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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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January 25, 2013

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Re: **Freeport-McMoRan Copper & Gold, Inc. cases:**
Jacksonville Police and Fire Pension Fund v. Moffett
C.A. No. 8110-VCN
Sklar v. Moffett
C.A. No. 8126-VCN
[captions continue on the following page]

Gaines v. Adkerson
C.A. No. 8139-VCN
Rosenzweig v. Adkerson
C.A. No. 8140-VCN
Lang v. Moffett
C.A. No. 8142-VCN
Dauphin County Employee Retirement Fund v. Moffett
C.A. No. 8145-VCN
Newman v. Moffett
C.A. No. 8156-VCN
State-Boston Retirement System v. Moffett
C.A. No. 8206
Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters v. Moffett
C.A. No. 8207
United Wire Metal and Machine Pension Fund v. Moffett
C.A. No. 8208

McMoRan Exploration Co. cases:
Steven Kosoff IRA v. McMoRan Exploration Co.
C.A. No. 8100-VCN
Barasch v. McMoRan Exploration Co.
C.A. No. 8106-VCN
Berstein v. Moffett
C.A. No. 8107-VCN
Curalov v. McMoRan Exploration Company
C.A. No. 8115-VCN
Purnell v. Adkerson
C.A. No. 8117-VCN
Yagoobian v. McMoRan Exploration Co.
C.A. No. 8128-VCN

[captions continue on the following page]

Davis v. McMoRan Exploration Co.
C.A. No. 8132-VCN
Seidlitz v. Adkerson
C.A. No. 8151-VCN

In re Plains Exploration & Production Company
Consolidated C.A. No. 8090-VCN

Date Submitted: January 24, 2013

Dear Counsel:

Freeport-McMoRan Copper & Gold, Inc. ("Freeport") has agreed to acquire McMoRan Exploration Co. ("MMR") and Plains Exploration & Production Company ("PXP"). Shareholders of all three companies have challenged the various transactions which are scheduled to close in the second quarter of 2013. Shareholders of Freeport have filed ten derivative actions in this Court; shareholders of MMR have filed eight actions; and shareholders of PXP have filed two actions.

* * *

Before the Court are motions to consolidate the Freeport actions and to consolidate the MMR actions. Both applications are granted in accordance with Court of Chancery Rule 42(a) because of common questions of law and fact and because consolidation will facilitate the efficient resolution of the various claims.

* * *

The disputes requiring the Court's substantive attention are among counsel for the Plaintiffs who seek the designation of their clients as lead plaintiffs and themselves to serve as lead counsel for the prospective classes of shareholders.[1]

The Court's task of selecting lead counsel is not easy, especially in this case where competing counsel are experienced and highly qualified. The following factors guide the exercise of the Court's discretion in designating lead plaintiffs and appointing lead counsel: (1) quality of pleading that seems best able to represent the interests of the shareholder class; (2) the shareholder plaintiffs' economic stake; (3) willingness and ability of the proposed lead plaintiffs and lead counsel to litigate vigorously on behalf of the company or the class of shareholders; (4) absence of any conflict between larger, perhaps institutional, shareholders and smaller shareholders; (5) the enthusiasm or vigor with which the lawsuit has been prosecuted; and (6) the

[1] The PXP actions have been consolidated; counsel representing shareholders in those actions were able to agree on a management structure.

competence of counsel and access to necessary resources for prosecuting the claims.[2]

The fundamental objective of the process is establishing a "case management structure that optimizes the interests and potential of" the proposed class of shareholders of MMR and the interests of Freeport.[3]

This list of six factors quickly narrows to two: quality of the pleadings and the shareholder plaintiffs' relative economic interests. No persuasive reason or rationale has been offered to distinguish among counsel and their clients on the basis of the other four criteria.

* * *

<u>MMR Shareholder Actions</u>

The quest for lead counsel status to represent the interests of MMR shareholders has evolved to a contest between a group led by Prickett, Jones & Elliott, P.A. and another led by Taylor & McNew LLP.[4] A comparison of the

[2] *In re Del Monte Foods Co. S'holders Litig.*, 2010 WL 5550677, at *4 (Del. Ch. Dec. 31, 2010); *Hirt v. U.S. Timberlands Serv. Co. LLC*, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002).

[3] *Se. Pa. Transp. Auth. v. Rubin*, 2011 WL 1709105, at *2 (Del. Ch. Apr. 29, 2011).

[4] At one point, Rigrodsky & Long, P.A. was competing with Prickett, Jones & Elliott, and others. It has since become allied with Pricket, Jones & Elliott.

competing complaints provides the most helpful guidance because, frankly, little else can be found to distinguish confidently between them. The Court has set forth why the quality of the complaint is important:

> The quality of the pleadings is relevant for two reasons. The first is obvious, and it is that a demonstrably superior complaint is more likely to represent the interests of the plaintiff class and more likely to produce a successful outcome. The second reason the quality of the pleadings is relevant is because each complaint demonstrates the competence and investigative diligence of the counsel who filed it.[5]

The Court does not grade the various complaints as if it were a first-year legal writing instructor. The emphasis must be on the factual development reflected in the pleadings and the sophistication and understanding evidenced in the setting forth of the various theories of the case.

Although the Court believes that the complaints filed by the Taylor & McNew group could easily be revised to match the ones filed by Prickett, Jones & Elliott, as they now stand, Prickett, Jones & Elliott has the upper hand. The Davis complaint,[6] filed by Prickett, Jones & Elliott, has a fuller and richer factual development, structures its entire fairness claim in a more comprehensive fashion,

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[5] *In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 424886, at *2 (Del. Ch. Feb. 7, 2012).
[6] *Trudy A. Davis v. McMoRan Exploration Co.*, C.A. No. 8132-VCN.

including a specific effort to address the efforts of the Special Committee, raises claims under certain standstill agreements, and attempts to address issues regarding a charter amendment. In short, the Davis complaint is superior—even if not by a wide margin—than the Curalov complaint filed by the Taylor & McNew group.[7] This factor separates out the competing groups of attorneys and merits designation of Ms. Davis as lead plaintiff and the Prickett, Jones & Elliott group as lead counsel.[8]

* * *

Freeport Derivative Actions

A group of Freeport shareholders, including City of Roseville Employees' Retirement System, has suggested that efforts to organize the Plaintiffs and their counsel for purposes of representing the Freeport shareholders in these derivative actions should be stayed to afford an opportunity to pursue an effort to inspect Freeport's books and records and, if appropriate, to pursue an action under 8 *Del. C.* § 220. Many opinions have been written urging the use of Section 220 and a books

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[7] *Joao Curalov v. McMoRan Exploration Co.*, C.A. No. 8115-VCN.
[8] Differences in shareholdings may not be significant, but the plaintiffs who have chosen Prickett, Jones & Elliott appear to have a larger financial interest, collectively.

and records request to develop the facts necessary to prepare a derivative complaint.[9] But, as with just about everything, context matters.

These are not cases about an ongoing corporate governance issue; they do not offer a version of a *Caremark* claim; instead, the challenged transaction is scheduled to close in, perhaps, a little more than two months. In other words, time really is significant.

These actions have been filed and are ready to go; competent and experienced counsel are prepared to move forward now. They have, and will have, the benefit of numerous public documents. A Section 220 action would likely bring some benefit, but it is far from clear that there is sufficient time for such an effort, especially if the possibility of an appeal is considered.

Once the challenged deals involving Freeport's acquisition of MMR and PXP are closed, injunctive relief will not be effective and the 8 *Del. C.* § 102(b)(7) provision in Freeport's charter might pose a challenge, especially with regard to outside directors. Maybe Freeport's directors will not qualify for that protection, but that is a question the Court cannot, and arguably should not now, answer.

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[9] *See, e.g.*, *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 n.3 (Del. 1997).

Whether to pursue a books and records effort ultimately is a question of strategy and when viewed against the timing realities, it is not clearly the better approach.

Also, the other integrally-related actions involving MMR and PXP should be run on substantially the same schedule as the Freeport litigation for judicial administration purposes and the convenience of lawyers and litigants. The Court cannot justify staying and delaying the PXP and MMR cases while waiting for one group of Freeport shareholders to seek out documents and then to decide whether to file an action.

The focus must be on the interests of the Freeport shareholders as they pursue derivative claims. The Court is persuaded that the best structural approach is to proceed with the pending actions, which must be consolidated and lead counsel designated, and not stand down for the possible Section 220 proceedings that may otherwise be brought.

A balancing of these competing interests is required, and the Court concludes that additional delay in establishing a structure for managing the derivative claims of Freeport shareholders is not warranted.

* * *

By her letter of January 8, 2013, Ms. Tikellis informed the Court that all counsel for Plaintiffs had agreed to an organizational structure for pursuing the derivative actions on behalf of Freeport. She submitted a form of order that designated Chimicles & Tikellis LLP and Bernstein Liebhard LLP as lead counsel. By her letter of January 11, 2013, she asked the Court to disregard her previous correspondence because, with the filing of three new actions, she had decided to seek the Court's designation of Chimicles & Tikellis LLP and Labaton Sucharow LLP (but not Bernstein Liebhard LLP) as lead counsel. Although it was suggested that "these three new cases ha[ve] altered the landscape requiring a reanalysis of the *Hirt* factors,"[10] the precise reasons—most likely because of time constraints—were not set forth.

Maybe it is naïve to believe that a deal is a deal. Maybe it is naïve to believe that if one walks away from a deal, there ought to be a good reason. Maybe there are good reasons for the change of heart regarding the organizational structure to

[10] Letter from Pamela S. Tikellis, Esquire, to the Court, dated January 11, 2013.

pursue the Plaintiffs' interests in Freeport, but the Court is not convinced by what is in the record before it.[11]

The Court has benefitted from having observed the parallel work of both Chimicles & Tikellis LLP and Bernstein Liebhard LLP in response to the efforts of City of Roseville Employees' Retirement System to delay the implementation of a plaintiff's organizational structure to allow a books and records inspection. The work of both was focused, informative, and persuasive. Both demonstrated an understanding of the issues and of the concerns that should animate the Court. In short, the post-change conduct of both persuades the Court that excluding either one from the leadership structure would be ill-advised. A review of the *Hirt* factors offers no convincing reason to distinguish among the competing firms. If the Court found it necessary (and, perhaps, it will become necessary at some point), the *Hirt* factors presumably could be applied, even at the risk that their application might appear somewhat arbitrary, to assure Plaintiffs' adequate representation.

[11] The Court "recognizes that it is customary and desirable, where multiple lawsuits are filed relating to the same transaction or set of facts, for the plaintiffs' lawyers involved to meet and vote on an organizational structure for the prosecution of the litigation." *Hirt*, 2002 WL 1558342, a *2. In this case, the latter application to the Court by the Chimicles & Tikellis firm appears to be the product of shifting alliances.

Thus, the Court will designate three lead counsel: Chimicles & Tikellis LLP, Bernstein Liebhard LLP, and Labaton Sucharow LLP.[12] It is expected that they will work together and arrange for significant activity by the other counsel who have expressed a commitment to advance Freeport's interests (and the interests of its shareholders derivatively) in these actions. The Court, at this point, does not direct the inclusion or exclusion of any particular firm. The Court, for convenience, designates the complaint filed in C.A. No. 8145-VCN as the operative complaint, although lead counsel may, if they desire, select a different one. Plaintiffs Dauphin County Employee Retirement Fund, Jacksonville Police and Fire Pension Fund, and State-Boston Retirement System are designated the lead plaintiffs.[13]

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The Court has designated lead counsel. There should be plenty of work to share with others. The Court has not prescribed how the committees under lead counsel should be structured. That, as a general matter, is best left, at least initially,

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[12] Labaton Sucharow LLP's participation is consistent with its institutional investor clients and their substantial holdings of Freeport stock.
[13] These plaintiffs are each represented by one of the designated lead counsel.

to counsel to attempt to work out among themselves. If the Court's optimism is misguided, it will address disputes when, and if, they arise.

* * *

Implementing orders will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
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