IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

AMC DEFENDANTS' POST-TRIAL ANSWERING BRIEF

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PRELIMINARY STATEMENT[1]

Plaintiff's post-trial brief is full of yet more new theories Plaintiff did not previously advance and ignores the trial record. Plaintiff's theories, new or old, do not explain why the Merger — recommended by the Special Committee, overwhelmingly approved by SPCC's stockholders, and favorably received by the market — was unfair to SPCC or its minority stockholders or why the Special Committee would have knowingly misled anyone about the Merger. The record shows the Merger was not just fair, it was a good deal for SPCC.

ARGUMENT

I. PLAINTIFF MISSTATES THE ENTIRE FAIRNESS STANDARD

Plaintiff purports to quote *Cinerama, Inc. v. Technicolor, Inc*., for the proposition that "[w]here 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." *See*PPTB at 3.*Cinerama* says no such thing. Plaintiff's quotation actually comes from *In reEmerging Commc'ns, Inc. S'holdersLitig*., 2004 WL 1305745 (Del.Ch. June 4, 2004), and is taken entirely out of context. *Emerging* questioned whether a fair dealing analysis was required given the Court's determination that the price was not fair. But the Court stated that because the Supreme Court had not decided this issue, "a fair dealing analysis isrequired." 2004 WL 1305745, at *28.*Emerging* rejected the argument that unfair price *ipso facto* means the transaction was not fair. As this Court recently stated, "[a] strong record of fair dealing can influence the fair price inquiry, reinforcing the unitary nature of the entire fairness test." *Muoio& Co. LLC v. Hallmark Entm'tInvs., Co.,* 2011 WL 863007, at *16 (Del.Ch. Mar. 9, 2011).

[1] Capitalized terms not defined herein have the meanings set forth in the AMC Defendants' Post-Trial Opening Brief ("DPTB"). Citations to Plaintiff's Post-Trial Opening Brief are in the form "PPTB."

II. THE PROCESS WAS FAIR

Plaintiff's attempt to minimize the significance of a fair process in an entire fairness case is not surprising given the strong record here of a fair and extensive Special Committee process. The Special Committee and its advisors met formally on at least 20 occasions and informally on many other occasions over more than eight months.[2]

Plaintiff's Post-Trial Opening Brief confirms that he has abandoned any argument relating to the Special Committee's composition and independence. Instead, Plaintiff argues that the Special Committee failed to negotiate at arm's length. The record, however, provides no support for the proposition that the Special Committee was ineffectual. Instead, the evidence established that the Special Committee took its mandate seriously and negotiated the best deal available for SPCC and its minority stockholders. The burden has thus shifted to Plaintiff.

A. GrupoMexico Did Not Dictate The Terms Of The Merger

Plaintiff's contention that Grupo Mexico dictated the terms of the Merger is not supported by the record. That the value assigned to MineraMexico's equity under GrupoMexico's original proposal turned out to be roughly equal to the market value of the SPCC shares ultimately issued in connection with the Merger is happenstance. *See*DPTB 10-11. Neither the Special Committee nor GrupoMexico had any way of knowing that the "market value" of the number of shares ultimately issued would be $3.7 billion when the Merger closed; nor does Plaintiff claim otherwise. Plaintiff also ignores the facts that (i) the Merger resulted in the issuance of five million fewer shares than GrupoMexico's initial proposal (*see*JX-108 at AMC0019912) and (ii) the number of SPCC shares to be issued was not the only term of the Merger.

[2]Joint Pretrial Stip. & Order ("JPSO") ¶¶ 23-46; Trial Tr. ("Tr.") 19:3-21 (Palomino), 149:9-150:10 (Handelsman).

B. **The Special Committee Secured Important Concessions**

As Messrs. Handelsman and Palomino explained at trial, the Special Committee's approach was essentially to cause GrupoMexico to bid against itself until it proposed terms that were generally acceptable to the Special Committee.[3] This is exactly what happened, and the process allowed the Special Committee to secure important concessions for SPCC and its minority stockholders. Plaintiff's attempt to minimize the value of these concessions fails. When viewed in the context of the entire transaction, these concessions were meaningful and ensured that SPCC and its minority stockholders were getting the best deal available.[4]

- Fixed-Exchange Ratio**.** Grupo Mexico's initial proposal—based on the 20 day average price of SPCC stock prior to the closing—was a nonstarter because the Special Committee could not predict changes in SPCC's stock price, especially considering the historic volatility of the copper market and SPCC's trading price.[5] To alleviate that risk, the Special Committee and its advisors negotiated a fixed exchange ratio, which better protected SPCC's shareholders because SPCC and Minera were similar companies that would be affected by market conditions in similar ways, and it therefore represented the fundamental value of both companies.[6] Plaintiff's assertion that the Special Committee "had no basis" for negotiating a fixed exchange ratio is unsupported.
- Capping Minera's Net Debt. The Special Committee successfully negotiated a $1 billion cap on Minera's net debt.[7] This was a direct benefit to SPCC because it reduced the debt SPCC assumed by $300 million.[8] Plaintiff's contention that the Special Committee knew as early as April 2004 that Minera's net debt would be reduced to $754 million by the end of 2006 is not supported by the record and beside the point. *First*, Plaintiff cites two charts setting forth Minera's projected net debt under certain assumptions. These projections are not the same as a contractual

[3]Tr. 14:7-23 (Palomino); 143:13-144:12 (Handelsman).

[4]JX-129 at 28-29 (listing factors considered by Special Committee).

[5]Tr. 155:3-21 (Handelsman); Tr. 117:23-119:8 (Palomino); Ruiz Dep. 148:14-149:15. That Plaintiff now suggests that the Special Committee knew that SPCC's stock price would increase underscores the desperation of Plaintiff's "evolving" arguments.

[6]Tr. 117:23-119:8 (Palomino); Sanchez Dep. 117:12-118:14; 119:19-120:18.

[7]Tr. 83:14-84:16 (Palomino); Tr. 172:11-173:4, 175:10-16 (Handelsman).

[8]Tr. 75:23-76:18 (Palomino).

obligation to limit debt.[9] *Second*, even if Minera would have been obligated to pay down debt if certain events came to pass *later*, the point is that the Special Committee bargained for a separate cap on Minera's debt *prior to the Merger's closing*.

- The Special Dividend. The Special Committee secured a $100 million special dividend to be paid to all SPCC shareholders on a *pro-rata* basis prior to the Merger. Plaintiff ignores the fact that 45.8% of the special dividend was paid to shareholders other than GrupoMexico and that those payments were significant.[10]
- Corporate Governance Protections. The Special Committee negotiated important post-Merger corporate governance protections for SPCC and its minority shareholders. Plaintiff's contention that these provisions were meaningless is belied by the record.[11]
- Super-Majority Voting Requirement. The Special Committee also negotiated a super-majority voting requirement and then secured a commitment from Cerro to vote its 14.2% interest only in accordance with the Special Committee's recommendation.[12] Plaintiff's assertion that Grupo Mexico locked up the shareholder vote before the Merger was approved by the Special Committee misstates the record. The Special Committee had already settled on the 67.2 million share price when it considered Cerro's voting obligations and it specifically required that Cerro's vote be tied to the Special Committee's ultimate recommendation.[13] And Phelps Dodge agreed to vote in accordance with the Special Committee's recommendation *after* the Special Committee and Board had approved the Merger and SPCC had issued a preliminary proxy statement.[14]

III. THE MERGER PRICE WAS FAIR

A. Minera Was Worth At Least 67.2 Million Shares Of SPCC

Plaintiff argues that the Special Committee did not have a valid basis to use a relative valuation because it did not ask whether (i) SPCC's DCF value was reliable, (ii) how the inputs were determined, (iii) whether the companies reacted similarly to fluctuating metal prices,

[9] *See* PPTB 19 n.108. (Plaintiff's record citations are incorrect. The correct cites are JX-100 at SP COMM 003443 and JX-101 at SP COMM 003344.) In all events, whether GrupoMexico planned to refinance Minera's debt is irrelevant, because refinancing does not necessarily change the outstanding principal.

[10] *See* JX-129 at 25; Tr. 176:15-177:5 (Handelsman).

[11] JX-129 at 133 (amendments to SPCC's charter).

[12] JPSO ¶ 45; Tr. 174:7-19 (Handelsman).

[13] JX-12; JX-129 at 26; Tr. 182:7-183:17, 186:10-187:4 (Handelsman).

[14] *See* JX-163; JX-129 at 10, 27.

and (iv) whether it should pay for Minera with cash or stock. This new argument is both entirely speculative and contradicted by the trial record.

- SPCC's DCF Value Was Reliable. The Special Committee engaged A&S to review and analyze Minera and SPCC's projections. A&S did this, made adjustments as necessary, and those adjustments were incorporated into Goldman Sachs' analyses.[15] Plaintiff's new argument that the data A&S used was unreliable because Mr. Ortega supplied the data for both Minera and SPCC is baseless. There is no evidence that Mr. Ortega or anyone else did anything to affect the reliability of *any* data.[16] In addition, that SPCC exceeded management's forecasts in a later year was not something anyone could have known at the time (nor does Plaintiff cite evidence suggesting otherwise).
- The Special Committee Understood The Inputs. Plaintiff's new argument that the Special Committee did not know how the inputs in the DCF analyses of Minera and SPCC were determined is not supported by the record.[17] Similar inputs were used for both Minera and SPCC. As Mr. Palomino explained, the whole purpose of a relative valuation is to value the two companies using the same methodology and assumptions.[18]
- Minera Was More Sensitive To Copper Price. Plaintiff's new argument that "the Special Committee never had any basis to conclude that a higher long-term copper price favored Minera" is baseless. The Special Committee members and Goldman Sachs explained that because of Minera's higher cost structure, it was more sensitive to copper prices than SPCC.[19] Plaintiff cites *no* contrary evidence.
- The Special Committee Considered Paying For Minera With Cash. Plaintiff's new argument that the Special Committee never considered paying cash for Minera is contradicted by the evidence *Plaintiff* adduced. Plaintiff's counsel asked Mr. Palomino and Mr. Handelsman whether the Special Committee considered using cash or some combination of cash and stock as consideration for the Merger, and both testified that the Special Committee did exactly that.[20]

As the record shows, the Special Committee and its highly qualified advisors

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[15] *See* JX-67 at SP COMM 018538-018540; DX-2; JX-106 at SP COMM 004917; 004919.

[16] Tr. 248:11-17 (Ortega); *see also* Parker Dep. 99:12-16.

[17] *See* Ruiz Dep. 201:13-17 (explaining that Goldman Sachs explained the inputs).

[18] Tr. 53:18-54:20 (Palomino); *see alsoid*. at 58:14-24 (explaining that a relative valuation is an accepted valuation methodology for valuing similar companies).

[19] Tr. 40:10-41:9 (Palomino); Ruiz Dep. 190:3-191:20; Sanchez Dep. 122:9-123:101. For this reason (and others), the Special Committee decided to use $0.90/pound in the underlying DCF analyses of Minera and SPCC. *See* Tr. 40:10-41:13 (Palomino). Professor Schwartz explained that this decision increased the Special Committee's negotiating leverage (JX-48 ¶¶ 44-45).

[20] Tr. 127:3-128:2 (Palomino); *id* at 202:13-15; 223:10-224:14 (Handelsman).

conducted various analyses and engaged in numerous discussions before determining to value SPCC and Minera on a relative basis. That decision was the result of a thoughtful and thorough process. The Special Committee knew what a relative valuation was and how it worked, and determined that it was the methodology best suited for negotiating and evaluating the proposed Merger.[21] Plaintiff has adduced *no* contrary evidence. A relative valuation of Minera and SPCC showed that the issuance of 67.2 million shares of SPCC for Minera was fair.[22]

B. Beaulne's Analyses Are Flawed And Unreliable

Beaulne did no analysis of what drove SPCC's stock price and/or why Goldman Sachs' DCF value for SPCC was below its market capitalization, nor did he do his own DCF analysis of SPCC despite admitting that he could have done so, (Tr. 384:17-21; 388:9-12 (Beaulne)). Now that he has been confronted with evidence that copper companies generally traded above their DCF values in 2004 (JX-103), Plaintiff argues that the evidence is inadmissible. *See*PPTB at 12. This argument fails for two reasons:

- Plaintiff *twice* waived any objection to JX-103, first when *Plaintiff* himself added it to the exhibit list and again when his counsel failed to object to it at trial.[23]

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[21] Plaintiff's argument that Mr. Handelsman's testimony regarding the proposed collar on SPCC's stock price "calls into question" the Special Committee's reliance on a relative valuation makes no sense. Mr. Handelsman explained that with a relative valuation, minor copper price fluctuations would generally affect Minera and SPCC's values similarly and because the chance that something might affect either company's value differently was slim, proceeding without a collar was a chance the Special Committee thought was appropriate to take. Tr. 174:20-175:9 (Handelsman); *see also*Palomino Dep. 73:8-75:5; Sanchez Dep. 117:12-118:14; 199:19-120:18. Plaintiff cites no evidence that calls that decision by experienced directors and their advisors into question.

[22] JX-106 at SP COMM 004923-25; Tr. 9 91:12-92:23 (Palomino).

[23] *SeeCobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *23 (Del.Ch. July 20, 2007). In any event, Plaintiff's contention that "[a]pplying a premium to a DCF is not a generally accepted valuation methodology" (PPTB at 12) misapprehends JX-103. JX-103 shows that one of the inputs in the DCF analyses for all the copper companies it discusses has to be different from the assumptions to explain the copper companies' market prices. The most likely candidate, as Professor Schwartz explained, is the long-term copper price assumption.

- JX-103 was presented to and considered by the Special Committee as part of its work relating to the proposed Merger. It is therefore admissible evidence regarding the fairness of the process,[24] and it confirms the testimony of the Special Committee members about how they conducted their work relating to the proposed Merger.

Finally, Plaintiff's contention that Beaulne's opinion refutes JX-103 is wrong. There is not a single word in Beaulne's report trying to explain the difference between the public market price and DCF valuation of *any* copper company.[25]

C. Plaintiff's Attacks On Professor Schwartz's Analysis Are Wrong

Plaintiff argues that Professor Schwartz ignored (i) whether DCF valuations of SPCC and Minera were comparable in the first instance and (ii) how a change in the assumed long-term copper price would alter the operation and value of Minera and Southern on an individual basis. *See*PPTB at 5. Both arguments fail.

1. Professor Schwartz Used The Same Assumptions To Value Minera And SPCC

Plaintiff argues that Professor Schwartz did not value Minera and SPCC using the same set of assumptions because Professor Schwartz "used production plans and projections [for SPCC] based on life-of-mine plans that had not been reassessed since 1998 and 1999." PPTB at 7. This argument is nonsensical. SPCC's projections were reviewed and adjusted by A&S.[26] And Beaulne conceded that he was not aware of any evidence in the record that, at the time of Merger, SPCC's ore reserves were going to increase.[27]

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[24] *SeeCole v. Kershaw*, 2000 WL 1336724, at *3 (Del.Ch. Sept. 5, 2000).

[25] This is not surprising, given two undisputed facts. *First*, Beaulne never tried to explain the difference between SPCC's DCF valuation and its observed market price (Tr. 388:9-12 (Beaulne)), let alone trying to do this for companies other than SPCC. *Second*, someone broke up JX-103 before one part of it was given to Beaulne. *See* JX-47 at 79 (showing that Beaulne was given SP COMM 6858-6923, whereas JX-103 consists of SP COMM 6854-6950). And in trying to criticize JX-103 Beaulne admitted he knew nothing about it. (Tr. 405:3-15 (Beaulne)).

[26] *See* DX-2 at AS0001021, 0001023, & 0001024.

[27] Tr. 370:4-9; *see also*Tr. 422:4:8 (Beaulne).

2. **Professor Schwartz Did Not "Solve" For A Long Term Copper Price**

Plaintiff misstates Professor Schwartz's analysis. Professor Schwartz confirmed that the Merger was fair at $0.90/pound but performed sensitivity analyses to confirm his analysis. *See* JX-48 ¶¶ 25-26 &Ex. 1. Using his sensitivity analyses, Professor Schwartz demonstrated that, given the primary variables that impact the value of copper companies, it was likely that the market was using a long-term copper price higher than $0.90/pound to price SPCC toward the end of 2004 (JX-48 ¶¶ 47-51) and that the Merger was also fair at higher prices. Like JX-103, Professor Schwartz's analysis provided an explanation for the difference between SPCC's market price and its DCF value, something Beaulne never even tried to explain.

In any event, Plaintiff concedes that there is a substantial difference between a DCF valuation of SPCC using a $0.90/pound long-term copper price and SPCC's observed market price during 2004, yet Plaintiff does not claim that the market was somehow implying larger reserve sizes for any publicly traded copper companies.[28] And at the end of the day Plaintiff's argument that ore reserves increase as copper prices increase is much ado about nothing: Although Plaintiff points to one of SPCC's SEC filings to try to show that at $1.26/pound SPCC's copper reserves increased more than Minera's on a percentage basis in one specific year, Plaintiff ignores that the result of those projected increases was that Minera still had larger copper reserves than SPCC. *See* PPTB at 9, 18 n.96. And the end result of this analysis is even worse for Plaintiff — as the chart attached as Exhibit A shows, with only one *de minimis* exception, for every year since the Merger SPCC has reported that the Minera mines' copper reserves were larger than the SPCC mines' copper reserves at *both* lower and higher

[28] It is not surprising that Beaulne says nothing about this in his report, because he is not an engineer or a geologist and has no expertise in evaluating, let alone adjusting, life of mine plans.

copper prices.[29] Both before and after the Merger, using higher and lower copper price assumptions, Minera has had larger reserves than SPCC.

IV. PLAINTIFF IS NOT ENTITLED TO AN ADVERSE INFERENCE WITH RESPECT TO GOLDMAN SACHS

Plaintiff's argument (PPTB at 22-23) that the absence of a Goldman Sachs witness left "critical" questions unanswered is nonsense. Plaintiff had an opportunity to question Mr. Sanchez—who was a member of the Goldman Sachs team that advised the Special Committee but has not been a Goldman Sachs employee for many years—at his deposition. Goldman Sachs' counsel expressly permitted Plaintiff to ask Mr. Sanchez how Goldman Sachs decided what to do regarding the Merger (Sanchez Dep. 43:6-22), and Plaintiff *again* misquotes Mr. Sanchez's testimony — the same testimony he misquoted in his pretrial briefing — to try to create an issue where none exists.

Plaintiff's reliance on *Emerging* for the proposition that the Court should infer that Goldman Sachs never conducted a relative valuation is without merit. In *Emerging*, the only reason the Court inferred that the expert's testimony would be unfavorable was because the defendants never explained their failure to call their expert at trial. *See*2004 WL 1305745, at *25. That is not the case here. When the AMC Defendants arranged for a senior Goldman Sachs banker who was involved in Goldman Sachs' representation of the Special Committee to testify at trial, Plaintiff objected. Absent Plaintiff's objection, the AMC Defendants would have called a Goldman Sachs witness. In any event, the record here is replete with evidence showing what Goldman Sachs did and why.

[29] The sole exception is 2007, in which the reported reserves were 2.9% less for the Minera mines at the long-term price but 11.8% higher for the Minera mines at the higher assumed copper price. For *every* year since the Merger, Minera has had larger copper reserves than SPCC when the copper price was assumed to increase.

V. PLAINTIFF IS NOT ENTITLED TO DAMAGES

The AMC Defendants did not breach their fiduciary duties and are therefore not liable for any damages. But even if Plaintiff could establish a breach (he cannot), any damages would only be a fraction of what Plaintiff seeks.[30] A plaintiff waives the right to seek rescissory damages when he permits a case to languish after its initial filing.[31] And Plaintiff should not be awarded compound prejudgment interest in light of his dilatory prosecution.[32]

VI. THE AMC DEFENDANTS WIN ON ALL DISPUTED EVIDENTIARY ISSUES

JX-27 and JX-28 are irrelevant, constitute improper summaries, and contain improper expert opinion. Neither was disclosed in Beaulne's report, both are outside the scope of his report, and Plaintiff offered neither at trial. JX-149 is also irrelevant and is inadmissible hearsay.[33] Plaintiff's objections to the admissibility of JX-161 and DX-1 are meritless for the reasons discussed previously. *See*DPTB at 19 n.75.

CONCLUSION

The AMC Defendants respectfully request that the Court enter judgment in favor of the AMC Defendants and dismiss Plaintiff's claim with prejudice.

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[30] Plaintiff claims to seek "an equitable remedy that compensates the Company for the increase in Southern's value that was diverted from Southern's minority shareholders to Grupo." PPTB at 2. But Plaintiff has offered no evidence that any value was "diverted" from SPCC's minority shareholders. In fact, Beaulne admitted that he had not done "any analysis of whether SPCC's shareholders benefited from the transaction at issue in this case." Tr. 402:19-22 (Beaulne).

[31] *See Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 698 (Del. Ch. 1996). It would be unfair to allow Plaintiff to benefit from increases in SPCC's stock price that occurred during the period of his long delay. *See id.* at 699.

[32] *See Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 782 (Del. Ch. 1966); *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 909 (Del Ch. 1999); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 476 (Del. 1992); *see also Weinberger v. UOP, Inc.*, 517 A.2d 653, 657 (Del. Ch. 1986) (Delaware law disfavors compounding interest).

[33] *See In re Acceptance Ins. Cos., Inc. Sec. Litig.*, 352 F. Supp. 2d 940, 950 (D. Neb. 2004), *aff'd*, 423 F.3d 899 (8th Cir. 2005). Nor did Plaintiff ever seek to rely on this document at trial or otherwise.

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July 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2011, I electronically filed and caused to be served by LexisNexis File and Serve a copy of the foregoing AMC DEFENDANTS' **POST-TRIAL ANSWERING BRIEF** on the following counsel of record:

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