they let it go. And, in fact, if they
15 had a collar, the 20 percent collar they had asked
16 for, it would have been triggered.

17 So, I mean, the way they did this, the
18 pricing, I mean, it is like -- it is inexplicable.
19 And, you know, as you said, the whole theory of their
20 analysis is copper is going to go gangbusters. This
21 company tracks -- you know, the price fluctuates with
22 copper prices. If we think copper prices are going to
23 go up, let's take this risk, because then we can issue
24 a lot less shares. It will still be \$3 billion, but

1 it will be, you know, a lot less shares.

2 I mean, they ended up issuing 67
3 million shares with a market price, you know, if you
4 use an average near the closing, 3.7 billion. So what
5 they really paid, you know, assuming the valuation
6 date were the closing date, is 3.7, not 3.1.

7 Now, you might say, and I think they
8 are saying, well, Minera Mexico's value might have
9 gone up, too. But no, that's not what we are talking
10 about. We are talking about the negotiation. They
11 had the chance to get what we call -- I mean, it is
12 called floating exchange ratio. It is really just
13 fixing the number of shares based on the market price
14 close to the closing. They had a chance to get that.
15 It was clearly in their interest to do it. Why they
16 said from Day One it is a nonstarter is inexplicable.
17 That is -- to me that's an uninformed decision by the
18 committee. They didn't have any information in front
19 of them. You know, there is no documents, there is no
20 nothing. There is -- nobody was telling them it is
21 too dangerous, you know, you have got to lock it in.
22 So that's on that point.

23 And I do want to say, my last point
24 is, Your Honor -- we are talking about copper prices

1 all over the place -- there is a difference --

2 THE COURT: So basically what you are
3 saying is if they had done basically a fixed value, we
4 will give you stock worth --

5 MR. BROWN: This at the time of the
6 closing.

7 THE COURT: They then give you stock
8 worth the initial demand.

9 MR. BROWN: Three billion.

10 THE COURT: Then it would have been
11 better than what ultimately happened, because they
12 ultimately delivered value materially in excess of
13 that.

14 MR. BROWN: Right. Right. In effect,
15 what they -- you know, the point was why would you
16 lock the number of shares in. If you -- in a deal
17 like this, if you have reason to believe your stock
18 price is going to go up, it is to your great benefit
19 to calculate the number of shares in the 3 billion at
20 the time.

21 THE COURT: Yes. What you are saying
22 might make sense is a lock in the value you deliver.

23 MR. BROWN: Yes, yes.

24 THE COURT: But --

1 MR. BROWN: So instead of issuing 52
2 million shares worth 3.1 billion, they issued 67
3 million shares worth 3.7 billion. I mean, but again,
4 we are talking about the different assets. And we
5 have kind of all focused on the date the committee
6 approved it, and the basic point is there is -- as you
7 said, they asked for 3.1 billion in stock. That's
8 what they got. And if you look at the different
9 changes over time, it is always around 3.1 billion.
10 It was never changing.

11 The committee, if they were actually
12 focused on number of shares being relevant, I think
13 that's hard to believe, because it is not the number;
14 it is the value of your currency. If I have 100
15 one-hundred-dollar bills and one one-hundred-dollar
16 bill, they would have said, you know, let's only get
17 the one, let's only get the hundred, because if we
18 have to give away all these ones, that's more pieces
19 of paper. I mean, it is the value of the share of
20 stock, not the number of certificates.

21 My last point, Your Honor, is on the
22 stock price -- on the copper prices. There is a lot
23 of discussion of, you know, 90 cents or \$1.30, I
24 think. Just remember, there is a very big difference

1 between short-term copper prices -- that is one, two,
2 three, four years -- and long-term copper prices. So,
3 you know, when someone is saying 90 cents or \$1.20, I
4 mean, everyone was using much higher prices for
5 short-term, and in the DCFs, higher prices were used
6 in the short-term. When you are talking about doing
7 the DCF and the long-term number, that's a different
8 calculation. Like, as Mr. Stone said, just because
9 the market is going crazy right now, that doesn't
10 mean, you know, necessarily mean it will continue.

11 You know, what the company continued
12 to say was for long-term purposes, we use 90 cents. I
13 mean, they continued to use 90 cents into 2007, when
14 the price was 2 to \$3 a share, and they finally
15 increased their long-term number to \$1.20. So saying
16 we are going to increase the long-term copper price
17 assumption to \$1.30 is a humongous move, and, you
18 know, even if they expected short-term prices to go
19 up, I mean, I think --

20 THE COURT: So what you are saying is
21 there is another thing where there is another -- that
22 they never actually moved to this more bullish thing
23 in running the business after the transaction.

24 MR. BROWN: Not for years. That's

1 right.

2 Okay. Unless Your Honor has any
3 questions, we will leave it at that.

4 THE COURT: No. Thank you, Mr. Brown.

5 MR. STONE: Your Honor, just two quick
6 things. Your Honor, they didn't change because the
7 SEC wouldn't let them change. It is a three-year
8 average. You have a three-year look-back, so that's
9 why they didn't change.

10 But two quick points. I want to read
11 from JX-103.

12 THE COURT: Is that in the record
13 somewhere?

14 MR. STONE: What is that? That the
15 SEC required them to use a three-year look-back? I
16 think Mr. Jacob testified to that.

17 THE COURT: So it takes three years to
18 update your copper prices?

19 MR. STONE: Essentially, yes. I mean,
20 you have to look back three years. It is an average
21 over the past three years.

22 Reading from a July 8 presentation of
23 Goldman Sachs to the special committee -- and this
24 just goes to the whole point about what could happen

1 with a floating exchange ratio -- they had had
2 discussions with UBS and Grupo, and it says, "Assuming
3 the share price of SPCC of \$40.90 (the closing price
4 on the" NYSE "as of July 2, 2004) and the formula
5 provided in the Term Sheet, SPCC would issue 90.6
6 million new shares to" Grupo Mexico, "which would
7 result in" Grupo Mexico "owning 78.5 percent of SPCC
8 as compared to 54.2 percent (as of today)."

9 So that's what the committee was
10 focused on, is that based on the fluctuations of
11 stock, it wasn't just 72 million shares anymore. Now
12 it is 90 million shares. They wanted to lock it in.

13 The second point, Your Honor, is
14 Mr. Brown, I think, just proved that Anderson & Schwab
15 actually looked at both companies and did their due
16 diligence, but what he cited really is completely
17 misleading. The expansion studies at Toquepala and
18 Cuajone were greenfield studies on mines that had been
19 identified as copper deposits, but that's it. No
20 pre-feasibility studies had been done. They were in
21 the nascent stages of looking at these properties.

22 You compare that to the Phase 3 at
23 Cananea, which was a brownfield project, meaning the
24 deposit was there. It was tested. They had been

1 through feasibility studies. It was a question of
2 expanding a current mine. That's why it was included
3 ultimately in Goldman Sachs's, because it had been
4 completed, whereas the expansion studies at Toquepala
5 and Cuajone would have taken way more than the eight
6 months that the committee took to evaluate this
7 transaction. So while there may have been some
8 valuing there, I think Anderson & Schwab itself says
9 you couldn't quantify it at this point without a
10 further study, and that study would have taken years.

11 So there was nobody, you know, trying
12 to, you know, update what was going on at Minera and
13 not at SPCC. It was just a matter of where they were
14 in those projects. They were completely different.

15 THE COURT: Yes. I think Mr. Brown
16 says there was somebody at Minera trying to update
17 things. It is called Grupo Mexico.

18 MR. STONE: Well, no, no. They were
19 trying to update both of them. The problem is
20 Toquepala and Cuajone were at a stage where you had to
21 first do a pre-feasibility study, which is where you
22 go out and drill these little pipes into the ground,
23 and then you try to analyze and see how big the
24 reserve is. And it is a very painstaking process. It

1 takes a long time.

2 The Cananea mine is the largest copper
3 deposit in the world or the second largest. Everybody
4 knew that copper was there. That Phase 3 project that
5 they included ultimately in the final book was
6 something that had been in process for a long time,
7 and it was done by the time that Goldman Sachs did its
8 opinion, so it was able to update it. And it was an
9 existing field. It wasn't -- Toquepala and Cuajone
10 were different locations in Peru. They were untested
11 grounds.

12 THE COURT: Thank you. Thank you,
13 Mr. Stone, thank you, Mr. Brown, for excellent
14 arguments. It is a case that hurts my head a little
15 bit in all kinds of different ways.

16 And I appreciate our reporter's
17 patience with the fast-moving questioning.

18 I would welcome, you know, short, to-
19 the-point letters. I don't want argument. What I am
20 saying is a lot comes up in these things. These are
21 questions I ask, and I care about trying to get it
22 right. And to the extent that you are able to just
23 give me some letters citing to the record things you
24 want me to refer to, I would appreciate it.

1 The only argument that I would welcome
2 is this one about the temporally what I can take into
3 account and your perspectives on it. I don't want
4 anything long, but each side to some extent has
5 pointed to events that transpired after the closing.
6 You know, interestingly, depending on how you look at
7 the situation, it is not even clear you are supposed
8 to look at closing, I mean, if you think about it;
9 right? I mean, you could be so pure that you can't
10 even see how the deal, you know, got consummated. And
11 I want to be analytically rigorous about it, and I
12 know it matters, and I know it is a little bit
13 different than an appraisal.

14 And so I would appreciate any -- I
15 don't want 20-page briefs on it. What I am saying is
16 if you have got -- if there is some case law out there
17 that actually puts a point on it from your
18 perspective, you can put that in the letter, too. But
19 keep it short. Talk to each other. I don't want an
20 exchange of replies to the letters. I am saying think
21 about what came up at argument. There might be parts
22 of the record you wish to highlight. And you just
23 simply put, you know, in some organized way, "Your
24 Honor, this came up at argument. I think you might

1 well look at JX-" blank. "The relevant part of the
2 Goldman thing is" blank, you know, and just try to in
3 a nonargumentative way, you know, kind of put before
4 me, you know, some of the evidence that you think is
5 pertinent to the valuable discussion that you were
6 able to provide me with today.

7 So try to stay as cool as you can. It
8 is a pretty hot bench; right? But, you know, I think
9 today the temperature, it is actually even cooler
10 during the midst of a Chancery argument than it is
11 outside. So maybe you have got, like, air-conditioned
12 vehicles waiting for you. I hope so. And, you know,
13 avoid, you know, Long Island Iced Tea. It is a
14 temporary -- it will taste delicious, but you will pay
15 the price later.

16 So thank you everyone. Thanks for
17 working through lunch.

18 - - -

19 (Court adjourned at 1:16 p.m.)

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CERTIFICATE

1
2 I, LORRAINE B. MARINO, Registered
3 Diplomat Reporter and Delaware Notary Public, do
4 hereby certify that the foregoing pages numbered 3
5 through 147 contain a true and correct transcription
6 of the proceedings as stenographically reported by me
7 at the hearing in the above cause before the
8 Chancellor of the State of Delaware, on the date
9 therein indicated.

10 IN WITNESS WHEREOF I have hereunto set
11 my hand at Wilmington, this 13th day of July, 2011.

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14
15 /s/Lorraine B. Marino, RDR
16 Registered Diplomat Reporter
17 and Delaware Notary Public
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