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Case No. 6949-CS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE EL PASO CORPORATION SHAREHOLDER LITIGATION	C.A. No. 6949-CS

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE EXPERT REPORT OF KENNETH M. LEHN

Although plaintiffs received the Expert Report of Kenneth M. Lehn on January 23, 2012, the date scheduled for the delivery of defendants' expert report, and although plaintiffs now have 9 days to prepare for Lehn's deposition, plaintiffs have brought this tactical motion to strike Lehn's report.[1] Plaintiffs have not shown any prejudice resulting from defendants' decision to change their rebuttal expert in the week before their expert report was due. Indeed, in light of the Court's adjournment of the preliminary injunction hearing, plaintiffs will have more time to respond to Lehn's report than defendants had to respond to the report of plaintiffs' expert, David Clarke. Nonetheless, through this motion, plaintiffs hope to avoid having to respond to the substance of Lehn's analysis, which demonstrates serious flaws in Clarke's work. Plaintiffs' motion should be denied.

1. On December 11, 2011, plaintiffs served their expert disclosure reserving the right to offer the opinions of David G. Clarke in support of their preliminary injunction motion. Ex. A. Plaintiffs disclosed that Clarke might address "economic and financial considerations concerning the proposed acquisition of El Paso Corporation," including the analysis conducted by the various investment banks advising El Paso and

[1] Defendants understand that plaintiffs intend to take Lehn's deposition on February 1, 2012.

Kinder Morgan, "the value of El Paso and certain of its assets," the adequacy of the merger consideration, the effect of "certain deal protection devices," and the sufficiency of the disclosures to El Paso and Kinder Morgan shareholders. *Id*. This broad language offered little guidance regarding the subject matter of Clarke's report, and defendants, in attempting to identify an appropriate rebuttal expert, were uncertain what Clarke might address.

2. Defendants looked to the complaint to gauge what subjects Clarke might cover. The complaint asserts that the merger consideration is insufficient because of certain dynamics in the energy industry. Verified Consolidated Class Action Complaint, ¶¶ 85-94. In particular, plaintiffs allege that "[t]he agreed-upon consideration is inadequate in light of: (a) the surge in demand for pipelines, (b) the pricing power Kinder Morgan will garner as a result of the Proposed Transaction, (c) the anticipated synergies flowing from the Proposed Transaction, (d) the premiums paid in precedent energy deals, and (e) the uncertain value of the Kinder Morgan equity and warrants being offered to shareholders." *Id.* at ¶ 85. Defendants surmised that Clarke's report would most likely focus on conditions in the energy industry and their effect on El Paso, Kinder Morgan, and the combined entity post-merger. Accordingly, on December 21, 2011, the deadline set by the scheduling order, defendants disclosed their intention to rely upon the expert opinions of H. Stephen Grace, who is particularly knowledgeable about the energy industry, to rebut Clarke's opinions. Ex. B.

3. At midnight on January 13, 2012, plaintiffs submitted the Declaration of David G. Clarke in Support of Co-Lead Plaintiffs' Motion for Preliminary

Injunction (the "Clarke Declaration"). The focus of Clarke's report is the calculation of certain discounted cash flow analyses by Morgan Stanley and Goldman Sachs. Clarke Declaration 8-30. As set forth in the El Paso Defendants' Answering Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Answering Brief"), Clarke's claims are not appropriate on a preliminary injunction motion and are erroneous on their face. Answering Brief 55-59. Nevertheless, defendants thought it appropriate to submit a rebuttal report from an expert who specializes in the sorts of valuation issues addressed by Clarke. On January 17, 2012, four days after receiving the Clarke Declaration, defendants retained Lehn as a rebuttal expert. The next day, January 18, 2012, defendants served an amended expert disclosure identifying Lehn as their rebuttal expert. Ex. C. Plaintiffs registered their objection on a teleconference among the parties and in a letter, Ex. D, but did not seek any judicial relief at that time. On January 23, 2012, defendants served plaintiffs with the Lehn Report. Then, having read the Lehn Report, plaintiffs filed the instant motion to strike.

4. Plaintiffs have suffered no prejudice as a result of defendants' retention of a new expert after the date for expert disclosure under the scheduling order. Plaintiffs do not suggest that their opening brief or the Clarke Declaration would have been any different if they had known that the rebuttal expert would be named Lehn rather than Grace. Plaintiffs have no less time to review the rebuttal report, no less time to depose the expert, and no less time to prepare their reply brief. In fact, they will have more time than they would have expected because the preliminary injunction hearing has been moved, at plaintiffs' request, from February 1 to February 9. Plaintiffs will now

have nine days to prepare for their deposition of Lehn, in contrast to the seven days that defendants had before they deposed Clarke. Plaintiffs claim no hardship here, because there is none.

5. Instead, plaintiffs assert that they "can only infer that Mr. Grace in fact agreed with the sum and substance of Mr. Clarke's expert opinion and that Defendants had to scramble to replace Mr. Grace with an expert who would be willing to dispute Mr. Clarke's opinions." Plaintiffs' Motion to Strike Defendants' Expert Report of Kenneth M. Lehn at ¶ 6. Plaintiffs' inference is wrong. Defendants replaced Grace with Lehn because, as explained above, they believed that the Court would be better served by hearing from a rebuttal expert whose expertise is particularly focused on the valuation issues addressed by Clarke.

WHEREFORE, for the foregoing reasons, defendants respectfully request that the Court deny plaintiffs' motion to strike the Lehn Report.

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Dated: January 25, 2012

CERTIFICATE OF SERVICE

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