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OF THE
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Re: *In re Freeport-McMoRan Copper & Gold Inc. Derivative Litigation*
Consolidated C.A. No. 8145-VCN
Date Submitted: February 10, 2013

Dear Counsel:

The Proposed Intervenors[1] seek to intervene in this action and ask the Court to certify an interlocutory appeal of its decision[2] establishing a plaintiffs'

[1] The Proposed Intervenors are Amalgamated Bank, as 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.

management structure for this derivative action challenging Freeport-McMoRan Copper & Gold Inc.'s ("Freeport")[3] acquisition of the balance of McMoRan Exploration Co. ("MMR") and Plains Exploration & Production Company ("Plains Exploration").[4] The Proposed Intervenors have not filed a substantive derivative complaint on behalf of Freeport because they have elected to pursue a books and records inspection under 8 *Del. C.* § 220 before they decide to file a derivative action and before they decide what to assert in any derivative complaint.[5]

The transactions at issue are scheduled to close fairly soon, perhaps as early as seven weeks from now. If the Lead Plaintiffs fail in their derivative action, the Proposed Intervenors are right to be concerned about the possible collateral estoppel effects on any action they might choose to bring. As this Court has observed:

> A growing body of precedent holds that a Rule 23.1 dismissal has preclusive effect on other derivative complaints. These cases reason that because a stockholder plaintiff in a derivative action sues in the

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[2] *Jacksonville Police & Fire Pension Fund v. Moffett*, 2013 WL 297958 (Del. Ch. Jan. 25, 2013). The order implementing that letter opinion is the subject of the Proposed Intervenors' application for certification.

[3] The Proposed Intervenors are Freeport stockholders.

[4] *In re McMoRan Exploration Co. S'holder Litig.*, Consol. C.A. No. 8132-VCN; *In re Plains Exploration & Prod. Co. S'holder Litig.*, Consol. C.A. No. 8090-VCN.

[5] Although not parties, the Proposed Intervenors participated with both written and oral arguments during the process by which the Court selected Lead Plaintiffs and Lead Counsel.

> name of the corporation, all other stockholder plaintiffs are in privity with the plaintiff in the dismissed derivative action.[6]

It is not necessary to resolve this question; it suffices that the Proposed Intervenors have cause for concern.

The Court concluded that the most effective way to manage the three related cases was to place them on substantially the same schedule. Although far from perfect, that schedule would largely avoid repetitive or duplicative discovery. At the heart of each of the cases is the fairness, essentially questions of price and process, of the transactions to the three sets of shareholders. Even though the shareholders may come from different perspectives, much of the discovery would likely overlap. Having the cases proceed on approximately the same timeline will reduce the burdens on the Defendants and should generally be less costly for all.[7]

If the Court, in effect, held up this derivative action to allow the Proposed Intervenors to pursue their books and records inspection and then to decide whether to file a derivative action, it would have delayed litigation of this action by the Lead Plaintiffs who say they are ready to go and who do not see the need for the

[6] *La. Mun. & Police Empls. Ret. Sys. v. Pyott*, 46 A.3d 313, 323 (Del. Ch. 2012).
[7] The three cases, of course, are not the same. For example, the Lead Plaintiffs in this action will have to address questions of demand excusal on a compressed schedule. To the extent that the Proposed Intervenors suggest that the Court has dispensed with the necessary Rule 23.1 inquiry, they are mistaken.

additional information that might be acquired through a books and records inspection. Also, the remedial options available from a Freeport derivative action might be more narrow or more difficult to obtain after the challenged transactions close.

Lead Plaintiffs oppose both the motion to intervene and the application to certify an interlocutory appeal. For the reasons that follow, both will be granted.

INTERVENTION

1. Permissive Intervention under Court of Chancery Rule 24(b)

Court of Chancery Rule 24(b) governs permissive intervention:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

The Proposed Intervenors are exploring whether to file a derivative action which would question the conduct of Freeport's directors in pursuing the MMR and Plains Exploration acquisitions. Their claims on behalf of Freeport would likely relate closely to the fiduciary duty claims asserted in this action and, thus, their efforts would share multiple questions of law and fact in common with those of this action.[8]

[8] The Proposed Intervenors' primary reason for seeking to intervene—*i.e.*, to appeal the Court's order on Plaintiffs' organizational structure—is clearly identified.

An application for permissive intervention is subject to the Court's discretion. The Court is expressly directed to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."[9] But for the questions of delay and prejudice, intervention clearly would be appropriate. The Proposed Intervenors desire to pursue substantially the same claims, and with their participation, Freeport directly, and its shareholders derivatively, could benefit.

There is no reason to believe that allowing intervention will delay this action or prejudice the current parties.[10] The Court will not stay or delay the course of this derivative action at this time. The Proposed Intervenors believe that a books and records effort should be pursued, and the Court, at least at this point, is not inclined, even if it could, to put a stop to that effort. The books and records initiative will not interfere with the scheduling for this action, and, thus, allowing the Proposed Intervenors to intervene will carry no adverse consequences for the existing parties as they currently pursue derivative claims. The Court cannot address at this time what it would do if the Proposed Intervenors' books and records effort generates

[9] Ct. Ch. R. 23(b).
[10] Permissive intervention under Court of Chancery Rule 24(b) is regularly denied if intervention would unduly delay the action and cause prejudice to the existing parties. *See, e.g., Marie Raymond Revocable Trust v. Mat Five LLC*, 980 A.2d 388, 399 (Del. Ch. 2008).

significant and, at the time, new information regarding the conduct of Freeport's directors.

Thus, the Proposed Intervenors have satisfied the requirements of Rule 24(b).[11]

2. Court of Chancery Rule 24(c) and the Lack of a Proposed Complaint

The Proposed Intervenors did not file a proposed derivative complaint. This failure, according to the Lead Plaintiffs, ignores the mandate of Rule 24(c), which provides in part: "A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." The absence of a proposed pleading generally leads to the denial of the motion to intervene.[12]

The Proposed Intervenors contend that they have not filed a derivative complaint because, without first inspecting Freeport's books and records, they are

[11] The Court does not address the question of whether the Proposed Intervenors are also entitled to intervention of right under Rule 24(a). The primary obstacle to an application under that rule is whether their "interest is adequately represented by existing parties." Ct. Ch. R. 24(a)(2). That question turns largely on the disagreement between the Lead Plaintiffs and the Proposed Intervenors over undertaking a books and records inspection before bringing derivative claims.

[12] *See, e.g.*, *IMO Estate of Eaton*, 2012 WL 5963509, at *2 (Del. Ch. Nov. 21, 2012) ("The motion plainly is deficient under Rule 24(c) because it is not accompanied by a pleading setting forth the claim or defense Applicants seek to advance.").

reluctant to draft a comprehensive pleading. The real dispute—at this stage of this action—is not framed by the derivative complaint. Instead, the pressing topics involve the Plaintiffs' organizational structure and, as argued by the Proposed Intervenors, whether it is yet prudent to pursue a derivative action without the benefit of reviewing Freeport's books and records. The application filed by the Proposed Intervenors regarding the establishment of Plaintiffs' structure meets—again, for this stage of the proceedings—the objectives of Rule 24(c).[13]

In summary, the Proposed Intervenors' motion to intervene will be granted.

CERTIFICATION OF INTERLOCUTORY APPEAL

A Delaware trial court's certification of an interlocutory appeal is governed by Supreme Court Rule 42(b), which requires that the order from which appeal is sought: (1) establish a legal right; (2) determine a substantial issue; and (3) satisfy one of several other criteria, including whether decisions of the trial courts are in conflict or whether review may "otherwise serve considerations of justice."[14]

[13] The Lead Plaintiffs also note that, without a proposed complaint, there is no way to assure that the Proposed Intervenors share common questions of law and fact with the Lead Plaintiffs. The papers filed by the Proposed Intervenors, *see* Letter of Michael J. Barry, Esq., dated January 18, 2013; Br. in Supp. of Application for Certification of Interlocutory Appeal; Proposed Intervenors' Br. in Supp. of Mot. to Intervene in Order to Appeal Order of Consolidation & Appointment of Lead Pls. & Lead Counsel, clearly share the same focus as the Lead Plaintiffs' filings.

[14] Supr. Ct. R. 42(b)(v).

Certification is appropriate "only in extraordinary or exceptional circumstances."[15] If an interlocutory appeal "is unlikely to terminate the litigation," which this proposed interlocutory appeal would not, the moving party must demonstrate that appellate consideration at that point in the process would "serve the administration of justice."[16]

1. Establish a Legal Right

Lead Plaintiffs urge that the order for which review is sought did not establish a legal right within the meaning of Supreme Court Rule 42(b). Here, the Court did not address any substantive issues and did not directly resolve any rights of the parties seeking to appeal.[17] The Proposed Intervenors suggest that the Court limited their rights to pursue (or perhaps punished them as a result of their decision to pursue) a books and records inspection. The Court did not directly interfere with the Proposed Intervenors' right to invoke 8 *Del. C.* § 220. Its decision, however, may have collateral effects that impose a cost on the Proposed Intervenors for their strategic decision.

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[15] *In re Cogent, Inc. S'holder Litig.*, 2010 WL 4146179, at *1 (Del. Ch. Oct. 15, 2010).
[16] *Mich II Hldgs. LLC v. Schron*, 2012 WL 3224351, at *6 (Del. Ch. Aug. 7, 2012).
[17] *See Israel Disc. Bank of N.Y. v. First State Depository Co., LLC*, 2012 WL 5359296, at *3 (Del. Ch. Oct. 31, 2012).

With the Plaintiffs' organizational structure established by the order, the options (or opportunities) for the Proposed Intervenors (and their counsel) are necessarily limited. The order, as a practical matter, may very well have the effect of denying the Proposed Intervenors (and their counsel) a meaningful and material role in Freeport's derivative litigation. That, in effect, establishes a legal right (or the lack of one) that has consequences not only for the Proposed Intervenors, but also for Freeport because the Proposed Intervenors and their highly competent counsel will not likely be at the front of the efforts to protect Freeport's rights.

The need for establishing an orderly plaintiffs' management structure for cases of this nature does not fit well within procedural rules that were established for dealing with more common conflicts. The interests of the Proposed Intervenors will not have the benefit or protection of appellate review, unless a somewhat more flexible approach to certification is taken. The order did not terminate the litigation, but it restricted (if it did not eliminate) the Proposed Intervenors' interests in pursuing the derivative litigation.

The Proposed Intervenors, thus, have met the "legal right" portion of Supreme Court Rule 42(b).[18]

2. Determine a Substantial Issue

The next factor in ascertaining the propriety of an interlocutory appeal is whether the challenged order determined a substantial issue. A substantial issue has been decided by the trial court if it resolved "a main question of law which relates to the merits of the case."[19] The Court did not resolve, or even consider, a question of law tied to the merits of the case. Instead, its decision has implications regarding the extensive jurisprudence urging the use of the "tools at hand" before a derivative action is commenced.[20] The Proposed Intervenors followed guidance offered by the caselaw and took advantage of the inspection rights afforded by Section 220. The caselaw, of course, does not mandate that a potential plaintiff employ Section 220 or direct the potential plaintiff to ignore the context—as in this case where time may be of the essence—which may inform strategic analysis.

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[18] Because the period until the MMR and Plains Exploration transactions are likely to close is somewhat longer than typical and because it may be that the derivative claims could be effectively asserted after the potential closings, there is at least a reasonable possibility of adequate time for interlocutory appellate review. In many cases in which the Court establishes a plaintiffs' management structure, interlocutory appeal, because of time constraints, is difficult to pursue. In this case, the time limits, although tight, are not inherently preclusive.

[19] *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *1 (Del. Ch. July 22, 2008).

[20] *See, e.g.*, *South v. Baker*, 2012 WL 6114952, at *1 n.1 (Del. Ch. Sept. 25, 2012).

The tension is between the usefulness of a books and records inspection and the apparent need to move the substantive litigation forward in an expedited manner. The use of Section 220 is not limited to matters in the nature of a *Caremark* dispute.[21] The question is whether the schedule for the most efficient processing of the derivative claims allows time, in these specific circumstances, to take the route of a books and records inspection before moving forward with the substantive issues. There is no clear-cut, bright-line test to apply. Perhaps it is one of discretion and judgment.

Nevertheless, the question of when must (or when should) a potential derivative plaintiff first undertake a books and records inspection is an important one. With its decision not to delay this derivative action, the Court necessarily, at least for cases whose facts are similar to the facts in this case, has established a disincentive to use the books and records inspection process. How derivative cases which may have the need for expedited treatment are interfaced with books and records inspections constitutes a substantial question of corporate law and, thus, its decision, at least in these circumstances, constitutes the resolution of a substantial issue.

[21] *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996).

3. Additional Criteria

A party seeking interlocutory appeal must satisfy one of the other factors prescribed by Supreme Court Rule 42(b). One of those factors is considerations of justice. As set forth above, the coalescence of various important policies render the decision which the Proposed Intervenors seek to challenge one that implicates considerations of justice. These factors include case management; designation of plaintiffs' organizational structure; how to move forward with a derivative action which does not involve, at least for present, a shareholder vote as compared to the related direct shareholder actions; an action which may be mooted if the Plains Exploration and MMR shareholders do not approve their respective transaction; when a books and records inspection is a necessary or prudent prerequisite to the filing of a derivative action; and how a disappointed party can ever obtain effective appellate review of the determination of matters such as these. These factors, collectively, elicit important questions for the considerations of justice.[22] Perhaps

[22] Ultimately, the Lead Plaintiffs' argument boils down to a perception (which, because the question is not free from doubt, may be correct) that interlocutory appeal of the order establishing plaintiffs' management structure and the process interfacing various challenges to potential transactions, and the relationship between efforts under Section 220 and the filing and pursuit of derivative actions, may not be subject to timely appellate review.

these are simply matters to be resolved through the trial court's exercise of discretion, but that answer is not abundantly clear.

Accordingly, the Proposed Intervenors have satisfied the requirements of Supreme Court Rule 42(b).

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For the foregoing reasons, orders will be entered granting Proposed Intervenors the right to intervene and certifying their interlocutory appeal.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Jessica Zeldin, Esquire
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