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Transaction ID 56881990
Case No. 8145-VCN

# EXHIBIT A

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| **IN RE: FREEPORT-MCMORAN COPPER & GOLD INC. DERIVATIVE LITIGATION** | ) ) ) ) ) ) | **C.A. No. 8145-VCN** **DECLARATION OF HARVEY L. PITT** |

**Harvey L. Pitt, an attorney admitted to practice in the State of New York and the District of Columbia, declares, under penalty of perjury, pursuant to 28 U.S.C. §1746:**

## I. Introduction

**1. This Declaration is submitted in support of the proposed settlement of shareholder derivative claims ("Settlement Agreement") brought for the benefit of nominal defendant Freeport-McMoRan, Inc. ("Freeport" or the "Company") against certain of the Company's officers and directors.[1]**

**2. I am the founder and Chief Executive Officer of Kalorama Partners, LLC ("Kalorama"), a global strategic business consulting firm, specializing in corporate governance, transparency, regulatory, accounting, economic and risk/crisis management issues. I am also the founder and Chief Executive Officer of Kalorama Legal Services, PLLC, Kalorama's law firm affiliate.**

**3. Plaintiffs' Counsel retained me in June 2014, as an expert on corporate governance matters, to advise on, and assist in crafting, proposed corporate governance reforms in connection with settlement negotiations in this derivative action.**

**4. Plaintiffs' Counsel have requested that I review the terms of the Settlement Agreement—in particular, the "Corporate Governance Enhancements" (Settlement Agreement, Ex. A)—and provide my assessment whether, and to what extent, these governance reforms and enhancements will benefit Freeport and its shareholders.**

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[1] *See* **Dkt #338, *Stipulation and Agreement of Settlement, Compromise and Release* (filed Jan. 15, 2015).**

5. The views set forth in this Declaration are solely my own, based on my review of the settlement and documents contained in the record of this litigation, and reflecting my nearly fifty years' experience and background in the area of corporate governance, both in the private sector and as a regulator.

6. I have drafted this Declaration, with assistance from one of my Kalorama colleagues working under my supervision. I respectfully reserve the right to revise or supplement this Declaration should I subsequently become aware of additional relevant information.

7. My fee for the work I have performed in this matter, including the preparation of this Declaration, was my firm's standard flat-fee retainer (along with reimbursement of my actual out-of-pocket expenses), and was paid to my firm at the outset of this engagement. There are no additional fees due to my firm, and the fee I have already received was not, and is not, contingent upon the views I express in this Declaration, or whether the Court approves the proposed Settlement Agreement.

## II. Experience and Background

8. For convenience, my current CV is attached, setting forth my background and experience.[2] I briefly summarize those aspects of my experience relevant to the opinions I express below in the paragraphs that follow.

9. Since 2003, I have been Chief Executive Officer of both Kalorama firms.

10. As CEO of the Kalorama firms, and during my prior employment as a corporate attorney, I have counseled numerous boards of directors and executives, including special committees such as those looking into significant corporate transactions and potential self-dealing or conflict of interest transactions.

11. A major component of Kalorama's efforts relates to corporate governance, and involves assisting corporate boards and committees in determining the existence of conflicts, and finding appropriate mechanisms to ameliorate the impact of potential conflicts that might otherwise taint a proposed significant corporate transaction.

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[2] A copy of my current curriculum vitae is annexed as Ex. A.

12. Prior to founding Kalorama, I had two tours of duty with the U.S. Securities and Exchange Commission ("SEC"), including service as SEC General Counsel (1975-78) and as the SEC's twenty-sixth Chairman (2001-03). In both capacities, I was required to assess how officers and directors performed their fiduciary duties, and was called upon to make important decisions regarding the manner in which those duties are, and should be, performed.

13. For nearly a quarter century between my service as SEC General Counsel and my appointment as SEC Chairman, I was a senior corporate partner at an international law firm. My practice involved substantial representations of public companies, independent directors, full boards of directors, audit and special committees investment bankers, controlling shareholders and others, and frequently focused on significant corporate transactions.

14. Among other things, over the course of my professional activities, I have frequently assisted clients in deciding whether, when and how to engage in potentially profitable transactions that may have had self-dealing or conflict-of-interest overtones. Indeed, I recently chaired a Special Committee of a public company on whose Board I presently sit, regarding precisely that situation.

15. Over the last forty-seven years, I have been involved with dozens and dozens of merger transactions and special committees, and I am familiar with the criteria and practices that enable them to promote the best interests of the corporations and shareholders they serve.

## III. The Proposed Corporate Governance Enhancements Will Confer Significant Benefits on Freeport and Its Shareholders

16. As alleged by Plaintiffs, the record contains numerous examples of conduct (or failures to act) by Freeport's directors that disserved the best interests of the Company and its shareholders. A majority of Freeport's Board had a financial interest in the bailout of MMR, and even Freeport's outside directors took a passive approach that allowed the conflicted officers and directors to serve their own personal interests in connection with the challenged buyout of MMR and PXP ("the transaction").[3]

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[3] *See* Verified Second Amended and Consolidated Complaint, *In re Freeport-McMoRan Copper & Gold Inc. Derivative Litigation*, C.A. No. 8145-VCN (Jul. 19, 2013).

17. Without the addition of meaningful safeguards to Freeport's corporate governance framework, there is a tangible risk that the alleged improper behavior will recur.

18. While adjudications of misconduct address issues of fault and liability retrospectively, only mandatory governance reforms can prevent future instances of inadequate directorial oversight, and further the best interests of Freeport and its shareholders. Put more directly, the Settlement Agreement's proposed Governance Reforms will play a significant role in assuring the defendants' fidelity to their fiduciary obligations.

**a. The Governance Reforms Will Empower the Independent Directors and Strengthen the Independence of Directors, Providing Substantial Benefits to Freeport and its Shareholders**

Reforms to Strengthen the Power of Independent Directors

19. The proposed Governance Reforms provide for the creation of a Lead Independent Director (§I.A). The Company will establish this position, and vest it with significant responsibilities, including: presiding over Board meetings in the Chairman's absence; serving as a liaison between the Board Chair and non-management directors; approving various aspects of Board administration (information, agendas, and meeting schedules) from the perspective of independent Board members; and convening sessions for the independent directors--both at each regularly scheduled Board meeting and on an *ad hoc* basis.

20. In addition, the proposed Governance Reforms require the establishment of an Independent Executive Committee (§I.B), comprised of five independent directors—the Lead Independent Director and the chairs of the Board's Audit, Compensation, Corporate Responsibility, and Nominating/Governance Committees.

21. Significantly, the Executive Committee will have the authority to exercise all the powers of the Board, and the Executive Committee will have discretion to call meetings at it sees fit.

22. These proposed reforms will provide important benefits to Freeport's shareholders because they would create an institutional structure for the independent directors to exercise authority in the interests of the shareholders. As a leadership position, the Lead

Independent Director can operate to provide an important check and balance on the role of Freeport's chairman—of particular importance here because James R. Moffett, who has exhibited a dominating influence over Freeport that has often been at odds with the interests of shareholders, serves as Chairman.[4]

23. Similarly, the Executive Committee can serve as a board-level locus of power for the independent directors, and as a structure to cabin any decisions of Freeport's Office of the Chairman that are not designed solely to promote the interests of Freeport and its public shareholders. This would be accomplished by enhancing the power of independent directors at the board-level.[5] As designed, these measures will help Freeport's independent directors ensure that the Company's officers and directors act in the best interest of its shareholders.

Reforms to Strengthen the Independence of Directors

24. The proposed Governance Reforms also would enhance the standard of independence for Freeport's directors. The reforms would highlight specific circumstances that will disqualify any non-management individual from serving as an independent director, including that individual's receipt of $120,000 from relationships with Freeport during any twelve-month period within the past three years or serving as an employee of a firm that is Freeport's accounting or auditing firm (as well as someone whose immediate family members serve in the above capacities).

25. In addition, the proposed Governance Reforms would also require that the Board, at least on an annual basis, analyze each current or prospective director's independence, and affirmatively determine that each director has no material relationship with the Company other than as a director.

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[4] Mr. Moffett continues to serve as Chairman of the Freeport Board. Freeport-McMoRan Inc., 2014 Annual Report (Form 10-K), at p.61 (filed Feb. 27, 2015), available at http://investors.fcx.com/files/doc_financials/annual/10_K2014.pdf.

[5] The Office of the Chairman is comprised of Freeport's top three executives: Mr. Moffett, Executive Chairman, Richard C. Adkerson, Vice Chairman, President and CEO, and James C. Flores, Vice Chairman of the Company and President and CEO of Freeport-McMoRan Oil & Gas LLC. Freeport established the Office of the Chairman following its acquisition of MMR and PXP. Prior to these acquisitions, Mr. Adkerson served as Co-Chairman of MMR's Board, and Mr. Flores served as PXP's Chairman and CEO. See Freeport-McMoRan Copper & Gold, 2014 Proxy Statement (DEF 14A), at pp. 68-69 (filed Apr. 29, 2014), available at http://investors.fcx.com/files/doc_financials/annual/FCXProx2014.pdf.

26. The proposed Governance Reforms also call for the Company to establish procedures providing that the Nominating and Corporate Governance Committee will be "solely responsible" for formally considering and recommending to the full Board candidates for membership on the Board of Directors (aside from those nominated by shareholders) and membership on various Board committees.

The Reforms Will Provide Substantial Benefits to Freeport and its Shareholders

27. Directors and executive officers of corporations owe shareholders their utmost fidelity to the broad fiduciary obligations they assume upon serving in those corporate positions. These requirements are most vigorous when the company involved is publicly held, and institutional and individual investors have invested their capital in reliance upon the Directors' and executive officers' faithful execution of their fiduciary duties.

28. When companies like Freeport are forced to contend with a dominant and assertive Executive Chairman, mere reliance on technical standards of independence (fraught—as is the case here—with loopholes sufficiently large to permit a massive truck to drive through them)—simply purporting to apply hortatory statements of governance will not suffice. Instead, it becomes necessary to make fundamental changes to compel those with significant fiduciary obligations to live up to them.

29. To prevent a repetition of those kinds of efforts, the Settlement Agreement redefines Freeport's concept of directorial independence, eliminates the flexibility inherent in the current formulation of independence standards, and assures the regular review of the effectiveness of the proposed new standards and procedures.

30. As proposed, the Governance Reforms in the Settlement Agreement will provide substantial benefits to Freeport and its shareholders by

(a) Helping to ensure that Freeport's directors are truly independent;

(b) Empowering Freeport's truly independent directors to oversee the activities of senior management, and hold them fully accountable for their actions and failures to act; and

(c) Ensuring that business decisions are made solely to further the best interests of Freeport and its shareholders.

### b. The Governance Reforms Relating to Special Committees Provide Substantial Benefits to Freeport and its Shareholders

31. As alleged by Plaintiffs, Freeport's Special Committee ("SC") was rife with conflicts of interest that rendered it wholly ineffectual.[6] The SC was fundamentally compromised—before it was even established—because Freeport's Chairman, James R. Moffett, interfered with the creation and performance of the SC, and controlled the flow of data to the SC and the full Board, making it an exercise that did nothing more than elevate form over substance.[7] In effect, the MMR and PXP acquisitions that are at the heart of this litigation were a fait accompli and were secured long before the SC was actually created and allowed to begin functioning, with the only question being how big a premium the conflicted insiders would be able to obtain for themselves (which, in the end, approached 80 percent).

32. Indeed, one limitation placed on its discretion that led to this result was that the SC's mandate encompassed only the provision of advice to the Board on a "yes-no" decision vis-à-vis the proposed three-way merger. The SC had no authority or discretion to consider alternative transactions or structures. These constraints were most telling with respect to the transaction's structuring—despite many alternatives, the SC only pursued the approach that avoided the need to conduct a shareholder vote to approve the transaction.

33. To permit future Special Committees to provide the enormous and highly significant benefits to shareholders that such entities are intended to provide, and capable of providing, the Settlement Agreement provides for Freeport to adopt a policy that provides for:

- *Independence of SC Members*. Members of an SC should be subject to the Company's most elevated standards of independence;
- *Selection of SC Members*. Members of an SC should be selected "solely" by the Company's *independent* Nominating and Governance Committee; and

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6 Compl. ¶¶223-236.

7 *See* Compl. ¶¶87-143.

- *Expanded SC Mandate and Discretion*. Future SCs will have the discretion and authority to hire their own advisors, negotiate the terms of the transaction, and—of particular significance—to "consider alternative transaction structures and financial methodologies."

34. These governance reforms serve to elevate the structural safeguards and independence of SC vehicles, and the value they can ultimately provide to Freeport and its shareholders. The CEO and management of Freeport should have no role in selecting the members of any future SC, which the reforms work towards by placing the responsibility for selecting SC members "solely" in the hands of the Nominating and Governance Committee, comprised of truly independent directors.

35. These reforms also provide the SC with ample discretion to examine all aspects of a proposed transaction's structures, including the discretion to consider alternative structures and financing methodologies. Armed with such authority, the SC could have structured the transaction at the heart of this litigation in many ways that could have been more beneficial to Freeport and its shareholders.[8]

36. The most effective way of preventing a recurrence of these facets of Freeport's MMR and PXP transactions is to require the appointment of a truly independent SC, whose members are selected not by the CEO and senior management, but by truly independent directors on the Nominating and Governance Committee. Such an SC, governed solely by their exercise of valid business judgment and not by the influences of interested directors and/or executives, will be guided by the best interests of the Company and its shareholders, and be of substantial value as a result.

37. The proposed Governance Reforms set forth in the Settlement Agreement are designed to bring both regularity and normalcy

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[8] For example, the SC could have explored a structure whereby Freeport would have limited its purchase to PXP's stake in MMR, as opposed to purchasing 100% of PXP. Alternatively, the SC could have considered a financial approach in a manner that would have required shareholder approval. While the reforms to future SCs as provided in the Settlement Agreement will by no means require that transactions be structured to require shareholder approval, it will empower a future SC with the authority to propose such a deal structure. Here, if shareholders had had the benefit of such protections, they could have prevented the Board from effecting a transaction the specific terms of which resulted in the loss of substantial shareholder value through the falling price of Freeport shares immediately following the merger announcement, and caused widespread shareholder discontent and considerable adverse market reaction to the transactions. *See*, *e.g.*, Compl. ¶¶203-215.

to the process of reviewing significant management initiatives. With these new requirements, Freeport and its shareholders will be afforded a valuable solution to preventing a recurrence of the abuses alleged in the Complaint.

### c. The Proposed Overarching Governance Reforms Would Provide Substantial Benefits to Freeport and its Shareholders

38. The Proposed Governance Reforms would, if adopted, produce meaningful change in the way Freeport's management and Board accommodate their obligations to the Company as well as its public shareholders. However, until a new culture and DNA are established for Freeport, it is imperative that changes be accompanied by additional structural safeguards—as would be provided by the Settlement Agreement—to prevent the circumvention of Freeport's new obligations, including, among other things, requirements that:

- The Board annually approve the Company's executive management (§IV.A), and annually review the Company's succession plan for senior executives (§IV.B);
- The Compensation Committee adopt a compensation clawback policy, providing for the clawback of an executive's incentive compensation in the event of the executive's misconduct and a restatement of its financial statement (§IV.C); and
- The Company limit the vesting of any future grant of equity-based compensation so that (i) it does not occur automatically in the event of a change-of-control, and (ii) any accelerated vesting is conditioned on various factors and avoids any presumption that the maximum applicable performance goals have been achieved (§V).

39. Both the clawback policy and the equity-compensation vesting limits will serve to align the interests of Freeport's executives with those of shareholders through a more rigorous application of the Company's "pay for performance" approach to executive compensation. By recouping payments made to executives if it later becomes clear that the recipients did not actually meet the relevant performance targets (clawback), and by limiting gratuitous payouts in change-of-control situations due to wholly unsubstantiated and overly generous assumptions (vesting limits), these reforms will help avoid "payment" when "performance" is simply not manifest.

40. In addition, the Settlement Agreement requires that Freeport agree to maintain its committed actions, including the governance enhancements, for a minimum of three years from the date of adoption. (Settlement Agreement ¶4). This three-year term allows the reforms to "take hold," and become part of the culture and way of doing business at the Company, increasing the likelihood that they will become permanent practices.

## IV. Conclusion

41. In my experience, as a regulator, and as an advisor to public companies, public companies and their shareholders are best served when boards exercise independent judgment and good faith business judgment, both when confronted with potential corporate opportunities and more generally. In my opinion, for the reasons noted above, Freeport and its shareholders will receive substantial benefits under the terms of the proposed settlement because the Proposed Governance Reforms it contains would, among other things, enhance and facilitate directorial independence and empower structures, such as Board special committees, to operate solely in the best interests of Freeport and its shareholders.

42. The Governance Reforms contained in the Settlement Agreement address the conflicts of interest and compromised corporate structures that gave rise to this derivative litigation. The reforms—among others, establishing a lead independent director and an executive committee of independent directors, adopting heightened independence standards, and protecting the director nomination process and the special committee vehicle from being compromised—will provide more effective processes and safeguards to protect the interests of Freeport and its shareholders.

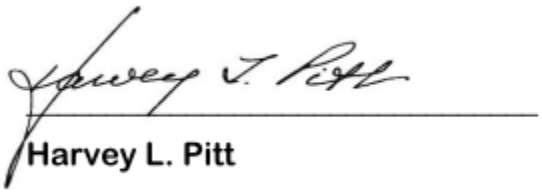
43. In addition, I believe that the monetary component of this derivative settlement—directing that the proceeds of $137.5 million, less legal fees, be paid to current Freeport shareholders as a special dividend—while not in itself a corporate governance reform, will redound to the benefit of the Company and its shareholders.

44. While derivative litigation can serve as a critical tool for protecting the interests of shareholders by holding directors and senior management accountable, the monetary component of derivative litigation is often subject to criticism because, in one sense, the money seems to exit one corporate pocket and enter another—but never find its way into the pockets of shareholders.

45. With the innovative approach adopted in the proposed settlement, Plaintiffs' Counsel have responded to critics, and have unassailably provided tangible value to shareholders. In the words of one fictional but well-known sports agent, through this settlement, Plaintiffs' Counsel have provided an answer to the demands from shareholders to "Show me the money!"[9] in the context of a derivative suit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 5, 2015.



Harvey L. Pitt

[9] This is a reference to the film "Jerry Maguire" (TriStar Pictures 1996).

# Exhibit A

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# Harvey L. Pitt
## Chief Executive Officer

**Harvey L. Pitt is the Chief Executive Officer of the global business consulting firm, Kalorama Partners, LLC, and its law firm affiliate, Kalorama Legal Services, PLLC. Prior to founding the two Kalorama firms, Mr. Pitt served as the twenty-sixth Chairman of the United States Securities and Exchange Commission. In that role, from 2001 until 2003, Mr. Pitt was responsible, among other things, for overseeing the SEC's response to the market disruptions resulting from the terrorist attacks of 9/11, for creating the SEC's "real time enforcement" program, and for leading the Commission's adoption of dozens of rules in response to the corporate and accounting crises generated by the excesses of the 1990s.**

**For nearly a quarter of a century before becoming the SEC's Chairman, Mr. Pitt was a senior corporate partner in the international law firm, Fried, Frank, Harris, Shriver & Jacobson. He was a founding trustee and the first President of the SEC Historical Society, and participates in a wide variety of bar and continuing legal education activities to further public consideration of significant corporate and securities law issues. Mr. Pitt served as an Adjunct Professor of Law at Georgetown University Law Center (1975-84), George Washington University Law School (1974-82), the University of Pennsylvania School of Law (1983-84), and The Yale Law School (2007).**

**Former Chairman Pitt served previously with the SEC, from 1968 until 1978, including three years as the Commission's General Counsel (1975-78). Former Chairman Pitt received a J.D. degree from St. John's University School of Law (1968), and his B.A. from the City University of New York (Brooklyn College) (1965). He was awarded an honorary LL.D. by St. John's University in June 2002, and was given the Brooklyn College President's Medal of Distinction in 2003.**

**Mr. Pitt is currently a Director and Chairman of the Audit Committee of GWU Medical Faculty Associates, Inc., a §501(c)(3) corporation that provides comprehensive medical care to residents of the greater Washington, D.C. metropolitan area. He is also currently a member of the Public Company Accounting Oversight Board's Advisory Council, a not-for-profit corporation created by the Sarbanes-Oxley Act of 2002, to oversee the audits of public companies and broker-dealers for the protection of investors and the public. He serves as an advisor to the Global Advisory Forum for CQS (UK) LLP and CQS Investment Management Limited. Further, he is an independent director of the international hedge funds of Paulson & Co. Inc., and a member of their Audit Committees. He is also a member of the Regulatory and Compliance Advisory Council for Millennium Capital Management, LLC. In addition, he serves as a senior advisor to Teneo Holdings LLC. Additionally, he serves on the Board of Directors, and is a member of the Audit Committee of Premier Alliance Group, Inc. He previously served for three years on the National Cathedral School's Board of Trustees, where he was at various times Board Vice-Chair, Co-Chair of the Board's Governance Committee and Chair of the Audit and Compensation Committees. Mr. Pitt previously served as a Director of Approva Corporation, and was a member of its Audit Committee. In 2011, Mr. Pitt was inducted into the NACD Directorship 100 Corporate Governance Hall of Fame.**