



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER
CORPORATION SHAREHOLDER
DERIVATIVE LITIGATION

)
)
) Consolidated C.A. No. 961-VCS
)
)

PLAINTIFF'S POST-TRIAL OPENING BRIEF

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GLOSSARY OF TERMS

A&S	Anderson & Schwab, Inc.
AMC	Americas Mining Corporation
Beaulne	Daniel Beaulne, Plaintiff's financial expert
Cerro	Cerro Trading Company, Inc.
DCF	Discounted cash flow
German Larrea	German Larrea Mota-Velasco, Chairman and Chief Executive Officer of Grupo
Goldman	Goldman, Sachs & Co.
Grupo or Grupo Mexico	Grupo Mexico, S.A.B. de C.V.
Handelsman	Harold S. Handelsman, member of the Special Committee
JX	Joint Trial Exhibit
Minera	Minera Mexico, S.A. de C.V.
Mintec	Mintec, Inc.
Ortega	Armando Ortega Gómez
Palomino	Luis Miguel Palomino Bonilla, member of the Special Committee
Phelps Dodge	Phelps Dodge Corporation
Proxy	Southern's definitive proxy statement soliciting stockholder approval of the Transaction, filed with the U.S. Securities and Exchange Commission on February 25, 2004
Schwartz	Professor Eduardo S. Schwartz, Defendants' financial expert
Southern, Southern Peru, or the Company	Southern Peru Copper Corporation (now known as Southern Copper Corporation)
Special Committee or Committee	The committee of Southern directors established to evaluate the Transaction
Transaction	The acquisition by Southern of AMC's 99.15% equity interest in Minera in exchange for approximately 67.2 million shares of Southern common stock pursuant to the terms of an Agreement and Plan of Merger dated October 21, 2004
UBS	UBS Investment Bank
Winters	Winters, Dorsey & Company, LLC

INTRODUCTION

The evidence presented at trial demonstrates that the Transaction was not entirely fair to Southern Peru. Southern bought Minera for \$3.7 billion in Southern stock. No credible evidence was presented at trial that demonstrates that Minera was worth anywhere close to that amount. On this basis alone, Plaintiff is entitled to judgment. See Section I.

The process by which the Transaction was approved did not simulate arm's-length negotiations and thus does not shift the burden of demonstrating unfairness to Plaintiff. Grupo Mexico proposed that it receive \$3.1 billion in Southern Peru stock; the Special Committee agreed to give Grupo exactly that. The only price term that the Special Committee negotiated was a fixed, collarless exchange ratio that ended up paying Grupo 14.5 million more shares than it even asked for. Grupo tied the Special Committee's hands from the outset, limiting its authority and access to reliable information. After concluding that Minera's stand-alone value was merely half of what Grupo wanted for it, the Committee found "comfort" in a relative DCF valuation methodology without ever determining that the underlying bases for this methodology were valid. The "concessions" supposedly wrung from Grupo were of no benefit to Southern. Grupo also timed and structured its dealings with Cerro and Phelps Dodge to ensure that after the Transaction was approved by the Special Committee the shareholder vote would be locked up. Such a process does not shift the burden to Plaintiff. See Section II.

AMC falls far short of meeting its burden of demonstrating entire fairness. No Grupo witness was called to explain why the Transaction price was fair. No Goldman witness explained why reliance on a relative DCF analysis that valued Southern at half its market price was appropriate, or whether Goldman had ever relied on such an analysis before or since. The witnesses who did testify provided wildly inconsistent renditions not only of what they thought,

but of what they did, and these recollections are further contradicted by the documentary record. See Section III.

In light of the size of the Transaction, the effect of AMC's breach of fiduciary duty was enormous. The Transaction was negotiated at the beginning of a rise in copper prices that benefited all copper companies, including both Southern and Grupo. Grupo caused the Company to overpay by 24.7 million shares of Company stock, and this stock has greatly increased in value in the years since. AMC cannot be permitted to use hindsight to prevent it from being held accountable for its conduct, however, just as if the copper mining industry had stagnated since 2004 Plaintiff could not have pointed to that fact as proof that the Transaction was unfair.¹ Plaintiff seeks an equitable remedy that compensates the Company for the increase in Southern's value that was diverted from Southern's minority shareholders to Grupo. See Section IV.

Judgment should be entered on behalf of Plaintiff.

¹ See Gentile v. Rossette, 2010 WL 2171613, *2 (Del. Ch.) (the court must consider fair price and process without the benefit of hindsight).

ARGUMENT

I. THE ACQUISITION PRICE WAS UNFAIR TO SOUTHERN

“The test of entire fairness is an exacting one.”² Entire fairness requires “the transaction itself to be objectively fair, independent of the board’s belief.”³ To make this determination, the Court must compare (i) the value of what was given by Southern and (ii) the value of what Southern received in return.⁴ Where a single stockholder controls both sides of an acquisition and where “the merger price is found to be unfair, it would be difficult, if not impossible, for the merger to be found ‘entirely fair’ even if the process leading up the merger involved fair dealing.”⁵ Given Grupo’s control of both Southern and Minera, price is the dominant factor in the entire fairness analysis, outweighing any process issues.⁶ This leads “to the result that where the merger price is found not to be fair, that finding establishes, *ipso facto*, the unfairness of the merger, thereby obviating the need for any analysis of the process oriented issues.”⁷

There is no credible evidence that the value of what Southern gave up in the Transaction – 67.2 million Southern shares used as the “currency” in the Transaction – was anything less

² T. Rowe Price Recovery Fund, L.P. v. Rubin, 770 A.2d 536, 554 (Del. Ch. 2000).

³ Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995).

⁴ Associated Imports, Inc. v. v. ASG Indus., Inc., 1984 WL 19833, *14-18 (Del. Ch.), aff’d sub nom., Hubbard v. Assoc. Imports, Inc., 497 A.2d 787 (Del. 1985).

⁵ In re Emerging Commc’ns, Inc., S’holders Litig., 2004 WL 1305745 at *28 (Del. Ch.) (dicta) (Jacobs, J., sitting by designation).

⁶ Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1140 (Del. Ch. 1994), aff’d 663 A.2d 1156 (Del. 1995) (where the acquisition partner has voting control of the enterprise, such as in a parent-sub merger, “price is a dominant concern”).

⁷ Id.; see also Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (“All aspects of the issue must be examined as a whole since the question is one of entire fairness. However, in a non-fraudulent transaction we recognize that price may be the preponderant consideration outweighing other features of the merger”); Reis v. Hazelett Strip-Casting Corp., 2011 WL 303207 at *12 n.10 (Del.Ch.) (“Numerous decisions recite [Weinberger’s] now-canonical formulation”).

than what those shares traded for on the New York Stock Exchange.⁸ Those 67.2 million Southern shares were worth \$3.1 billion on the day the Transaction was approved⁹ by the defendants, and \$3.7 billion on the day the Transaction closed.¹⁰ Grupo valued the shares it received in the Transaction at market price,¹¹ and that is how the Court should value the shares. This is consistent with Delaware law.¹² Public markets for stock, particularly a stock that is widely traded on the New York Stock Exchange and followed by multiple analysts, offer a ready and reliable value that this Court should use in accessing the fair market value of what Southern gave up in the Transaction.¹³ However, there is no credible evidence to support a \$3.1 billion equity value for Minera, let alone the \$3.7 billion price Southern actually paid in the Transaction.

⁸ Trial Tr. 221:12-19 (Handelsman – Cross) (“THE COURT: Okay. But again, I just want to be clear, I am not here - - when I am ultimately looking at them, I am not looking at there is some sort of thing where, you know, the market was somehow overvaluing Southern Peru, and that you have to sort of normalize for that. That’s not what the committee ever considered. THE WITNESS: No.”); *id.* 349:14-351:18 (Beaulne – Direct) (explaining relevant factors that lead to conclusion that the trading price of Southern stock was representative of fair market value); *id.* 222:16-19 (Handelsman – Cross) (“Oh, I think there would have been a robust market for Southern Peru Copper in the copper industry at or better than the price that it traded at.”); *id.* 187:8-11 (Handelsman – Direct) (testifying that Cerro (and Phelps Dodge, *see* JX 135) sold its shares at market price); *see also*, ASARCO LLC v. Americas Mining Corp., 396 B.R. 278, 342 (S.D. Tex. 2008) (“AMC’s expert, Dr. Pirrong, contends that the market price the day of the transaction is the best method for valuing a company in an efficient market”); *id.* (“Dr. Pirrong contends that SPCC was traded in a semi-strong market, meaning that publicly available information, including past stock prices, is quickly incorporated in the current price.”)

⁹ JX 18 at 7 (67.2 x \$45.92 = \$3.086 billion).

¹⁰ JX 18 at 5 (67.2 x \$55.89 = \$3.756 billion).

¹¹ JX 108 at AMC0019912; JX 156 at SP COMM 007078; JX 129 at 22; *see, also*, JX 115 at AMC0019883; JX 107 at SPCOMM006674.

¹² Market price is the benchmark of what the Company could have received from the sale of its stock in arm’s-length negotiation with disinterested, independent third-parties. *See Union Illinois v. Korte*, 2001 WL 1526303, *7 n.14 (Del. Ch.) (“the amount which the company could have received from the sale of its stock, absent unfair dealing, is the fair market value.”)

¹³ *See, e.g., Associated Imports*, 1984 WL 19833; *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319 (Del. 1993) (recognizing damage to corporation from over-issuing stock to controlling stockholder to acquire assets is the market value of over-issued stock); *Applebaum v. Avaya, Inc.*, 805 A.2d 209 (Del. Ch. 2002), *aff’d*, 812 A.2d 880 (Del. 2002) (deciding on summary judgment that average market price for common stock as quoted on the New York Stock Exchange in the ten days leading up to the transaction equaled fair value); *Kahn v. Tremont Corp.*, 1996 WL 145452, *9 (Del. Ch.), *rev’d on other grounds*, 694

A. Defendants Have Not Proven Fair Price

Defendants' evidence of fair price is not credible. Prof. Schwartz's relative DCF valuation analysis ignores: (i) whether his DCF valuations of Southern and Minera were comparable in the first instance;¹⁴ and (ii) how a change in the assumed long-term copper price would alter the operation and value of each of Minera and Southern on an individual basis.¹⁵ Prof. Schwartz has never before valued a company using such an approach.¹⁶ Prof. Schwartz also admitted at trial that he would have done a more thorough job had he actually been asked by Defendants to value Minera.¹⁷ In sum, Prof. Schwartz's ad-hoc opinion of Minera's value is fundamentally flawed, and cannot prove that the Transaction price was fair.

1. Professor Schwartz Did Not Value Minera and Southern Using The Same Assumptions

Prof. Schwartz testified that he valued Minera and Southern using the same assumptions.¹⁸ What he meant was that he compared the two companies using the same long-

A.2d 422 (Del. 1997) ("Thus generally the market price of that stock presents a fair measure of the value of the stock at the time the contract to purchase and sell was agreed upon."). In re Lorai Space and Commcn's Inc., 2008 WL 4293781, *30 n.150 (Del. Ch.) ("one has to be extremely cautious about substituting an imprecise estimate for a market tested price").

¹⁴ In addition to Plaintiff's argument below, Plaintiff also argues at length in its Pre-Trial Opening and Answering Brief that Prof. Schwartz failed to test the reliability of his Southern DCF value using alternative valuation methodologies. Prof. Schwartz admitted at trial that using multiple valuation techniques to test the reliability of a valuation conclusion is generally accepted in the financial community. Trial Tr. 483:18-20 (Schwartz – Cross).

¹⁵ Prof. Schwartz also disregarded other metal prices (such as molybdenum) which he admitted at trial were in reality all rising. Trial Tr. 443:10-13 (Schwartz – Direct); see also JX 143 at 11 (average price for molybdenum in 2003: \$5.32; average price for molybdenum in 2004: \$15.95; average price for molybdenum in 2005: \$31.05).

¹⁶ Trial Tr. 453:1-4 (Schwartz – Cross) ("Q. And you don't remember ever having done a relative valuation analysis before similar to the one you did here; correct? A. Correct.").

¹⁷ Trial Tr. 464:23-465:2 (Schwartz – Cross). Prior to trial Prof. Schwartz had no idea how he would value Minera. Schwartz Dep. Tr. 115:15-21; see also, Pl.'s Pre-Trial Opening Br. at 37-41.

¹⁸ Trial Tr. 433:18-22 (Schwartz – Direct).

term copper price.¹⁹ However, Prof. Schwartz's relative valuation methodology was nothing more than the DCF value for Minera compared to the DCF value for Southern.²⁰ "There is no magic to this."²¹ Consequently, the DCF values are only as reliable as the projected cash flows they use.²² But Prof. Schwartz ignored the most fundamental component of the projected cash flows for a mining company: how the reserves for each company were determined. As Prof. Schwartz admitted, "reserves are the most important factor in a mining company."²³

Prof. Schwartz may be right that in the "big picture" Minera and Southern are similar mining companies, but his relative valuation approach was hardly an "apples-to-apples" comparison. For Minera, Prof. Schwartz (and Goldman) relied on projections that were developed in a robust sell-side scenario.²⁴ Grupo was motivated to put Minera's best face on and did so. Grupo engaged two mining engineering firms, Winters and Mintec, to reassess Minera's reserves and optimize Minera's life-of-mine plans and operations.²⁵ When A&S knocked down the most aggressive aspects of Winters's and Mintec's work on Minera, Mintec again revised and adjusted its analyses to produce an alternative life-of-mine plan ("Alternative 3") that added approximately \$240 million in incremental value to Minera.²⁶

¹⁹ Trial Tr. 439:17-18 (Schwartz – Direct) ("Yes. Using the same assumption that I had for Minera Mexico, I valued SPCC.")

²⁰ Trial Tr. 437:20-24 (Schwartz - Direct).

²¹ Trial Tr. 437:21 (Schwartz – Direct).

²² Trial Tr. 128:19-129:4 (Palomino – Cross), 440:16-22 (Schwartz – Direct).

²³ Trial Tr. 471:14-16 (Schwartz – Cross).

²⁴ Trial Tr. 355:21-356:14 (Beaulne – Direct).

²⁵ Id.; JX 116 at SP COMM 001497.

²⁶ JX 103 at 26 (Goldman July 8 Presentation) ("New optimization plan for Cananea ('Alternative 3') recently developed by GM and Mintec was not included in projections at this point. According to Mintec, such a plan could yield US\$240mm in incremental value on a pre-tax net present value basis prior to any potential adjustments by A&S, using a 8.76% real discount rate as per MM management"); compare

In contrast, for Southern, Prof. Schwartz (and Goldman) used production plans and projections based on life-of-mine plans that had not been reassessed since 1998 and 1999,²⁷ and the same reserves reported by Southern in its 2003 10-K.²⁸ A&S advised the Special Committee that there was expansion potential at both Toquepala and Cuajone and that optimization plans (like those conducted for Minera) could be conducted for Southern,²⁹ but the Special Committee declined to follow A&S's advice. However, after the Transaction closed, Southern engaged Mintec to certify the results of an exploration program that had begun in 2002.³⁰ Mintec certified that ore reserves at Toquepala increased 83%³¹ and that the life of Toquepala increased 23 years,³² extending the life of Toquepala to 2055.³³ Not surprisingly, Southern outperformed its 2004 and 2005 projections by a substantial margin.³⁴ Southern beat its 2004 projected EBITDA by 37%, and its 2005 projections by 135%. In contrast, Minera's projected

JX106 at 16 (Goldman October 21 Presentation) ("Projections include new optimization plan for Cananea ('Alternative 3') developed by Grupo and Mintec").

²⁷ Trial Tr. 318:11-18 (Jacob – Cross); see also JX 128 at A14 (2004 10-K) ("Reserves calculated as mentioned above were declared and filed with the Securities and Exchange Commission in 1998 for the Cuajone mine and in 1999 for Toquepala mine."); JX 123 at 19 (2003 10-K) (same).

²⁸ Compare JX 123 at 9 (reporting life-of-mine reserves for Toquepala and Cuajone of 619 million tons and 1,123 million tons of sulfide ore, respectively) and JX 26 at GS-SPCC 085558-62, sum of Line 7 (using input of 619 million tons of sulfide ore at Toquepala) and GS-SPCC 085558-62, sum of Line 41 (using input of 1,123 million tons of sulfide ore at Cuajone).

²⁹ JX 75 at SP COMM 006957 ("There is expansion potential at both Toquepala and Cuajone. If time permits, the conceptual studies should be expanded, similar to Alternative 3 at Cananea. There is no doubt optimization that can be done to the current thinking that will add value at lower expenditures.").

³⁰ JX 141.

³¹ JX 141; Trial Tr. 324:8-325:4 (Jacob – Cross).

³² JX 141; Trial Tr. 325:9-17 (Jacob – Cross).

³³ See JX 26 at GS-SPCC 085561 (projecting Toquepala life to 2032).

³⁴ Compare JX 106 at SP COMM 004926 with JX 20.

performance for 2004 was dead-on.³⁵ Prof. Schwartz neither examined nor explained these discrepancies.³⁶

2. Prof. Schwartz’s “Calibration” Using A Materially Higher Copper Price Is Invalid

Prof. Schwartz reconciled the massive difference between Southern’s market price and his DCF value for Southern by testifying that the market must have been using a long-term copper price of \$1.30.³⁷ There is no evidence in the record to support a long-term copper price of \$1.30.³⁸ But Prof. Schwartz was unconcerned with the reality of the actual outlook for copper prices in 2004. He simply “calibrated” his relative DCF valuation of Southern and Minera by holding all things constant and solving for a higher long-term copper price.³⁹ He did this without any regard for how a substantial increase of the long-term copper price would alter the

³⁵ Compare JX 106 at SP COMM 004926 with JX 20.

³⁶ Trial Tr. 481:18-21 (Schwartz – Cross). Neither did Goldman. See Pl.’s Pre-Trial Opening Br. at 11-17.

³⁷ Trial Tr. 462:7-10 (Schwartz – Cross).

³⁸ The market consensus during the time was a long-term copper price of \$0.90 per pound. Goldman’s review of Wall Street Research indicated projected long-term copper prices from five different analysts in a range of \$0.85-\$1.00 per pound. JX 106 at 28. Goldman relied on the median long-term copper price of \$0.90 per pound in rendering its fairness opinion. JX 129 at 34 (“The Forecasts reflected per pound copper prices of \$1.20 in 2005, \$1.08 in 2006, \$1.00 in 2007 and \$.90 thereafter and per pound molybdenum prices of \$5.50 in 2005 and \$3.50 thereafter, based on average forecasts published by selected Wall Street research analysts.”). The Special Committee determined that \$0.90 per pound was the most appropriate long-term copper price to use to value Minera. Palomino Dep. Tr. 191:16-20 (“What we did is we used the copper price that was what we believed the right copper price or the best copper price to use for a long term forecast as would be necessary in this transaction.”).

Even Southern relied on a long-term copper price of \$0.90 per pound for its internal long-term planning. See, e.g., JX 128 at A-14 (2004 10-K) (“For purposes of long-term planning, SPCC uses metal prices that are believed to be reflective of the full price cycle of the metal market. . . . For this purpose SPCC uses a 90 cents copper price . . .”); JX 137 at 41 (2005 10-K) (“For purposes of our long-term planning, our management uses metals price assumptions of \$0.90 per pound for copper and \$4.50 per pound for molybdenum. These prices are intended to approximate average prices over the long term. ***Our management uses these price assumptions, as it believes these prices reflect the full price cycle of the metals market.***”) (emphasis added).

³⁹ As Prof. Schwartz explains, his long-term copper price “is derived by solving for the long-term copper price while holding SPCC’s equity value (with real WACC of 6.74%) to be equal to its market capitalization.” JX 48 at Exhibit 4.

operations and valuations of Southern and Minera. Prof. Schwartz did not think that his methodology was “very problematic, especially because if the price goes up, both companies will have the reserves increase in value.”⁴⁰ Yet Prof. Schwartz did nothing to test how much each company’s reserves may increase in value at a higher long-term copper price.⁴¹ Prof. Schwartz admits that the relative values of the companies could change, but he could not say how because he did not do the analysis.⁴²

Copper reserves are calculated based upon the amount of copper that can be taken out of the ground at a profit.⁴³ When the long-term copper price assumption is increased, more copper can be pulled out of the ground at a profit. Accordingly, in the long-term (which is what the life-of-mine plan is based on), copper companies will take more copper out of the ground.⁴⁴ Southern’s SEC filings reveal that Southern was far more sensitive to increases in copper prices than Minera, and that rising copper prices “don’t change each company equally.”⁴⁵ Southern’s 2005 10-K demonstrates that when copper prices increased from \$0.90 to \$1.261 per pound, Southern’s copper reserves increased by 116% (from 13,112 thousand tons⁴⁶ to 28,314 thousand tons⁴⁷) while Minera’s increased by only 44% (from 20,325 thousand tons⁴⁸ to 29,220 thousand

⁴⁰ Id. 469:23-470:4 (Schwartz – Cross).

⁴¹ Trial Tr. 477:1-5 (Schwartz – Cross) (“Did you do an analysis of exactly what effect an increase in long-term copper prices would have on the actual copper reserves for Southern and Minera Mexico? A. No.”)

⁴² Trial Tr. 477:16-18 (Schwartz – Cross) (“I don’t know. I haven’t done the analysis so I cannot tell you, but they could change.”)

⁴³ See JX 128 at A12.

⁴⁴ Trial Tr. 480:8-16 (Schwartz – Cross).

⁴⁵ Trial Tr. 360:12-15 (Beaulne – Direct).

⁴⁶ See JX 137 at 44 (copper contained in ore reserves = 6,880 and 6,232 thousand tons for Cuajone and Toquepala, respectively).

⁴⁷ See JX 137 at 42 (copper contained in ore reserves = 10, 924 and 17,390 thousand tons for Cuajone and Toquepala, respectively).

tons⁴⁹). Prof. Schwartz's assumption that a 45% increase in long-term copper prices (\$0.90 to \$1.30) would not change the relative values of the companies is unsupportable.⁵⁰

B. Plaintiff Has Proven Minera Was Not Worth the Price Southern Paid

Minera's equity value on October 21, 2004 was no more than \$1.854 billion.⁵¹ This value was determined using two valuation methodologies, each yielding substantially similar values.⁵² Defendants attack Mr. Beaulne's valuation of Minera by suggesting that the market was generally valuing copper companies at a premium to their DCF values, and, in Southern's case, theorize that the market implied 45% higher long-term metal prices than assumed in Mr. Beaulne's analyses. The argument has no credible basis in fact. Mr. Beaulne's comparable company analysis disproves the theory entirely. But even if the market was valuing copper companies at a premium to their DCF values, there is no evidence to support a conclusion that Grupo could have sold Minera in the market at a 70% premium to its DCF value.

1. Mr. Beaulne's Market Approach Refutes a Conclusion That in the Market Minera Was Worth 70% More Than Its DCF Value

⁴⁸ See JX 137 at 44 (copper contained in ore reserves = 16,700 and 3,625 thousand tons for Cananea and La Caridad, respectively).

⁴⁹ See JX 137 at 44 (copper contained in ore reserves = 21,961 and 7,259 thousand tons for Cananea and La Caridad, respectively).

⁵⁰ Defendants' repeated testimony that Minera is more sensitive to increases in the long-term copper price is also unsupportable. See, e.g., Trial Tr. 40:10-41:8 (Palomino – Direct); 437:8-9 (Schwartz – Direct). Minera is more sensitive to a change in long-term copper prices when changes in reserves are ignored, but Mr. Palomino could not recall at trial whether Minera was more sensitive to copper prices when one took into account the increase in reserves that would result from an increase in the long-term copper price assumption. Trial Tr. 126:17-21 (Palomino – Cross). And of course, Prof. Schwartz did not consider the point. Trial Tr. 477:1-18 (Schwartz – Cross).

⁵¹ JX 47 at 42; JX 48 at Exhibit 1. This value is also supported by Goldman's DCF and Goldman's "contribution analysis" when performed using generally accepted valuation methodologies. See Pl.'s Pre-Trial Opening Br. at 34-37.

⁵² The reliability of Mr. Beaulne's valuation of Minera has been argued at length in Plaintiff's Pre-Trial Opening and Answering Briefs. Nonetheless, attached hereto as Exhibit A is Ivanhoe Mines Ltd.'s Financial Statements for periods ended December 31, 2003 and 2002. As Mr. Beaulne testified at trial, page 66 states that in 2003 nearly 75% of Ivanhoe's revenue was attributable to its Iron Ore Division. There were no errors made in Mr. Beaulne's comparable company analysis.

Prof. Schwartz admitted that he was not retained to establish a market value of Minera.⁵³ But he testified that if he had, he “would take the market prices of traded companies . . . and [he] would imply how the market is pricing those companies, and [he] would use that to value Minera Mexico.”⁵⁴ That is precisely what Mr. Beaulne did. Mr. Beaulne compared 2004 and 2005 EBIT and EBITDA, which are common metrics used in the financial community to value copper companies, of four comparable companies.⁵⁵ For both 2004 and 2005, and for both EBIT and EBITDA, the median and mean multiples are very close together.⁵⁶ Mr. Beaulne selected the median multiple and applied it to Minera. The purpose of this valuation methodology is to “summarize how the investing public values one dollar of earnings in a given industry.”⁵⁷ Under Mr. Beaulne’s market approach analysis, Minera’s median equity value was \$1.8775 billion on October 21, 2004, only \$47 million more than its DCF value.⁵⁸ To the extent the market was anticipating higher copper prices in valuing copper companies, that assumption would be embedded in how the investing public valued one dollar of earnings of a copper company, and is part of Mr. Beaulne’s comparable company analysis. Defendants have offered no evidence to the contrary, or that Goldman, Prof. Schwartz, or anyone else valued Minera at 70% more than its DCF value.

⁵³ Trial Tr. 461:21-22 (Schwartz – Cross).

⁵⁴ Trial Tr. 462:2-6 (Schwartz – Cross).

⁵⁵ Trial Tr. 348:5-7 (Beaulne – Direct); JX 47 at Exhibit 4. Defendants cannot credibly dispute the comparability of Mr. Beaulne’s selected companies. The Proxy states that each of these companies is comparable. See JX 129 at 33 (listing Southern, Grupo, Antofagasta and Phelps Dodge and stating “[a]lthough none of the selected companies are directly comparable to our company, the companies included were chosen by Goldman Sachs because they are publicly traded companies with operations that for purposes of analysis may be considered similar to our company.”)

⁵⁶ Trial Tr. 348:15-16 (Beaulne – Direct); JX 47 at Exhibit 4.

⁵⁷ Taylor v. American Specialty Retailing Group, Inc., 2003 WL 21753752, at *8 (Del. Ch.).

⁵⁸ JX 47 at 41-42.

2. There Is No Evidence Showing That Grupo Could Sell Minera Into The Market At A 70% Premium To Minera's DCF Value

Defendants point to a single page in a single document to suggest that the market was valuing copper companies in 2004 at a 30% premium to their net asset value.⁵⁹ The page was prepared by UBS – Grupo's banker – during negotiations with Goldman. The passage is hearsay within hearsay, yet Defendants proffer it as if it is competent expert evidence. Notably, Prof. Schwartz neither relied on nor mentioned the document in his report. As Mr. Beaulne testified:

I don't know the analysts, what their basis for net asset value is, how they're determining -- sometimes net asset value they only go ten years. You don't know if they're optimizing it. It's just -- and I've -- in cases where people have even presented valuations to the Securities and Exchange Commission, they will not allow you to present a valuation where you're using a multiple of a DCF. So that is their approach that is completely incorrect.⁶⁰

Indeed, as this Court is well aware, the DCF “value is a value of the entity itself.”⁶¹ Applying a premium to a DCF is not a generally accepted valuation methodology.⁶²

Regardless, the data on the page hardly supports UBS's conclusion. Three copper producers are listed. Only two were comparable to Southern: Antofagasta and Phelps Dodge.⁶³ The management case indicates that these two companies traded at 1.1x their net asset value. How exactly net asset value was determined for these companies is unknown,⁶⁴ except that the low case used a constant copper price of \$0.85/lb, the average case used a copper price of \$1.00/lb for 2004-2006 and \$0.85/lb. thereafter, and the management case used a constant copper

⁵⁹ JX 103 at SP COMM 006945.

⁶⁰ Trial Tr. 405:3-15 (Beaulne – Cross).

⁶¹ In re Toys “R” Us, Inc. S’holder Litig., 877 A.2d 975, 1013 (Del. Ch. 2005).

⁶² Id.

⁶³ The market capitalization of AVR Resources was under \$500 million. JX 103 at SP COMM 006945.

⁶⁴ Trial Tr. 405:3-15 (Beaulne – Cross).

price of \$1.00/lb.⁶⁵ No case used a long-term (or even an short-term⁶⁶) copper price of \$1.30/lb. This is not surprising. At the time, no copper company used a long-term copper price of \$1.30/lb,⁶⁷ and nine out of ten analysts projected long-term copper prices of \$1.00/lb or less.⁶⁸ If Southern disclosed to the market that it actually valued Minera using a \$1.30/lb long-term copper price, rather than the \$0.90/lb stated in the Proxy,⁶⁹ the market would have crucified Southern. The market would have also crucified Southern if it was disclosed that Minera was actually valued at 6.3x to 6.5x 2005E EBITDA,⁷⁰ rather than at 5.6x 2005E EBITDA as stated in the roadshow.⁷¹

The state of Minera's operations in 2004 is also relevant to whether Grupo could have obtained a premium for Minera in the public M&A market. Defendants compare Minera and Southern as if they had similar operations. Nothing is further from reality. Southern was a well-oiled, money-making machine. Despite three years of depressed copper prices ending in 2003,

⁶⁵ JX 103 at SP COMM 006945, SP COMM 006929.

⁶⁶ Mr. Beaulne made more sensitive assumptions to account for higher short-term copper prices in his analysis of Minera. In his October 21, 2004 valuation, Mr. Beaulne assumed copper prices of \$1.25/lb. for 2004, \$1.21/lb. in 2005, \$1.08/lb. in 2006, \$1.00/lb. in 2007, and \$0.90/lb. thereafter. JX 47 at 25. In his April 1, 2005 valuation, Mr. Beaulne assumed copper prices of \$1.45/lb. in 2005, \$1.20/lb. in 2006, \$1.10/lb. in 2007, and \$0.95/lb. thereafter.

⁶⁷ JX 103 at SP COMM 006878 (Phelps Dodge: \$0.90/lb.; Codelco: \$0.91/lb.; Grupo Mexico: \$0.90/lb.; Southern: \$0.90/lb.; Freeport: \$0.85/lb.; Placer Dome: \$0.85/lb.); see also id. at SP COMM 006929 (Aur Resources: \$0.95/lb.; Antofagasta: \$0.88/lb.) Even more telling, Southern did not increase the copper price it used for long-term planning until December 31, 2007. JX 143 at 66. By then copper prices had averaged more than \$0.90/lb. for four years in a row. JX 143 at 11.

⁶⁸ JX 103 at SP COMM 006877. And of those nine analysts, seven projected long-term copper prices of \$0.90/lb. or less.

⁶⁹ PX 129 at 34 (“The Forecasts reflected per pound copper prices of \$1.20 in 2005, \$1.08 in 2006, \$1.00 in 2007 and \$.90 thereafter . . .”).

⁷⁰ JX 106 at 24.

⁷¹ JX 107 at SP COMM 006674 (“Transaction estimated enterprise value of US\$4.1 billion – implied MM EV/EBITDA 2005E multiple of 5.6x”).

Southern continued to turn a profit.⁷² Minera was decimated. “[S]uppliers were repossessing trucks in the mines.”⁷³ “There were large pieces of equipment that were parked because they were broken down and there weren’t spare parts to repair them.”⁷⁴ The life-of-mine plans optimized by Winters and Mintec were forward-looking and required significant capital expenditure to execute. As Handelsman testified, “the whole premise of this transaction was to use the fisc of Southern Peru and its pristine balance sheet to develop the mining assets of Minera Mexico.”⁷⁵ There is no basis to assume Grupo would have obtained a premium to Minera’s valuation in the public M&A market. There is simply no evidence that the price Southern paid for Minera was fair.

II. THERE IS INSUFFICIENT EVIDENCE OF ARM’S-LENGTH DEALING TO SHIFT THE BURDEN TO PLAINTIFF

Defendants do not get a burden shift because of the “mere existence of an independent special committee.”⁷⁶ Rather, to shift the burden “the majority shareholder must not dictate the terms of the merger” and “the special committee must have real bargaining power that it can exercise with the majority shareholder on an arms length basis.”⁷⁷ “[T]he committee must act with informed diligence, and seek the best result available for its constituents, given the facts at hand.”⁷⁸ Defendants have not proven that the Transaction was negotiated by an effective Special Committee. The fairness burden thus remains with Defendants.

⁷² See ASARCO, 396 B.R. at 307 (“Even in the midst of this prolonged copper price downturn, the SPCC operations remained profitable—this being another indication of the quality of the Peruvian operation.”)

⁷³ Trial Tr. 98:16-19 (Palomino – Direct).

⁷⁴ Parker Dep. Tr. 50:2-22.

⁷⁵ Trial Tr. 219:11-15 (Handelsman – Cross); see also JX 115 at AMC 19903 (Grupo can “untap the true value of MM through multiple migration”).

⁷⁶ Rabkin v. Olin Corp., 1990 WL 47648, *6 (Del. Ch.).

⁷⁷ Kahn v. Tremont Corp., 694 A.2d 422, 429 (Del. 1997).

⁷⁸ Gesoff v. IIC Indus., 902 A.2d 1130, 1148 (Del. Ch. 2006).

A. Grupo Dictated the Terms

On February 3, 2004, Grupo proposed that Southern “*acquire* Minera Mexico from AMC” in exchange for \$3.1 billion in Southern stock.⁷⁹ On October 21, 2004, the Special Committee approved the Transaction and gave Grupo exactly that.⁸⁰

B. The Special Committee’s Inexplicable Shift to a Fixed Exchange Ratio Was Disastrous

Grupo’s May 7, 2004 term sheet demanded \$3.1 billion in Southern stock, calculated on a floating exchange ratio.⁸¹ Rather than accept Grupo’s proposal and take advantage of Southern’s increasing stock price,⁸² the Special Committee “negotiated” to fix the number of shares issued in the Transaction. The Special Committee had no basis for doing so. Issuing a floating number of shares would be detrimental to Southern only if its stock price declined, but with rising copper prices neither the Special Committee nor Southern believed this would happen.⁸³ Had the Special Committee simply accepted the floating exchange ratio proposed by Grupo, Southern

⁷⁹ JX 108 at AMC0019912 (emphasis added). In response to the Special Committee’s request for clarification, Grupo made a similar proposal on May 7, 2004. See JX 156 at SP COMM 7078; see also, Sanchez Dep. Tr. At 31, 35, 132-33 (Southern bought Minera). Defendants never referred to the Transaction as a “merger of equals” until they were defending it in this litigation.

⁸⁰ Trial Tr. at 274:16-19 (Ortega – Cross) (“Grupo was asking for \$3.1 billion worth of stock, and in the end it got \$3.1 billion worth of stock.”); JX 106 at SP COMM 004900 (“MM Implied Consideration” is \$3.119 billion); Handelsman Trial Tr. at 201:23-202:5 (“Q: The 67.2 million shares that were being given to Grupo Mexico in exchange for Minera, how much were they worth? A: I think at the time that the deal was approved by the board, they were worth about \$3.1 billion, and I think at the time the transaction closed they were worth about \$3.6 billion.”).

⁸¹ JX 156 at SP COMM 007078.

⁸² Trial Tr. at 49:4-5 (Palomino – Cross) (“the market was probably getting ahead of itself basically because of copper price assumptions”).

⁸³ See Handelsman Dep. Tr. at 100:24-101:1; Trial Tr. at 312:22-313:4 (Jacob – Cross) (discussing rising copper prices in 2004).

would have issued 14.5 million fewer shares in the Transaction.⁸⁴ Instead, the Special Committee demanded a fixed-share exchange ratio, to which Grupo gladly accepted.

C. The Special Committee Adopted Relative Valuation Without a Valid Basis For Doing So

On June 23, 2004, Goldman presented the Special Committee with its discounted cash flow analysis of Southern.⁸⁵ Although neither the June 23 Special Committee meeting minutes nor the June 23 Goldman presentation contain any reference to relative valuation,⁸⁶ the results of the Southern DCF analysis purportedly were a revelation. As Handelsman described it:

[I]nitially, when we thought that the value of Southern Peru was its market value and the value of Minera Mexico was its discounted cash flow value..., those were very different numbers.

The numbers became less different and more understandable ... on a basis of their relative value as opposed to value determined by stock price on one side and DCF on the other.⁸⁷

* * *

When you used the discounted cash flow analysis metric against market price, it didn't look like the right price. When you looked at the companies on this basis, it was a lot closer to the asked and seemed to make sense.⁸⁸

The Special Committee's professed epiphany that relative valuation was the proper method to value Minera was unreasonable and led to an unfair result. Rather than being "comforted by the fact that the DCF analysis of Minera Mexico and the DCF analysis of SPCC were not as different as the discounted cash flow analysis of Minera Mexico and the market

⁸⁴ Southern's average closing price between and including February 25, 2005 and March 24, 2005 was \$59.75 per share. JX 18 at 5.

⁸⁵ JX 102, at 22-24.

⁸⁶ See generally JX 89 and JX 102. The minutes, however, contain nearly a full page of redactions on the grounds of privilege.

⁸⁷ Trial Tr. at 159:24-160:13 (Handelsman – Direct).

⁸⁸ Trial Tr. at 162:11-15 (Handelsman – Direct).

value of Southern Peru,”⁸⁹ that fact should have caused the Special Committee to ask more questions. Is Southern’s DCF value reliable? How were the inputs determined? Did the companies react similarly to fluctuating metal prices? Should we pay for Minera with cash instead of stock?⁹⁰ If the Southern DCF analysis is showing a lower value, how can we best leverage our stock currency? If the Special Committee investigated these issues, it would have discovered that:

- Southern’s Projections Were Stale And Unreliable: As discussed in section I.A.1, supra, Southern continuously exceeded management forecasts throughout 2004, while Minera’s projections were spot-on. Grupo supplied the data for both Minera and Southern,⁹¹ and Ortega, who was advising German Larrea on the Transaction,⁹² controlled the data room.⁹³ Under these conditions, the Special Committee’s reliance on relative DCF analyses for Minera and Southern was plainly imprudent.
- The Special Committee Had No Basis to Believe (Wrongly) That Minera Benefited More From an Increase in the Long-Term Copper Price: The Special Committee and Defendants assert that “Minera Mexico’s value increased more when the price of copper went up than Southern Peru Copper’s value.”⁹⁴ As discussed in section I.A.2., supra, this assertion is demonstrably incorrect. Goldman 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,⁹⁵ and the Special Committee never had any basis to conclude that a

⁸⁹ Trial Tr. at 159:6-10 (Handelsman Direct).

⁹⁰ Handelsman’s testimony at trial regarding borrowing to pay cash for Minera misses the mark. Trial Tr. 223:10-224:15 (Handelsman – Redirect). Southern could have raised the cash in the equity markets. See Trial Tr. 222:16-19 (Handelsman – Cross) (“Oh, I think there would have been a robust market for Southern Peru Copper in the copper industry at or better than the price it traded at.”). This would have also created the “liquidity” value the Special Committee claimed to be concerned about.

⁹¹ See JX 106 at SP COMM 004917, 4919; Trial Tr. at 261:21-262:2 (Ortega – Cross) (Southern data room materials came from Grupo); Sanchez Dep. Tr. at 77-78 (same).

⁹² Ortega Trial Tr. at 259:1-6 (Ortega – Cross).

⁹³ Trial Tr. at 259:22-24 (Ortega – Cross).

⁹⁴ Trial Tr. at 80:11-13 (Palomino – Direct); id. at 54:8-13.

⁹⁵ See generally JXs 96-98, 100-106.

higher long-term copper price favored Minera. In fact, higher copper prices benefited Southern significantly in relation to Minera.⁹⁶

There is no evidence that the Special Committee asked these questions, and there is no evidence in the record from which the Special Committee could have concluded that reliance on a relative DCF valuation was prudent or reasonable. Instead, the Special Committee “was comforted” that relative valuation “seemed to make sense” merely because it provided an excuse for claiming that the value of Minera “was a lot closer” to Grupo’s asking price than Minera’s DCF value showed.⁹⁷

D. The Special Committee Squandered Southern’s Superior Multiple

Prior to the Transaction, Southern traded at a higher multiple than Grupo.⁹⁸ Grupo believed that “the inherent value of MM is not fully reflected in Grupo Mexico’s share price.”⁹⁹ Thus, Grupo proposed the Transaction in order to “Untap the true value of MM through multiple migration,”¹⁰⁰ which would have a “positive effect on [Grupo’s] share price” because “investors will value SPCC and MM assets at the same multiple.”¹⁰¹ By valuing Minera as if it were

⁹⁶ Southern’s SEC filings list reserves in Southern’s Peruvian and Mexican mines at \$0.90/lb and at \$1.26/lb. See JX 132 at 42 and 44. Southern’s Peruvian mines have 13,112 thousand tons of copper at \$0.90/lb and 28,314 thousand tons of copper at \$1.26/lb. Id. Southern’s Mexican mines have 20,324 thousand tons of copper at \$0.90/lb and 29,220 thousand tons of copper at \$1.26/lb. Id. An increase in copper prices drastically increases Southern’s reserves relative to Minera’s reserves.

⁹⁷ Trial Tr. at 162:14-15 (Handelsman Direct).

⁹⁸ See, e.g., JX 106 at SP COMM 004913.

⁹⁹ JX 115 at AMC0019986.

¹⁰⁰ JX 115 at AMC00199903. See, also, id. at AMC0019886.

¹⁰¹ Id. at AMC0019886. See also Trial Tr. at 271:18-22 (Ortega – Cross) (“Q: So in this presentation UBS was advising Grupo’s board that migrating Minera’s assets to Southern’s multiple would be beneficial to Grupo Mexico; correct? A: Correct.”).

already part of Southern and trading at Southern's multiple, the Special Committee gave all of Minera's "untapped" value to Grupo.¹⁰²

E. The "Concessions" The Special Committee Purportedly Obtained Were Meaningless

Contrary to Defendants' contention, the Special Committee obtained no significant "concessions" from Grupo during the course of evaluating the Transaction.¹⁰³

- Capping Minera's Debt: Handelsman's testimony that the Special Committee was telling Grupo to "Pay down some of your debt, fellows" is simply contradicted by the facts.¹⁰⁴ Minera was contractually obligated to reduce its debt in the event copper prices exceeded \$0.88 per pound,¹⁰⁵ which occurred on October 15, 2003.¹⁰⁶ Moreover, Grupo had planned to refinance Minera's debt since before the Transaction was proposed.¹⁰⁷ The Special Committee knew as early as April 2004 that Minera's debt would be reduced to \$754 million by the end of 2006,¹⁰⁸ "whether or not this [Transaction] happens."¹⁰⁹ In fact, Minera's \$1 billion debt cap was *lower* than the Special Committee's \$1.105 billion demand,¹¹⁰ proving it was in no way a "concession" by Grupo.
- The Special Dividend: Just like the cap on Minera's debt, the \$100 million special dividend was nothing more than a tool to "[b]ridge the difference between what [Grupo] wanted and what [the Special Committee] willing to pay."¹¹¹ As a result

¹⁰² See Ruiz Depo. Tr. at 51:24-52:7. As discussed at section I.A.1., *supra*, Southern's projections were not optimized, which resulted in higher implied Southern EBITDA multiples, and thus a higher implied Minera equity value.

¹⁰³ See JX 129 at 24-25 (purported "concessions" made by Grupo include capping Minera's debt, agreeing to pay a \$100 million special dividend, and adoption of corporate governance terms).

¹⁰⁴ Trial Tr. at 173:1-4 (Handelsman – Direct).

¹⁰⁵ JX 125 at 55 ("when the prices of copper, zinc and silver exceed \$0.88 per pound, \$0.485 per pound, and \$5.00 per ounce, respectively, we will pay an amount equal to 75% of the excess cash flow generated by the sales of such metals at the higher metal price, which will be applied first, to the amortization of Tranche B, then to the amortization of Tranche A"). Minera was also obligated to pay 100% of any net working surplus capital that exceeded \$240 million towards its debt. *Id.*

¹⁰⁶ JX 23 at 11.

¹⁰⁷ Trial Tr. at 275:6-9 (Ortega – Cross) ("Q: So even before proposing the transaction to sell Minera, Grupo had already planned to refinance Minera's debt; correct? A: Um-hum.").

¹⁰⁸ See JX 101 at SP COMM 003443; JX 102 at SP COMM 003344.

¹⁰⁹ JX 74 at SP COMM 010050.

¹¹⁰ See JX 160 at SP COMM 010491.

¹¹¹ Trial Tr. at 128:8-9 (Palomino – Cross).

of the special dividend, Grupo received both \$54 million in cash and the number of shares it wanted in the Transaction.

- Corporate Governance Provisions: Defendants contend that Southern and its stockholders benefited from certain corporate governance terms “negotiated” by the Special Committee.¹¹² These governance terms were worthless and did nothing to alleviate the unfairness of the Transaction.¹¹³

F. Grupo Controlled the Outcome of the Transaction

1. The Shareholder Vote Was Locked Up

The Proxy states that on October 5, 2004, German Larrea and Handelsman agreed that “if the parties reached agreement with respect to the terms of the proposed transaction, both Grupo Mexico and Cerro would indicate their intention to vote in favor of the transaction.”¹¹⁴ German Larrea’s October 13, 2004 draft voting agreement¹¹⁵ sent to Mr. Handelsman sought to memorialize this agreement. The evidence, despite Mr. Handelsman’s denials,¹¹⁶ thus suggests a *quid pro quo* exchange of Cerro’s vote in favor of the Transaction for Cerro’s long-sought¹¹⁷ registration rights.

¹¹² This Court recognizes that such concessions are “cheap and easy to give.” In re Emerson Radio S’holder Derivative Litig., 2011 WL 1135006, *5 (Del. Ch.); Campbell v. The Talbots, Inc., Del. Ch., C.A. No. 5199-VCS, Settlement Hearing Tr. (Dec. 20, 2010) at 18 (“I would hardly say that this would be the first time that this Court has inquired as to the actual benefit of the supposed therapeutic change and has questioned the value of therapeutic changes, to the extent that the company was already listed under an exchange and the exchange rules for the company already required that corporate governance provision.”); see also Pl.’s Pre-Trial Answering Br. at 21-23.

¹¹³ For example, the Special Committee “negotiated” for a Board committee to review related party transactions in excess of \$10 million, which “Southern’s audit committee was already thoroughly reviewing,” Trial Tr. at 278:6-10 (Ortega – Cross), and every related party transaction between 2002 and 2004 was below that \$10 million threshold. Trial Tr. at 279:5-280:9 (Ortega – Cross).

¹¹⁴ JX 129 at 25. At this meeting the Special Committee and German Larrea also finalized most of the substantive terms of the Transaction. Id.

¹¹⁵ JX 52.

¹¹⁶ Handelsman testified at trial that he “never would have agreed to that” and that “there were not” other Cerro representatives discussing registration rights with German Larrea. Trial Tr. at 204:15, 205:12-18 (Handelsman – Cross).

¹¹⁷ JX 30.

Having agreed to the material terms of the Transaction on October 5, 2004,¹¹⁸ the parties' October 8, 2004 agreement that approval of the Transaction would be subject to a two-thirds super-majority vote¹¹⁹ ensured the Transaction would be approved, and was hardly a substitute for a true majority of the minority vote provision.¹²⁰ Furthermore, as of December 22, 2004, Phelps Dodge's agreement to vote in favor of the Transaction was irrevocable,¹²¹ so even if the Special Committee had changed its recommendation pre-closing in light of the Company's rising stock price and superior performance, the Special Committee could not have "vetoed" the Transaction.¹²² As Ortega conceded, "it was entirely up to Grupo whether the transaction went forward or not."¹²³

2. The Special Committee Lacked the Power to Negotiate

The Special Committee's mandate made clear that the Special Committee possessed only the power to "evaluate" the Transaction.¹²⁴ Accordingly, the Special Committee "did not try to make our own proposals to Grupo Mexico," and only "negotiate[d] with them in the sense of telling them what it is that we don't agree with."¹²⁵

¹¹⁸ JX 129 at 25; Trial Tr. at 208:20-24 (Handelsman – Cross).

¹¹⁹ JX 129 at 25.

¹²⁰ See In re John Q. Hammons Hotels Inc. S'holder Litig., 2009 WL 3165613, *12 (Del. Ch.) (a majority of the minority provision "must provide[] the stockholders [the] important opportunity to approve or disapprove of the work of the special committee and to stop a transaction they believe is not in their best interests.").

¹²¹ JX 15 at AMC0024877.

¹²² See contra Palomino Dep. Tr. at 96:16-22.

¹²³ Trial Tr. 286:15-19 (Ortega – Cross) ("Q: So it was entirely up to Grupo whether the transaction went forward or not; correct? A: Um-hum. Q: Yes? A: Yes.").

¹²⁴ JX 16 at SP COMM 000441.

¹²⁵ Trial Tr. at 14:10-19 (Palomino – Direct); see also Trial Tr. at 143:19-144:12 (Handelsman – Direct) (Grupo could decide whether it wanted to "negotiate in the face of a no.").

G. There Was Not a Fully Informed Vote on the Transaction

As detailed in Plaintiff's opening and answering pre-trial briefs, the proxy statement issued in connection with the vote on the Transaction was materially misleading and omitted material information.¹²⁶ Consequently, the stockholder vote was not informed.¹²⁷

III. THE EVIDENCE IS INSUFFICIENT TO MEET DEFENDANTS' BURDEN OF PROVING ENTIRE FAIRNESS

A. No Grupo Witness Testified

Despite being the controlling stockholder and sole corporate defendant, Grupo offered no trial testimony to demonstrate that the Transaction was fair.¹²⁸ Grupo asserts that Minera's equity value was \$3.1 billion, yet neither Grupo nor UBS testified to support this claim.

B. No Goldman Sachs Witness Testified

Defendants also presented no evidence at trial from the Special Committee's financial advisor.¹²⁹ Their absence leaves unanswered two critical questions: why Goldman adopted its relative DCF valuation approach, and whether Goldman had ever exclusively relied on relative DCF valuation before. Sanchez's deposition testimony that "more than absolute values, what matters is relative valuations"¹³⁰ was entirely inconsistent with his testimony that "[i]f you are buying a company, there is only one DCF value to do, which is the company that you are

¹²⁶ See Pl's. Pre-Trial Opening Br. at 25-28, 46-47; Pl's. Pre-Trial Ans. Br. at 23-24.

¹²⁷ See Weinberger, 457 A.2d at 712; Emerging Commc'ns., 2004 WL 1305745, at *37-38 (stockholder vote uninformed where, among other things, financial projections and valuation information withheld from stockholders).

¹²⁸ Defendant Ortega testified that he was merely an "interlocutor between [Grupo] and the special committee." Trial. Tr. at 247:19-22 (Ortega – Direct).

¹²⁹ Martin Sanchez, the Goldman witness deposed by Plaintiff, "refused" to appear at trial. In re Southern Peru Copper Corp. S'holder Deriv. Litig., Consol. C.A. No. 961-VCS, Tr. (Jun. 15, 2011) at 5:6-10. Alternative Goldman witnesses either also refused to appear at trial, or were not able to appear until weeks after the scheduled conclusion of trial.

¹³⁰ Sanchez Dep. Tr. 41:25-42:3.

buying.”¹³¹ Further, absent any evidence that Goldman has ever before relied solely upon a relative DCF analysis to support the fairness of an acquisition,¹³² the Court should infer that Goldman never has.¹³³

C. Witness Testimony is Inconsistent With the Special Committee’s Claimed Reliance on Relative Valuation

Palomino testified that he thought relative valuation “was a good methodology”¹³⁴ that is “used all the time”¹³⁵ and that “the relative discounted cash flow analysis is one that [he] would tend to attach more importance to, typically.”¹³⁶ Likewise, Handelsman testified that “the appropriate measurement” in evaluating the Transaction was “what that relative DCF valuation meant in terms of give and get at that point and using that methodology.”¹³⁷ Much of Palomino and Handelsman’s other testimony, however, is inconsistent with their professed reliance on relative valuation.

As discussed above, one of the fundamental (yet patently wrong) assumptions underlying the Special Committee’s relative valuation method was that “the higher the price used for copper, the more advantageous the situation would be for Minera Mexico.”¹³⁸ This is purportedly because “the reserves of Minera Mexico were proportionately larger than those of

¹³¹ Id. at 41:14-16.

¹³² Goldman’s counsel precluded Sanchez from testifying about how or why Goldman chose its relative DCF approach. Sanchez Dep. Tr. at 43:21-44:2, 44:6-22, 45:22-24.

¹³³ Emerging Commc’ns, 2004 WL 130575, at *25 (where defendants’ financial advisor did not testify, “the only logical inference -- and the inference this Court has drawn -- is that Houlihan’s testimony would have been unfavorable to the defendants’ position.”).

¹³⁴ Trial Tr. at 55:17 (Palomino – Direct).

¹³⁵ Trial Tr. at 58:17-18 (Palomino – Direct).

¹³⁶ Trial Tr. at 58:21-23 (Palomino – Direct).

¹³⁷ Trial Tr. at 201:18-22 (Handelsman – Cross).

¹³⁸ Trial Tr. 40:18-20 (Palomino – Direct); see also id. at 41:11-13.

Southern Peru.”¹³⁹ While Palomino knows that “higher [copper] prices would tend to increase reserves and lower prices would tend to decrease them,”¹⁴⁰ he testified “I don’t recall” whether Minera was “more sensitive [than Southern] when you consider expanding reserves that could be resultant from rising copper prices.”¹⁴¹ Palomino’s inability to recall whether one of the fundamental premises of the relative valuation method was true severely undermines the credibility of his reliance on relative valuation.

Handelsman’s testimony regarding the proposed collar on Southern’s stock price further calls into question the Special Committee’s purported reliance on relative valuation.

Handelsman testified that the Special Committee proposed the collar because

the stock of one company could go down and, therefore, the person who is the recipient of that stock isn’t getting as much as they thought they would; or the stock of the issuer, Southern Copper, could go up, and then Grupo Mexico would get a lot more than it was asking for.¹⁴²

This statement is entirely inconsistent with Defendants’ position at trial. Handelsman admitted that the value received by Grupo in the Transaction was directly related to the value of Southern’s stock price, not the “relative values” of the companies. Handelsman’s clumsy attempt to explain why the Special Committee abandoned the collar¹⁴³ does nothing to change the fact that Handelsman plainly had reason to doubt his “feeling that a relative value of the two companies made sense” irrespective of Southern’s stock price.

¹³⁹ Trial Tr. at 86:16-17 (Palomino – Direct).

¹⁴⁰ Trial Tr. at 125:19-21 (Palomino – Cross).

¹⁴¹ Trial Tr. at 126:17-21 (Palomino – Cross).

¹⁴² Trial Tr. at 171:22-172:7 (Handelsman – Direct).

¹⁴³ Trial Tr. at 175:1-9 (Handelsman – Direct) (“I thought the collar had some meaning, but I thought that it was less important because I believed -- based upon my feeling that a relative value of the two companies made sense, that ships rise with a rising tide and ships fall with a falling tide; and, therefore, the chances of the value of one getting out of sync with the value of the other was a chance that was worth taking, although it would certainly have been better to have the collar.”).

Handelsman further admitted that the \$100 million special dividend “decreased, at least for the moment, the value of Southern stock by having Southern use some of its cash to pay the special dividend.”¹⁴⁴ Hence, Handelsman testified the intended effect of the special dividend was that “*the value of the specie being used in the merger went down. . .*”¹⁴⁵ Handelsman’s testimony confirms that throughout his evaluation of the Transaction he understood that the value Southern was paying to acquire Minera was not a function of the relative valuation of the companies, but rather a function of the market value of Southern’s stock.

D. Witness Descriptions of the Price “Negotiations” are Inconsistent with the Documentary Record

The Special Committee members testified that they “extensively” negotiated with Grupo Mexico to get the best price for the Transaction.¹⁴⁶ Ortega agreed, stating that “it was a very active, a very active negotiation.”¹⁴⁷ At trial, the Special Committee members testified how they tactically responded to Grupo’s offers and brought the negotiations to a successful result. The witnesses’ testimony regarding their “negotiations” with Grupo, however, was materially inconsistent, both internally and with the documentary record.

Handelsman and Palomino both testified that Grupo’s initial \$3.1 billion valuation of Minera¹⁴⁸ was “too high,”¹⁴⁹ but they were not surprised because it was Grupo’s “initial

¹⁴⁴ Trial Tr. at 176:3-5 (Handelsman – Direct).

¹⁴⁵ Trial Tr. at 176:8-10 (Handelsman – Direct) (emphasis added).

¹⁴⁶ Trial Tr. at 14:7-15:3 (Palomino – Direct); *id.* at 143:19-144:12 (Handelsman – Direct).

¹⁴⁷ Trial Tr. at 250:8-9 (Ortega – Direct).

¹⁴⁸ JX 156 at SP COMM 007078. The prior two proposals, on February 3, 2004 and March 25, 2004, each also demanded a number of Southern shares that equaled \$3.1 billion at Southern’s market price. See JX 108 at AMC0019912-13; JX 155 at SP COMM 001626.

¹⁴⁹ Trial Tr. at 42:9-14 (Palomino – Direct); *see also* Trial Tr. at 156:23-157:7 (Handelsman – Direct) (“the value of Minera Mexico was substantially less than the asked price of Grupo Mexico by a substantial margin”).

proposal.”¹⁵⁰ Following Goldman’s June 11 confirmation that Grupo overvalued Minera by \$1.4 billion,¹⁵¹ the Special Committee regarded the gulf over the “valuation of Minera Mexico” as “substantial.”¹⁵² Sometime thereafter, the Special Committee directed Goldman to run a DCF valuation of Southern. Goldman’s June 23 DCF value of Southern was between \$1.7 and \$2.9 billion,¹⁵³ which purportedly “comforted” Handelsman¹⁵⁴ because he realized then that “we weren’t paying double for the company.”¹⁵⁵ On July 8, 2004, Goldman for the first time presented the two companies’ relative DCF values as a proposed method of valuing Minera in the Transaction.¹⁵⁶

Shortly after hearing Goldman’s July 8, 2004 presentation, however, the Committee instructed Goldman to present UBS with a counter-proposal that was neither discussed during the trial, nor disclosed in the Proxy,¹⁵⁷ nor described in any document produced by Defendants, Southern, or the Special Committee. On July 12, 2004, Goldman and UBS met to discuss a counter-proposal from the Special Committee under which the Company would issue 52 million shares to Grupo in exchange for Minera.¹⁵⁸ Goldman presented the proposal not by comparing the two companies’ DCF values, as would be consistent with the relative valuation method, but by comparing their 2004 EBITDA multiples.¹⁵⁹ This counter-proposal entirely contradicts the

¹⁵⁰ Trial Tr. at 36:2-9 (Palomino – Direct).

¹⁵¹ JX 101 at SP COMM 3381.

¹⁵² JX 88 at SP COMM 17997.

¹⁵³ JX 102 at SP COMM 6978.

¹⁵⁴ Trial Tr. at 159:7 (Handelsman – Direct).

¹⁵⁵ Trial Tr. at 162:19-20 (Handelsman – Direct).

¹⁵⁶ Compare JX 103 at SP COMM 6896-98 with JX 96, 97, 98, 100, 101, 102.

¹⁵⁷ See JX 119.

¹⁵⁸ JX 119 at UBS—SCC 5597.

¹⁵⁹ JX 119 at UBS—SCC 5599.

Special Committee's professed belief as of June 23, 2004 that Southern and Minera should be compared on a relative DCF basis.¹⁶⁰

Although the Proxy contains no reference to the Special Committee's 52 million share counter-proposal, it does reference Grupo's 80 million share response to it, which was purportedly made between "late July and early August."¹⁶¹ Other than the Proxy, however, Defendants have produced no documentary evidence that Grupo ever made such a proposal. Defendants have also failed to produce Special Committee minutes for their supposed August 5 and 25 meetings during this important period.

The Special Committee members each testified to their vehement responses to Grupo's 80 million share proposal. Palomino testified that in response to the proposal, he and Ruiz met with Mr. Larrea, and told him that "if the proposal was not, you know, changed substantially, we could not reach an agreement."¹⁶² He recounted their dramatic meeting with Mr. Larrea, which ended with Mr. Larrea bowing to the pressure and "call[ing them] back" to "present something that was acceptable."¹⁶³ Handelsman, who was not present for the standoff, described the 80 million share proposal as a "substantially higher ask than the original one," especially since the "stock price of SPCC had gone up." As a result of this "significant overreach," Handelsman said, the parties were at an "impasse."¹⁶⁴

In fact, however, the 80 million share proposal was hardly "substantially higher" than the prior proposal. The market value of 80 million Southern shares at that time simply equaled \$3.1

¹⁶⁰ Trial Tr. at 159:3-160:13 (Handelsman – Direct).

¹⁶¹ JX 129 at 22.

¹⁶² Trial Tr. at 60-61 (Palomino – Direct).

¹⁶³ Trial Tr. at 61:1-4 (Palomino – Direct).

¹⁶⁴ Trial Tr. at 163-64 (Handelsman – Direct).

billion.¹⁶⁵ Curiously, Handelsman’s statement that the Company’s stock price had “gone up” begs the question “since when?”, as the last documented offer (on May 7, 2004) had been on a floating exchange ratio.¹⁶⁶ According to defendants, Grupo’s next offer – the result of the parties’ “extraordinary effort to come to an agreement”¹⁶⁷ – was for the Company to issue 67 million shares for Minera. Again, the 67 million shares were worth \$3.1 billion.¹⁶⁸ Palomino nonetheless testified that “it must have been an extraordinary effort for Mr. Larrea to accept reducing a proposal.”¹⁶⁹

Palomino stated that at 67 million shares, “it basically brought numbers to within a stone's throw of what we thought was reasonable.”¹⁷⁰ Instead of throwing the stone, however, the Committee simply dropped it. The Special Committee’s counter-proposal on September 23, 2004 was for 64 million shares, which were then worth \$3.00 billion.¹⁷¹ The remaining \$100 million valuation gap, moreover, was hardly closed by hard-nosed negotiations; it was “bridged” by agreeing to a \$100 million transaction dividend that principally benefited Grupo.¹⁷²

¹⁶⁵ Compare JX 129 (“in excess of 80 million shares” demanded in “late July and early August”) with JX 18 at 8-9 (average stock price between July 20, 2004 Special Committee meeting and August 21, 2004 proposal is \$38.28 per share). $\$38.28/\text{share} \times 80 \text{ million shares} = \3.1 billion .

¹⁶⁶ JX 156 at SP COMM 7078.

¹⁶⁷ JX 157 at SP COMM 10486.

¹⁶⁸ See JX 158 at SP COMM 14582-83; see also JX 18 at 8 (SPCC stock closed at \$45.72 on September 7, 2004). $\$45.72/\text{share} \times 67 \text{ million shares} = \3.1 billion .

¹⁶⁹ Trial Tr. at 63:21-64:4 (Palomino – Direct).

¹⁷⁰ Trial Tr. at 64:5-9 (Palomino – Direct). Handelsman agreed: the 67 million share proposal “while a bit higher than – was in the realm of reason based on Goldman’s valuation of the relative value of the two companies.” Trial Tr. at 164:16-23 (Handelsman – Direct).

¹⁷¹ Compare JX 159 at AMC 27542 (64,000,000 million [sic] shares) with JX 18 at 8 (SPCC stock closed at \$46.90 on September 22, 2004). $\$46.90/\text{share} \times 64 \text{ million shares} = \3.00 billion .

¹⁷² See section II.E., *supra*.

The Proxy states that at an October 5, 2004 meeting between Grupo, the Special Committee, and Cerro, the price negotiations, including the special dividend, concluded, and Cerro agreed to support the Transaction.¹⁷³ Handelsman oddly cannot remember this meeting,¹⁷⁴ and further insisted that he “never would have agreed to that” on behalf of Cerro.¹⁷⁵ But he conceded that the Special Committee, “taking Cerro out of the picture,” had agreed to all of those terms on October 5, 2004.¹⁷⁶ One would be hard-pressed to believe that Mr. Handelsman would have agreed to a final price term without approval from the Pritzkers (his “client”¹⁷⁷), or that the Pritzkers would have agreed to support a final deal without assurances regarding their long-sought rights offering.¹⁷⁸ Handelsman’s protestations and memory lapses aside, the evidence strongly suggests that AMC bought deal certainty from Cerro more than two weeks before the Committee approved the Transaction.¹⁷⁹ In the end, while the witnesses insisted that they engaged in “extensive” negotiations¹⁸⁰ geared towards “get[ting] to the right price,”¹⁸¹ the record establishes that the Special Committee simply rationalized Grupo’s price, ultimately accepting Grupo’s initial offer only on far less advantageous terms.

¹⁷³ JX 129 at 25.

¹⁷⁴ Trial Tr. at 203:5-19 (Handelsman – Cross).

¹⁷⁵ Trial Tr. at 204:14-205:4 (Handelsman – Cross). Mr. Handelsman further stated that he was the only one negotiating with Mr. Larrea on behalf of the Pritzkers. Id. at 205:12-16.

¹⁷⁶ Trial Tr. at 207:8-12 (Handelsman – Cross).

¹⁷⁷ Trial Tr. at 139:10-16 (Handelsman – Direct) (part of Mr. Handelsman’s “mandate” was to “protect the Pritkzer interests”); id. at 176:24 (referring to Pritzkers at his “client”).

¹⁷⁸ See Trial Tr. at 168:7-8 (Handelsman – Direct) (“both we and Phelps Dodge wanted to get out”); see also JX 30.

¹⁷⁹ See section II.F.1., supra.

¹⁸⁰ Trial Tr. at 14:7-15:3 (Palomino – Direct); Trial Tr. at 143:19-144:12 (Handelsman – Direct).

¹⁸¹ Trial Tr. at 162:6-11 (Handelsman – Direct).

IV. PLAINTIFF IS ENTITLED TO RECISSORY RELIEF AND/OR DAMAGES

The Court has broad discretion to “fashion any form of equitable and monetary relief as may be appropriate.”¹⁸² Southern overpaid by at least 24.7 million Southern shares to acquire Minera in the Transaction.¹⁸³ Plaintiff asks that AMC be ordered to return these shares, and all benefits flowing therefrom, to Southern.¹⁸⁴

CONCLUSION

For the foregoing reasons, judgment should be entered in plaintiff’s favor.

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¹⁸² Weinberger, 457 A.2d at 714.

¹⁸³ JX 47.

¹⁸⁴ Southern affected a 2-for-1 stock split on October 3, 2006 and a 3-for-1 stock split on July 10, 2008. In addition, \$60.20 in dividends have been paid on each of the 24.7 million Southern shares issued in excess of Minera’s fair value (adjusted for stock splits). JX 28; see also, Pl.’s Pre-Trial Opening Br. at 47-49.

CERTIFICATE OF SERVICE

I, Marcus E. Montejo, do hereby certify on this 1st day of July, 2011, that I caused a copy of Plaintiff's Post-Trial Opening Brief to be served via eFiling through LexisNexis File and Serve to counsel for the parties as follows:

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