



**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' MOTION IN SUPPORT OF CREDIT SUISSE  
SETTLEMENT AND SUPPLEMENTAL  
REQUEST FOR ATTORNEYS' FEES AND EXPENSES**

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Date: March 18, 2015

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"), submit this motion in support of the settlement and supplemental fee and expense request in connection with the settlement of third-party Credit Suisse Securities (USA) LLC ("Credit Suisse"). If approved, Credit Suisse will pay \$16.25 million to Freeport-McMoRan Copper & Gold Inc. ("Freeport" or the "Company"), \$10 million cash and \$6.25 million in credit for future services. Plaintiffs' Counsel seek 25% of this amount in attorneys' fees (or \$4.06 million).

### **FACTUAL BACKGROUND**

1. Credit Suisse was a financial advisor to the special committee (the "Special Committee") of the Freeport board of directors (the "Board") in connection with Freeport's acquisition of McMoRan Exploration Co. ("MMR") and Plains Exploration and Production Co. ("PXP"), the transaction at the center of this derivative action (the "Transaction"). Credit Suisse's fee in connection with the MMR portion of the Transaction was \$8 million. ¶¶ 99.<sup>1</sup>

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<sup>1</sup> All "¶" cites are to the Verified Second Amended and Consolidated Complaint dated July 19, 2013.

2. During the course of the litigation, Plaintiffs challenged, *inter alia*, Credit Suisse's MMR valuation models, including the MMR Net Asset Value ("NAV") analysis, as well as other aspects of Credit Suisse's Fairness Opinions underlying the Transaction. Plaintiffs also alleged that Credit Suisse improperly pressured the Special Committee's independent geological consultant, RPS, to maximize the value of MMR and PXP.

3. Shortly after the Action began, on or about January 3, 2013, Plaintiffs served Credit Suisse with a subpoena *duces tecum* and *ad testificandum* (the "Subpoena") relating to the Transaction. Although Credit Suisse produced some documents, it did not produce its actual valuation model, or the calculations supporting it.

4. After deposing a representative of Credit Suisse in February 2013, Plaintiffs continued to request additional responsive documents from Credit Suisse. On May 12, 2014, Credit Suisse finally produced its valuation model for the NAV analysis with a designation of "Highly Confidential."

5. After reviewing the valuation model and consulting with their experts, Plaintiffs concluded that after-tax cash flow projections for MMR were inaccurate and unreliable. Specifically, in Credit Suisse's model, the after-tax cash flows exceeded MMR's pre-tax cash flow. Accordingly, Plaintiffs and their experts concluded that Credit Suisse overvalued MMR for purposes of the Transaction.

6. After reaching this conclusion, Plaintiffs considered amending their complaint to include Credit Suisse as a defendant. On August 15, 2014, Plaintiffs filed a motion to vacate Credit Suisse's "Highly Confidential" designation on certain valuation documents relating to the NAV analysis so that Plaintiffs could freely include this information in an amended complaint. On August 22, 2014, the Court granted Plaintiffs' motion to vacate the "Highly Confidential" designation.

7. During this time, as explained more fully in Plaintiffs' papers in support of final settlement approval, Plaintiffs were engaged in a formal mediation process to settle this litigation with the Freeport directors. Mediation sessions took place from May through November of 2014, and resulted in a settlement that, among other things, permitted Plaintiffs to evaluate, and if appropriate, bring non-indemnifiable claims against Credit Suisse.

8. Beginning in January 2015, Plaintiffs and Credit Suisse began discussing a formal resolution of these potential claims and engaged in a formal mediation session with retired Judge Layn Phillips, the same mediator who assisted with the settlement against the Freeport defendants. As a result of the mediation and subsequent discussions and negotiations, Credit Suisse agreed to a settlement of \$16.25 million.

9. The Settlement consists of a cash payment by Credit Suisse to Freeport of \$10 million, and a credit of \$6.25 million to be redeemable in

connection with future services provided by Credit Suisse at fair market value (the nature of such services is to be agreed to by Credit Suisse and Freeport). The \$10 million payment to Freeport will be included in the special dividend to be issued to Freeport's shareholders as part of the Settlement.

### **ARGUMENT**

#### **A. THE CREDIT SUISSE SETTLEMENT SHOULD BE APPROVED AND THE REQUESTED FEE AND EXPENSE AWARD IS FAIR AND REASONABLE**

10. Plaintiffs have achieved a \$16.5 million benefit on behalf of Freeport from its banker – a non-party to this Action. Indeed, it was exclusively due to Plaintiffs' diligence and persistence that Credit Suisse's valuation error was uncovered and now rectified.

11. Under the common fund doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1252-53 (Del. 2012) (citations and internal quotation omitted). Commensurate with the \$16.25 million recovery, Plaintiffs' counsel request an award of additional attorneys' fees in the amount of \$4.06 million (or 25% of the amount recovered from Credit Suisse for Freeport). Plaintiffs' counsel respectfully submit that the request is eminently fair and reasonable under the precedents of this Court and in light of the significant benefits achieved.

12. As set forth in Plaintiffs' papers in support of final settlement approval in this action, the amount of the fee and expense award is committed to the sound discretion of the Court.<sup>2</sup> 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.<sup>3</sup> These factors fully support the present fee and expense application.

**1. The Benefits Achieved and Risks Faced Support the Settlement and the Fee**

13. As this Court is well-aware, the benefits achieved through litigation are accorded the greatest weight in determining an appropriate fee award.<sup>4</sup> In this regard, the settlement with Credit Suisse, both on its own and as considered in connection with the \$137.5 million settlement with the Defendants, is an exceptional result both for Freeport and its public stockholders.

14. Pursuant to the additional settlement addendum, Credit Suisse will pay Freeport \$10 million in cash, which will be used to supplement the special

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<sup>2</sup> *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).

<sup>3</sup> *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).

<sup>4</sup> *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.").

dividend to be paid to Freeport's stockholders. And in addition, Freeport will receive a credit of \$6.25 million that it can use in connection with assignments Credit Suisse performs for Freeport at fair market value, which assignments shall be reasonably agreed between Freeport and Credit Suisse (any services, not just financial advisory services) at fair market value. In sum, therefore, the total settlement here would resolve the claims asserted in the Action and Freeport's claims against Credit Suisse for total consideration of \$153.75 million, which truly marks an exceptional recovery by any measure. This Settlement is an outstanding result that resolves all claims, and marks an historic way to resolve derivative litigation on claims that directly, and perhaps uniquely, injured stockholders.

15. Even considering the supplemental settlement with Credit Suisse on its own, and not as part of the overall settlement of the Action (which is how it should be considered), the supplemental settlement with Credit Suisse is more than reasonable. First, the supplemental settlement with Credit Suisse resolves an objection that threatened to derail the primary settlement agreement with Defendants, and which may have prevented Freeport's stockholders from receiving the precedent-setting special dividend negotiated by the parties here.

16. To explain, Credit Suisse was prepared to argue that the entire Freeport Settlement was invalid because it constituted a breach of Credit Suisse's retainer agreement with Freeport (the "Retainer Agreement"). Because Credit

Suisse had not been given an “unconditional release” in connection with the Freeport Settlement (which it claimed it was entitled to under the Retainer Agreement), it was prepared to object to the Settlement, arguing that the entire Settlement was invalid.

17. Plaintiffs would have argued that the Freeport Settlement did not breach the Retainer Agreement, because it specifically carved-out only claims against Credit Suisse that could not be indemnified. Nevertheless, even if the Court agreed with Plaintiffs’ interpretation of the Retainer Agreement, it was far from clear that Plaintiffs would prevail in proving non-indemnifiable claims.

18. Second, on economic terms, the supplemental settlement with Credit Suisse is independently reasonable. Plaintiffs believed there were two viable claims against Credit Suisse that were carved out of the Freeport Settlement: (i) a contractually based malpractice claim, and (ii) a claim that Credit Suisse aided and abetted the Freeport Defendants’ violation of their fiduciary duties to the Company.

19. Plaintiffs believe they had a strong argument that Credit Suisse’s conduct failed to meet appropriate professional standards in connection with the services it performed with regard to Freeport’s acquisition of MMR. But any contract-based malpractice claim faced a significant limitation on damages because

the Retainer Agreement capped such damages at the amount of fees received by Credit Suisse.

20. Credit Suisse's fees in connection with the MMR acquisition totaled \$8 million. As such, the \$16.25 million recovery from Credit Suisse results is more than two times (2x) the cap on damages that likely would have applied on any malpractice and/or breach of contract claim (which, by the terms of the Retainer Agreement, would most likely have been brought in New York courts).

21. Aiding and abetting claims would *not* have been subject to the \$8 million cap on damages, but they would have given rise to significant, and perhaps insurmountable legal hurdles. Among other things, the aiding and abetting claim would have been very difficult to establish, as it would have required Plaintiffs to prove the underlying breach of fiduciary duty (which was strenuously denied by the defendants), and the requisite intent on Credit Suisse's part. Thus, if Credit Suisse admitted that it made an error, but said its error reflects incompetence rather than "knowing participation," damages may have been limited to the \$8 million available for malpractice. Even if Plaintiffs would have met their burden on these issues, pursuant to the release in the Stipulation of Settlement, damages against Credit Suisse would have been reduced proportionately to reflect the relative liability of the settling Freeport Defendants. Ultimately, when parsed through these potential results, \$16.25 million is an excellent result.

22. Ultimately, the Settlement obviates these issues and will provide immediate monetary benefits to Freeport and its shareholders. The valuable benefits achieved more than support the Settlement and supplemental fee request.

## **2. The Efforts of Experienced Counsel Resolved Complex Issues**

23. The difficulty and complexity of the claims are also considered in determining an appropriate fee award.<sup>5</sup> The issues involving Credit Suisse were extremely complex and the course of the litigation was unusual. During the Freeport litigation, Plaintiffs focused their strategic efforts on the defendant directors as well as Credit Suisse. Among other things, Plaintiffs subpoenaed documents from Credit Suisse during the course of expedited proceedings, deposed the principal banker from Credit Suisse with respect to the Transaction, and filed and won a motion to de-designate certain documents that Credit Suisse designated as highly confidential.

24. A sophisticated analysis of the documents and facts with respect to Credit Suisse gave Plaintiffs heavy ammunition to pursue claims concerning Credit Suisse's role in the Transaction. Plaintiffs and Credit Suisse then engaged in a mediation process and following hard-fought, arms-length negotiations, ultimately arrived at a resolution of their claims on highly-beneficial terms to Freeport and its shareholders.

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<sup>5</sup> *Ams. Mining Corp.*, 51 A.3d at 1256.

25. These factors further support the requested attorneys' fee and expense award.

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

26. As with all aspects of this litigation, Plaintiffs' counsel pursued the claims against Credit Suisse on a fully contingent basis. Counsel invested considerable time understanding and investigating the nature of Credit Suisse's MMR valuation and were prepared to file additional claims against Credit Suisse, as specifically contemplated in the settlement of this litigation, without any guarantee of payment whatever. This contingent nature of counsel's efforts supports the full fee award. *See, e.g., Seinfeld*, 847 A.2d at 337 (contingent representation entitles plaintiff's counsel to both a "risk" premium and an "incentive" premium on top of the value of their hourly services).<sup>6</sup>

27. The standing of Plaintiffs' counsel also favors a full approval of the fee request. Plaintiffs are represented by firms that specialize in derivative and class action litigation and are well-known to this Court. In this particular instance, obtaining additional relief from a third-party required a high level of expertise, an unwavering commitment, and the resources and ability to analyze claims against third-parties while simultaneously engaging in extensive settlement negotiations.

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<sup>6</sup> *See also In re First Interstate Bancorp Consol. S'holders Litig.*, 756 A.2d 353 (Del. Ch. 1999), *aff'd sub nom.*, *First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000); *Chrysler Corp. v. Dann*, 223 A.2d 384, 389 (Del. 1966) (awarding greater attorneys' fees based on contingent nature of action).

Plaintiffs respectfully submit that the skill and expertise of their counsel supports the requested fee award.

#### **4. Reasonableness of the Fee Sought**

28. Plaintiffs' efforts against Credit Suisse are inextricably linked with Plaintiffs' efforts against the named defendants in this litigation. As financial advisor to the Special Committee, Plaintiffs were aware of and litigated claims relating to Credit Suisse from the inception of this case. As explained above, Plaintiffs subpoenaed documents from Credit Suisse at an early stage in the proceedings, deposed a Credit Suisse representative, and engaged in motion practice regarding Credit Suisse relating to additional documents and the confidentiality designations of certain of these documents. Furthermore, in a novel departure from the typical approach, Plaintiffs made sure to preserve their ability to litigate further against Credit Suisse in connection with the Settlement with the Freeport defendants. All of these efforts were instrumental in securing a settlement with the named defendants and supporting Plaintiffs' theory that Freeport overpaid for MMR.

29. Plaintiffs request a fee award of 25% of the value of the benefits provided by Credit Suisse to Freeport in connection with the Settlement. As set forth more fully in Plaintiffs' papers in support of final settlement approval, this percentage is well within the range approved by this Court. *See Ams. Mining*

*Corp.* 531 A.3d at 1260 (“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%.”) (citations and quotation omitted).

30. Plaintiffs believe that the result in this case is exceptional as they were able to secure a direct monetary payment to stockholders in a derivative action, while at the same time preserving claims as to a third-party financial advisor, and, ultimately securing a second monetary settlement from that advisor. The monetary recovery from both these settlements will be passed-through to Freeport’s shareholders in the form of a Special Dividend. Plaintiffs submit that the exemplary nature of the results achieved here supports the requested attorneys’ fee. *See, e.g., In re Orchard Enters., Inc. S’holder Litig.*, 2014 WL 4181912, at \*8 (Del. Ch. Aug. 22, 2014), judgment entered by, 2014 WL 4248096 (Del. Ch. Aug. 27, 2014) (“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. ... The wealth proposition for plaintiffs’ counsel is simple: If you want more for yourself, get more for those whom you represent.”) (citations omitted).

31. The Supreme Court’s decision in *Americas Mining Corp.* and this Court’s decision in *Orchard Enterprises* demonstrate that the benefit achieved is

paramount in setting an appropriate fee. But even should this Court wish to consider Plaintiffs' counsel's lodestar, the fee request is still reasonable. Plaintiffs request 25% of the benefits to be paid by Credit Suisse, or \$4.06 million. When combined with the \$28.75 million fee requested as part of the settlement with the named defendants, Plaintiffs' counsel's total fee request is \$32.81 million (exclusive of expenses). Assuming *arguendo* that Plaintiffs' counsel worked only the 17,712.70 hours submitted in the settlement approval papers (with no additional time devoted exclusively to engaging Credit Suisse), the combined fee request represents a lodestar of \$1,852.34 per hour,<sup>7</sup> which is far less than the \$35,000 hourly rate approved by the Supreme Court in *Americas Mining Corp.* See *Ams Mining Corp.*, 51 A.2d at 1257.<sup>8</sup> The combined multiplier of 2.99 is also well within the range of Delaware precedent.<sup>9</sup>

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<sup>7</sup> Plaintiffs inadvertently cited to an hourly rate of \$618.44 in their brief in support of the Freeport Settlement. That should have been \$1,623.12 per hour. Notwithstanding, the hourly rate of \$1,623.12 per hour still justifies the fee sought in this case.

<sup>8</sup> See also *In re Genentech, Inc. S'holders Litig.*, C.A. No. 3911-VCS, at 7-9, 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).

<sup>9</sup> 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).

## **CONCLUSION**

For all the aforementioned reasons, as well as those stated in Plaintiffs' initial request for an award of attorneys' fees filed on March 8, 2015, Plaintiffs respectfully request that the Court approve the Credit Suisse Settlement and the attorneys' fee request.

Dated: March 18, 2015

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**CERTIFICATE OF SERVICE**

I, Christine S. Azar, hereby certify that on this 18th day of March, 2015, I caused a copy of the foregoing Plaintiffs' Motion in Support of Credit Suisse Settlement and Supplemental Request for Attorneys' Fees to be served via Lexis/Nexis File & Serve upon the following attorneys of record:

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