IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE EL PASO CORPORATION SHAREHOLDER LITIGATION	))	CONSOLIDATED C.A. No. 6949-CS
	:	REDACTED PUBLIC VERSION FILED JANUARY 26, 2012

GOLDMAN SACHS'S ANSWERING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs seek to enjoin the merger (the "Merger") of Kinder Morgan, Inc. ("KMI") and El Paso Corporation ("El Paso"), alleging, among other things, that The Goldman Sachs Group, Inc. and Goldman, Sachs & Co. ("Goldman Sachs") aided and abetted an alleged breach of fiduciary duty by the members of the El Paso Board of Directors (the "El Paso Board") in the course of providing financial advisory services in connection with the Board's consideration of a planned spin-off of certain El Paso assets (the "Spin-Off") and an ensuing unsolicited merger proposal from KMI.[1] The crux of the complaint's allegations involving Goldman Sachs—and the sum total of the arguments Plaintiffs direct at Goldman Sachs in their opening brief—is that Goldman Sachs's advice to El Paso *must have been* tainted because a separate division administers funds which own a 19.1% interest in KMI shares and has two representatives on the KMI board.

Plaintiffs' overall attempt to assail the Merger fails for the reasons set forth in the principal Defendants' opposition papers, which Goldman Sachs will not duplicate here. But to the extent Plaintiffs premise this motion on allegations relating to Goldman Sachs, they are a headline without a story, and for that reason, Goldman Sachs respectfully submits this separate brief. The potential conflict caused by the KMI investment was known to El Paso's management and the El Paso Board from the outset

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[1] The Goldman Sachs Group, Inc. is a bank holding company and the publicly held parent company of the Goldman Sachs organization, which includes Goldman, Sachs & Co. At no time has The Goldman Sachs Group, Inc. ever provided investment banking services to El Paso, it is not a proper defendant, and it will move to dismiss in due course.

of their consideration of the KMI proposal. They chose to include Goldman Sachs, El Paso's long-time financial advisor that was in the midst of advising on an announced spin-off transaction, with their eyes wide open to the conflict issue and only after taking commensurate precautions to limit Goldman Sachs's role in the transaction. The Goldman Sachs bankers, for their part, abided by the ground rules established by El Paso—some of which Goldman Sachs had also suggested—and concentrated on providing El Paso with their best advice. And Goldman Sachs, in order to further protect El Paso, required the two Goldman Sachs representatives on the KMI board to recuse themselves from any consideration of KMI's proposal for El Paso.

Plaintiffs' brief, like their Complaint, is an exercise in assumption and innuendo. Every piece of Goldman Sachs's advice is painted in the most dastardly terms, allegedly motivated by rapacious and crude objectives. But Plaintiffs do not confront an inconvenient fact that undermines all their rhetoric: every bit of Goldman Sachs's advice was being vetted by a sophisticated independent board, with whom Goldman Sachs had an eight-year relationship, and by an accomplished rival, Morgan Stanley & Co. LLC ("Morgan Stanley"), which had been retained by El Paso as a second advisor, and ultimately became the sole advisor as to the KMI proposal. Indeed, Plaintiffs have failed to identify any specific way in which the El Paso Board's performance of its duties was compromised by the ownership interest in KMI of the funds managed by Goldman Sachs. Instead, the record demonstrates that El Paso was attentive to the potential conflict in considering Goldman Sachs's advice, engaging Morgan Stanley within 48 hours of

receiving the KMI proposal, and, once that proposal looked like it might turn hostile, limiting Goldman Sachs's role to continuing to analyze the spin-off transaction that Goldman Sachs had been working on since March 2011.

In sum, the behavior of Goldman Sachs and El Paso does not give rise to an "aiding and abetting" claim against Goldman Sachs or otherwise run afoul of Delaware law, which does not preclude an advisor from acting for a party because of a potential conflict but instead requires the conflict to be disclosed and dealt with sensibly. Any conflict that may have arisen as a result of Goldman Sachs-managed funds' ownership interest in KMI was not something sought by either El Paso or Goldman Sachs, but was instead visited upon them by the fortuity of the unsolicited KMI proposal. Both parties took reasonable measures to ensure that the potential conflict did not compromise the El Paso Board's consideration of the KMI proposal, and nothing more was required under Delaware law.

STATEMENT OF FACTS

A. Goldman Sachs's Historical Relationships with El Paso and KMI

El Paso has long been an investment banking client of Goldman Sachs. (Daniel Dep. at 23-24; Vagt Dep. at 20-21.)[2] Stephen Daniel, a managing director and

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[2] All depositions taken in connection with this matter have been lodged by counsel for El Paso. Transcripts of depositions are cited herein as "[Witness] Dep." Plaintiffs' Brief in Support of Plaintiffs' Motion for a Preliminary Injunction (Corrected Version), dated January 17, 2012, is cited as "Pl. Br." Exhibits filed in connection with and appended to Plaintiffs' brief are cited as "Pl. Br., Exh. [ ]." Finally, certain additional exhibits are annexed to the accompanying affidavits of Raymond J. DiCamillo, sworn to and subscribed on January 23, 2012, cited herein as

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partner of Goldman Sachs, is the investment banker principally responsible for Goldman Sachs's advisory relationship with El Paso and has been advising El Paso on behalf of Goldman Sachs since September 2003. (Daniel Dep. at 24-25.)

As for KMI, Goldman Sachs's Principal Investment Area ("GS PIA") manages several investment funds (hereinafter collectively referred to as "GS Funds")[3] that own approximately 19.1% of KMI stock.[4] In conjunction with this investment, GS Funds is entitled to select two members of KMI's Board of Directors (the "GS Funds Directors").[5] (KMI Proxy at 26-27.) Goldman Sachs has also, from time to time, performed investment banking work for KMI, including acting as lead underwriter in connection with its 2011 public offering. (Daniel Dep. at 12, 21-23.)

Mr. Daniel has never done any work for KMI and has never had any contact with Richard Kinder, the Chairman and CEO of KMI. (Daniel Dep. at 141.)

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"DiCamillo Aff., Exh. [ ]," and Laurie Schmidt, sworn to and subscribed on January 23, 2012, cited herein as "Schmidt Aff., Exh. [ ]."

3 The various funds and their respective interests are detailed in Amendment No. 2 to Form S-4 Registration Statement, Kinder Morgan, Inc., Jan. 3, 2012, 250-51 (lodged by counsel for El Paso, and referred to hereinafter and cited as "KMI Proxy").

4 Plaintiffs' argument assumes that this 19.1% is owned by Goldman Sachs directly and therefore overstates the impact that changes in the KMI offering price would have on Goldman Sachs. (*See* Pl. Br. at 2.)

5 The GS Funds' representatives on the KMI board are Henry Cornell and Kenneth Pontarelli.

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B. KMI's 2010 Offer for El Paso

In September 2010, KMI approached El Paso about a possible business combination between the two companies. (Daniel Dep. at 32; Sult Dep. at 36-37.) At that time, El Paso asked Goldman Sachs, and Mr. Daniel in particular, to provide financial advice on the potential transaction. (Daniel Dep. at 33.) Mr. Daniel immediately reminded El Paso about the GS Funds' ownership interest in KMI, and thereafter received clearance from both El Paso and Goldman Sachs's internal conflicts personnel to advise El Paso regarding KMI's approach. (Daniel Dep. at 34-36.) El Paso ultimately decided that the KMI proposal was not attractive and did not pursue it. (Daniel Dep. at 38-39; Kinder Dep. at 11-12; Sult Dep. at 45-51.)

C. March through August 2011: Goldman Sachs Advises El Paso Regarding a Proposed Spin-Off

In March 2011, Mr. Daniel and Goldman Sachs were asked by El Paso to consider the merits of a potential separation of El Paso's exploration and production portfolio ("E&P") from its pipeline business (the "Spin-Off"). (Daniel Dep. at 50.) On

March 30, 2011, Goldman Sachs made a presentation to the El Paso Board of Directors on this issue, and, following this meeting, the Board directed El Paso management to continue to consider the Spin-Off. (Vagt Dep. at 39-40.) Goldman Sachs was retained as a financial advisor in connection with the project.[6] (Daniel Dep. at 50-51, 69-70.)

On May 17, 2011, Goldman Sachs made a presentation to El Paso's board and management on the Spin-Off.[7] (Daniel Dep. at 76-78.) On May 24, 2011, the El Paso Board approved and publicly announced the plan to spin off its E&P business to the public by the close of 2011. (Vagt Dep. at 62-63; DiCamillo Aff., Exh. A, B.)

D. Goldman Sachs's Directors on the KMI Board Recuse Themselves from Discussions Regarding El Paso

On August 25, 2011, KMI board members received a set of presentation materials from KMI's management concerning a potential El Paso merger proposal, to be discussed at a board meeting the next day. (Kinder Dep. at 36.) This was the first communication to the KMI board members regarding the potential proposal. (Kinder Dep. at 36-37.) Before the August 26 KMI board meeting, Kenneth Pontarelli, one of the

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6 Pursuant to the engagement letter relating to the Spin-Off project, Goldman Sachs was to be paid $5 million, plus certain expenses, once the Spin-Off was publicly announced, and another $25 million upon completion of the Spin-Off. Additionally, both Goldman Sachs and El Paso estimated that Goldman Sachs would earn another $5 to $10 million dollars underwriting any debt financing connected with this transaction. (Daniel Dep. at 74-75; Sult Dep. at 101.) Although Goldman Sachs began providing financial advice to El Paso regarding the Spin-Off in March 2011, the engagement letter was not executed until August 25, 2011. (Daniel Dep. at 73-74; Pl. Br., Exh. 19.)

7 This presentation included an analysis of the enterprise value of the E&P segment, REDACTED

two GS Funds Directors, informed Richard Kinder, KMI's Chairman and CEO, that the GS Funds Directors would not participate in the August 26, 2011 board discussions regarding the El Paso merger proposal because of Goldman Sachs's investment banking relationship with El Paso. (Kinder Dep. at 73-74.) Accordingly, the GS Funds Directors did not attend this initial board discussion. (Kinder Dep. at 74.) Two days later, Mr. Pontarelli informed KMI's General Counsel that the GS Funds Directors would not be participating in any future board discussions concerning the El Paso proposal (Kinder Dep at 75.) Both GS Funds Directors maintained this recusal from board discussions of the El Paso proposal throughout KMI's consideration of the transaction. (Kinder Dep. at 73.)

Plaintiffs do not acknowledge anywhere in their brief that Goldman Sachs took this precaution. Nor do they point to any evidence that the GS Funds Directors violated their self-imposed abstention at any time.

E. August 30: KMI's Initial Bid for El Paso and Goldman Sachs's Engagement

On August 30, 2011, KMI sent a letter to the El Paso Board conveying an offer to acquire El Paso for $25.50 a share, payable 60% in cash and 40% in KMI stock. (Pl. Br., Exh. 20 at 1.) Later that day, Mr. Daniel was asked by El Paso senior management if Goldman Sachs could act for El Paso in connection with the proposal. (Daniel Dep. at 93-94.) Mr. Daniel contacted personnel at Goldman Sachs responsible for addressing potential conflicts ("GS Conflicts") to present the potential El Paso engagement. (Daniel Dep. at 94.)

GS Conflicts informed Mr. Daniel that Goldman Sachs could accept the new engagement as long as Mr. Daniel: (i) reminded El Paso of the GS Funds' ownership interest in KMI, (ii) advised El Paso that the GS Funds Directors would recuse themselves from any consideration of KMI's involvement with El Paso, and (iii) encouraged El Paso to hire an additional financial advisor. (Daniel Dep. at 94-95.) Mr. Daniel promptly conveyed this information to John R. Sult, El Paso's Chief Financial Officer. (Daniel Dep. at 95; Sult Dep. at 113-14.) Though El Paso management felt that Mr. Daniel had been "a trusted advisor to El Paso since 2003 and his team understood their duties to the El Paso team and the El Paso shareholders quite well," they chose to proceed with caution and hire an additional financial advisor. (Foshee Dep. at 30.) The next day, El Paso engaged Morgan Stanley as a second advisor in connection with the KMI proposal. (Cox Dep. at 24.)

Pursuant to Goldman Sachs's long-standing institutional procedures (which Plaintiffs ignore), members of the Goldman Sachs Investment Banking Division ("GS IBD") team were already aware of the established policy within Goldman Sachs to only share confidential information—even internally—on a need-to-know basis. (Daniel Dep. at 133.) Nonetheless, in an abundance of caution, on September 6, 2011, Goldman Sachs's Compliance Department circulated e-mails to the GS IBD and GS PIA teams, instructing them that they should not exchange any confidential information about El Paso or KMI. (DiCamillo Aff., Exh. C; Pl. Br., Exh. 45.) There is no evidence that any member of the GS IBD team working on the El Paso matter ever passed any information

to anyone on the GS PIA team in violation of the general Goldman Sachs need-to-know policy or the team separation protocols for the El Paso engagement. (Kinder Dep. at 74-76; Daniel Dep. at 129-30, 133-35.)

Importantly, in the engagement letter relating to the KMI proposal,[8] Goldman Sachs represented that:

> None of the Goldman Sachs personnel working for the Company on the Transaction have communicated or shared or will communicate or share any confidential information with respect to the Transaction with Goldman Sachs personnel having responsibility for managing the PIA investment in KMI or any other members of PIA.

(DiCamillo Aff., Exh. D at 3.) Mr. Daniel testified at his deposition that this representation was true on the date it was made and continues to be true as to him and, to the best of his knowledge, as to the entire GS IBD team that worked on the El Paso/KMI transaction.[9] (Daniel Dep. at 129-134.) (In fact, Mr. Daniel does not recall ever having discussed El Paso or KMI with either GS Funds Director.[10] (Daniel Dep. at 18).)

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8 This engagement letter was not executed until October 7, 2011. Mr. Sult explained that the precise terms regarding the fee continued to be discussed until the engagement letter was executed on October 6-7. (Sult Dep. at 232-233.) Pursuant to the engagement letter, Goldman Sachs was to receive $20 million—$5 million dollars less than it would have received had the Spin-Off been concluded—upon the completion of a sale of El Paso to KMI with no promise of future financing work. (DiCamillo Aff., Exh. D.)

9 Robert Kimmel, a Vice President in GS IBD, was a member of the team advising El Paso, who had previously worked on teams advising KMI on other matters. (Daniel Dep., 22, 52, 192-193.) This was disclosed to El Paso, which approved Kimmel's continued participation on the team advising El Paso. (Daniel Dep. at 192) ("I recall a discussion . . . with the company in the beginning to make sure that they remembered Robert had worked on the [KMI] IPO and I can recall I think it was JR Sult saying . . . whatever you do, keep Robert on the team.")

10 Pursuant to a set of negotiated and agreed-upon search parameters, KMI and Goldman Sachs produced over 5,000 documents in response to Plaintiffs' document requests in this matter.

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Plaintiffs point out that Goldman Sachs declined to accede to Morgan Stanley's request that it surrender its exclusive right under the Spin-Off engagement letter to advise El Paso regarding the Spin-Off. (Sult Dep. at 243; Daniel Dep. at 194-95; Pl. Br., Exh. 19 at 1.) Plaintiffs suggest that Goldman Sachs's decision was somehow related to the GS Funds' investment in KMI (*see* Pl. Br. at 3, 11, 22, 35-36), but there is no evidence to support this contention. Instead, the record reflects that Goldman Sachs simply wished to protect its already-bargained-for exclusivity with regard to a project on which it had already established itself over the course of several months. (Sult Dep. at 244-46; Daniel Dep. at 194-95.) Notably, Goldman Sachs did agree to amend the terms of the Spin-Off engagement letter to relinquish any exclusive rights it had to advise or arrange financing for a potential sale of El Paso's Exploration & Production assets in order to facilitate the KMI transaction. (Daniel Dep. at 136-37, 201-02; DiCamillo Aff., Exh. E.)

F. Goldman Sachs's Work in Connection with the September 5 El Paso Board Meeting

In anticipation of a September 5, 2011 El Paso board meeting to consider the KMI overture, Goldman Sachs prepared materials for the El Paso Board's consideration. Because of its work relating to the Spin-Off, it was in the fortuitous position of being able to provide Morgan Stanley with background information. (Daniel

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Plaintiffs have not cited to one of these documents as indicating a breach of Goldman Sachs's representation.

Dep. at 114; Cox Dep. at 57-58; Sult Dep. at 143-47.) Plaintiffs characterize this good faith efficiency as nefarious (Pl. Br. at 13-14, 35), but there is no indication in the record that Goldman Sachs ever influenced, or attempted to influence, the methodology Morgan Stanley employed in valuing El Paso. Indeed, Morgan Stanley's Jonathan Cox testified that all of Morgan Stanley's valuation analysis was conducted independent of Goldman Sachs. (Cox Dep. at 30, 40-41.)

Consistent with the above, at the September 5 board meeting, the two banks separately presented their analyses. Although their methodologies differed somewhat, Goldman Sachs and Morgan Stanley reached substantially similar conclusions with regard to their valuations of El Paso. (Daniel Dep. at 118-19; Cox Dep. at 60.) The El Paso Board ultimately concluded that KMI's offer was inadequate and authorized management to advise KMI of that decision. (Pl. Br., Exh. 24 at 8; Daniel Dep. at 123; Foshee Dep. at 168.)

After the meeting, Mr. Daniel worked with Morgan Stanley and El Paso management in putting together El Paso's written response to KMI as well as a set of talking points for Mr. Foshee to use in discussions with Mr. Kinder setting out the reasons why the offer was inadequate. (Daniel Dep. at 122-123; Cox Dep. at 34-35.)

G. Goldman Sachs's Role with Respect to the September 9 KMI Proposal

On September 9, 2011, Mr. Kinder sent Mr. Foshee a second letter stating that KMI would consider improving its offer if it were permitted to conduct limited due diligence. (Kinder Dep. at 55; Pl. Br., Exh. 27.) The letter also stated that, if El Paso did

not respond favorably to this latest proposal, KMI would make its earlier offer of $25.50 per share public. (Pl. Br., Exh. 27 at 1.) The following day, El Paso's senior management discussed this updated proposal with its counsel Wachtell, Lipton, Rosen & Katz; Morgan Stanley; and Goldman Sachs. (Daniel Dep. at 117.) The advisors were asked to consider an appropriate response and be prepared to discuss it with management on September 12, 2011. (Daniel Dep. at 123-25.)

On September 12, Goldman Sachs and Morgan Stanley each had separate meetings with the management of El Paso in order to discuss further the new proposal and prepare for an upcoming September 15 El Paso board meeting. (Daniel Dep. at 121-22.) During the meeting, Goldman Sachs and El Paso discussed the ramifications of El Paso's rejection of KMI's new bid, including the possibility that KMI would take its offer public. (Daniel Dep. at 123-25.) Mr. Daniel testified that, although there would have been "pros and cons" for El Paso if KMI were to take its offer public, a "con" would have been that a public offer could have made it "more difficult to try to negotiate a higher price" for El Paso. (Daniel Dep. at 125-26.) Mr. Daniel also explained that a public offer could have had a negative impact on employee morale and potential loss of human capital at El Paso. (Daniel Dep. at 126.) Consequently, Mr. Daniel discussed with El Paso the possibility that management might provide due diligence to KMI in order to forestall a public bid. (Daniel Dep. at 126-27.)

While it is correct that both Mr. Foshee and Mr. Sult disagreed with Mr. Daniel's suggested approach (Foshee Dep. at 184-85; Sult Dep. at 216-17), Plaintiffs'

characterization of this advice as "inexplicabl[e]" (Pl. Br. at 15), is unfounded. Mr. Kinder's letter of September 9 stated that KMI might make its offer public, an outcome that Mr. Daniel believed might not be beneficial to El Paso. Even Mr. Foshee, in disagreeing with Mr. Daniel's advice, acknowledged that there "was some basis for [it]." (Foshee Dep. at 185.) In any event, El Paso did not take Mr. Daniel's advice, belying any suggestion that El Paso management and the El Paso Board were manipulated by Goldman Sachs.

In fact, quite to the contrary, at some point after the September 12 meeting and before the contemplated September 15 El Paso board meeting, Robert Baker, General Counsel at El Paso, informed Mr. Daniel that El Paso had decided to limit Goldman Sachs's future role as advisor in connection with the KMI proposal to updating its valuations regarding the proposed Spin-Off because of Goldman Sachs's ownership interest in KMI. (Daniel Dep. at 103-04; *see also* Sult Dep. at 225; Foshee Dep. at 192-93). There was discussion between Mr. Daniel and Mr. Baker about Mr. Daniel alone continuing on in a broader advisory role, but, after some consideration of that alternative, Mr. Daniel advised Mr. Baker that it was not workable. (Daniel Dep. at 101-05.)

Mr. Foshee testified that the decision to minimize Goldman Sachs's role was prompted by a theoretical concern of management that, in order to protect its investment in KMI, other parts of Goldman Sachs might pressure Mr. Daniel to advise El Paso to avoid a strategy that could result in KMI employing a hostile approach to

acquiring El Paso. (Foshee Dep. at 186-89.) Mr. Foshee emphasized that management's concern was not based on anything specific or knowledge of any actual pressure on Mr. Daniel or anyone else on the Goldman Sachs team. In fact, to the contrary, Mr. Foshee testified that Mr. Daniel was a "trusted advisor to El Paso" and remarked that "Steve Daniel was well aware of . . . the long-term franchise value associated with maintaining the Chinese walls that in effect allow every financial institution to properly function." (Foshee Dep. at 30-31.) Nevertheless, out of an abundance of caution, El Paso decided to limit further Goldman Sachs's role in the transaction. (Sult Dep. at 216; Foshee Dep. at 189-93.)

Mr. Daniel testified that he was in fact never pressured by any other member of Goldman Sachs to provide any particular advice to El Paso concerning the KMI transaction, and that he does not believe Goldman Sachs's ownership interest in KMI had any influence on the substantive advice he provided El Paso. (Daniel Dep. at 211.) Prior to the September 15 El Paso board meeting, Mr. Daniel confirmed with Mr. Baker that Goldman Sachs would not provide any tactical advice to El Paso at the Board meeting. (Daniel Dep. at 105-07.) Consequently, Goldman Sachs limited its presentation at the September 15 El Paso board meeting to an update of the Spin-Off transaction values and certain valuation work it had already completed on the KMI offer. (Daniel Dep. at 105-08; Sult Dep. at 189; Pl. Br., Exh. 28, Exh. 29 at 3.) This presentation was made outside the presence of and before any presentation by Morgan

Stanley, and Goldman Sachs was asked to leave the meeting once its presentation was completed. (Daniel Dep. at 107-08; Pl. Br., Exh. 29 at 3.)[11]

Unbeknownst to Goldman Sachs, prior to its presentation on September 15 and before it was asked to join the meeting, the El Paso Board had been told of management's concerns and accepted management's recommendation to limit Goldman Sachs's future role in connection with the KMI proposal to providing advice related to the Spin-Off. (Pl. Br., Exh. 29 at 2.) As a result, by the time Goldman Sachs made its presentation, the board had been told by management to rely on Morgan Stanley for advice related to the Merger from that point forward.

Consistent with the Board's September 15 decision, after that board meeting, El Paso never asked Goldman Sachs to do anything more relating to the KMI proposal other than to update its Spin-Off analysis, and Goldman Sachs never provided any broader advice to El Paso's board or management. (Sult Dep. at 225.) Goldman Sachs provided one update to the Board on the Spin-Off on October 6, 2011, which was the only time it appeared before the El Paso Board after September 15. (Daniel Dep. at 200; Pl. Br., Exh. 37.) Goldman Sachs was also not involved in any negotiations with KMI. (Daniel Dep. at 200.)

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[11] Plaintiffs' expert David G. Clarke criticizes certain of Goldman Sachs's valuation choices. (*See* Expert Declaration of David G. Clarke in Support of Co-lead Plaintiffs' Motion for a Preliminary Injunction (Corrected Version), dated January 17, 2012 (hereinafter "Clarke Decl."), at 22-32.) The El Paso Defendants have submitted an affidavit from Kenneth M. Lehn responding to Mr. Clarke's declaration, but, for the avoidance of doubt, Goldman Sachs rejects each of Mr. Clarke's criticisms of its work.

Plaintiffs attempt to inflate Goldman Sachs's involvement with the KMI negotiations after September 15 by stating that Goldman Sachs was "simply carved . . . out of 'tactical' discussions—*i.e.*, discussions about specific negotiating tactics . . . ." (Pl. Br. at 5.) In fact, after September 15, Goldman Sachs was never asked to comment on any of the subsequent counterproposals between the parties.[12] Goldman Sachs was also not involved in the diligence process, and thus had no part in the discussions concerning the REDACTED to REDACTED million shortfall in KMI's model of El Paso that Plaintiffs discuss in their opening brief. (Pl. Br. at 16.) Moreover, Goldman Sachs was never asked by El Paso to value the warrants that made up a meaningful part of KMI's proposed merger consideration. (Daniel Dep. at 198.) Finally, Goldman Sachs never provided El Paso with a fairness opinion on the transaction generally.[13] (Daniel Dep. at 198-99.)

H. October 6: Goldman Sachs Presents its Spin-Off Analysis to the El Paso Board

As stated above, Goldman Sachs presented the El Paso Board with a Spin-Off analysis on October 6 that updated its valuation of El Paso's E&P segment. (Foshee Dep. at 297; Daniel Dep. at 152.) REDACTED

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12 Plaintiffs distort the record by selectively quoting an e-mail written by Morgan Stanley's Steve Munger to eliminate a critical portion of it that provides contemporaneous support for Goldman Sachs's reduced role. REDACTED

13 Subsequent to September 15, Goldman Sachs proposed providing a fairness opinion on the Merger, but El Paso declined the offer. (Sult Dep. at 234-35.)

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The October 6 presentation was the last work that Goldman Sachs did for El Paso before El Paso agreed to the Merger. Plaintiffs characterize the $20 million fee that Goldman Sachs received in connection with its advice under the terms of its engagement letter with El Paso as "unwarranted." (Pl. Br. at 23.) But in doing so, Plaintiffs ignore testimony explaining that the fee was, in fact, intended to compensate

Goldman Sachs not only for services it provided in connection with the KMI proposal—updating the valuations of El Paso's proposed Spin-Off, and assisting El Paso in its September 5 response to KMI's initial offer (Foshee Dep. at 200)—but also for unrelated services that Goldman Sachs had provided El Paso in previous years, such as its work on Kinder Morgan's 2010 merger proposal, for which Goldman Sachs was never paid. (Sult Dep. at 242.) Moreover, the fee was also intended to ensure that Goldman Sachs would receive some compensation for the substantial work it had done on the Spin-Off, in the event the Spin-Off was not ultimately consummated. (Sult Dep. at 242.)

I. October 16, 2011: Goldman Sachs's Representatives on KMI's Board Recuse Themselves from the Decision to Approve the Merger

On October 16, 2011, the Boards of El Paso and KMI each voted to approve a merger between the two companies. The Goldman Directors continued to recuse themselves from the KMI board discussions regarding El Paso, and thus did not participate in the vote in favor of the Merger. (Kinder Dep. at 73.) They did, however, receive the KMI Board materials for the October 16 meeting in order to evaluate a request from KMI that Goldman Sachs sign an agreement that it would vote its KMI shares in favor of the merger. (KMI Proxy at 109-10.)

ARGUMENT

I. Plaintiffs Cannot Demonstrate that Goldman Sachs's Conduct Violated Delaware Law in Connection with the El Paso Board's Performance of its Fiduciary Duties.

As has been made abundantly clear, to the extent that Goldman Sachs faced a potential conflict of interest with regard to the Merger, such conflict was promptly

disclosed and addressed, in full compliance with the dictates of Delaware law. Nothing in the record supports a conclusion that the El Paso Board breached its fiduciary duties based on Goldman Sachs's advice, much less that Goldman Sachs aided and abetted the breach.[14]

Stripping away the invective, Plaintiffs' Brief points to nothing more than the fact that, while one division of Goldman Sachs acted as a financial advisor to El Paso in connection with the Merger, funds managed by another division of Goldman Sachs owned an interest in KMI. This mere fact did not, as a matter of Delaware law, disqualify Goldman Sachs from playing a carefully circumscribed role as an advisor to El Paso, and there are no grounds for the Court to issue a preliminary injunction based on the GS Funds' ownership interest in KMI.[15]

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[14] In order to establish a claim that Goldman Sachs aided and abetted such a breach of duty, Plaintiffs would have to prove that Goldman Sachs "knowingly" participated in the breach. *In re General Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *23 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. Mar. 20, 2006). To establish "knowledge," Plaintiffs must show (i) explicit facts from which the alleged aider and abettor's knowledge "can be reasonably inferred," or (ii) facts demonstrating that the challenged transaction was so "inherently wrongful" (*i.e.*, *per se* illegal), that the alleged aider and abettor is deemed to have been "on notice" of the underlying fiduciary breach. *Id.* at *24, *29. Conclusory allegations of knowing participation are insufficient. *Id.* at *24. Furthermore, knowledge of the breach alone, without more, is insufficient to state a claim—actual complicity in the breach is required. *Oliver* v. *Boston Univ.*, 2000 WL 1091480, at *9 (Del. Ch. July 25, 2000). For the reasons discussed herein, Plaintiffs have failed to establish a likelihood of success on their contention that Goldman Sachs either knew of a predicate breach by the El Paso Board or was complicit in the breach.

[15] For the reasons set forth in El Paso's Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, Plaintiffs have failed to demonstrate that (i) their claim that the El Paso Defendants breached their fiduciary duties in connection with the Merger is likely to succeed on the merits; (ii) they will suffer irreparable harm in the absence of an injunction; or (iii) they would suffer greater harm in the absence of injunctive relief than defendants would suffer if such relief were granted.

A. GS PIA's Investment in KMI Did Not Create a Per Se Conflict of Interest Preventing Goldman Sachs from Acting as Financial Advisor to El Paso in Connection with the Merger.

Delaware courts that have addressed conflict questions have consistently focused on whether the conflict was disclosed and whether measures were taken to address any potential harm that might be caused by the conflict. *See, e.g., In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613 at *16 (Del. Ch. Oct. 2, 2009) ("This Court . . . has stressed the importance of disclosure of potential conflicts of interest of financial advisors."); *David P. Simonetti Rollover IRA* v. *Margolis*, 2008 WL 5048692, at *8 (Del. Ch. June 27, 2008) ("[I]t is imperative for the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts."); *Solash* v. *Telex Corp.*, 1988 WL 3587, at *10 (Del. Ch. January 19, 1988) (emphasizing the importance of management oversight and reliance on second financial advisor's fairness opinion where primary financial advisor faced potential conflict of interest).

In *Solash* v. *Telex Corp.*, faced with a set of facts substantially similar to those before this Court, Chancellor Allen denied a motion to enjoin preliminarily an acquisition based on an alleged conflict of the target's financial advisor. 1988 WL 3587, at *10-11. There, the target's advisor, Drexel Burnham Lambert, Inc. ("Drexel"), also owned a ten percent stake in the acquirer, Memorex International N.V. ("Memorex"). *Id.* at *5. Drexel disclosed its ownership interest in Memorex to the Telex Board, which continued not only to rely on the advice of Drexel but also to include Drexel in

negotiations with Memorex. The board also retained a second advisor, Wertheim, Schroder & Co., Inc., to provide a fairness opinion on the transaction. *Id.* at *6.

In declining to enjoin the *Telex* transaction based on Drexel's Memorex ownership interest, the Court observed that: (i) Drexel's Memorex interest was disclosed to the board; (ii) the "management of Telex continued to attend to the negotiations"; (iii) the "results of the negotiations could, in all events, be checked against the directors' own views of Telex's value"; and (iv) "the board did retain an independent investment banker who confirmed that, in its opinion, the Memorex transaction was at a fair price." *Id.* at *10. Ultimately, the Court concluded that "plaintiffs have shown no sufficient reasonable likelihood of success on its claim that the board has breached a duty to the shareholders in negotiating and recommending the Memorex offer in the circumstances to warrant the relief now sought." *Id.* at *11.

Other Delaware courts assessing the legal significance of potential conflicts have also stressed the importance of disclosure of the conflict in mitigating its impact. *See, e.g., In re Atheros Commc'ns, Inc.,* 2011 WL 864928, at *8, *14 (Del. Ch. May 12, 2011) (enjoining stockholder vote on proposed acquisition pending disclosure in proxy materials of financial advisor's potential conflict of interest); *In Re Toys "R" Us, Inc., S'holder Litig.,* 877 A.2d 975, 1006, 1023 (Del. Ch. 2005) (declining to enjoin shareholder vote where financial advisor's disclosed potential conflict did not have "a causal influence" on the board's process).

In addition, the palliative effect of a "Chinese wall" to prevent information from passing from the personnel providing financial advice to other parts of the bank has been recognized as a reasonable means of addressing a conflict. *See generally,* Leo Herzel & Dale E. Colling, *The Chinese Wall and Conflict of Interest in Banks,* 34 Bus. Law 73, 74 (1978) (concluding that "the Wall is by far the most effective solution to the problem [of conflicts between different branches of the same investment bank] . . . .").

B. Goldman Sachs's Investment in KMI Cannot Serve as a Basis to Enjoin the KMI Merger with El Paso or Find that Goldman Sachs Aided and Abetted any Breach.

Based on the legal standards elaborated above, Goldman Sachs's investment in KMI cannot serve as a basis to enjoin the KMI merger with El Paso.

As Plaintiffs themselves acknowledge in their Complaint, "the [El Paso] Board was provided with details about, and discussed, Goldman Sachs's relationship with and ownership interest in Kinder Morgan." (Compl. at 46, ¶ 141.) The testimony was unanimous that the potential conflict was promptly disclosed to El Paso management and the Board, and Goldman Sachs took substantial internal precautions to prevent the potential conflict from compromising the advice it provided to El Paso. Goldman Sachs instituted a "Chinese wall," notifying all personnel associated with Goldman Sachs's investment in KMI that they were not to engage in any communications regarding the Merger with any member of the team advising El Paso, and vice versa. (DiCamillo Aff., Exh. C.) This wall augmented standard Goldman Sachs confidentiality practices. Furthermore, as a separate precaution, Goldman Sachs required its representatives on the

KMI board to recuse themselves from any consideration of the Merger. These internal precautions at Goldman Sachs worked. (*See* Kinder Dep. at 73 (noting that Mr. Kinder had no conversations with any individuals from Goldman Sachs after August 28, 2011); Daniel Dep. at 210-11 (stating that, to his knowledge, there were no communications between the GS IBD team advising El Paso and the GS PIA personnel associated with Goldman Sachs's investment in KMI).) Plaintiffs cite nothing indicating the contrary.

Moreover, Plaintiffs cannot point to any reason why El Paso management, or the sophisticated El Paso Board—which consists of 11 independent directors—would allow this potential conflict to compromise their consideration of the KMI offer. More importantly, the record is clear that they did not as they promptly hired a second investment bank and, essentially, eliminated Goldman Sachs from any consideration of the KMI proposal within days of KMI's September 9 letter.[16]

REDACTED

[16] Puzzlingly, Plaintiffs cite *Ortsman* v. *Green*, 2007 WL 702475 (Del. Ch. Feb. 28, 2007) for the hyperbolic proposition that the El Paso Board "could never . . . purge the taint of Goldman's involvement," "no matter how many other purportedly independent banks it brought in . . . ." (Pl. Br. at 35). However, *Ortsman* was a ruling on a motion for expedited proceedings; the Court did not address the merits of the conflicts question at issue in that case. *Ortsman*, 2007 WL 702475 at *1.

REDACTED

See LC

Capital Master Fund, LTD. v. *James*, 990 A.2d 435, 453 (Del. Ch. 2010) (director's $5.6 million stake of company stock insufficient to show he was materially self-interested because plaintiffs failed to advance any reason to believe that a 10% shift in merger consideration—which "would cost him approximately $500,000"—would be material to the director).

That said, considering the precautions that El Paso took in light of the much larger general Goldman Sachs-related conflict of which it was aware, it is difficult to see what else it would have done to protect against the Daniel issue. To the extent that, had it known about his investments, El Paso would have decided not to use Mr. Daniel at all to advise on the KMI proposal, that is effectively what happened after September 12, and Mr. Daniel's role before September 12 could not have prejudiced El Paso, as it is undisputed that his advice, consistent with Morgan Stanley's independent advice, was that El Paso should argue for a higher price from KMI.

REDACTED

REDACTED

Plaintiffs'

analysis is also devoid of any consideration of how Mr. Daniel and the rest of the GS IBD team could possibly have imagined they could get away with purposely distorting their Spin-Off advice. The team had been evaluating the Spin-Off for months pursuant to an established model, and its valuation of the E&P assets could only change if inputs to the model were changed. It would have been extraordinarily difficult to do that surreptitiously when presenting to a sophisticated board that had a second renowned financial advisor. REDACTED

C. Plaintiffs Offer No Apposite Legal Support for Their Conflict Argument.

In support of their arguments, Plaintiffs cite three ill-fitting cases—*In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. Feb. 14, 2011), *Khanna* v. *McMinn*, 2006 WL 1388744 (Del. Ch. May 9, 2006) and *In re Prime Hospitality, Inc.*, 2005 WL 1138738 (Del. Ch. May 4, 2005)—and omit any mention of the *Telex* case, which, as described above, is a much closer fit.

In *Del Monte*, the Court preliminarily enjoined a stockholder vote on a proposed merger between Del Monte Foods Company ("Del Monte") and three private equity firms led by Kohlberg, Kravis, Roberts & Co. ("KKR"). 25 A.3d at 817, 844-45.

The Court found that, while providing sell-side financial advice to Del Monte, the financial advisor "secretly and selfishly manipulated the sale process to engineer a transaction that would permit [the advisor] to obtain lucrative buy-side financing fees [from KKR]," and "[o]n multiple occasions, . . . protected its own interests by withholding information from the Board that could have led Del Monte to retain a different bank, pursue a different alternative, or deny [the advisor] a buy-side role." *Id.* at 817. Noting that the advisor had failed to disclose its conflicting interests, the Court enjoined the vote because, although "the [Del Monte] Board sought in good faith to fulfill its fiduciary duties . . . [, it] failed because it was misled by [the advisor]." *Id.* at 818.

Del Monte is entirely distinguishable from this case. First, and most fundamentally, it concerns the non-disclosure of a financial advisor's conflict of interest. Moreover, the potential conflict that Goldman Sachs may have faced when KMI happened to make a bid for one of its advisory clients pales in comparison to the situation in *Del Monte*, where the financial advisor was found to have actively and self-interestedly created the conflict of interest. In contrast to the conduct at issue in *Del Monte*, Goldman Sachs disclosed its potential conflict and took numerous measures (catalogued elsewhere herein) to prevent the improper exchange of information amongst different Goldman Sachs teams.

Plaintiffs' reliance on *Khanna* v. *McMinn* and *In re Prime Hospitality, Inc.* is similarly misplaced, as those cases were decided at different procedural postures on entirely distinguishable standards of law. *Khanna* was a derivative case where the Court

was confronted with a motion to dismiss for lack of demand. 2006 WL 1388744 at *1. Among a roster of particularized allegations of breaches of duty by an acquiror's board, allegations were made that the advisor that provided a fairness opinion to the board was conflicted because of a $40 million bridge loan it had provided to the target. *Id.* at *25. The Court held that these allegations as a whole precluded a finding at the pleading stage that the transaction reflected a valid exercise of business judgment. *Id.* The *Prime Hospitality* case involved an application to approve a settlement, which the Court declined to grant because, on the "paltry record" provided to the Court, it could not adequately evaluate "numerous untested allegations and theories," including whether an allegedly conflicted advisor had disclosed its conflict to its client. 2005 WL 1138738 at *1, *11, *13. Neither of these decisions provide any insight as to whether a disclosed conflict by an advisor who did not provide a fairness opinion and whose role was otherwise limited justifies an order enjoining a merger vote.

CONCLUSION

For these and the foregoing reasons, Goldman Sachs respectfully requests that the Court deny Plaintiffs' Motion for Preliminary Injunction.

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