IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PLAINTIFF'S POST-TRIAL ANSWERING BRIEF

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I. INTRODUCTION

Defendants' post-trial argument proceeds from false premises. Plaintiff's alleged failure to "***explain why*** … ***the Special Committee would have any motive*** to short change the public stockholders" is described by Defendants as "***a complete failure of proof***."[1] The Special Committee is not on trial; its motive is not at issue.[2] Defendants can call the trial "anti-climactic," but the Special Committee members need not crumble and confess their sins on the stand for this conflicted Transaction to be deemed unfair. The fairness of the Transaction is judged on the results the Special Committee achieved, not on how "proud" the members are "of the job they did."[3] The overwhelming evidence is that the Special Committee did very little, and the little it did do caused Southern to pay much more for Minera than Grupo even asked (and far more than Plaintiff has proven Minera is worth). This puts this case in stark contrast to any other self-interested transaction held to be entirely fair by this Court.[4] Indeed, Defendants can neither shift nor meet their burden of proving entire fairness. Judgment should be entered for Plaintiff.

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[1] AMC Defs.' Post-Trial Opening Br. ("DOB") at 1. Emphasis is added and internal citations are omitted unless otherwise indicated.

[2] The Special Committee Defendants were dismissed under 102(b)(7). "Considerations of [their] motive are irrelevant." Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

[3] Id. at 2; see also Trial Tr. 106:13-14 (Palomino – Direct).

[4] See, e.g., S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co., 2011 WL 863007 (Del. Ch.) (where the special committee forced Hallmark to "bid against itself" and obtained a "major economic concession"); In re John Q. Hammons Hotels Inc. S'holder Litig., 2011 WL 227634 (Del. Ch.) (where special committee obtained an 85% increase over controlling stockholder's initial offer); In re Cysive, Inc. S'holders Litig., 836 A.2d 531, 556 (Del. Ch. 2003) ("The committee bargained hard with Snowbird, holding out to get a higher price and ensuring that the committee retained the flexibility to accept a higher bid."); Emerald Partners v. Berlin, 2001 WL 115340 (Del. Ch.) (where the non-affiliated directors negotiated down controlling stockholder's initial proposal for an exchange ratio that would have given him May common shares representing up to $105 million of value, to a ratio that gave the controlling stockholder shares worth $28.6 million; "***Although the non-affiliated directors agreed with Mr. Hall that the merger promised to benefit all May stockholders from a business standpoint, those directors acted steadfastly to assure that May's minority would not pay any more than the lowest price, or agree to any nonmonetary terms but the most favorable, that could realistically be negotiated***.") (emphasis added). (cont'd).

II. ARGUMENT

A. Defendants' Reliance On An Ineffective Special Committee Cannot Survive The Exacting Scrutiny Of Entire Fairness

Defendants' false arguments concerning the Special Committee process cannot withstand the exacting scrutiny required under entire fairness and do not warrant a burden shift.

1. False: The Special Committee Had a "Clear Mandate" to Negotiate

Defendants can only describe the Special Committee's mandate as "clear"[5] by ignoring key documents and trial testimony.[6] The Special Committee's charter provides that it only had the power to "evaluate" Grupo's proposal.[7] Both Palomino and Handelsman testified that they had no power to make counter-offers.[8] Defendants also falsely compare their mandate to that in Hallmark, where the committee was authorized to "negotiate," as well as to "take such further action" as it "deems appropriate."[9] Moreover, in Hallmark, unlike here, the entire transaction was subject to the committee's "favorable recommendation."[10]

2. False: The Special Committee Was "Fully Informed"

That the Special Committee hired blue-chip advisors[11] does not mean that its members were "fully informed." In fact, the Special Committee was never advised on critical issues.

Here, the utter absence of ***any*** negotiation over the economic terms of the Transaction is not the "strong record of a fair process" that can be "indicative of fair price." DOB at 2. Completely contrary to the records established in cases such as Hallmark and Emerald Partners, here Defendants do not even try to claim that the Transaction represented the "best deal possible." Rather, they emphasize that "the entire fairness analysis does not require perfection on the part of the board of directors." DOB at 4.

[5] DOB at 7 ("The Special Committee was given a clear mandate from the SPCC Board to negotiate the Merger at arm's length.").

[6] Pl.'s Post-Trial Opening Br. ("POB") at 21.

[7] JX 58 at AMC0025427A-28A.

[8] Trial Tr. 14:10-19 (Palomino – Direct); id. at 143:19-144:12 (Handelsman – Direct).

[9] Hallmark, 2011 WL 863007, at *13.

[10] Id. at *5

[11] DOB at 7 ("The Special Committee relied on the professional advice provided by advisors throughout the evaluation process.").

Defendants claim that the Special Committee decided "the best way to analyze the proposed Merger was by comparing the values of [the companies] using the same methodology and assumptions."[12] But this decision was made without any understanding or appreciation for the differences in how the DCFs for Minera and Southern were prepared or how the values of the two companies changed relative to one another when the price of copper (and other metal prices) changed. Indeed, the decision was made even before Goldman presented any relative DCF analysis to the Special Committee.[13]

Goldman and A&S ***never*** advised the Special Committee that (i) Minera was worth $3.1 billion; (ii) Minera could be acquired at, or would trade at, a massive premium to its DCF value if it was a public company; or (iii) Southern's stock should be valued at a discount to its market value.[14] And the Special Committee ignored, among other things, Goldman's advice that Minera was in fact worth much less than $3.1 billion[15] and A&S's advice that Southern's financial plans could (and should) be optimized to account for expansion potential.[16] Goldman also did not present any analysis to the Special Committee demonstrating the effect of fluctuating copper prices on the reserves and values of Southern and Minera,[17] and the Special Committee never had any basis to conclude (as they asserted at trial) that a higher long-term copper price favored

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[12] DOB at 13.

[13] POB at 25-26.

[14] Trial Tr. 221:23-222:19 (Handelsman – Cross) (responding to the Court's comment that there are "arguments you can make with respect to a thinly traded security like Southern Peru with the overhang of control that the trading price might not be as informative as something where there is a much more liquid float," Handelsman stated that "there would have been a robust market for Southern Peru Copper in the copper industry at or better than the price that it traded at.").

[15] JX 103 at SP COMM 006885.

[16] JX 75 at SP COMM 006957.

[17] See generally JXs 96-98, 100-106.

Minera.[18] Southern's SEC filings plainly demonstrate that higher copper prices benefited Southern more than Minera.[19]

3. False: Defendants' Description of the "Negotiations"

The trial proved the fallacy of Defendants' repeated argument that the Special Committee "negotiated down (by roughly 7%) the number of shares to be exchanged for Minera."[20] Moreover, the other "negotiated key terms" were hardly that.[21]

> Claim: Plaintiff argues that the Merger consideration the Special Committee recommended was the same as Grupo Mexico's initial proposal. But that argument is incorrect.[22]

The Record: Grupo initially and consistently demanded that it receive $3.1 billion in Southern stock in exchange for Minera and the Special Committee approved the Transaction and gave Grupo exactly that.[23] While a Grupo witness could have been called to testify that these

[18] DOB at 18 ("Because Minera had larger reserves and a higher cost structure, increases in the long-term copper price would increase the value of both companies, but Minera's value would increase at a higher rate."). Further contrary to testimony at trial, the Special Committee members never received advice that a $0.90/lb long-term copper price was "conservative." DOB at 18, n.69 ("[T]he long-term copper price used for ore reserve calculations is a conservative price that does not necessarily reflect the market price of current market estimates relating to copper."). Rather, Southern states unequivocally in its SEC filings that the long-term copper price it uses to determine its reserves is the price that it believes reflects "the full price cycle of the metal market," and the record demonstrates that $0.90/lb was the market consensus for long-term copper prices at the time. JX 128 at A-14 (2004 10-K); POB at 8-10.

[19] POB at 9-10.

[20] Compare DOB at 9 with AMC Defs. Pre-Trial Opening Brief at 20 ("DPTOB").

[21] Compare DOB at 9-10 with POB at 19 (Minera was contractually obligated to reduce its debt "whether or not this Transaction happens"); id. at 19-20 ($100 million special dividend gave Grupo $54 million in cash and increased the number of shares issued to Grupo); id. at 20, n.113 (Audit Committee already reviewed related party transactions); id. at 20-21 (2/3 voting requirement and voting agreements with Cerro and Phelps Dodge locked up the Transaction); Pl.'s Pre-Trial Opening Br. at 19-20 (Transaction eliminated dual-class equity structure that had given minority stockholders the right to elect two directors to the Board).

[22] DOB at 10.

[23] POB at 15. See, also, Handelsman Dep. Tr. 111:1-11 ("Q: 4.3 billion enterprise value, 3.147 billion equity value, maybe there were slight differences between, you know, things, but that was basically the same numbers that they [Grupo] had been proposing all along, correct? A. Substantially so.").

facts amount to "happenstance,"[24] this bald assertion by Defendants' lawyers defies both the evidence and common sense.

> Claim: Grupo Mexico's initial proposal would have resulted in the issuance of approximately 72 million shares of SPCC stock based on a floating exchange ratio, whereas the transaction that the Special Committee recommended in October 2004 resulted in the issuance of 67.2 million shares on the basis of a fixed exchange ratio.[25]

The Record: Grupo's first "proper term sheet" contemplated the issuance of a number of Southern shares based on a trailing 20-day average closing price.[26] Had the Special Committee accepted this proposal, Southern would have issued 52.7 million shares in the Transaction.[27] In fact, had the Special Committee accepted ***any*** of Grupo's floating exchange proposals, the Company would have avoided paying an additional $600 million in value between the merger agreement and closing of the Transaction.

> Claim: the Special Committee negotiated a fixed exchange ratio months before the transaction closed, so the Special Committee (and Grupo Mexico) had no way of knowing that the market value of the shares issued would be $3.1 billion.[28]

The Record: Each demand by Grupo equated to $3.1 billion, both before and after the switch from floating to fixed exchange ratio. Grupo's agreeing to use a fixed exchange ratio did not alter Grupo's demand for $3.1 billion in Southern shares.[29] Again, a Grupo witness could have testified that Grupo was not solely focused on the market value of the shares it received, but for their lawyers instead to pretend that the share value randomly landed on $3.1 billion on

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[24] DOB at 10.

[25] DOB at 10.

[26] Trial Tr. 27:15-21 (Palomino – Direct) (discussing May 7, 2004 term sheet); JX 156.

[27] POB at 15-16.

[28] DOB at 10.

[29] See POB at 27-28.

October 21, 2004 is ridiculous. In fact, Southern and the Special Committee expected the value to be ***higher*** than $3.1 billion,[30] and of course, Grupo always had the right to vote against the Transaction if the market proved them wrong.[31]

4. False: The Market Reacted Positively To The Transaction

Defendants grasp at straws by repeating their false rendition of the market's reaction to the Transaction. Once again, Defendants do not let the facts get in the way of a good story.[32]

> Claim: after the Proxy was released on February 25, 2005 – the first time SPCC and Minera's financials were presented together – SPCC's stock price increased.[33]

The Record: Defendants' statement was false when first made, and is still false. The market was capable of compiling pro forma financials on October 21, 2004[34] and November 22, 2004.[35] Southern's stock declined following both dates.[36]

* * *

In sum, Defendants' tale of how fabulous a job the Special Committee did in "negotiating at arm's length" with Grupo fails. Defendants' story is entirely unsupported by the

[30] Handelsman Dep. Tr. 100:24-101:1; Trial Tr. 312:22-313:4 (Jacob - Cross).

[31] POB at 20-21.

[32] Defendants' persistence on this point, see, e.g., DPTOB at 36, is not proof.

[33] DOB at 21.

[34] Minera's financial results had been publicly filed with the SEC since 2002. Pl.'s Pre-Trial Answering Br. at 12 & n.56.

[35] The Preliminary Proxy filed with the SEC on November 22, 2004 and Southern's November road-show materials both included the same pro forma financials for Southern and Minera that Defendants claim were first presented on February 25, 2005. Pls. Pre-Trial Opening Br. at 25-28.

[36] JX 18.

record. The Special Committee had more than a billion dollars of leverage and failed to use it.[37] The record does not prove fair process and does not warrant a burden shift.

B. Plaintiff Has Proven That Minera Was Not Worth What Southern Paid[38]

While Plaintiff is criticized for his "talismanic reliance on SPCC's stock price," Southern stock was the "specie being used in the merger,"[39] and its value was thus what Southern paid in the Transaction. By contrast, Defendants repeat "relative valuation" as if it wards off evil spirits, but have totally failed to explain why $3.1 billion was a fair price for Southern to pay for Minera, or how a relative DCF valuation could have fairly been relied upon as an ***exclusive*** methodology for evaluating this conflicted transaction. No Grupo witness or Goldman witness was called to

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[37] In re Loral Space and Commc'n, Inc., 2008 WL 4293781, at *25 (Del. Ch.) (discussing failure of special committee to negotiate with controlling stockholder).

[38] Defendants' belated post-trial proffer of "evidence" also does not prove the Transaction price was fair. Defendants submit (1) a chart of the stock movements of "comparable" companies from October 21, 2004 to the present, and (2) two examples of public company mergers that relied in part on relative valuation, ostensibly to prove that the Transaction was fair. DOB at 20-22. First, Defendants' chart demonstrates only that Southern's stock did not outperform its competitors from October 21, 2004 through April 1, 2005, and later outperformed the comparable companies after Mintec certified a 83% expansion to Southern's reserves. Second, Defendants' evidence that a relative DCF analysis is not "unusual in current transactions" is not only hearsay, but entirely distinguishable.

Defendants reliance on In re Gen. Motors (Hughes) S'holder Litig., 897 A.2d 162 (Del. 2006) as authority for this Court to take judicial notice of their untimely proffer of SEC filings is misguided. Defendants are not offering the SEC filings as evidence of what has been disclosed to stockholders. Defendants are offering the SEC filings as evidence as to the sufficiency of the scope of advice received by the Special Committee and to support their claim that a relative DCF valuation is not "unusual in current transactions." DOB at 17, n.68.

Regardless, the SEC filings provide no support that boards rely on DCFs that value their companies at a fraction of their market capitalization or ride solo on the wings of relative valuation. In the United/Continental transaction, Continental was the target company. Continental's shares are valued at $22.68 per share, see UAL Corporation, Registration/Proxy Statement (Form S-4), at 2 (June 25, 2010), the mid-point of the DCF range of value for the company ($16 to $28 per share). Id. at 70. In the Northeast Utilities/NStar transaction, NStar's financial advisors used numerous analyses—including comparable companies and precedent transactions—to zero in on an exchange ratio, see Northeast Utilities, Registration/Proxy Statement (Form S-4), at 72-78 (Nov. 22, 2010), which Goldman and the Special Committee did not do here.

[39] Trial Tr. at 176:9 (Handelsman – Direct).

answer either of these questions, and under generally accepted valuation principles, the price paid was unfair.

The supposed "two conclusions"[40] of the Special Committee fail to prove that Minera was worth the price Southern paid. First, that Minera may be worth more as part of a NYSE company than a Mexican conglomerate does not prove that the price Southern paid for Minera was fair. According to Goldman's Illustrative Look-Through Analysis of GM, Minera's equity value was no more than $912 million.[41] Southern paid $3.7 billion for Minera, a value that implied a premium to Southern's own trading EBITDA multiple.[42] There is nothing in the record that proves (or even discusses) that migrating Minera to a NYSE company would unlock $2.788 billion of value. Regardless, by valuing Minera at an even higher multiple than Southern was trading, Grupo received more than the entirety of whatever value was "untapped" through "multiple migration."[43]

Second, there is nothing in the record to support a conclusion that Southern was trading at a huge premium to its DCF value. Even in the material cobbled together by UBS from unknown sources, Phelps Dodge and Antofagasta were only trading marginally above net asset value.[44] A properly-functioning Special Committee would have more reasonably concluded that Southern's DCF model was flawed, particularly considering that: (i) Southern's data came from Grupo[45]; (ii) the production plans and projections were based on (a) life-of-mine plans that had not been

[40] DOB at 15-16 ("Minera Was Worth More As Part Of A Public Company" and "SPCC Was Trading Based On A Long-Term Copper Price Higher Than $0.90/Pound").

[41] JX 103 at SP COMM 006889.

[42] See Pl.'s Pre-Trial Opening Br. at 35-37 (6.3x to 6.5x 2005E EBITDA v. 5.5x 2005E EBITDA).

[43] POB at 18-19; see also Ruiz Dep. at 51:24-52:7.

[44] POB at 12; JX 103 at SP COMM 006945.

[45] POB at 17.

reassessed since 1998 and 1999,[46] and (b) the same reserves reported by Southern in its 2003 10-K[47]; (iii) A&S advised that Southern's mine plans could be optimized,[48] but they were not; (iv) Southern beat its 2004 projected EBITDA by 37% and its 2005 projections by 135% while Minera's projected performance for 2004 was dead-on;[49] and (v) the market also expected Southern to out-perform management (Grupo) forecasts.[50]

Mr. Beaulne's multiples analysis proves Minera was not worth the price Southern paid. Even if a 30% control premium were applied to Mr. Beaulne's multiples analysis[51] (a premium that defendants offer no expert testimony, nor any evidence at all, to support[52]), the implied equity value is still far below the price Southern paid for Minera. For October 21, 2004, the implied equity value would be $2.3 billion[53] and for April 1, 2005, the implied equity value for

[46] POB at 7.

[47] POB at 7, n.28.

[48] JX 75 at SP COMM 006957.

[49] Compare JX 106 at SP COMM 004926 with JX 20.

[50] Pl.'s Pretrial Opening Br. at 16-17.

[51] See DOB at 27.

[52] Contrary to Defendants' claim, Mr. Beaulne's multiples analysis is not improper just because he did not apply a control premium. See, e.g., Shannon P. Pratt, et al., Valuing a Business at 357 (4th ed.) ("Valuation analysts who use the guideline public-company valuation method and then automatically tack on a percentage 'control premium' . . . had better reconsider their methodology."); id. at 359 ("Each company that an analyst is valuing must be carefully analyzed to estimate the amount of an appropriate control premium, or even whether any premium is warranted at all. The actual answer may well be a discount from what we commonly call the "public traded equivalent value.'"). Mr. Beaulne considered a control premium and concluded that applying a control premium here was inappropriate. Trial Tr. 402:8-18 (Beaulne – Cross).

[53] (Enterprise value ($2.831 billion) less debt ($1 billion)) x (1.3) = $2.381 billion. JX 47 at 41.

Minera would be $2.9 billion.[54] Thus, even if an unsubstantiated control premium as large as 30% were applied, Southern still overpaid for Minera by at least $700 million.[55]

In sum, Defendants have not proven that the Transaction was entirely fair.[56]

CONCLUSION

For the foregoing reasons, judgment should be entered in Plaintiff's favor.

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[54] (Enterprise value ($3.253 billion) less debt ($1 billion)) x (1.3) = $2.929 billion. JX 47 at 41.

[55] Defendants wrongly apply a control premium to Minera's enterprise value rather than its equity value. DOB at 27; see also id. at 10-11 ("All this reflects is that, look at in terms of assets in the ground and the costs to extract and sell them, ***Minera's enterprise value*** was equal to or greater than SPCC's.") (emphasis added).

[56] Defendants continue their "attack the plaintiff" argument but offer no evidence to show "a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders." Emerald Partners v. Berlin, 564 A.2d 670, 674 (Del. Ch. 1989). Defendants did not even call Plaintiff as a trial witness. Defendants make-weight claim that account statements were withheld is also baseless. As this Court is well aware, under Rule 26(e) "[a] party who has responded to a request for discovery with a response that is complete when made is under no duty to supplement the response to include information thereafter acquired, except" in circumstances set forth in Rule 26(e)(1)-(3). None of those circumstances arose until defendants made a supplemental request (Rule 26(e)(3)) on June 16, 2011. Notwithstanding the fact that the defendants request did not afford plaintiff the 30 days allowed to respond to document requests under Rule 34 before trial, Plaintiff made a complete response to Defendants' untimely request on June 22, 2011. There is no basis for the Court to conclude Plaintiff does not satisfy the continuous ownership requirement.

CERTIFICATE OF SERVICE

I, Marcus E. Montejo, do hereby certify on this 8th day of July, 2011, that I caused a copy of Plaintiff's Post-Trial Answering Brief to be served via eFiling through LexisNexis File and Serve to counsel for the parties as follows:

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