COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Michael Hanrahan, Esquire
Paul A. Fioravanti, Jr., Esquire
Prickett, Jones & Elliott, P.A.
1310 N. King Street
Wilmington, DE 19801

Lewis H. Lazarus, Esquire
Joseph R. Slights, III, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801

Lisa A. Schmidt, Esquire
Srinivas M. Raju, Esquire
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, DE 19801

Seth D. Rigrodsky, Esquire
Brian D. Long, Esquire
Rigrodsky & Long, P.A.
2 Righter Parkway, Suite 120
Wilmington, DE 19803

Collins J. Seitz, Jr., Esquire
Bradley R. Aronstam, Esquire
Seitz Ross Aronstam & Moritz LLP
100 S. West Street, Suite 400
Wilmington, DE 19801

M. Duncan Grant, Esquire
James G. McMillan, III, Esquire
Pepper Hamilton LLP
1313 N. Market Street, Suite 5100
Wilmington, DE 19801

Re: *In re McMoRan Exploration Co. Stockholder Litigation*
Consolidated C.A. No. 8132-VCN
Date Submitted: October 11, 2013

Dear Counsel:

The Plaintiffs, former shareholders of McMoRan Exploration Company ("MMR"), challenged its acquisition by Defendant Freeport-McMoRan Copper & Gold, Inc. ("Freeport"). A settlement was negotiated and approved.[1] The only remaining issue is an award to Plaintiffs of their attorneys' fees and expenses.

Although numerous factors inform the Court's exercise of discretion in awarding attorneys' fees,[2] the benefit achieved by the Plaintiffs for the shareholder class[3] is the most significant. The parties debate the value of the benefits achieved and, in some instances, whether they are fairly and fully attributable to the efforts of Plaintiffs' attorneys.[4]

* * *

Before turning to an assessment of the benefits obtained, the Court first considers those other factors that have been identified to guide its exercise of

[1] Tr. of Settlement H'rg, C.A. No. 8132-VCN (Del. Ch. Oct. 11, 2013) ("Tr.").
[2] *See, e.g.*, *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).
[3] A class consisting generally of former shareholders, except for Defendants and their affiliates, was certified. Tr. at 112.
[4] The Plaintiffs seek an award of $6 million. In contrast, the Defendants acknowledge that an award of $1.5 million might be appropriate. Tr. at 99.

discretion in awarding attorneys' fees.[5] A very brief review will suffice.

Plaintiffs' counsel are well-qualified and experienced in matters of this nature. The fee was contingent. This case was somewhat more complex than many merger cases because of the multiple transactions and the atypical consideration. The number of different benefits achieved serves to highlight the relative complexity of the settlement negotiations. The litigation moved in fits and starts through no fault of Plaintiffs' counsel; the Defendants encountered several obstacles to a prompt conclusion of their proposed transactions. Nonetheless, Plaintiffs' counsel committed significant time and effort to the cause; of course, some of that effort did not generate positive results.[6]

The work, much of it performed on an expedited schedule, included a dozen depositions, several motions, briefing of a preliminary injunction that was never fully pursued, and a number of conferences with the Court. Briefing was complicated by a number of proxy revisions. The Plaintiffs devoted roughly

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[5] *See, e.g.*, *Sugarland*, 420 A.2d at 149.
[6] In particular, the questions about price and process were not resolved to the benefit of the class.

5,700 hours of attorney time to the effort.[7] The Plaintiffs incurred expenses of almost $320,000, including more than $200,000 in expert fees.

* * *

The Plaintiffs did not cause or obtain an increase in the nominal consideration received by class members: $14.75 per share and 1.15 units of the Gulf Coast Ultra Deep Royalty Trust (the "Trust") which held a royalty interest related to production from some of MMR's then-existing exploration properties.

The Plaintiffs decided not to pursue their price and process claims. Instead, they secured additional disclosures,[8] obtained a contractual commitment that, in general terms, required the use of best efforts to obtain a listing of the Trust units on a recognized and accepted national market.[9] The Plaintiffs also take credit for revisions in the Trust agreement governing the Trust units and for restricting the scope of a proposed amendment of MMR's certificate so that Freeport would only be exempt from a supermajority vote requirement with respect to its merger with

[7] Of these hours, less than 60 hours were expended after the memorandum of understanding. Davenport Decl., Ex. T. At Plaintiffs' counsel's regular hourly rates, the pre-memorandum of understanding lodestar would be almost $2,750,000.
[8] In addition to disclosures set forth in the settlement agreement, the Plaintiffs also claim credit for other disclosures before the settlement.
[9] The Plaintiffs assert that the listing provision was worth $50 million to the class or roughly $0.42 per MMR share. The Defendants maintain that they always intended to obtain the listing.

MMR. Thus, if the merger did not occur, Freeport would return to being subject to the supermajority vote requirement.

* * *

The fee debate centers on the listing provision. Although Defendants contend that listing was always intended, the listing provision initially in the merger agreement was waived, and the class had no contractual right to insist upon listing efforts. The Defendants may be correct that listing could not have been achieved within the timeframe in which the transaction would close and thus the waiver was necessary to facilitate the transaction. Nevertheless, without the efforts of Plaintiffs, it appears that there would not have been any contractual protection. That contractual protection, above a mere intent, provided value to the shareholders. The difficulty is quantifying that value.

Listing generally increases liquidity. Listing on a "better" exchange will generally increase liquidity even further. Liquidity generally increases the value of an investment; conversely, the lack of liquidity is generally viewed as depressing the value of an investment. Even if these generalizations are applicable, the question of—to what extent would liquidity of the Trust units increase value—remains.

The parties each retained an expert to assist in this analytical process. Unfortunately, the methodology of each expert in these circumstances does not offer much comfort. The points which they make are valid to an extent, and, as one would expect, would lead the Court to different conclusions. Ultimately, however, neither provides a reliable quantification.[10]

The Defendants' expert relied upon an event study analysis. When the contractual changes requiring best efforts to obtain a listing were announced, MMR's stock price did not increase. Similarly, when the listing provision was removed from the merger agreement, the price of MMR stock did not decline.

It is argued that the market reaction (or non-reaction) shows the absence of value that may fairly be attributed to a contractual listing requirement. That is a plausible reading of investor response. Unfortunately, it is not the only possibility. First, it is not clear that the market was aware (as least within a short time period)

[10] It is not the Court's purpose to criticize the experts' efforts. Valuing the listing of the Trust units is a daunting task. Each expert necessarily relied upon implicit assumptions, the accuracy of which cannot be tested completely. The Court considered whether holding a formal evidentiary hearing would be helpful and concluded that it would not be helpful. Perhaps not coincidentally, no party insisted upon an evidentiary hearing.

of the listing changes. Widespread and accurate disclosure of the event is important if one is to assess the validity of an event study. Second, the event study is based on MMR stock (and not the pricing of the Trust units), and MMR disseminated a substantial amount of information, such as financial reports, updates on production from its Ultra Deep properties, and its production results more broadly. It is difficult to discern which, if any, of these sources affected price. These concerns substantially impair the conclusions of the Defendants' expert.

In the period leading up to the merger, MMR stock was trading above the $14.75 per share price. One could attribute the excess as the market's effort to value the Trust unit interests that would accompany merger proceeds.[11] Plaintiffs' expert argues that the liquidity benefit which the Trust units received is the value that the listing requirement provided. To calculate the liquidity benefit, he looked at a variety of studies examining how much of a liquidity discount is present when a company moves from a more liquid market to a less liquid market. Plaintiffs' expert determined that 20% was an acceptable midpoint in the range of possible

[11] It is also possible that the market had some expectation of a price increase.

values and thus Plaintiffs' counsel generated a benefit per Trust unit of 20 percent of its value.

Plaintiffs' expert's methods are unreliable for several reasons. First, one cannot be sure of the market on which the Trust units will eventually be listed. Second, it is difficult to assess whether the market generally otherwise accounted for this uncertainty and how the fact that MMR was listed on a national market was factored into the analysis. Third, the discount used by Plaintiffs' expert depended upon studies which involved circumstances different from those encountered by the Trust units. Fourth, although it may be an accurate assumption, it is not inevitable that a liquidity premium and an illiquidity discount (as based on mirror image movements from one market to another) would be equal.

In sum, the Court is convinced that listing the Trust units on a national market would enhance value; it is not convinced that the $50 million value sponsored by the Plaintiffs is an accurate estimate of the benefit provided. Indeed, attributing any specific value is too speculative; the more likely value would be substantially less than the projection of the Plaintiffs' expert.

Despite the absence of a reliable quantification of this benefit for the class members, it, nonetheless, warrants a fee in the range of $400,000 to $600,000.

* * *

Plaintiffs claim credit for a series of additional disclosures benefiting the class.[12] The additional disclosures obtained by Plaintiffs addressed a range of topics and required multiple pages.[13] Among them were: Freeport's retention of a conflicted advisor which had also advised MMR; the impact of a finite term of the Trust; the reasons behind, and the consequences of, the waiver of the national exchange listing for the Trust units and how best efforts to pursue that listing

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[12] The Defendants contend that Plaintiffs waived any entitlement to fees related to pre-settlement disclosures. The settlement agreement incorporated the settlement terms listed on "Exhibit 1." Stipulation of Settlement (the "Stipulation") ¶ 1. Exhibit 1 includes all disclosures agreed to by the parties and does not list the pre-settlement disclosures. At paragraph 11, the parties agreed that "[a]s subject to the terms and conditions of this Stipulation . . . ," a fee application could be made. In paragraph 13, the parties agree that "[e]xcept as provided herein, the [Defendants] shall bear no other expenses . . ."

Defendants argue that these provisions coalesced to preclude Plaintiffs from seeking a fee for any disclosures not set forth in the Stipulation of Settlement. There is no affirmative waiver of an entitlement to fees; pre-settlement accomplishments are attributable to the Plaintiffs unless there is a showing to the contrary. *See Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1015-16 (Del. 2007). Fees are routinely not discussed before the settlement. In short, if the Defendants wanted to preclude an application for fees for pre-settlement accomplishments by the Plaintiffs, they should have done so expressly. The fees awarded for disclosures obtained by the Plaintiffs will include disclosures made before the settlement. No other reason for not including them has been offered.

[13] No effort is made to list all additional disclosures comprehensively. *See* Stipulation, Ex. A, Ex. 1; Davenport Decl. Exs. C, G.

would be pursued; the number of Trust units that Freeport would have because of its preferred stock holdings; the potential dilution related to, among other matters, convertible securities; the financial advisor's use of a methodology different from MMR's in valuing the Trust units, together with a more complete disclosure of the financial efforts of both financial advisors; a description of the voting of the continuing directors; the formation of the Special Committee and its efforts; the establishment of the Trust; and the approval of (and reasons for) the certificate revision. These disclosures are numerous and some are more useful than others. None is of great value, but they collectively supported the settlement and warrant a fee in the range of fees frequently found in disclosure cases. For the disclosures achieving these therapeutic benefits for the shareholders, a fee is justified in the range of $400,000 to $850,000.

* * *

The Company's charter had a supermajority vote provision which applied to Freeport (which with its affiliates and Plains Exploration held roughly 37 percent of the Company's voting power). In the context of this transaction, this provision was deleted for purposes of the merger vote; however, the chosen language deleting it exempted Freeport on an on-going basis without being limited to the merger. The Plaintiffs secured a revision that limited Freeport's exemption from the supermajority provision to just this merger. In Plaintiffs' view, if the merger did not go through, Freeport would revert to having to deal with the supermajority provision and could not force through a less favorable transaction.

The value of preserving the supermajority provision in this instance is debated. Although a provision of that nature may involve a substantial fee, the merger was likely to be approved and, thus, the potential benefits from preserving the supermajority provision were limited. Balancing—however uncertain—the value of the supermajority protection against the speculative nature of any harm that might result (an unlikely event because of the merger's likely approval) is necessary. Under these circumstances, the Plaintiffs' efforts in preserving the supermajority feature supports a fee in the range of $250,000 to $400,000.

* * *

The Plaintiffs also obtained revisions to the Trust agreement governing the Trust units. In particular, the settlement provides that Freeport and its affiliates may not vote on a matter presenting a material conflict between Freeport and the other unit holders.[14] The class was further protected by a restriction on changes to the Trust agreement that are adverse to them. A voting requirement for a majority of the units not held by Freeport and its affiliates is a significant protection for the shareholder class.[15] Unlike the supermajority vote provision related to MMR, this provision will benefit the holders of the Trust units well into the future, which materially enhanced its relative value. In addition, Freeport, as part of the settlement, committed to make an interest-free, unsecured loan to the trust, if its annual commitment of $350,000 turns out not to have been sufficient. That financial resource for the trust is valuable, though its value is difficult to ascertain because it is difficult to predict how likely it is that those funds will be needed. These class benefits merit a fee in the range of $400,000 to $750,000.

[14] The Trust units are to exist for a finite period of 20 years.
[15] It is somewhat analogous to a majority of the minority provision which, in certain circumstances, can justify a sizeable fee award.

* * *

Quantifying the benefits achieved by the Plaintiffs is difficult. No increase in the merger consideration was obtained. Preservation of a supermajority provision may bring value, but, here, the likelihood of real benefit was reduced because it was likely that the merger would be approved. Listing (or listing on a "better" market) will enhance liquidity, and liquidity is viewed as value enhancing. Perhaps the listing would have been sought without the efforts of Plaintiffs but a contractual obligation—even if measured by best efforts—is an improvement over a mere intention. Yet, there is no reliable way to value listing of these trust units.

If the minimum numbers of the various ranges and the maximum numbers of the various ranges as set forth above are aggregated, a fee range (without consideration of expenses) of $1.45 million to $2.6 million is obtained.[16]

Awarding fees is rarely a truly precise endeavor, and this application is more challenging than many. Ultimately, this is a matter committed to the Court's discretion. After considering the foregoing, the Court concludes that the

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[16] Adding these "fees" arguably attributable to each collection of benefits may be a rational exercise, but one wonders if embedded in such "fees" is the cost of opening the file and getting started, something of a mobilization expense, that should not be double counted.

appropriate award of fees and expenses for the efforts of Plaintiffs' attorneys is $2.4 million.

An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K