IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: FREEPORT-MCMORAN COPPER & GOLD INC. DERIVATIVE LITIGATION	**C.A. No. 8145-VCN**

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Co-Lead Plaintiffs Dauphin County Employee Retirement Fund, State-Boston Retirement System, Amalgamated Bank, Trustee for the LongView LargeCap 500 Index Fund, LongView LargeCap 500 Index VEBA Fund, LongView Quantitative LargeCap Fund, and LongView Quantitative LargeCap VEBA Fund, and City of Roseville Employees' Retirement System (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby submit this memorandum of law in support of their motion for final approval of a proposed settlement and an award of attorneys' fees and reimbursement of expenses.

PRELIMINARY STATEMENT

After over two years of vigorous litigation, Plaintiffs are pleased to present for the Court's consideration a historic and precedent-setting settlement (the "Settlement") of Plaintiffs' claims arising from Freeport-McMoRan Copper & Gold Inc.'s ("Freeport" or the "Company") acquisition of both McMoRan Exploration Co. ("MMR") and Plains Exploration & Production Co. ("PXP") (the "Transaction").

The Settlement provides enormous benefits to Freeport's stockholders. Having suffered a material drop in the value of their stock as a direct result of the announcement of these value-destroying buyouts, Freeport's stockholders will receive a special dividend of $137.5 million, including $115 million paid by third-party insurers. The $137.5 million Settlement recovery is the third largest cash settlement of a derivative suit in Delaware Court of Chancery history. The benefits do not end there, as the Settlement also includes significant corporate governance enhancements at Freeport that will help ensure that the alleged misconduct that led to this litigation is not repeated. Moreover, the Settlement permits Plaintiffs to evaluate, and if appropriate, bring non-indemnifiable claims against Credit Suisse, which served as financial advisor to Freeport's special committee (the "Special Committee") in the Transaction.

This litigation centered on the conflicted decision by the Freeport board of directors (the "Board") to protect the substantial interests of Freeport insiders, including its Chairman and former CEO, Defendant James R. Moffett ("Moffett"), by acquiring the rapidly failing MMR at a wildly inflated price. MMR's failure created conflicts for a majority of Freeport's directors because nine Freeport directors had significant personal investments in MMR and six out of twelve Freeport directors also sat on the MMR Board. In order to protect their interests in MMR, Moffett and the other interested Freeport directors orchestrated a bailout of MMR using Freeport's coffers. Because PXP owned enough MMR stock to block any deal with Freeport, Defendants arranged an interconnected purchase of PXP to secure its consent to the Transaction while lining the pockets of PXP's CEO, Defendant Flores, with over $200 million in change of control payments.

The parties heavily litigated this case. Indeed, Defendants vigorously opposed Plaintiffs' claims and, absent the Settlement, surely would have continued to fight every step of the way. Plaintiffs amended their complaint twice and conducted significant discovery, including the review of over 80,000 pages of documents (constituting nearly 10,000 such documents) and taking eleven depositions of Defendants and non-parties. The parties also engaged in extensive briefing and oral argument on various motions, including Defendants' comprehensive motions to dismiss. Following the four-hour oral argument on Defendants' motions to dismiss held on March 24, 2014, the Court reserved judgment. Shortly thereafter, the parties assessed the situation and agreed to explore a potential settlement.

From Plaintiffs' perspective, the central goals in negotiating a settlement of this matter were twofold: (1) to achieve a significant monetary recovery for Freeport stockholders; and (2) to improve Freeport's corporate governance practices so as to avoid a repeat of the issues that led to the lawsuit in the first place. The Settlement achieves both of these goals and provides significant benefit to Freeport stockholders.

Plaintiffs believe that the Defendants agreed to the Settlement because Plaintiffs and their counsel ("Plaintiffs' Counsel") made clear that they were willing to litigate the case to trial unless Defendants made significant concessions to the Company's stockholders. For their efforts, Plaintiffs' Counsel seek an award of $28.75 million in attorneys' fees plus $693,175.06 in out-of-pocket expenses. The requested fee award is 21% of the fund created to distribute cash to Freeport's stockholders pursuant to the Settlement, without taking into account any of the non-monetary benefits. This requested fee is entirely appropriate in light of the historic result achieved, which puts substantial cash directly into the hands of stockholders through the special dividend, as well as this Court's precedents.

In sum, Plaintiffs respectfully submit that this case exemplifies the very best that a derivative action, initiated by committed institutional plaintiffs and prosecuted by experienced and dedicated counsel, can confer upon a company and its stockholders. The Settlement and the requested fee and expense awards should be approved.

STATEMENT OF FACTS

A. ALLEGATIONS OF THE COMPLAINT

1. The Board's Conflict Arising From Financial Difficulties at MMR

Freeport and MMR are part of the Freeport McMoRan family of companies, which was founded in 1969 by Defendant Moffett and others. ¶¶ 1, 23, 50-59.[1] At the time of the Transaction, Moffett was Chairman and a former CEO of Freeport,

[1] Citations in the form "¶ __ " are to the Verified Second Amended and Consolidated Derivative Action Complaint, filed on July 19, 2013.

and Co-Chairman and CEO of MMR, as well as MMR's largest stockholder. *Id*. In 1995, Moffett caused both Freeport and MMR to be spun off from their predecessor company, Freeport-McMoRan, Inc. ("FMI"). ¶¶ 54-58. While Freeport was devoted to stable and low-risk mining activities, MMR focused on a high-risk oil and gas exploration strategy in the Gulf of Mexico, including a "deep gas play" (utilizing wells that are 15,000 to 25,000 feet deep) and an "ultra-deep gas play" (utilizing wells deeper than 25,000 feet). ¶¶ 57-59. Very few companies other than MMR are engaged in the "ultra-deep gas play" in the Gulf of Mexico (and none have succeeded). ¶ 59.

Despite having completely different and non-synergistic businesses prior to the Transaction, Freeport and MMR overlapped at virtually every significant management position, and many of the same individuals served on both companies' boards of directors. ¶¶ 43-51. Six members of Freeport's twelve-member board, namely defendants Moffett, Adkerson, Rankin, Day, Ford and Graham, also comprised a majority of MMR's eleven-member board. ¶ 36. The two companies regularly held coordinated board meetings (¶ 51), while management at both companies utilized the same office space and shared the same telephone number and Internet domain (¶ 43).

In 2010, Freeport provided MMR with a cash infusion of $900 million in exchange for 500,000 shares of MMR preferred stock, which were convertible into

MMR common stock. ¶¶ 60-65. MMR used some of this cash to purchase certain of PXP's assets in the Gulf of Mexico, a transaction in which PXP obtained 51 million shares of MMR common stock. ¶ 61. As a result of these deals, PXP owned 31.3% of MMR common stock and Freeport owned 16.1%. ¶ 64. PXP also acquired a veto power over any transaction between MMR and Freeport because MMR's charter required any transaction with a 15% stockholder (such as Freeport) to be approved by a 75% supermajority of MMR common shares. ¶ 65. In addition, Freeport and PXP each had the right to nominate two MMR directors, and one of PXP's nominees was its CEO, defendant Flores. ¶¶ 40, 61.

MMR's focus on the "ultra-deep gas play" was highly speculative, required a tremendous capital outlay, and created virtually no return for MMR and its investors. ¶¶ 67-69. By the time of the Transaction, MMR faced serious financial concerns and was quickly running out of cash with its access to capital evaporating. *Id*.

2. The Transaction was a Bail-Out for MMR

In June of 2012, Flores informed Moffett that PXP was considering selling its MMR shares on the open market in order to improve PXP's own credit metrics and cash flow. ¶¶ 75, 77, 92. A divestiture by MMR's largest stockholder would have been devastating to MMR's already diminishing stock price, exacerbating losses for Moffett and the eight other Freeport directors who held MMR stock. ¶¶

4, 76. Without informing the MMR board, Moffett devised a plan to have Freeport bail out the struggling MMR, and sought the cooperation of Flores, given PXP's ownership of enough MMR stock to veto any transaction. ¶¶ 78-80. Flores took advantage of this leverage by negotiating a sale of PXP to Freeport, and securing approximately $200 million in change-in-control payments for himself as well as the opportunity to become Moffett's heir apparent at Freeport. ¶¶ 79-80.

3. The Special Committee Process was Flawed and Conflicted

Before proposing the Transaction to the Freeport board, Moffett secured the approval of defendant Allison, a Freeport director who Moffett knew would be appointed to chair any special committee, successfully having him confirm before any process began that he was "on board" with the Transaction. ¶¶ 6, 87, 89. Moffett later proposed the Transaction to Freeport and MMR directors at a joint board dinner. ¶ 93. One month later, the Freeport Board created the Special Committee and – as Moffett anticipated – Allison was appointed chair. Defendants Krulak, Lackey, Madonna and McCoy comprised the rest of the Special Committee. ¶ 94. Moffett also caused Freeport to hire his long time business associate Michael Madden ("Madden") to help facilitate and negotiate the Transaction. ¶¶ 44, 83. The Special Committee let Madden and Defendant Quirk, who was an executive of both Freeport and MMR, vet the legal and financial advisors. ¶ 96. Madden steered the Special Committee toward selecting Credit Suisse as its financial advisor. ¶¶ 98-100.

The Complaint alleges critical defects in the Special Committee process from the outset. The Special Committee confirmed that the Transaction could be structured to avoid a stockholder vote. ¶¶ 102-104. The Special Committee also accepted a mandate limited to evaluating the Transaction. ¶ 95. Consistent with that mandate, the Special Committee gave no more than perfunctory consideration to any other alternative. *Id.* Further, the Special Committee allowed improper influence from Freeport's management, especially Moffett. Quirk and Madden regularly advised Moffett as to the status of the due diligence and valuation work being performed by Credit Suisse and RPS Group ("RPS"), the oil and gas engineering consultant hired by the Special Committee to assist in the valuation of MMR and PXP. Quirk and Madden were seeking Moffett's approval, which led to Moffett presiding over a meeting with the financial advisors of both Freeport and MMR to push for an inflated valuation of MMR. ¶¶ 105-106. Moffett also held private meetings with Allison right before Special Committee meetings. ¶ 106. Further, Moffett pressured the MMR special committee and its advisors to push for even higher prices than the improvidently high premium prices the Freeport Special Committee was willing to pay. ¶¶ 8, 143. Moffett and other conflicted directors also took affirmative steps to discourage potential suitors who may have been interested in a strategic combination with Freeport, and failed to inform the Special Committee of these potential alternative transactions. ¶ 107.

The Special Committee's outside advisors, including Credit Suisse and RPS, provided deeply flawed advice. For example, the Special Committee hired RPS to assist with evaluating MMR's reserves. ¶¶ 99-101. Yet, RPS's retainer expressly prevented it from determining whether MMR's reserves actually existed, reviewing MMR's capital expenditures, or opining as to whether MMR could extract oil or gas in a commercially viable manner. ¶ 101. Credit Suisse sought to inflate the value of MMR, and pushed RPS to do the same – acting directly contrary to the interests of Freeport and its stockholders.

4. Allegations that Freeport Overpaid for MMR and PXP

Given the numerous conflicts of interest and valuation issues, Freeport overpaid for MMR and PXP. ¶¶ 9, 11, 171-188. On December 5, 2012, Freeport, PXP and MMR announced that Freeport would pay a 74% premium for MMR and a significant premium for PXP. *See* ¶¶ 9, 171, 187. Allison himself admitted that the premium paid for MMR was "unusual," particularly in light of the speculative nature of MMR's assets. Indeed, even <u>MMR's</u> lead banker at Evercore Group LLC ("Evercore") acknowledged that the premium was "quite high" and among the highest he had ever seen. ¶ 171. When the Transaction was announced, the market moved swiftly to condemn it. For example, Freeport's stock price dropped from $38.28 on December 4, 2012 to a close of $30.81 on December 6, 2012, a decline of nearly 20% on extremely heavy trading volume. ¶¶ 12, 199, 203. The sharp drop in Freeport's stock price lessened the value of the stock consideration that PXP stockholders were to receive, and as a result Freeport was required to further overpay for PXP in the form of two special dividends to PXP stockholders. ¶¶ 11, 188.

B. HISTORY OF THE LITIGATION

Following the announcement of the Transaction, eleven Freeport stockholders filed derivative complaints in the Court of Chancery challenging the Transaction as unfair to Freeport and its stockholders.[2] By order dated January 25, 2013 (Transaction ID #49131484), the Court consolidated the actions and appointed Dauphin County Employees Retirement Fund, Jacksonville Police and Fire Pension Fund and State-Boston Retirement System as Co-Lead Plaintiffs[3] and

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[2] Three related derivative actions were also filed in the Superior Court of the State of Arizona, Maricopa County. On March 18, 2013, a Motion to Intervene into the Delaware Action filed by the Arizona plaintiffs was granted. Additionally, seven other Freeport stockholders demanded documents pursuant to 8 *Del. C.* § 220 ("Section 220").

[3] On February 9, 2015, the Court granted the Notice of Withdrawal of Jacksonville Police and Fire Pension Fund. (Transaction ID #56739713).

Chimicles & Tikellis LLP, Bernstein Liebhard LLP and Labaton Sucharow LLP as Co-Lead Counsel (the "Consolidated Action").[4]

Plaintiffs initially sought to preliminarily enjoin the Transaction. The parties engaged in expedited discovery involving review of an extensive document production and a heavy deposition schedule in a highly compressed time period. Defendants and third parties produced nearly 10,000 documents, consisting of over 80,000 pages, and Plaintiffs' Counsel deposed eleven Defendants and third parties, including Moffett, Allison, Adkerson, Flores, members of the PXP board and the MMR Special Committee, and representatives of Credit Suisse and RPS. Plaintiffs' Counsel also engaged consulting experts to assist in evaluating the financial documents produced and to assist with preparation for these depositions. After engaging in this significant amount of discovery, Plaintiffs elected to move forward with the Action in order to seek damages resulting from the Transaction.

On April 22, 2013, the Court amended its prior order to add The Amalgamated Bank as Trustee for the Longview LargeCap 500 Index Fund, LongView LargeCap 500 Index VEBA Fund, LongView Quantitative LargeCap

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[4] The action captioned *Stephen Blau MD Money Purchase Pension Plan Trust v. Moffett, et al*., a case alleging that the Board improperly refused a demand to litigate the claims, was not initially consolidated with the other actions. On April 4, 2014, the *Blau* action was consolidated into the Consolidated Action. (Transaction ID #55248392).

Fund, LongView Quantitative LargeCap VEBA Fund and Roseville Employees' Retirement System as additional Co-Lead Plaintiffs, and Bernstein Litowitz Berger & Grossmann LLP and Grant & Eisenhofer P.A. as additional Co-Lead Counsel. (Transaction ID #51900176).

On July 19, 2013, Plaintiffs filed the Verified Second Amended and Consolidated Derivative Action Complaint (the "Complaint"). (Transaction ID #53271371). The Complaint alleged a derivative claim for breach of fiduciary duties against the members of the Freeport Board and Freeport's CFO Kathleen J. Quirk ("Quirk" and collectively with the Board the "Freeport Individual Defendants") (Count I); a derivative claim for breach of the duty of loyalty against Quirk and members of the Freeport Board who held MMR stock and/or served concurrently on the MMR board (Count II); and a claim for aiding and abetting against Defendant Flores (Count III).

In October 2013, amidst continuing document discovery, Freeport and the Freeport Individual Defendants filed their motion to dismiss the Complaint. The Non-Special Committee Individual Defendants, and Defendant Flores, each filed separate motions to dismiss the Complaint. Defendants argued, among other things, that the Special Committee and the supposedly disinterested vote of the Freeport board neutralized any potential conflicts and subjected the Transaction to business judgment scrutiny.

On November 21, 2013, Plaintiffs filed their response in opposition to the motions to dismiss. Plaintiffs argued that the entire fairness standard applied to the Transaction because, *inter alia*, Moffett controlled the Transaction and the Special Committee was neither independent nor effective. On December 20, 2013, Defendants filed three separate reply briefs in further support of their motions to dismiss. On March 12, 2014, the Court heard over four hours of oral argument on Defendants' motions to dismiss.

C. THE SETTLEMENT NEGOTIATIONS

In March 2014, while Defendants' motion to dismiss was *sub judice*, the parties agreed to submit to voluntary non-binding mediation. The parties retained Judge Layn Phillips, a former federal district judge in the United States District Court for the Western District of Oklahoma, who has substantial experience in mediating such litigations ("Judge Phillips" or the "Mediator"). Indeed, Judge Phillips has been described as "one of the most prominent and highly skilled mediators of complex actions."[5] The mediation was scheduled for May 23, 2014.

While preparing for the mediation, the parties continued to engage in discovery, including document discovery and noticing several depositions. In aid of the mediation, Plaintiffs consulted an expert damages consultant to assist

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[5] *In re Delphi Corp. Sec. Deriv. and ERISA Litig.*, 248 F.R.D. 483, 498 (E.D. Mich. 2008).

Plaintiffs in assessing damages. Additionally, Plaintiffs retained Harvey L. Pitt, former Chairman of the SEC, to assist in addressing compliance and governance reforms – although it was Plaintiffs' Counsel's view that the parties needed to make substantial progress on the monetary recovery aspect of any settlement before any substantive negotiations could take place on the needed corporate governance reforms. Plaintiffs' Counsel also prepared extensive mediation statements addressing both liability and damages issues. The parties exchanged mediation statements on May 8, 2014, reply mediation statements on May 13, 2014 and on May 23, 2014 participated in a mediation session. In addition to Plaintiffs' Counsel, Freeport's in-house and outside counsel as well as representatives of many of the D&O carriers participated in the mediation session.

Although the parties, under the supervision of the Mediator, engaged in substantial negotiations regarding liability and damages, the first mediation session did not result in a settlement. However, the parties remained willing to continue the negotiations in the hope of reaching an amicable resolution. Accordingly, on May 30, 2014, the parties informed the Court of the ongoing mediation process and requested that it postpone issuing its opinion on the motion to dismiss.

A second mediation session was scheduled for August 4, 2014. In anticipation of that session, the parties exchanged supplemental mediation statements on June 30, 2014. The second mediation session lasted all day and again involved vigorous and extensive negotiations. Although the parties narrowed the divide, a very significant difference remained between the parties' positions at the end of the day. The parties also began to discuss a possible structure in which any monetary recovery would be returned directly to the shareholders. The idea of a special dividend was raised as a potential means to achieve that end.

A third mediation session was scheduled for September 12, 2014. Between the August 4 mediation session and the September 12 mediation session the parties continued negotiations through the Mediator, as well as through direct discussions, in order to "narrow the gap" and make the September 12 mediation as productive as possible. Just prior to the third mediation session, the parties accepted a Mediator's proposal setting a range within which negotiations would commence on the date. In addition, the Plaintiffs presented the Defendants with a proposal for corporate governance reforms to be implemented as part of the settlement. At the third mediation session, the parties made significant progress on the amount of the monetary recovery, although no final number was agreed.

Over the following weeks, the parties negotiated a term sheet, including the scope of the release, and the corporate governance proposals that were to be part of any settlement. There were many hotly contested issues in these negotiations but, over time, the parties were able to agree to a term sheet including all provisions other than the final number for the monetary recovery aspect of a settlement, as well as final corporate governance enhancements.

On November 5, 2014, the parties participated in a fourth mediation session. Counsel for all parties participated as well as representatives of certain D&O carriers that had not participated in previous mediation sessions. At the fourth mediation session, the parties finally reached agreement on the monetary aspect of the settlement and the previously-negotiated term sheet was executed. On November 11, 2014, the parties informed the Court of the Settlement.

The parties then began negotiating the final Stipulation of Settlement and related papers. Although the substantive terms of the Settlement had already been agreed to, the negotiations of the stipulation and other papers raised new issues that resulted in numerous back and forth drafts being proposed, and many direct telephonic negotiations, until the parties could ultimately agree on their final form. On January 15, 2015, the final settlement papers were filed with the Court. (Transaction ID #56594885).

D. TERMS OF THE PROPOSED SETTLEMENT

Plaintiffs' goals in negotiating a settlement of this matter were (1) to achieve a significant monetary recovery for Freeport stockholders and (2) to have meaningful corporate governance enhancements put in place to address the issues that led to the lawsuit in the first place. The Settlement achieves both of these goals and provides significant benefit to Freeport stockholders.

First, the Settlement provides for a direct cash payment to Freeport's stockholders of $137.5 million. $115 million of the consideration is to be paid on behalf of the Settling Defendants by the D&O carriers. Given the significant adverse impact that the Transaction had on the value of Freeport's stockholders' shares, and given that the core theory of the case was the abuse by the Defendants of their control over Freeport's excess capital, Plaintiffs pushed for and obtained Defendants' agreement that this recovery would form part of a special dividend (the "Special Dividend") to be distributed to those stockholders.

An additional $22.5 million, to be funded by the Company, was also negotiated for and agreed to, thereby providing to the stockholders a total of $137.5 million (plus accrued interest on the D&O contribution and less Plaintiffs' Counsel's attorneys' fees and expenses from that contribution awarded by the Court) that would comprise the total of the Special Dividend. This unprecedented provision returns the significant monetary recovery from a derivative case *directly to the stockholders*.

Second, Exhibit A to the Stipulation of Settlement sets forth the Settlement's Corporate Governance Enhancements. The central focus of the Corporate Governance Enhancements was to bring more independence to the Freeport Board and to provide greater oversight in potential conflict situations. *See* Declaration of

Harvey L. Pitt (the "Pitt Declaration") (attached hereto as Exhibit A). As part of the Settlement, the Company has agreed to maintain the Corporate Governance Enhancements for a period of at least three years from the date of adoption. Below is a brief summary of the valuable provisions in the Settlement that achieve that end.

1. Enhancements to Powers of Independent Directors

The Company has agreed to establish the position of Lead Independent Director, with certain enumerated job responsibilities, including: serving as a liaison between the chairman and the non-management directors, approving all meeting schedules and agendas, convening independent sessions with Company employees or executive directors present and approving all information sent to the Board. The Company has further agreed to establish an Executive Committee comprised solely of independent directors, including the Lead Independent Director, with the authority to exercise all the powers of the Board in the management and business affairs of the Company.

2. Enhancements to Board and Committee Membership Requirements

The Company has agreed that membership of the Executive, Corporate Responsibility, Audit Compensation and Nominating & Corporate Governance Committees will consist solely of independent directors, primarily as defined by the New York Stock Exchange ("NYSE") with certain additional requirements.

Each director's independent status is to be evaluated on at least an annual basis. Moreover, the Company will establish procedures by which the Nominating and Corporate Governance Committee, with consideration of the views of significant stockholders, will be solely responsible for considering and recommending board and committee members.

The Company has also agreed to a policy that provides that if the Board determines to establish a special committee for the evaluation of a potential significant transaction, membership on the committee will be restricted to independent directors with no material interest in the transaction at issue. Members of the special committee are to be selected solely by the Nominating and Corporate Governance Committee. Such committee would be empowered to hire its own advisors, negotiate the terms of the transaction, to consider alternative transactions and/or financing and provide a recommendation to the Board with respect to the transaction. The committee will also have to power to decline to refer the transaction to the full Board for approval.

3. Requirements for Approval or Ratification of Related-Party Transactions

The Company has agreed to a related-party transaction policy that will require, among other things, prior approval or review and ratification by the Audit Committee or by the disinterested members of the Board.

4. Policies Related to Executive Management, Succession Planning and Executive Compensation

The Board will annually approve appointment of the Company's executive management and review the Company's succession plan for senior executives. The Compensation Committee will receive advice from an independent executive compensation consultant who will not provide any services to Company management. The Compensation Committee will also adopt an incentive compensation clawback policy applicable in the event of an executive's misconduct that causes a restatement of the Company's financial statements.

5. Policies Regarding Future Equity Vesting Provisions

Any awarded but unvested performance-based equity compensation to the Company's executive officers or directors will not automatically vest upon a change of control. Vesting may only be accelerated in connection with or after a change of control upon termination of employment or service. Also, such acceleration will not presume maximum achievement of performance goals but will be based on certain enumerated criteria.

ARGUMENT

A. THE SETTLEMENT SHOULD BE APPROVED AS FAIR, REASONABLE AND ADEQUATE

1. The Standard for Approving the Settlement

Delaware has long favored the voluntary settlement of contested claims.[6] In reviewing the settlement of an action brought on behalf of a company and its stockholders, the Court "'consider[s] the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then . . . appl[ies] its own business judgment in deciding whether the settlement is reasonable in light of these factors.'"[7]

The Court is "not required to decide any of the issues on the merits."[8] Rather, the Court's duty is to consider the nature of the claims, the possible defenses, the legal and factual obstacles to be faced by plaintiffs at trial, and the

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[6] *See, e.g., Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 265-66 (Del. 1990); *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1102 (Del. 1989); *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986).

[7] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989) (quoting *Polk*, 507 A.2d at 535); *see also Wayne v. Utils. & Indust. Corp.*, 1979 WL 2699, at *3 (Del. Ch. July 19, 1979) ("The function of this Court in reaching a decision as to whether or not to approve a proposed settlement of a derivative stockholders' action in a situation in which the intrinsic fairness of the settlement must be tested, is to exercise its business judgment, . . .").

[8] *Polk*, 507 A.2d at 536.

delay, expense and complexity of litigation.[9] Of particular importance is balancing the strength of plaintiffs' claims being compromised against the benefits secured by the settlement for class members.[10] As the Delaware Supreme Court summarized in *Polk*, the "facts and circumstances" to be considered by courts in assessing the overall fairness of a proposed settlement include: (1) the probable validity of the claims; (2) the apparent difficulties in enforcing the claims through the courts; (3) the delay, expense and trouble of litigation; (4) the amount of the compromise as compared with the amount of any collectible judgment; and (5) the views of the parties involved.[11] When considered under these standards, the Settlement is plainly fair, reasonable, and adequate.

B. ANALYSIS OF THE VALIDITY OF THE CLAIMS IN THE LITIGATION AND BENEFITS ACHIEVED THROUGH THE SETTLEMENT

In determining whether a settlement is fair and reasonable, the Court balances the strength of Plaintiffs' claims against the benefits secured by the Settlement.[12] Here, the balancing of the immediate benefits secured by the Settlement, *i.e.* a $137.5 million payment to stockholders (minus attorneys' fees

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[9] *See, Kahn*, 594 A.2d at 58-59.

[10] *Barkan*, 567 A.2d at 1284; *Polk*, 507 A.2d at 535.

[11] *Polk*, 507 A.2d at 536.

[12] *See, Kahn*, 594 A.2d at 59; *Barkan*, 567 A.2d, 1285-86; *In re MAXXAM, Inc.*, 659 A.2d 760, 768 (Del. Ch. 1995).

and expenses) and significant corporate governance reforms, against the risk, delay, and cost of further litigating Plaintiffs' claims weighs heavily in favor of approval of the Settlement.

Although the structure and history of the Transaction at issue here was certainly complex, Plaintiffs' claims are cogent and straightforward. Plaintiffs alleged that Freeport's directors breached their fiduciary duties by materially overpaying to bail out MMR, in which those fiduciaries had a direct financial interest, and purchasing PXP in order to give effect to the MMR bailout. In other words, Plaintiffs alleged that the Board used its control over Freeport's coffers to enrich itself. While Plaintiffs and Plaintiffs' Counsel believe the claims asserted in the litigation have substantial merit, complex stockholder derivative litigation is always uncertain and Plaintiffs faced significant risks in prosecuting this litigation.[13]

1. Challenges to Liability

Plaintiffs faced significant risks in establishing Defendants' liability. Indeed, Defendants vigorously contested Plaintiffs' claims and asserted that the Special Committee sanitized the Transaction of any conflicts and at all times the

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[13] *See, Ryan v. Gifford*, 2009 WL 18143, at *7 (Del. Ch. Jan. 2, 2009) ("Although some of plaintiffs' claims have merit, if the case were to proceed to trial, defendants would undoubtedly raise defenses that would make any recovery by Maxim uncertain.").

Board acted consistently with its duties under Delaware law, in good faith and exercised sound business judgment.

Plaintiffs believed their breach of fiduciary duty claims to have substantial merit. As explained above, this action challenged the decision by Freeport's Board to significantly overpay to acquire MMR and PXP in a deal fraught with disabling conflicts. Plaintiffs allege that the Transaction was engineered and controlled throughout by Defendant Moffett, Freeport's Chair and former CEO and the Co-Chair, President, CEO, and the largest individual shareholder of MMR, in order to bail out the floundering, cash-poor MMR at the expense of Freeport's public shareholders.

Plaintiffs also alleged that the Special Committee's independence was compromised by, *inter alia*, the successful effort before its formation to secure the cooperation of its chair, its limited mandate and the significant role agents of management played in selecting its advisors, the skewed incentives provided to Credit Suisse in its retention agreement, and the numerous efforts Moffett and those reporting to him made to interfere in the committee's deliberations. Plaintiffs further allege that these factors rendered the Committee ineffective such that, *inter alia*, it allowed Credit Suisse to present to it deeply flawed and inflated valuations of MMR's value, marginalized the honest skepticism of RPS as to significant assumptions relating to that value, considered at face value MMR management's hugely inflated valuations of itself that were wholly unsupported, and failed to exercise any leverage provided to it by the fact that MMR was facing insolvency.

As a result of these corrupted processes, Plaintiffs alleged that Freeport significantly overpaid for both MMR and PXP. Freeport agreed to acquire MMR for $14.75 per share in cash – representing an "unusual" and staggering 74% premium to MMR's stock price – and 1.15 units of a royalty trust. Freeport agreed to acquire PXP for stock and cash worth a total of $50 per share, a 39% premium. Further, Freeport permitted PXP to pay its stockholders an additional $3 per share special dividend in order to induce them to approve the deal. The market's immediate reaction to the announcement of the Transaction confirmed its unfairness to Freeport's stockholders. In the two days following the announcement of the Transaction, Freeport's stock price fell by nearly 20%.

Although Plaintiffs and Plaintiffs' Counsel believe that the claims asserted have substantial merit, Defendants raised various defenses to Plaintiffs' claims. For example, in their motions to dismiss, Defendants argued that they faced no liability because the business judgment rule, not the entire fairness standard, governed Freeport's decision to acquire MMR and PXP.

Indeed, Defendants vigorously argued that the presence of the Special Committee alone was fatal to Plaintiffs' claims – especially given that Freeport has no single stockholder with a controlling interest in the company. According to Defendants, Freeport's Board did "exactly" what Delaware Courts have told corporate boards to do when transactions pose potential conflicts – namely "form[] a special committee of independent directors." Defendants also pointed to the fact that the members of the Special Committee did not have any pecuniary interest in the Transaction. As for Plaintiffs' allegation that the Special Committee Chair, Defendant Allison, had prejudged the Transaction, Defendants countered that Allison's statement that he was "on board" simply meant that he was willing to pursue the Transaction, subject to detailed due diligence and reasonable terms. With respect to Plaintiffs' claim that Moffett thoroughly dominated the Special Committee, Defendants argued that his conduct amounted to simple inquiries as to how the diligence process was proceeding and did not represent any real attempt to influence the Committee's independence.

Defendants also emphasized that a majority of the Freeport directors who actually voted on and approved the Transaction were disinterested and independent. In that regard, Defendants pointed to the fact that Defendants Moffett, Adkerson and Siegele recused themselves entirely from the vote on the Transaction and, of the seven remaining Freeport directors who voted, four had absolutely no pecuniary interest in the Transaction (*i.e.,* Allison, Krulak, Lackey and Madonna).

Further, Defendants had significant arguments that the PXP acquisition had not been tainted by any conflicts. Indeed, this Court had already rejected an attempt by PXP stockholders to enjoin the PXP-Freeport merger. *See In re Plains Exploration & Prod. Co. S'holder Litig.*, 2013 WL 1909124 (Del. Ch. May 9, 2013) (the "PXP Merger Opinion"). There, the Court rejected PXP stockholders' *Revlon* claims, highlighting the fact that, with the exception of Flores, the seven "remaining [PXP] directors [were] disinterested and independent" (*id.* at *4) and concluding that PXP stockholders had "fail[ed] to establish a reasonable probability that the [PXP] Board's decision-making process was inadequate or that its actions were unreasonable in light of the circumstances" (*id.*). Although Plaintiffs here were challenging the decision by *Freeport's Board* to allegedly overpay for PXP, Defendants would have surely relied upon the Court's PXP Merger Opinion to support their argument that the PXP acquisition was free of any disabling conflicts of interest.

While Plaintiffs and Plaintiffs' Counsel believed Defendants' arguments to be unavailing – they nevertheless presented substantial risk to Plaintiffs' claims. Indeed, with the law concerning entire fairness in flux, there was no guarantee that the Transaction would be subjected to entire fairness review.[14] Further, even if the Court determined that entire fairness was the appropriate standard of review of the Transaction, Defendants could still have avoided liability by demonstrating the entire fairness of the decisions to acquire MMR and PXP.[15]

Therefore, Plaintiffs negotiated and agreed to the Settlement in order to provide substantial and immediate relief to Freeport's stockholders and to avoid the risks and expense of continued litigation.

2. Challenges to Damages

Even if Plaintiffs were able to establish that Defendants were liable to Freeport for entering into the MMR and PXP acquisitions, Plaintiffs still faced risks with respect to proving damages.

As an initial matter, Defendants would have continued to vigorously argue that the purchase prices Freeport paid for MMR and PXP were fair and, thus, stockholders suffered no damages at all. According to Defendants, the prices

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[14] *See, e.g., Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (holding that business judgment, rather than entire fairness, may be the appropriate standard of review when a well-informed and empowered special committee approves a transaction).

[15] *See, e.g., In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *13 (Del. Ch. May 6, 2010) ("Even if a court found the entire fairness standard applicable here, Plaintiffs still would have to clear significant hurdles to succeed on their claim. Defendants credibly can claim, for example, that the Transaction meets the entire fairness standard.").

Freeport paid were fully supported by six months of due diligence conducted by experienced financial advisors and were well within a reasonable range of the acquisition values of MMR and PXP.

Heightening Plaintiffs' damages risk was the fact that Defendants would have heavily disputed not only Plaintiffs' damages figure, but also Plaintiffs' methodology for calculating damages in the context of the Transaction. This was not a typical deal case where a stockholder sues on behalf of a target and alleges that the acquirer should have paid a higher price. Nor are damages in derivative cases customarily calculated by simply taking the market capitalization loss resulting from the over 19% decline in the price of Freeport's stock price precipitated by the announcement of the Transaction. Here, Plaintiffs alleged that the acquirer (Freeport) paid too high a price for a pair of acquisition targets (MMR and PXP) – and thus Plaintiffs had to establish the amount of the alleged overpayment. In that regard, Plaintiffs hired an experienced damages expert to assist in calculating damages. While Plaintiffs believe that their expert's preliminary damages estimates were reasonable and supportable, Defendants would have surely presented their own expert(s) to criticize those estimates. This situation would have undoubtedly given rise to a "battle of the experts" – with Plaintiffs facing significant risk as to whether or not their expert's opinions would prevail. The calculation of damages therefore reflected an additional significant risk to Plaintiffs.

Further, assuming that Plaintiffs had gone to trial and prevailed, any damages would have been awarded to the Company. Pursuant to the Settlement, however, individual stockholders will receive a financial benefit. Accordingly, Plaintiffs negotiated and agreed to the Settlement in order to provide substantial and immediate relief to Freeport's stockholders and to avoid the risks and expense of continued litigation.

3. The Benefits of the Settlement Compare Favorably with the Risks of Continued Litigation

This Settlement provides substantial and, indeed, historic and precedent-setting benefits to Freeport and its stockholders. Most obviously, solely as a result of the litigation efforts of Plaintiffs and Plaintiffs' Counsel, the Settlement provides that Freeport stockholders will receive $137.5 million in cash, less Plaintiffs' attorneys' fees and expenses, in the form of a special dividend. This is an enormous sum of money that stockholders would not receive absent the Settlement. Indeed, the $137.5 million Settlement amount ranks as the third highest derivative settlement achieved in the history of the Delaware Court of Chancery. The substantial amount reflects not only the strength of the claims, but also the recognition by Defendants that Plaintiffs and Plaintiffs' Counsel were determined and willing to take these claims to trial. Further, $115 million of the

Settlement amount is "outside" money, in that it will paid by insurers on behalf of the Settling Defendants. In addition, issuing the entirety of the Settlement proceeds via a special dividend is a novel derivative settlement structure that is particularly appropriate in the unique circumstances of this case. Crucially, this structure ensures that the stockholders who suffered real harm as a result of the challenged Transaction, given the steep drop in the valuation of their shares because of it, will directly benefit from the Settlement (notwithstanding that the claims are derivative under the law).

In addition to this massive monetary payment, the Settlement requires Freeport to enact and maintain certain corporate governance enhancements that will help ensure it is managed for the sole benefit of its stockholders in the future. These corporate benefits include, *inter alia*: (i) the establishment of a lead independent director; (ii) the establishment of an Executive Committee comprised solely of independent directors; (iii) enhanced independent director requirements; (iv) enhanced director nomination procedures; (v) new policies that ensure any future special committee will be adequately empowered and independent; and (vi) limits on future executive compensation and equity vesting provisions.[16]

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[16] *See* Pitt Declaration.

These corporate governance reforms provide significant unquantifiable benefits to Freeport and its stockholders.

The Settlement also allows Plaintiffs to analyze, and, if appropriate, pursue non-indemnifiable claims against Credit Suisse. Any recovery from those claims will go to stockholders through another special dividend. While there can be no guarantee that there will be any litigation against Credit Suisse, the prospect of additional future value is a benefit to Freeport and its stockholders.

In comparison to these significant and immediate benefits achieved through the Settlement, Plaintiffs faced significant risks in continuing to litigate these matters. If the parties had not agreed to the Settlement, this Court, in response to the Defendants' Motions to Dismiss, would have determined the future of the litigation. Although Plaintiffs and their counsel believe that their arguments should prevail, Defendants nevertheless may have been successful in insulating the Freeport Board's actions under the business judgment rule. Such a result would have terminated the case and Freeport's stockholders would have received nothing.

Even if Plaintiffs had successfully defeated Defendants' Motions to Dismiss, that would have only meant that Plaintiffs could continue to pursue the litigation. Without doubt, Defendants would have continued vigorously to pursue their substantial defenses. Plaintiffs therefore would have faced a long road through further discovery, summary judgment briefing, and, ultimately, a trial. Although

Plaintiffs would have forcefully pursued what they believe to be meritorious claims, they would have faced a lengthy and unpredictable litigation before they could have obtained any relief for Freeport's stockholders. Further, there was no certainty that Plaintiffs would have prevailed.

The significant $137.5 million monetary benefit, in conjunction with the significant corporate governance reforms and the potential of litigation against Credit Suisse, when weighed against the risks of continued litigation, support approval of the Settlement.

C. THE SETTLEMENT WAS REACHED THROUGH ARMS-LENGTH NEGOTIATIONS

In assessing the fairness of settlements, Delaware courts place considerable weight on the question of whether the settlement was reached through adversarial, arms-length negotiations.[17] Here, the litigation and extensive arms-length negotiations were not merely adversarial, but were the product of numerous aggressive battles between Plaintiffs and Defendants. Indeed, it took no less than

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[17] *See, e.g.*, *In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *3 (Del. Ch. Mar. 29, 2011). This focus on the adequacy of the negotiation process is hardly limited to Delaware and extends to both state and federal courts around the country. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (according presumption of fairness to settlements reached "'in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'") (*citing* Manual for Complex Litigation, Third, § 30.42 (1995)).

four separate mediation sessions, accompanied by detailed written submissions, and months of hard work to achieve the Settlement.

Further, Judge Phillips supervised the parties' extensive settlement negotiations. The considerable effort of Judge Phillips cannot be overstated. In serving as mediator between the parties, Judge Phillips found common ground and helped each side better understand the strengths and weakness of their own and the other side's arguments. Over the course of four intensive and time consuming in person mediation sessions, as well as countless teleconferences among all parties and individual phone calls, Judge Phillips ensured that each side fully understood the nature of the case and the risks of proceeding to trial. Through this rigorous mediation process, the parties were able to reach a mutually agreeable Settlement. This also weighs in favor of approving the Settlement.

D. THE EXPERIENCE AND OPINION OF PLAINTIFFS' COUNSEL FAVORS APPROVING THE SETTLEMENT

The opinion of experienced counsel is entitled to weight in determining the fairness of a settlement.[18] Here, Plaintiffs' Counsel are experienced and skilled stockholder advocates, well-known to the Court, who negotiated the terms of the Settlement on behalf of Plaintiffs, and concluded that the Settlement is fair, reasonable, adequate, and in the best interests of the Company and its stockholders.

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[18] *See generally Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964).

Moreover, Plaintiffs' Counsel made this final determination only after conducting considerable discovery, engaging in a very thorough and time-consuming mediation process, and engaging in intense arms-length settlement negotiations with opposing counsel, which were supervised by an experienced Mediator. Plaintiffs' Counsel were well-aware of the strengths and weaknesses of their case while negotiating the Settlement.[19] Accordingly, Plaintiffs' Counsel's opinion is informed and this factor, like each of the other factors cited above, powerfully supports approval of the Settlement.[20]

E. THE REQUESTED FEE AND EXPENSE AWARD IS FAIR AND REASONABLE

For prosecuting this litigation on a fully contingent basis for two years and obtaining precedent-setting benefits for the Company and its stockholders despite Defendants' zealous and aggressive defense, Plaintiffs' Counsel request that they be awarded attorneys' fees in the amount of $28.75 million, plus $693,175.06 in expenses. Plaintiffs' Counsel respectfully submit that the request is eminently fair

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[19] Plaintiffs have also submitted affidavits to demonstrate their support of the Settlement. *See* Transmittal Affidavit of Christine S. Azar in Support of Plaintiffs' Opening Brief in Support of Motion for Final Approval of Proposed Settlement and an Award of Attorneys' Fees and Reimbursement of Expenses ("Azar Trans. Aff."), Exhibits 1, 2.

[20] *See Neponsit Inv. Co. v. Abramson*, 405 A.2d 97 (Del. 1979) (approving settlement based, in part, on plaintiff's counsel's conclusion, reached after conducting pretrial discovery, that the settlement was fair and in the best interest of the class).

and reasonable under the precedents of this Court and in light of the significant benefits, both monetary and non-monetary, that were obtained as a result of the prosecution and resolution of this case. Plaintiffs' Counsel seek the fee and expense award under both the common fund and the corporate benefit doctrines. Under these doctrines, an award of attorneys' fees and expenses is appropriate when, through the efforts of counsel, a common fund or common benefit is conferred on a readily ascertainable group, as is the situation here.[21]

The amount of the fee and expense award is committed to the sound discretion of the Court.[22] In exercising its discretion, this Court considers (1) the benefits achieved in the action, (2) the efforts of counsel and the time spent in connection with the case, (3) the contingent nature of the fee, (4) the difficulty of the litigation, and (5) the standing and ability of counsel.[23] These factors fully support the present fee and expense application.

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[21] *See Smith v. Fid. Mgmt. & Research Co.*, 2014 WL 1599935, at *8 (Del. Ch. Apr. 16, 2014) (*citing Dover Historical Soc'y, Inc. v. Dover Planning Comm'n*, 902 A.2d. 1084, 1089 (Del. 2006)).

[22] *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1273 (Del. 2005); *Tandycrafts v. Initio P'rs*, 562 A.2d 1162, 1165-66 (Del. 1989). *See also Ryan*, 2009 WL 18143, at *13("Such non-monetary recovery is properly considered by the Court in determining a fee award and in the past has served as the sole basis for a fee award.")

[23] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980); *In re Plains Res., Inc. S'holders Litig.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005).

1. The Benefits Achieved

The benefits achieved through litigation are accorded the greatest weight in determining an appropriate fee award.[24] Here the primary benefit is obvious—the third largest cash settlement of a derivative lawsuit in history.[25] As a direct result of the actions undertaken by Plaintiffs and Plaintiffs' Counsel, Freeport stockholders will directly receive the entire settlement amount, or $137.5 million net of attorneys' fees and expenses, in the form of a special dividend.

The novel and precedent setting use of a special dividend to stockholders provides value in and of itself.[26] This is especially true in this litigation, where the director defendants were alleged to have abused their control over the corporate treasury to further their own personal interests, pursuing a transaction that very directly harmed the personal worth of Freeport's public stockholders. In other words, while this action was a derivative suit under Delaware law, the economic

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[24] *See Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000) ("Sugarland's first factor is indeed its most important – the results accomplished for the benefit of the shareholders.").

[25] Alison Frankel, *Is $137.5 Mln S'holder Dividend New Model for Derivative Suits?*, Reuters (Jan. 15, 2015), http://blogs.reuters.com/alison-frankel/2015/01/15/is-137-5-mln-shareholder-dividend-new-model-for-derivative-suits/ (last visited Mar. 6, 2015).

[26] *See* Liz Hoffman, *Freeport Settlement a Doubly Rare Win for Shareholders*, Wall Street Journal (Dec. 1, 2014), http://blogs.wsj.com/moneybeat/2014/12/01/freeport-settlement-a-doubly-rare-win-for-shareholders/ (last visited Mar. 6, 2015); Frankel, supra.

effect of the challenged Transaction is more akin to a direct class action claim, as the negative effect on Freeport stockholders was felt immediately and directly. Moreover, even the additional $22.5 million that is being approved as a special dividend is a meaningful benefit because this provision requires the same Board that misused its control over stockholder funds in the past to return capital in order to compensate those same stockholders for their harm. Put another way, since the entire settlement amount will be paid to Freeport stockholders, the Board will not be able to put these funds to its own purposes.

Commentators have agreed that this is a significant benefit. For example, Allison Frankel, in writing for *Reuters* stated, "it's an ingenious answer to the argument that cash payments in derivative suits are like transferring money from one corporate pocket to another, dropping some of it along the way to plaintiffs' lawyers. Paying the money to shareholders sends a much stronger message of board accountability."[27]

In addition to this enormous cash payment, further significant benefits in the form of corporate governance improvements flow from the Settlement. These corporate benefits include, *inter alia*: (i) the establishment of a lead independent

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[27] *See* Alison Frankel, *Ugly-duckling Shareholder Derivative Suits are Poised for Swandom,* Reuters (Jan. 2, 2015), http://blogs.reuters.com/alison-frankel/2015/01/02/ugly-duckling-shareholder-derivative-suits-are-poised-for-swandom/ (last visited Mar. 6, 2015).

director; (ii) the establishment of an Executive Committee comprised solely of independent directors; (iii) enhanced independent director requirements; (iv) enhanced director nomination procedures; (v) new policies that ensure any future special committee will be adequately empowered and independent; and (vi) limits on future executive compensation and equity vesting provisions. As the Court stated in *Ryan v. Gifford*, such non-quantifiable benefits can readily support a settlement and fee request.[28] Accordingly, each of these is valuable to Freeport stockholders, as they help ensure that the decision whether to enter into any future transaction will be dictated solely by the stockholders' collective interest.

All of these benefits are solely due to the efforts of Plaintiffs and Plaintiffs' counsel in investigating the Transaction at issue and pursuing these claims. For these reasons alone, the Court should grant Plaintiffs' Counsel's fee and expense request.

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[28] *See Ryan*, 2009 WL 18143, at *10 ("As part of the Settlement, Maxim will also receive the benefit of substantial corporate governance changes designed to address the problems that led to the backdating of options. These changes are designed to assure that Maxim's options grant process is transparent and properly monitored, while still providing Maxim with the flexibility to use options to incentivize its employees. It is difficult to place a value on such non-pecuniary benefits; however, such governance reforms can provide substantial benefits and are appropriately considered by the Court when evaluating a proposed settlement.").

2. The Efforts of Experienced Counsel Resolved Complex Issues

The difficulty and complexity of the claims are also considered in determining an appropriate fee to award.[29] Here, the issues were complex and the course of the litigation was unusual. In pursuing this action, Plaintiffs and Plaintiffs' Counsel challenged a corporate board's decision to acquire two other companies, a notoriously difficult claim to prevail on. Over the course of the litigation, Plaintiffs filed two amended complaints (and were prepared to file a third), reviewed over 80,000 pages of document discovery, conducted eleven depositions, and briefed and argued a motion to expedite and Defendants' extensive Motions to Dismiss.

Achieving a resolution of this case – especially one that provides such extensive benefits to the Company and its stockholders – will allow the Company to formulate business plans going forward for itself, MMR, and PXP, without the cloud and uncertainties that the filing of the stockholder cases had raised for the Company. These factors, in addition to the complex issues raised in this litigation and the procedural devices employed, further support the requested attorneys' fee and expense award.

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[29] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1256 (Del. 2012).

3. The Contingent Nature of the Fee and Standing of Counsel

Delaware courts recognize that counsel is typically "entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis."[30] Here, Plaintiffs' Counsel litigated the action for over two years on a fully contingent basis, investing time and money with no guarantee of any recovery. Delaware has a public policy to "reward this sort of risk taking in determining the amount of a fee award."[31]

In addition, the Court must consider the "standing and ability of Plaintiffs' counsel."[32] Here, Plaintiffs' Counsel are well-known for their skill and expertise in representing stockholders in complex litigation. They include firms that are among the preeminent corporate governance litigation firms in the country. In addition to their well-documented successes in previous litigation, including actions before

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[30] *Ryan*, 2009 WL 18143 at *13; *see also Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018 at *12 (Del. Ch. Aug. 30, 2007) ("Fee awards should encourage future meritorious lawsuits by compensating the plaintiffs' attorneys for their lost opportunity costs (typically their hourly rate), the risks associated with the litigation, and a premium."); *In re Plains Res. Inc.*, 2005 WL 332811, at *6 (finding that plaintiffs' counsel were all retained on a contingent fee basis, and stood to gain nothing unless the litigation was successful).

[31] *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 365 (Del. Ch. 1999), *aff'd sub nom. First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000); *see also Chrysler Corp. v. Dann*, 223 A.2d 384, 389 (Del. 1966) (awarding greater fees considering the contingent nature of the action).

[32] *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171, at *13 (Del. Ch. Oct. 28, 2010).

this Court, their skill and experience is further evidenced by their ability to obtain the benefits conferred by the Settlement efficiently and with minimal Court intervention, and in the face of defenses raised by highly-acclaimed counsel for Defendants. As such, this factor strongly supports approval of the requested fee.

4. Reasonableness of the Fee Sought

Considering both the monetary and governance benefits that this litigation has provided to Freeport stockholders, Plaintiffs' Counsel's request of $28.75 million in attorneys' fees plus $693,175.06 in expenses is eminently fair and reasonable. On a percentage basis, the requested fee is significantly lower than what this Court's precedents support in relation to the benefits conferred. Indeed, the fee request of only 21% of the total monetary benefit being provided directly to Freeport's stockholders is entirely consistent with this Court's precedents.[33] The Delaware Supreme Court's decision in *Americas Mining Corp.* is highly instructive here:

> Delaware case law supports a wide range of reasonable percentages for attorneys' fees, but 33% is "the very top of the range of percentages." The Court of Chancery has a history of awarding lower

[33] The fee request is only 25% of the settlement consideration being provided by the Directors' and Officers' insurance carriers. Furthermore, this percentage does not factor in the significant corporate governance reforms achieved through the Settlement and the value, independent of its dollar amount, to shareholders of this innovative approach of having them directly receive a recovery related to the harm they suffered.

> percentages of the benefit where cases have settled before trial. When a case settles early, the Court of Chancery tends to award 10–15% of the monetary benefit conferred. When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards in the Court of Chancery range from 15–25% of the monetary benefits conferred. "A study of recent Delaware fee awards finds that the average amount of fees awarded when derivative and class actions settle for both monetary and therapeutic consideration is approximately 23% of the monetary benefit conferred; the median is 25%." Higher percentages are warranted when cases progress to a post-trial adjudication.
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> The question presented in this case is how to properly determine a reasonable percentage for a fee award in a megafund case. A recent study by the economic consulting firm National Economic Research Associates ("NERA") demonstrates that overall as the settlement values increase, the amount of fee percentages and expenses decrease. The study reports that median attorneys' fees awarded from settlements in securities class actions are generally in the range of 22% to 30% of the recovery until the recovery approaches approximately $500 million. Once in the vicinity of over $500 million, the median attorneys' fees falls to 11%.[34]

Despite acknowledging the existence of a "megafund" rule in other jurisdictions, the Delaware Supreme Court declined "to impose either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in mega-fund cases."[35] The Supreme Court even decided that a 15% fee (*i.e.*,

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[34] *Ams. Mining Corp.*, 51 A.3d at 1259-60 (footnotes & citations omitted).
[35] *Id.* at 1261.

$300 million) on a result valued at $2 billion was not excessive. Further, the Court was unconcerned that it was awarding $35,000 per hour because "[t]his Court expressly rejected the use of time expended as the principal basis for determining fees awarded to plaintiff's counsel. Instead, we held that the *benefit achieved* by the litigation is the 'common yardstick by which a plaintiff's counsel is compensated in a successful derivative action.'"[36]

This Court reiterated this yardstick in a recent decision, explaining that extraordinary attorneys' fees derive from extraordinary recoveries and not from anything particular to the litigation itself:

> The reward for an exceptional result comes not from a special appeal for case-specific largesse, but rather from the percentage calculation itself. A percentage of a low or ordinary recovery will produce a low or ordinary fee; the same percentage of an exceptional recovery will produce an exceptional fee. *See Ams. Mining Corp.*, 51 A.3d at 1259 (explaining that the "common fund is itself the measure of success"). The wealth proposition for plaintiffs' counsel is simple: If you want more for yourself, get more for those whom you represent.[37]

Clearly, the fee request here – which constitutes a reasonable 21% of the money provided to stockholders under the Settlement – is entirely consistent with the precedent of *Ams. Mining Corp.* and fair and reasonable based on the benefits

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[36] *Id.* at 1257-58 (citation omitted).

[37] *In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *8 (Del. Ch. Aug. 22, 2014), *judgment entered* 2014 WL 4248096 (Del. Ch. Aug. 27, 2014).

conferred and the amount of litigation activity. This case did not settle promptly after the filing of a complaint and perfunctory discovery. Here, Plaintiffs engaged in intense litigation, considerable discovery, and an unusually protracted and extensive mediation process before agreeing to the historic Settlement. These substantial efforts included full briefing and argument on a motion to expedite and Defendants' comprehensive Motions to Dismiss, the filing of two amended complaints (and the preparation of a third), a review of over 80,000 pages of documents produced in discovery, the taking of eleven depositions, and participating in four mediation sessions.

Fee awards in other cases bear out the reasonableness of the fee request. While Delaware courts have awarded as much as 33% of the benefit conferred to the corporation as attorney's fees,[38] fee awards of 15% to 25% have often been awarded in cases where some level of motion practice and discovery was conducted.[39]

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[38] *See, e.g., Goodrich v. E.F. Hutton Gp., Inc.*, 681 A.2d 1039, 1050 (Del. 1996) (33%).

[39] *In re Cablevision/Rainbow Media Gp. Tracking Stock Litig.*,2009 WL 1514925 (Del. Ch. May 22, 2009) (awarding 22.5% where plaintiffs' counsel devoted nearly 5,000 hours to the case); *Stepak v. Ross*, 1985 WL 21137 (Del. Ch. Sept. 5, 1985) (awarding 20% where plaintiff took extensive discovery).

Finally, although Delaware courts have traditionally also looked to the time and expenses incurred by plaintiffs' counsel as a "backstop check" when assessing reasonableness,[40] the Supreme Court's decision in *Americas Mining Corp.* and this Court's decision in *Orchard Enterprises* make clear that the *benefit achieved* is to be given primacy in setting an appropriate fee. But even should this Court wish to consider Plaintiffs' Counsel's time and expenses, the fee request is still reasonable. Here, Plaintiffs' Counsel devoted 17,712.70 hours in the pursuit of this case and incurred $693,175.06 in expenses.[41] This results in an hourly rate of $618.44 and a lodestar multiplier of 2.62. These amounts are far less than the effective hourly rate approved by the Supreme Court in *Americas Mining Corp*.[42] The fee request is also comparable on a lodestar basis to awards granted in past cases.[43]

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[40] *Abercrombie & Fitch*, 886 A.2d at 1274.

[41] *See* Azar Trans. Aff., Exhibits 3-7.

[42] *Ams. Mining Corp.*, 51 A.2d at 1252, 1257 (fee award represented a $35,000 hourly rate); *see also In re Genentech, Inc. S'holders Litig.,* C.A. No. 3911-VCS, at 6, 8, 56 (Del. Ch. July 9, 2009) (TRANSCRIPT) (awarding $24.5 million fee that represented a $5,400 hourly rate); *In re Digex, Inc. S'holders Litig.*, C.A. No. 18336-CC, at 141, 147 (Del. Ch. Apr. 6, 2001) (TRANSCRIPT) (7.5% fee award represented a $2,963.86 hourly rate in case for which plaintiffs' counsel were found to be only partially responsible for the benefit achieved).

[43] *See Ams. Mining Corp.*, 51 A.2d at 1257-59 (fee award represented a 66x lodestar multiple); *In re Genentech, supra* at 7, 56 (fee award represented an 11.3x lodestar multiple); *In re Digex, supra* at 141, 147 (fee award represented an 8.8 lodestar multiple).

Moreover, as noted above, but for Plaintiffs' Counsel's efforts in identifying, investigating, researching, commencing, prosecuting and resolving this case, none of the benefits described above would exist, and the Company's stockholders would be much the poorer for it.

CONCLUSION

For all of the foregoing reasons, Plaintiffs and Plaintiffs' Counsel respectfully submit that the Settlement should be approved and the Court should approve Plaintiffs' Counsel's fee and expense request in its entirety.

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CERTIFICATE OF SERVICE

I, Christine S. Azar, hereby certify that on this 8th day of March, 2015, I caused a copy of the foregoing Plaintiffs' Opening Brief in Support of Motion for Final Approval of Proposed Settlement and an Award of Attorneys' Fees and Reimbursement of Expenses to be served via Lexis/Nexis File & Serve upon the following attorneys of record:

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