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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: 2/17/12

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT[1]

Defendants' brief in opposition to Plaintiffs' motion for a preliminary injunction brings to mind Lieutenant Frank Drebin instructing a crowd mesmerized by an exploding fireworks factory: "Alright, move on. There is nothing to see here, please disperse. Nothing to see here!"[2] Despite Defendants' effort to distract from their improper conduct, there is most definitely something to see here. And it is not pretty.

Even if this case did not present the Court with conflicted advisors and senior management, the facts uncovered in expedited discovery raise serious questions about the unusual decisions resulting in the proposed acquisition of El Paso Corporation ("El Paso" or the "Company") by Kinder Morgan Inc. ("KMI") (the "Merger"). When the Court links up the odd conduct of the El Paso board of directors (the "Board") with Defendants' giving short shrift to the advisors' and management's serious conflicts of interest, these serious questions translate into a likelihood of success on the merits. Indeed, with all parties agreeing that the substantive component of *Revlon* required the Board to seek out the highest

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[1] Citations herein to "Ex. __" are to the exhibits compiled in Plaintiffs' previously-filed Appendix to Brief in Support of Plaintiffs' Motion for a Preliminary Injunction (for Exhibits 1-50) or in the Appendix to Reply Brief in Support of Plaintiffs' Motion for a Preliminary Injunction (for Exhibits 51-58), filed herewith. Citations to "Op. Br." are to Plaintiffs' opening brief, and citations to "El Paso Br.," "KMI Br." and "Goldman Br." are to the answering briefs filed by the El Paso Defendants, KMI, and Goldman, respectively.

[2] For the relevant movie clip, *see* http://www.youtube.com/watch?v=rSjK2Oqrgic.

available price, the Court should reach the same result whether it applies *Revlon's* reasonableness standard of judicial review or the entire fairness standard.

First, consider the unusual confluence of events and decisions leading to the Merger:

1. In September 2010, Rich Kinder ("Kinder") told El Paso CEO Doug Foshee ("Foshee") that Kinder wanted El Paso to spin off the Company's exploration and production ("E&P") business and then sell the balance of El Paso to KMI. That deal failed because KMI was not public and lacked an attractive acquisition currency. Within months, Kinder cured that problem by taking KMI public, and Foshee convinced his Board to spin off El Paso's E&P business (the "Spin").

2. On August 30, 2011, almost a year after his initial approach and with the Spin now in the works, Kinder visited Foshee to offer $25.50 in cash and stock for the entire Company. One director quickly recognized it was "inadequate" and said that KMI stock was as attractive an acquisition currency as "a box of stale Saltines."[3] The Board told Foshee to reject the offer, refused to allow KMI to conduct any due diligence, and barred Foshee from even presenting a counter-offer. As Foshee himself put it, KMI's $25.50 offer was "significantly below what we would be willing to accept."[4]

3. A few days after Foshee met one-on-one with Kinder to reject the $25.50 offer, Kinder called Foshee, not to raise the offer, but to suggest that KMI would go public with the $25.50 offer.[5]

4. On September 15, following presentations by both Goldman, Sachs & Co. ("Goldman") and Morgan Stanley, Foshee persuaded the Board to let him present Kinder with a $28 per share demand: less than 10% above the price the Board had just rejected as not worth discussion.[6]

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[3] EP00022792 (August 31, 2011 email from Vagt to Foshee) (Ex. 23).

[4] Foshee Tr. at 140:25 – 141:3 (Ex. 12).

[5] Foshee Tr. at 176:11-177:25 (Ex. 12); Kinder Tr. at 65:9-66:25 (Ex. 6).

[6] Proxy at 104 (Ex. 5). Citations herein to "Proxy" are to the preliminary proxy that was included in the Appendix accompanying Plaintiffs' opening brief. Although the final proxy has since been issued, there were no substantive changes with respect to the portions cited herein.

The Board also instructed Foshee that $26.50 was its floor price.[7]

5. In response to the $28 demand, Kinder initially agreed to pay $27.55 in cash and stock, only to revisit that deal within days due to a supposed valuation "bust" that nobody on the El Paso side could ever verify.[8] Rather than walk away, Foshee urged the Board to lower its demand yet again. When the Board said that it preferred not to include KMI warrants as deal consideration, but that in any event its "floor" for the cash and stock consideration of any deal was $26.50, Foshee took matters into his own hands and made a demand to Kinder for just $26 in cash and stock, plus a warrant of vague and speculative value.

6. Following some back and forth, KMI agreed to pay $25.91 in cash and stock (*i.e.*, less than 2% above the $25.50 price the Board determined didn't warrant discussion, and below the $26.50 "floor" the Board had "re-iterated" to the management team). KMI also offered a warrant whose value is speculative (and may well be zero). Even Kinder viewed this proposal as "substantially the same" as an offer the Board had previously rejected, but Foshee persuaded the Board to accept it.

7. Morgan Stanley told the Board that it could not expect to elicit competing bids for the entire Company, but that there may be other potential buyers for the Company's separate parts. Despite this advice, the Board never assessed whether it should pressure KMI to increase its offer by exploring bids for El Paso's component businesses.[9] Instead, the Board agreed to have El Paso management assist KMI in its efforts to "flip" the E&P business.

8. Ensuring that nobody makes a competing offer, the Merger Agreement defines "Superior Proposal" so that no bid for the E&P business could

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[7] *See* El Paso September 15, 2011 Board meeting minutes, at 6 (Ex. 29).

[8] Sult Tr. at 250:13-18 (Ex. 9).

[9] Daniel Tr. at 140:24 – 141:5 (Ex. 10); Vagt Tr. at 150:14-24 (Ex. 7). While the Board makes much of the fact that it had previously examined several strategic alternatives in advance of approving the Spin, it never explains why it did not discuss selling either the Pipeline or E&P business and using the Company's $3 billion net operating loss to offset the tax consequences, as KMI plans to do. El Paso Br. at 38-39. The Board's failure to reconsider its options when it learned of KMI's plans to "flip" the E&P assets underscores its failure in this regard. *See* Vagt Tr. at 150:14-24 (Ex. 7).

> trigger the Board's "fiduciary out,"[10] while the termination fee is so large when compared to the Pipeline division that a competing bid for that division is effectively precluded, even assuming the Board would consider aggregate bids for parts of the Company to be "superior."

This history alone raises questions about the Board's process that cause suspicion when viewed in isolation, and approach the inexplicable when viewed cumulatively. But the Court need not look far for an explanation: both of the Company's financial advisors as well as its lead negotiator (Foshee) had strong motives to steer the Board toward a transaction with KMI rather than explore obvious alternatives to maximize value.

Defendants' opposition to Plaintiffs' motion rests on three core points. *First*, Defendants assert that Goldman's conflict – a $4 billion investment in KMI while simultaneously advising the El Paso Board on ways to maximize value[11] – is just theoretical, and that retaining Morgan Stanley somehow cleansed the process. *Second*, Defendants assert that the management conflict – the desire of Foshee and certain other senior executives to buy the E&P business from KMI after the Merger has been consummated – is a mere fabrication and should be ignored. *Third*, Defendants say that with a market premium price and without

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[10] *See* Merger Agreement § 5.3 (Ex. 3); El Paso Form 10-Q filed on Nov. 7, 2011, at 24 (El Paso had $24.078 billion total consolidated assets as of September 30, 2011, of which $4.724 billion were E&P assets) (Ex. 4).

[11] Goldman tries to downplay its economic interest in KMI by claiming that funds managed by Goldman, rather than Goldman itself, own the 19% interest in KMI. Goldman Br. at 4 n.4. Regardless of the name in which the shares are held, the Proxy acknowledges that Goldman "may be deemed to beneficially own approximately 19 percent of the shares of Kinder Morgan Class P common stock … making it the second largest beneficial holder." Proxy at 26 (Ex. 5).

competing bidders, nobody can fairly question the Merger. None of Defendants' contentions withstand scrutiny.

First, Defendants cannot just whistle past the Goldman conflict, not only because of its staggering magnitude, but also because Defendants did not actually prevent Goldman from influencing the process. From the outset of the Company's exploration of a strategic transaction, Goldman exhibited its willingness to share information with KMI that Goldman had gleaned as El Paso's advisor. In October 2010, Greenhill & Co. ("Greenhill") was advising KMI in connection with a proposed acquisition of El Paso, and it asked KMI to contact Goldman for information concerning El Paso's rejection of that proposal.[12] KMI executive Park Shaper reported a week later that he had received feedback from Goldman and would relay the information verbally.[13] So much for Goldman's "Chinese wall."

Defendants say the Board wanted Goldman in its corner because of Goldman's knowledge of the Spin and because of the Merger's "quick timeframe."[14] Even if August 30 to September 14 (KMI's unilaterally set response date) qualifies as a "quick timeframe," this is no reason to retain an obviously conflicted advisor like Goldman. Investment bankers routinely provide advice within days of a new engagement, and nothing prevented another banker with industry expertise from doing so here. Moreover, if the Board really was so

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[12] KMI-EP027497 at 498 (Ex. 56).

[13] KMI-EP027497 (Ex. 56).

[14] El Paso Br. at 7.

dependent on Goldman that it was willing to ignore 4 billion reasons for Goldman to slant its view, can the Court really credit Defendants' claim that the Board ignored Goldman's advice as it related to the Merger? And if the Board did not let Goldman's advice affect its assessment of the Merger, why did the Board agree to pay Goldman $20 million for its work on the Merger?

Within a week after KMI's offer surfaced, Goldman reduced its valuation of El Paso's E&P business by [REDACTED] from the figure it had presented in the spring.[15] Just a month later, Goldman reduced its E&P valuation by [REDACTED] [REDACTED][16] Defendants say the Board knew that these reductions rested on short-term market fluctuations and they therefore could not have been misled.[17] Wrong. By not contrasting these substantially reduced E&P valuations with valuations that reflected E&P's true long-term trajectory (which was no worse and potentially better than it had been in the spring), Goldman denied the Board material information reflecting the merits of the Spin – the only transaction the Board was considering as an alternative to a sale to KMI. Even Foshee thought – incorrectly – that Goldman's valuation methodology for the E&P business "looked at the long term in the sense that … it would have been either explicitly or implicitly the present value of an expected set of cash flows that would include short-term cash

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[15] EP00000259 (September 5 Goldman board presentation reducing E&P enterprise values from [REDACTED] to [REDACTED]) (Ex. 26).

[16] Daniel Tr. at 152:11-25 (Goldman reduced E&P valuation from [REDACTED] on September 5 to [REDACTED] on October 6) (Ex. 10).

[17] El Paso Br. at 43-44.

flows and long-term cash flows."[18] Whatever discussions Defendants claim to have had concerning Goldman's valuations, it is apparent that Goldman did not adequately explain their significance (or lack thereof) to the Board, because those valuations did not look at the long term in any sense.

Goldman's short-term focus also leaves the Board in knots when trying to justify its failure to assess separate sales of the Pipeline and E&P businesses in the fall of 2011. Defendants contend that the Board did not need to assess this option because they had done so in late 2010 and early 2011.[19] But if market conditions had changed so dramatically since the spring that the Board was now willing to abandon the previously-approved Spin, why would they assume their prior assessments regarding other potential transactions could not change?

Defendants say that Morgan Stanley's retention excuses any Goldman taint. Not so. From the outset, the Board compromised Morgan Stanley's independence by having it serve as co-advisor with Goldman on the KMI proposal, and by exposing Morgan Stanley to Goldman's analyses and thinking.[20] Moreover, as

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[18] Foshee Tr. at 98:5-17 (discussing Goldman's May 2011 E&P valuation, which used the same methodology as its September 5 and October 6 valuations) (Ex. 12).

[19] El Paso Br. at 1-2, 13, 38.

[20] Daniel Tr. at 108:11-24 (Morgan Stanley listened to Goldman's presentations at the September 5 and October 6 Board meetings), 114:18-25, 115:5-22 (Goldman shared information and discussed tactical matters with Morgan Stanley through at least September 12), and 122:12-16 (El Paso asked Goldman bankers to "help the Morgan Stanley people get up to speed") (Ex. 10); Sult Tr. at 178:5-14 (Sult communicated with Goldman and Morgan Stanley together following the September 5 meeting) (Ex. 9).

detailed in the Expert Declaration of David G. Clarke ("Clarke Declaration"), and amplified in the Declaration of David G. Clarke in Response to the Affidavit of Kenneth M. Lehn ("Clarke Rebuttal") submitted herewith, Morgan Stanley's valuation work suffered from obvious flaws that should have raised bright "red flags" for the Board.[21] Even the most passive director would question a banker that assigns a 2.9% perpetual growth rate to KMI (a company the Board knew needed El Paso in order to boost its future growth prospects) while assigning a below-inflation 0.7% growth rate to El Paso (which had every reason to believe that its extensive capital investments would lead to impressive long-term growth).

The Court should also reject Defendants' assertion that Morgan Stanley's $35 million contingent fee – payable solely if the Board chose the Merger rather than the Spin – is appropriate as a matter of law.[22] In the normal course, the alternative to a strategic transaction is to remain a standalone company, and the target board is in a strong position to assess that alternative. In those circumstances, the bankers may have some financial incentive to favor a deal, but they also are provided with a non-contingent payment just for providing valuation advice, and have a "tail" that will protect them if the board does a deal within the next year or two. Here, on the other hand, the Board needed financial advisors to assess *each* of the two alternatives it was actually weighing – the Spin and the

[21] Clarke Decl. at 8-21; Clarke Rebuttal at 5-7, 16.

[22] El Paso Br. at 47-48.

Merger. The *only* advisor for the Spin was Goldman, and by depressing the value of the Spin, Goldman helped KMI and itself by increasing the perceived relative value of KMI's offer. Morgan Stanley, meanwhile, knew it would never be paid if the Spin was consummated. Not surprisingly, it tilted its analysis by using assumptions that would depress El Paso's value and inflate KMI's.[23] In this unique fact pattern, paying Goldman regardless of the outcome but paying Morgan Stanley only if KMI's offer succeeded was unreasonable, as it means the Board had no disinterested advisor on which to rely.

In the end, some conflicts can be "managed." Not a target financial advisor's $4 billion investment in the only buyer allowed in the process. The Board's failure to immediately exclude Goldman from the sale process the moment KMI emerged is simply inexplicable. Indeed, KMI and Goldman wasted no time leveraging their unique relationship and knowledge of El Paso. And Defendants' arguments notwithstanding, Goldman did not stay out of the process. Rather, Goldman's fingerprints remain all over this deal.

Second, Defendants argue that the management conflict arising from Foshee's MBO aspirations is somehow fabricated and that Foshee's $90 million payout was irrelevant.[24] Their position on this score is Orwellian. The facts are simple and undisputed: El Paso management knew since September 2010 that

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[23] *See* Clarke Decl. at 8-21; Clarke Rebuttal at 5-13, 18-19.

[24] El Paso Br. at 52-53.

KMI did not want to keep the E&P business.[25] With the September 20, 2011 term sheet, they learned that KMI in fact would flip the E&P business.[26] Any good faith seller who hears that a buyer intends to flip a substantial portion of the acquired business has to ask himself whether he underpriced the company, and must consider selling the company's constituent parts on his own. Here, however, management kept the Board focused on the sale to KMI because they decided, before the deal was signed, that they wanted to bid for the E&P business themselves, and that they would have an inside track once KMI put it up for sale.

Contrary to Defendants' assertion, the management conflict does not just rest on a single email. Foshee himself testified about not one, but two distinct conversations with Kinder, in which Foshee first informed Kinder that El Paso management wanted to make a bid and then suggested (conveniently) that El Paso management wait to submit a bid until after KMI had obtained "price discovery" through the bidding process.[27] [REDACTED] proves nothing except that Foshee is sticking to the plan he described to Kinder, or perhaps that the plan was aborted once Plaintiffs uncovered the truth.

Defendants are also incorrect in arguing that KMI's desire to maximize its own return from an E&P sale negates the possibility that El Paso management

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[25] KMI-EP027292 (September 15, 2010 Greenhill/KMI Presentation to El Paso, contemplating a spin-off of the E&P business in advance of a sale of the pipeline business to KMI) (Ex. 55).

[26] MS00009628 (Ex. 31).

[27] *See* Foshee Tr. at 272:2-12, 277:2-278:19 (Ex. 12).

would sell El Paso for less than full value to KMI.[28] As Foshee testified, he believed a management buyout of the E&P business could be very profitable.[29] This opportunity, which would not have to be shared with the Company's current shareholders, gave management an incentive not to let the Board play "hardball" with KMI and risk jeopardizing the Merger. In sum, management's desires tainted the Board's process, even if their lawyers have since told them to drop the idea.

Third, Defendants observe that the premium to El Paso shareholders is large and there are no competing bidders. Neither factor justifies the Board's failure to safeguard the interests of El Paso's shareholders. As to the premium, the same counsel representing KMI here took a similar position in defending against a challenge to KMI's 2007 going-private transaction, when they argued that the consideration paid to KMI's former shareholders represented a 27% premium to the pre-offer trading price.[30] Yet when Foshee was asked for his view of the purportedly high premium paid to shareholders in that transaction, he testified in this case that he wished "El Paso would have been in a better financial position because I thought it was a great deal for … [Rich Kinder for] the amount that it

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[28] El Paso Br. at 52.

[29] Foshee Tr. at 276:9-16 (Ex. 12).

[30] *See In re Kinder Morgan, Inc. S'holders Litig.*, Consol. Case No. 06 C 801 (Kan. Dist. Ct.), Memorandum of Law in Support of the Management Defendants' Motion for Summary Judgment, at 3, 13 (filed July 16, 2010) (Ex. 52).

was bought for."[31] Kinder ended up paying $200 million to KMI's former shareholders to settle litigation stemming from the going-private.[32] Injunctive relief is proper here so El Paso shareholders are not shortchanged on the front end.

When all is said and done, KMI's desire to pay $25.91 plus a warrant and immediately profit by flipping the E&P business reveals where maximum value most likely resides: in a bifurcated sale of the E&P and Pipeline businesses. Further, while El Paso touts that the premium has ostensibly grown because KMI's stock price has increased, it fails to consider how much this increase reflects the market's view that KMI is buying El Paso for a song.

Finally, Defendants' argument about the absence of a competing bidder is akin to a child who murders his parents and then pleads for mercy on the grounds he is an orphan. Rich Kinder readily admitted that he bid for El Paso in its entirety because he knew – as El Paso's management and advisors did – that there was unlikely to be any bidding competition for the whole Company.[33] Nonetheless, the Board failed to consider an alternative form of transaction that they were told and knew would more likely result in competitive auctions: separate sales of the

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[31] Foshee Tr. at 55:2-5 (Ex. 12).

[32] *See* "Kinder Morgan's Settlement of Suits Over 2007 Buyout Is Approved by Judge," Bloomberg (Nov. 19, 2010) (Ex. 53).

[33] Kinder Tr. at 23:14-24:3 (Ex. 6); Foshee Tr. at 166:17-24 (Q: And in those discussions, did Morgan Stanley's representatives explain that there was not a, not a high likelihood that there was any company that would compete with Kinder Morgan for bidding for all of El Paso? A: I think Morgan Stanley may have done that. I think that was the general consensus of the group.) (Ex. 12).

Pipeline and E&P businesses.[34] Quite simply, there are no bidders because that's the way Rich Kinder structured his bid, and the El Paso Board accepted management's and its financial advisors' aversion to exploring separate sales of the E&P and Pipeline businesses.

Worse yet, the Board has precluded itself from even entertaining E&P offers for the benefit of the Company's shareholders. The narrow "fiduciary-out" prevents the Board from considering or accepting any offers to purchase the E&P assets because they represent less than half of the Company's assets. The termination fee, in turn, effectively prevents anyone from purchasing the Company's Pipeline business, as $650 million represents 78% of the Pipeline's EBITDA for the first nine months of 2011. These provisions virtually guarantee that no post-signing bids will emerge for the E&P or Pipeline business separately.

In sum, this deal was infected from the outset. The Merger is not closing any time soon, as regulatory approval is still pending and closing is not expected until late in the second quarter of 2012. Rather than force the parties to fight over the availability of and how to calculate post-closing damages, the Court should preliminarily enjoin the shareholder vote and the operation of the deal protections so the Board can obtain unconflicted advice and open the sales process for bids for the Company's disparate divisions.

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[34] Cox Tr. at 196:4 – 197:4 (Ex. 8).

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW

The parties agree that El Paso's Board was under a duty to seek the highest available price, which is the substantive legal standard set by *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). However, the parties differ on the standard of judicial review the Court should apply when considering whether the Board fulfilled its duty to maximize shareholder value. Defendants assert that the procedural aspect of *Revlon* applies, requiring the Court to assess the substantive reasonableness of the Board's conduct, while Plaintiffs believe the Board's performance must satisfy entire fairness.

This debate is largely academic. If the Court concludes that the magnitude of Goldman's conflict and the existence of both known and undisclosed conflicts of management had a likelihood of either overtly or indirectly steering the Board to a conclusion that does not maximize shareholder value, then Plaintiffs have shown a likelihood of success under either standard: the Board's reliance on conflicted advisors cannot be deemed reasonable, and the sales process and price obtained therefrom will not be deemed fair.

To the extent selecting a standard of review is pertinent, however, the Court should apply the entire fairness standard. Contrary to Defendants' assertions, the application of entire fairness is not limited to situations in which a controlling shareholder stands on both sides of a transaction or where a majority of the board

has "divided loyalties."[35] As detailed in Plaintiffs' opening brief, this Court also applies the exacting standards of entire fairness where there is "illicit manipulation of a board's deliberative processes by self-interested corporate fiduciaries." *See Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989).

The instant action and *Macmillan* both involve conflicted senior management and advisors that tainted the sales process.[36] In *Macmillan*, senior management, who would receive a significant ownership interest in the new company if KKR emerged as the successful bidder, rigged the bidding process by, *inter alia*, "tipping" KKR. 559 A.2d at 1275, 1277. The Macmillan board's financial advisor – which had been hand-selected by interested senior management – further slanted the process by tipping KKR to additional information not known to the other bidder. *Id.* at 1276-77, 1280. Here, likewise, Foshee and other members of his senior management team: (a) never disclosed to the Board their desire to bid on the E&P assets; and (b) took actions to facilitate a sale of the entire Company to KMI at a less-than-value-maximizing price, described below, which effectively gave management the "inside track" to successfully bid when KMI sold the E&P assets. Meanwhile, Goldman – which itself had a strong financial stake in a sale to KMI – worked hand-in-hand with Morgan Stanley and ensured that Morgan Stanley's fee arrangement favored recommendation of the

[35] El Paso Br. at 31.

[36] El Paso Br. at 31.

Merger, and both firms ended up providing analyses to the Board that were slanted in favor of the transaction preferred by Goldman and management.

Even if the Court does not apply the entire fairness standard, Plaintiffs have made a sufficient showing that the Board did not meet *Revlon*'s substantive reasonableness standard. In short, it is hard to see why this Court should be satisfied by a process plagued by conflicts of interest, which led to a result mere pennies better than the price the Board had considered not worthy of further discussion from the outset.

II. THE BOARD'S RELIANCE ON CONFLICTED FINANCIAL ADVISORS AND MANAGEMENT HAS DEPRIVED EL PASO'S SHAREHOLDERS OF A VALUE-MAXIMIZING TRANSACTION

Under the *Revlon* standard of review that Defendants advocate, the Court must "assure itself that the board acted reasonably, in the sense of taking a logical and reasoned approach for the purpose of advancing a proper objective, and [] thereby smoke out mere pretextual justifications for improperly motivated decisions." *In re Dollar Thrifty S'holder Litig.,* 14 A.3d 573, 598 (Del. Ch. 2010). Here, the evidence shows that the Board was aware of serious conflicts of interest on the part of both Goldman and Foshee, yet instead of taking precautions to ensure it was receiving unbiased advice, the Board merely took steps designed to create the *appearance* of independence without real protection for the shareholders' interests. As a result, shareholders are left with a proposed Merger which may provide a premium over the pre-announcement trading price, but which they can have no confidence is a value-maximizing transaction.

A. The Board's Reliance On Goldman Fatally Infected The Sales Process

Goldman's conflict is simply without comparison. As Morgan Stanley's Steven Munger put it, this deal reflects Goldman at its most "shameless."[37] Allowing the Merger to proceed and letting Goldman collect its $20 million fee for advising the target despite its ***$4 billion*** ownership interest in the buyer will only tell bankers that there is no conflict that necessitates recusal under Delaware law. Delaware law has its limits, and Plaintiffs submit that they have been exceeded by Goldman's "shameless" greed in this deal.

Notably, Defendants do not deny that Goldman's multi-billion dollar investment in KMI gave it a strong financial motive to steer the Board toward the KMI Merger. Nor do they deny that Goldman's ownership interest in KMI gave rise to a conflict of interest when Goldman provided advice to El Paso concerning KMI's proposal. Instead, Defendants argue that the conflict should be ignored because: (i) Goldman erected a Chinese wall between the personnel advising El Paso and the personnel managing Goldman's investment in KMI; (ii) the conflict was disclosed to the Board; and (iii) "there is no evidence that Goldman's conflict had a causal influence on [the] board's process."[38] Each of these arguments should be rejected.

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[37] *See* MS00008953 (Ex. 42).

[38] El Paso Br. at 46 (internal quotation marks omitted).

First, the existence of a Chinese wall within Goldman proves nothing. Putting aside Goldman's refusal to make a fulsome production of documents to Plaintiffs,[39] the lack of emails breaching the wall does not mean no conversations took place. And, in any event, the wall is irrelevant given the nature of this conflict. The Goldman partner who led the Merger and Spin engagements, Stephen Daniel, was well aware of the size of Goldman's investment in KMI, and also had his own personal investments in KMI, in Goldman, and in one of the funds through which Goldman held its KMI stake. Nobody had to pressure Daniel or remind him about the significance of $4 billion to Goldman, and whether Daniel passed information to KMI does not matter because – as should have been obvious to the Board – he knew what steps would benefit KMI (and thereby Goldman), *i.e.*, convincing the Board to abandon the Spin in favor of a transaction with KMI.

Second, the disclosure of Goldman's conflict to the Board and the Board's meek response to it should only heighten the Court's concern, not mitigate it. While Goldman seeks to distinguish *In re Del Monte Foods Company S'holder Litig.*, 25 A.3d 813 (Del. Ch. 2011) on the grounds that it involved an advisor's

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[39] Goldman claimed that with document production on such a tight timeline, it had to make only limited productions of emails and other electronic documents. It refused to search for electronic documents from 2010, for example, even though it advised El Paso in connection with a September 2010 offer from KMI. KMI's 2010 document production reveals that Goldman talked to KMI about Goldman's work for El Paso. KMI-EP027497 (Ex. 56).

undisclosed conflict of interest, *Del Monte* is noteworthy for what the Court said it expected a reasonable board to have done if that conflict had been disclosed:

> If the directors had known at the outset of Barclays' intentions and activities, the Board likely would have hired a different banker.... Even if the directors decided to proceed with Barclays, the Board and its experienced counsel doubtless would have taken steps to protect the integrity of the process. As soon as Barclays disclosed its buy-side aspirations, the Board likely would have followed *Toys 'R' Us* and "nixed that idea."

25 A.3d at 833. El Paso's Board – though acting in the post-*Del Monte* world – did the ***exact opposite*** and retained Goldman to provide advice on the KMI proposal despite a known multi-billion dollar conflict. While the Board eventually told Goldman not to participate in "tactical" discussions concerning KMI after mid-September, this was too little too late. Goldman had already been an active participant in numerous tactical discussions about the KMI proposal – both with the Board and with Morgan Stanley[40] – and had shared its data and valuation analyses with its supposedly independent co-advisor.[41] Even after mid-September, the Board continued to rely on Goldman for advice on the Spin, which was integral to the Board's binary decision between the Spin and the Merger. That advice included valuations of the E&P business that were [redacted] less than what Goldman had presented in the spring, thus making the Spin appear less attractive. The Board found Goldman's advice concerning the KMI deal so valuable that it

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[40] Daniel Tr. at 114:22 – 116:2, 117:6 – 118:6 (Ex. 10).

[41] Daniel Tr. at 108:11 – 109:6, 122:4-21 (Ex. 10).

agreed – on October 6, after Goldman had supposedly stopped working on the transaction – to pay Goldman ***$20 million*** for its advice regarding the KMI sale.[42]

Third, Goldman's conflict was not merely theoretical. Prior to KMI entering the scene, the Board had chosen its course and was proceeding toward the Spin. After the KMI offer came along and presented Goldman with a chance to benefit far more than it ever could from the Spin, the Board – relying on analyses provided by Goldman as to the relative merits of these two competing paths[43] – changed course. Goldman receiving the $20 million fee it is due to collect for its work on the Merger, while claiming that its work had no "causal influence" on the Board's process, is the height of audacity.

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[42] Defendants now seek to justify this fee as some sort of payment for past services, but the engagement letter says nothing of the sort. That letter "confirm[s] the arrangements under which [Goldman] is engaged by [El Paso] as financial advisor in connection with the possible sale of the Company (the 'Transaction'), which may include a sale of the Company to [KMI]," and states that Goldman "will provide [El Paso] with financial advice and assistance in connection with this Transaction" and will receive a fee of $20 million if the Transaction closes. GS-ELP00019060-00019067 (Ex. 57). Nowhere does the letter suggest that this fee is for past services, and indeed Goldman already had fee arrangements in place for those past services. *See* GS-ELP00018601 (February 8, 2006 engagement letter for ongoing advisory services, with fees equal to $150,000 per year) (Ex. 13); GS-ELP00021501-00021508 (August 25, 2011 engagement letter for the Spin, providing for a $5 million fee upon announcement of a Spin and $25 million upon closing) (Ex. 19).

[43] *See, e.g.*, Daniel Tr. at 163:6 – 166:17 (Goldman presented a discounted cash flow analysis to El Paso's Board on September 15, 2011, concerning the E&P business, the pipeline business, and the combined company to help the El Paso Board compare the value of the KMI transaction with the present value of the benefits to be achieved if the Spin were deployed) (Ex. 10).

Plaintiffs have pointed to specific aspects of Goldman's advice that suggest that Goldman was using its position to nudge the Board away from the Spin and toward the KMI deal, namely: (1) its [redacted] decrease in the valuation of the E&P business between May and October 2011, without contrasting these short-term reductions in value with more stable long term valuations;[44] (2) use of an unusually high discount rate in its "present value of stock prices" and levered DCF-yield analyses of El Paso's Pipeline Segment;[45] (3) applying an unreasonably low multiple and unreasonably high discount rates in its unlevered DCF and "present value of future stock prices" analyses of El Paso's E&P segment;[46] (4) use of an incorrect number of periods to discount the terminal value of both El Paso business segments;[47] and (5) its recommendation that El Paso reconsider its decision to deny due diligence to KMI in response to KMI's threat to take the rejected $25.50 offer public.

Seeking to excuse Goldman's conflict as par for the course, Defendants argue that *Solash v. Telex Corp.*, 1988 WL 3587 (Del. Ch. Jan. 19, 1988), a case in which the target's financial advisor held a 10% stake in the buyer, mandates denial

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[44] EP00000259 (September 5 Goldman board presentation – Slide entitled "E&PCo. Analysis at Various Prices" – reducing range of E&P enterprise values from [redacted]) (Ex. 26); Daniel Tr. at 152:11-25 (Goldman reduced post-Spin value of E&P business again, from [redacted] on September 5 to [redacted] on October 6) (Ex. 10).

[45] Clarke Decl. at 22-24.

[46] Clarke Decl. at 25-28.

[47] Clarke Decl. at 24, 28.

of injunctive relief.[48] *Solash* is readily distinguishable from the case at bar for a number of reasons. First, unlike Goldman, Telex's financial advisor provided unbiased advice – *i.e.*, it told the board that *both* alternative transactions under consideration were fair, even though its own interests favored one over the other. 1988 WL 3587, at *6. Second, disinterested members of Telex management controlled the negotiations, *id.* at *10, whereas here they were led by Foshee, who disregarded explicit instructions from the Board. Third, in *Solash* there had been a robust pre-signing market canvass, while here there was none and there are deal protection devices that preclude a meaningful post-signing market check. Fourth, the Telex board was operating under time pressure due to a looming tender offer deadline, whereas El Paso's Board had plenty of time to respond to KMI's offers.

Plaintiffs respectfully submit that sanctioning Defendants' utter indifference to an unprecedented conflict would establish precisely the wrong precedent for Delaware law.

B. The Board's Retention Of Morgan Stanley Did Not Cleanse Goldman's Conflict

Goldman continued to advise the Board well into October, against the advice of El Paso's counsel.[49] Had the Board had the shareholders' best interests truly in mind, it would have removed Goldman entirely. Instead, it hired Morgan

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[48] El Paso Br. at 44-45; Goldman Br. at 20-21.

[49] *See* MS00008953 ("Over Wachtell's objection, [Goldman] got a letter signed which engaged them as an advisor in the sale of the company.") (Ex. 42).

Stanley and now asserts that this purged the taint of Goldman's conflict.[50] However Morgan Stanley's advice was also tainted because the Board—and Goldman—ensured that Morgan Stanley could not retain whatever independence it might have had at the outset.

The Board allowed Goldman to act as Morgan Stanley's tour guide to the Merger and the Spin, bringing them "up to speed" on a deal that Morgan Stanley was supposed to be evaluating with fresh eyes.[51] Then, the Board skewed Morgan Stanley's financial incentives toward the Merger and away from any alternative transaction, including the Spin or a sale of the Pipeline or E&P assets. In the end, Morgan Stanley rendered a fairness opinion predicated on peculiar and incorrect assumptions that made KMI's offer look better than it was.

1. Goldman's Collaboration Infected Morgan Stanley

The facts of this case illustrate why the "Court has not stopped at disclosure, but rather has examined banker conflicts closely to determine whether they tainted the directors' process." *Del Monte*, 25 A.3d at 832 (citing cases). While Defendants selectively cite to the deposition of Jonathan Cox to claim there was no interaction between Morgan Stanley and Goldman,[52] they ignore the record evidence to the contrary. Daniel testified that up to and through the September 12, 2011 Board meeting, Goldman and Morgan Stanley were "sharing information

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[50] El Paso Br. at 47.

[51] Daniel Tr. at 113:2 – 115:9, 122:12-16 (Ex. 10).

[52] El Paso Br. at 32.

back and forth" and were operating as "co-advisors" with no "differentiation in the roles being played by Goldman and by Morgan Stanley."[53] The Board and El Paso management were fully aware of this dynamic.[54] Morgan Stanley even sat in as Goldman presented its views on the Spin and the Merger to the Board.[55] The evidence simply does not support Defendants' argument that Morgan Stanley was "hermetically sealed off" from Goldman.

2. The Structure of Morgan Stanley's Contingency Fee Pointed the Investment Bank to Just One of Several Viable Transactions

As explained in Plaintiffs' opening brief, Goldman refused El Paso's request to change Goldman's engagement terms so that Morgan Stanley could be paid if the Spin was consummated.[56] Goldman simply refused in a casual conversation with El Paso's CFO – it was not even a conversation the Board bothered to have.[57] Inexplicably, the Board did not use Goldman's demand for a fee on the KMI deal as leverage to get Morgan Stanley a fee structure that would

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[53] Daniel Tr. at 113:2-115:9, 122:12-16 (Ex. 10).

[54] *Id.*; Foshee Tr. at 200:14-18 ("Q. Did you think [Goldman] did a lot of work to get Morgan Stanley up to speed? A. I think they did a fair amount of work to be helpful to Morgan to get them as up to speed as Goldman was.") (Ex. 12).

[55] Daniel Tr. at 108:11-109:6 (Ex. 10).

[56] Op. Br. at 13-14; 22; *see also* Sult Tr. at 137:10-138:21; 241:18-22 (Ex. 9); Daniel Tr. at 194:8-195:19; 195:25-196:19 (Ex. 10).

[57] Daniel Tr. at 195:7-196:19 (Q. And Goldman didn't agree to let Morgan Stanley be a co-advisor on the spin; correct? A. Right…. I don't recall it as a -- a difficult conversation. It was more like -- I think it was with J.R. [Sult] -- more like they had asked -- so he was asking but he was going to be okay with wherever we went with it.") (Ex. 10).

reward it for unbiased advice. Instead, the Board agreed to pay Goldman on the KMI deal on October 6, well after Defendants say Goldman stopped working on that deal, thus giving ***both*** financial advisors a monetary incentive to promote the Merger.

Defendants' argument that contingent fees for financial advisors are "routine"[58] and "recognized as proper by our courts" misses the mark.[59] A board normally is not assessing two options, both of which depend on outside advisors' analyses. Also, while bankers often have a financial incentive to favor the deal on the table, they are typically paid something if the deal as written does not close, or does not close within the projected timeframe. This provides the banker some incentive to render a balanced opinion, although even then, the differential between the contingent and non-contingent portions of the fee "may fairly raise questions about the financial advisor's objectivity and self-interest." *Atheros*, 2011 WL 864928, at *8.

Morgan Stanley's advisory fee structure is in this respect both novel and pernicious. The Board desperately needed financial advice concerning the relative

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[58] El Paso Br. at 47 (citing *In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *8 (Del. Ch. Mar. 4, 2011)).

[59] *Id.* (citing *In re Toys 'R' Us, Inc. S'holder Litig.*, 877 A.2d 975, 1005 & n.44 (Del. Ch. 2005)).

merits of the Spin and the Merger.[60] Unlike Goldman, which would be compensated whether the Board chose the Spin or the Merger, Morgan Stanley would receive *nothing* if the Board chose the Spin.[61] Morgan Stanley – which was supposed to be the Board's "independent" advisor – therefore had everything to lose by opining that KMI's offer should be rejected. Particularly given that the Board already had one advisor with a severe conflict of interest favoring the Merger, the Board should have made sure that Morgan Stanley had financial incentives that were at least somewhat balanced between alternatives. The Board's failure to do so breached its duty to take steps reasonably designed to maximize shareholder value.

3. Morgan Stanley Undervalued El Paso and Overvalued KMI, And the Board Failed to Question Obvious Errors in that Presentation

The conflict described above was not merely theoretical. As the Court recognized in *In re Tele-Communications, Inc. Shareholders Litigation*, 2005 WL 3642727, at *10 (Del. Ch. Dec. 21, 2005, revised Jan. 10, 2006), "[a] contingently paid and possibly interested financial advisor might be more convenient and cheaper absent a deal, but its potentially misguided recommendations could result

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[60] The Board also should have been seeking advice concerning a potential break-up and asset sale, especially once the Board learned that KMI planned to flip the E&P assets. But the Board never considered that option.

[61] EP00009006 (Morgan Stanley retention letter agreeing to pay a $7 million "Announcement Fee" if there is an agreement providing for a publicly announced sale of EP and a $35 million "Transaction Fee" (against which the announcement fee is credited) if the sale is consummated) (Ex. 46).

in even higher costs to the special committee's shareholder constituency in the event a deal was consummated." *See also Del Monte*, 25 A.3d at 818 (recognizing that an advisor's conflict can taint the advice it gives and the actions it takes). That is precisely what occurred here.

As explained more fully in Plaintiffs' opening brief and in the Clarke Declaration and Clarke Rebuttal, critical aspects of Morgan Stanley's fairness opinion contain glaring and anomalous errors that should have caused any financially competent member of the Board to question Morgan Stanley's assessment.[62] As Clarke testified, "they're like red flags or errors that just would stand out to anybody that had a minimal amount of financial expertise."[63]

El Paso argues that "on a preliminary injunction application in which the *Revlon* standard applies, the court need not resolve valuation disputes."[64] Plaintiffs' argument is not a "valuation dispute" at all. As Clarke testified, he did not perform his own valuation analysis.[65] Instead "what [he] was trying to do was to identify errors in an analysis that would have been apparent to an El Paso Board member,"[66] and to "show the effect in the analyses of changing [their] errors."[67]

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[62] Op. Br. at 44; Clarke Decl. at 18.

[63] Clarke Tr. at 30:4-7 (Ex. 54).

[64] El Paso Br. at 55.

[65] While Defendants now challenge certain "outputs" that flow *from Morgan Stanley's models* after correction of the obvious errors, these are not necessarily the outputs that Clarke would have derived had he performed an independent valuation.

[66] Clarke Tr. at 32:10-13 (Ex. 54).

As El Paso notes, "the issue is whether the El Paso board failed to discharge its *Revlon* duties by relying on the Morgan Stanley fairness opinion and the Morgan Stanley valuation work underlying that opinion."[68] The Clarke Declaration demonstrates that the Board failed to provide enough attention to Morgan Stanley's analyses to identify obvious errors and their consequences. *Sample v. Morgan*, 914 A.2d 647, 668-69 (Del. Ch. 2007) ("[G]iven the brevity of the Committee's deliberations and its sole reliance on [a conflicted advisor] for advice, a serious issue arises about the Committee's compliance with its duty of care. The Committee's [decision] . . . might be thought to have arisen as much from the rapid action of a poorly-informed committee relying upon conflicted advice from a lawyer subservient to management rather than from a good faith exercise of business judgment.").

Tellingly, Defendants' briefs utterly fail to address the Board's reliance on a transparently erroneous analysis. There is no response from El Paso to Plaintiffs' evidence as to why the significant errors in Morgan Stanley's analyses, all of which biased its conclusions in one direction – in favor of the KMI offer – were patently unreasonable. Instead, El Paso focuses on what it claims are anomalous results when the errors are corrected, notwithstanding Clarke's

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[67] Clarke Tr. at 49:4-7 (Ex. 54).

[68] El Paso Br. at 55.

repeated statement that he was "correcting Morgan Stanley's analysis using their assumptions,"[69] and not performing his own valuations.

In a further effort to distract the Court's attention from the Board's failure to question Morgan Stanley's flawed assumptions, El Paso cites Clarke's testimony that if he were doing a valuation of El Paso, in addition to performing a DCF analysis, he would "consider" doing a comparative company and comparable transaction analysis.[70] Apparently, El Paso is implying that the Board could have adequately relied on the results of those two methods as performed by Morgan Stanley. However, as El Paso's own expert, Professor Kenneth Lehn, testified in another case, "the comparable companies approach usually does not result in reliable estimates of a firm's value."[71] During that testimony, Lehn could not recall, of the "50 or so" valuations he had performed during a twenty-year period, "any instances where [he] deemed a comparable companies analysis a reliable indicator of value."[72] Lehn further acknowledged that "as a general matter, having observations of less than 20 or 30 [comparable companies] would generally be viewed as not a sufficiently large sample" to produce a reliable estimate of a company's value.[73] Morgan Stanley used only seven comparable companies in its

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[69] Clarke Tr. at 77 (Ex. 54).

[70] El Paso Br. at 56.

[71] *In re John Q. Hammons Hotels, Inc. Shareholder Litigation*, C.A. No. 758-CC, Lehn Deposition Transcript ("Lehn Tr.") (Apr. 8, 2010) at 19:6-10 (Ex. 51).

[72] *Id.* at 31:9-20.

[73] *Id.* at 57:2-59:3.

analyses of KMI and of El Paso's Pipeline and E&P segments.[74] In sum, Lehn agrees with Clarke: "the discounted cash flow approach would be the better approach."[75]

a. Defendants Do Not Dispute That Morgan Stanley's 0.7% Perpetuity Growth Rate Is Unreasonably Low

As detailed in the Clarke Declaration, Morgan Stanley's DCF opinion rests on an absurdly low implied perpetuity growth rate of 0.7% for El Paso's Pipeline business—a number well below inflation.[76] Defendants and their expert completely fail to address the fact that a 0.7% perpetuity growth rate implies that El Paso would be shrinking in the future—a fact contradicted by the evidence, including Foshee's own testimony regarding the growth prospects of El Paso's Pipeline segment.[77] Instead, Defendants dispute Clarke's use of the 2.9% perpetuity growth rate Morgan Stanley used to calculate the terminal value of

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[74] Proxy at 124, 126, 127 (Ex. 5).

[75] Lehn Tr. at 58:8-10 (Ex. 51). Moreover, El Paso's citation to Clarke's testimony on this issue is incomplete and misleading. Considering whether to perform an analysis and concluding that it is useful are two different things. Thus, El Paso fails to mention Clarke's further testimony that (1) as to those methods, while "it's helpful if there's information to be gleaned from using the method[,] [i]n many cases there are no comparable companies," Clarke Tr. at 36:21-24 (Ex. 54), and (2) he determined that in this case finding such comparable companies would be difficult in light of "the significant changes projected for El Paso [and] the uniqueness of KMI." Clarke Decl. at 4-7; Clarke Tr. at 58:8-25; 66:1-11; 186:23-188:12 (Ex. 54).

[76] Clarke Decl. at 8-9; Op. Br. at 44.

[77] Op. Br. at 45; Foshee Tr. at 65:8-66:7 (Ex. 12).

KMI, and contend that Clarke erred by using that growth rate without also using the discount rate that Morgan Stanley used in that calculation of KMI's value.[78]

First, even if this criticism were correct and 2.9% were not the correct perpetuity growth rate, Defendants ignore all of the reasons set forth in the Clarke Declaration as to why 0.7% is implausibly low and could not have been reasonably relied upon by the Board. Second, as Clarke demonstrates in his rebuttal declaration, a change in the implied perpetuity growth rate does not require a change of the discount rate as Defendants assert, because the two are independent variables.[79] Third, the Clarke Declaration set forth an alternative reason as to why a 2.9% perpetuity growth rate is a conservative assumption for El Paso's Pipeline business: the strong likelihood El Paso would grow at least as fast as inflation[80] given, among other things, Foshee's testimony as to the Company's strong long-term growth prospects,[81] the large capital expenditures the Company

[78] El Paso Br. at 57.

[79] Clarke Rebuttal at 15-16. Lehn claims the two variables are related if the terminal value is kept constant. Lehn Report, ¶ 15. But, as Lehn of course knows, Clarke does not hold the terminal value constant; it necessarily changed when Clarke modified Morgan Stanley's analysis to reflect an appropriate perpetuity growth rate. Clarke Rebuttal at 15. These types of games by Defendants' expert expose Defendants' lack of justification for Morgan Stanley's transparently unreasonable assumptions.

[80] Clarke Decl. at 11.

[81] Clarke Decl. at 10.

projects in the future,[82] and the fact that as a regulated entity, El Paso is virtually guaranteed the ability to increase rates on par with inflation.[83]

El Paso also argues that Clarke's changes to Morgan Stanley's analysis create an outcome that "implies growth without net investment." This argument is based on two fundamental errors in Lehn's rebuttal report. The first relates to Clarke's assumption, based on the projections Morgan Stanley used, that [redacted]

[redacted] On that basis, Lehn claims that a higher terminal multiple than that which Morgan Stanley used is unwarranted as [redacted]

[redacted][84] This assertion fails to consider El Paso's substantial growth capital expenditures for the Pipeline segment starting before the projection period and projected to continue thereafter, including through 2015.[85] Second, in a footnote, Lehn acknowledges those expenditures (without, however, conceding that they undermine his support for a terminal multiple that implies an implausibly low 0.7% perpetual growth rate for the Pipeline segment), but argues that in normalizing free cash flows, Clarke's "model sets capital expenditures equal to depreciation and amortization in the terminal period, implying that El Paso was

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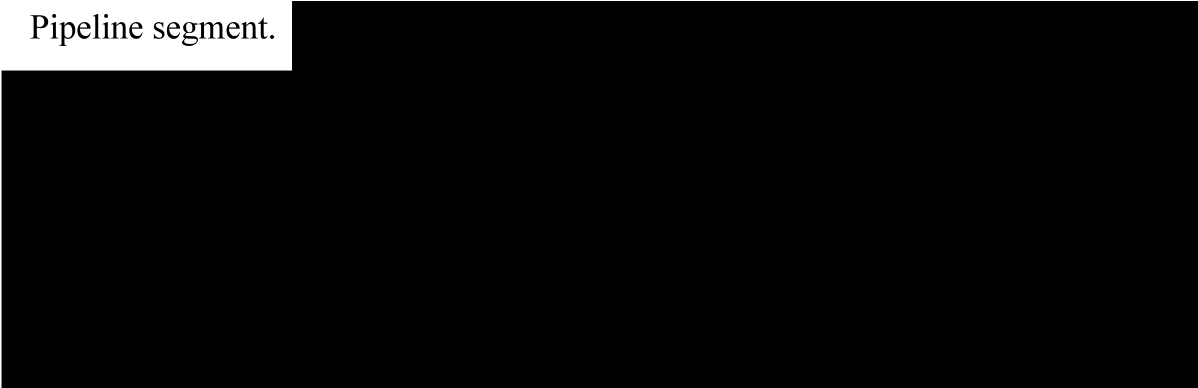
[82] Clarke Tr. at 92:18-94:11 (Ex. 54).

[83] *See* http://www.regulationbodyofknowledge.org/chapter4/narrative/4/.

[84] Lehn Decl. at ¶ 18.

[85] *See* Clarke Rebuttal at 2-4.

expected to simply replace the existing productive capacity of its assets in perpetuity, not invest for growth."[86] This assertion is based on the false premise that there necessarily exists a dollar-for-dollar relationship between the amount of capital expenditures necessary to maintain a company's assets in a particular year and the amount of depreciation and amortization expenses the company writes off. It is also fully belied by a simple observation of El Paso's projections for the Pipeline segment.



.[87] Again, that Defendants and their expert feel the need to make such misleading arguments is telling.

b. Defendants Do Not Dispute That Morgan Stanley Presented the Board With Two Dramatically Different Cost of Equity Rates for KMI

A director that sees bankers changing key inputs for the same variable in different parts of the banker's analysis should seek an explanation. Clarke explains in his Declaration that the 7.5% cost of equity Morgan Stanley picked for KMI was unreasonably low and dramatically inconsistent with the 11.8% cost of equity Morgan Stanley calculated for KMI for another purpose (***and which was***

[86] Lehn Decl. at n.23.

[87] Clarke Rebuttal at 3.

disclosed in the very same September 26 presentation to the Board that reflected the 7.5% figure).[88] It is inconceivable that a Board member, acting in good faith and exercising even a minimal degree of diligence, would not have noticed and questioned these two wildly different discount rates for the same company. Correcting the KMI discount rate lowers the value for the KMI stock that forms part of the Merger consideration.[89]

El Paso argues that "in his report, Clarke offers no explanation for selecting a 9.5% cost of equity over [the] 7.5% cost of equity" that Morgan Stanley used.[90] El Paso must be misreading Clarke's report, given the anomaly identified above, which El Paso and Lehn fail to address. Further, in his deposition, Clarke provided an additional reason why Morgan Stanley's 7.5% cost of equity was unreasonable. Morgan Stanley's calculation was based on a purported historical beta, notwithstanding that KMI's stock had been trading for only eight months, and "Ibbotson Morningstar[] indicates that you really need to have about 60 months of data before you can appropriately calculate a beta. And, in fact, Morningstar Ibbotson doesn't provide a beta for KMI for that reason. So ... I don't think there's enough data to calculate a beta for KMI."[91] In the face of this

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[88] Clarke Decl. at 17-18 & n.23.

[89] Clarke Decl. at 18.

[90] El Paso Br. at 58.

[91] Clarke Tr. at 138:4-12 & Errata Sheet thereto (Ex. 54).

testimony, the best that Lehn and the El Paso Defendants can do is claim that use of an historical beta was not unreasonable "under the circumstances."[92]

In determining a reasonable alternative discount rate to apply to KMI, Clarke noted that KMI's own advisors used materially higher discount rates to value KMI.[93] Clarke gave the El Paso Board the benefit of the doubt and chose a conservative discount rate that was within the lowest range used by KMI's advisors, and lower than the rate Morgan Stanley itself used for a separate purpose—*i.e.*, the mid-range of Evercore's CAPM valuation discount.[94]

In sum, the Board inexplicably failed to question Morgan Stanley's disagreement with itself as to its cost of equity assumptions for KMI. For this and the other reasons set forth above, the Board did not reasonably rely on Morgan Stanley's fairness opinion with regard to the Merger.[95]

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[92] Lehn Report at ¶ 26; El Paso Br. at 58. While the alternative to use of an historical beta is to derive one by analysis of those used for comparable companies, Defendants note Clarke's testimony as to the difficulty of finding companies comparable to KMI. What Defendants leave out is Clarke's testimony that, regardless of how difficult that may be, "the beta that was derived for KMI is just not meaningful given the short trading history. So the next best alternative would be beta derived from comparable companies." Clarke Tr. at 187:9-188:12 (Ex. 54).

[93] Clarke Decl. at 19.

[94] *Id.*

[95] Op. Br. at 45.

C. The Board Improperly Ceded All Negotiating Power To Foshee, A CEO With A Known Conflict As Well As A Secret Motivation

A board of directors has a duty to ensure that a sales process is not tainted by reliance on an interested insider. *Macmillan*, 559 A.2d at 1280 ("[D]irectors are required to demonstrate both their utmost good faith and the most scrupulous inherent fairness of transactions in which they possess a financial, business or other personal interest which does not devolve upon the corporation or all stockholders generally."). The evidence here shows that the Board ceded complete negotiating authority to Foshee, despite knowing that he was securing a lucrative exit package. Worse, Foshee used this freedom [REDACTED] for a potential purchase of the E&P assets by himself and other members of El Paso's senior management. Letting a potentially conflicted Foshee subvert the shareholders' interests breached the Board's fiduciary duty. *Macmillan*, 559 A.2d at 1285 ("The board may not allow any impermissible influence, inconsistent with the best interests of the shareholders, to alter the strict fulfillment of these duties.").

1. Foshee Faced A Disabling Conflict in the Negotiations

The Board allowed Foshee to lead the negotiations with Rich Kinder despite the $90 million-plus that Foshee stood to receive upon consummation of the Merger, much of which would not have been received in the event of the

Spin.[96] Defendants argue that entrusting Foshee with the keys to the kingdom was okay because he shared the public shareholders' interest in maximizing value.[97] This misses the point. Foshee is not a typical shareholder. The issue before this Court is whether the size of Foshee's contingent compensation was "so substantial as to have rendered it improbable that [Foshee] could discharge [his] fiduciary obligations in an even-handed manner." *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 951 (Del. Ch. 2001). Given that Foshee stands to receive more than $90 million from his interest in El Paso in the sale to KMI, and far less through the Spin, locking down the Merger is a more powerful incentive than negotiating hard for every nickel per share that was reasonably obtainable.[98]

In any event, while Defendants contend that acceleration of options, "without more," will not suffice to impugn Foshee,[99] discovery has revealed that management's potential bid on the E&P assets gave Foshee even more to gain than scoring his $90 million-plus payday. The liquidity Foshee receives as a result of the vesting of his El Paso options, as well as his potential bid on the E&P assets

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[96] Vagt Tr. at 227:12-229:4 (Ex. 7).

[97] El Paso Br. at 48.

[98] Defendants maintain that this is meaningless because the shares would have vested within the next two years anyway. El Paso Br. at 49. Under any reasonable measure, the right to receive tens of millions of dollars years before you otherwise would have been entitled to that large sum of money is material. Additionally, receipt of these dollars now (instead of in two years), provides an immediate source of investment funds, and fits squarely within Foshee's plan to pursue the contemplated MBO.

[99] El Paso Br. at 48-49 (citing *In re Openlane, Inc. S'holders Litig.*, 2011 WL 4599662, at *5 (Del. Ch. Sept. 30, 2011)).

which could be funded through cashing out those options, dwarfs the potential payouts in cases cited by Defendants where the Court found that mere acceleration of options is insufficient to infer the requisite interest for a breach of loyalty claim. *See, e.g., Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *9 (Del. Ch. Nov. 30, 2007) ("Globis has not provided any facts from which this Court could find the acceleration of the unvested options, even when viewed separately, was substantial enough to infer interest."); *Krim v. ProNet, Inc.*, 744 A.2d 523 (Del. Ch. 1999) (same). Indeed, the potential MBO is precisely the type of interest over which the Court has previously expressed concern in situations where the Board has abdicated control of negotiations to a lead negotiator with a private agenda. *See In re Lear Corp. S'holders Litig.*, 926 A.2d 94, 117-18 (Del. Ch. 2007) (suggesting that the negotiation process could be tainted without some independent oversight).

At the time he was negotiating the KMI deal, Foshee and his management team were contemplating a management buyout of the E&P assets.[100] While negotiating the merger, Foshee discussed with Smolik the idea of a MBO and both were clearly interested.[101] According to Smolik, Foshee was "willing (maybe even

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[100] EP00033390 (email between Sult and Smolik discussing that El Paso's executives learned that KMI was looking to earn [redacted] from a sale of the E&P business, and management believes this "bogey" represents an attractive buyout opportunity) (Ex. 41).

[101] EP00033390 (Ex. 41).

desires) to have the conversation with [KMI]."[102] Smolik expressly stated "I like the possibility,"[103] and Sult agreed that it "[c]ould be a real win win."[104] Shortly after signing the merger agreement, Foshee told Kinder of management's interest in submitting a bid. Then, Foshee engaged in a subsequent conversation with Kinder in which Foshee communicated that:

> [I]t probably didn't make any sense for the management team to [bid] up front, because from Kinder Morgan's standpoint, they really needed to get price discovery on the assets. But that if [KMI] got to a point in that price discovery where they weren't liking what they were seeing or wanted an alternative, that then if they were interested, there would be interest on the part of management.[105]

Whether a bid from management has yet been forthcoming is irrelevant.[106] What matters is that Foshee had conflicting thoughts in his head—undisclosed to the Board—while negotiating the Merger and clearly realized that by allowing a sale to KMI, regardless of price, he would be in the best position to buy the valuable E&P assets at a depressed price. *See, e.g., Dollar Thrifty*, 14 A.3d at 598 ("The court must take a nuanced and realistic look at the possibility that personal interests short of pure self-dealing have influenced the board to block a bid or to

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[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Foshee Tr. 277:20 – 278:5 (Ex. 12).

[106] Again, as previously established, Foshee testified that the management group was not going to bid in the initial rounds. Foshee Tr. at 278:20 – 279:14 (Ex. 12).

steer a deal to one bidder rather than another.”). His failure to disclose these secret motivations to the Board, while continuing to serve as lead negotiator of the Merger, was a breach of Foshee’s own fiduciary duties.

El Paso argues that there is “no basis to believe that KMI would sell E&P for anything less than the highest available price.”[107] What they leave out is that Foshee testified that it was senior management’s plan, and what they communicated to KMI, that “if Kinder ever got to a point in [the] process where they wanted to sit down, then management would have some interest in it.”[108] As El Paso makes clear elsewhere in its brief,[109] the members of its senior management team were well aware that the market for natural gas production had entered a temporary and substantial slump.

Moreover, El Paso management would not get the chance to participate on the buy side of any E&P deal if the Board walked away from the negotiations. Thus, unlike in *Toys “R” Us*, where the “challenge to [the CEO’s] fidelity to the Company and its stockholders [was] not substantiated,” 877 A.2d at 1004, the record here shows that Foshee had a rational, strategic and self-interested reason

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[107] El Paso Br. at 52.

[108] Foshee Tr. at 279:11-14 (Ex. 12).

[109] El Paso Br. at 4, 18.

for taking the deal on the terms he did: it provided him both the opportunity and the cash and liquidity to help fund a lucrative MBO transaction.

2. The Board Failed to Involve Itself in the Sales Process

Defendants try to portray the Board as having a tight leash on Foshee during negotiations.[110] This is simply not true. There was not a single negotiation between Foshee and Kinder where any other Board member was present.[111] The Board was not even aware of all of the discussions Foshee was having.[112] The Board's failure was not limited to ignorance, though. The Board knew that, on at least one occasion, Foshee ignored their direct instructions regarding a counteroffer to KMI, something Director Vagt testified was "not particularly" surprising.[113] Specifically, after the Board "re-iterated" an absolute floor of $26.50 for the cash/stock component of the merger consideration,[114] Foshee told Kinder that El Paso would accept a cash/stock component of only $26.00.[115] When KMI responded with an offer of $14.64 in cash, 0.4817 in KMI stock, and 0.640 of a warrant, with a total cash/stock value of only $25.78 (excluding the

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[110] El Paso Br. at 51.

[111] Vagt Tr. at 191:22-192:10 (explaining that the Board had complete trust in Foshee to negotiate alone) (Ex. 7); Sult Tr. at 172:2-173:4 (Board was "comfortable" with Foshee negotiating alone) (Ex. 9).

[112] Director Vagt, for example, acknowledges that he had no involvement in the KMI negotiations, Vagt Tr. at 167:10-18 (Ex. 7), and that he was not aware of all negotiations. *Id.* at 160:9-161:17.

[113] Vagt Tr. at 188:20-189:25 (Ex. 7).

[114] Proxy at 107-108 (Ex. 5).

[115] EP00000413 (Ex. 34); KMI-EP009378 (Ex. 49).

warrants) – predictably, well below the Board's "floor" – Foshee recommended that offer to the Board and the Board inexplicably accepted it.

Defendants hide this issue in footnote 28, calling it a "quibble" that ignores the value of the warrants.[116] The record is unambiguous: when responding to KMI's proposal to include warrants as a "bridge" to reach the $27.55 price previously accepted, the Board instructed Foshee that the mix of consideration must include cash and stock worth *at least* $26.50, *with warrants on top of that*.[117] Foshee testified that this instruction was not some mere "preference," and was in fact "reiterated," and that he differed with the Board because he was "a larger proponent of warrants."[118] The difference between the Board's floor and what Foshee sought while he served as the sole negotiator despite his undisclosed desire to buy the E&P business amounts to over $386 million based on the number of outstanding shares of El Paso's common stock as of January 20, 2012: hardly a quibble.

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[116] El Paso Br. at 52 n.28.

[117] Vagt Tr. at 187:13-15 ("Q. So the floor value for cash and stock excludes the warrants? A. Yes. That was our objective.") (Ex. 7); Foshee Tr. at 293:5-14 ("Q. Okay. Now, that is their preference, the preference is to cash over stock. But they said to you, they reiterated that the floor value for the cash and stock consideration was 26.50; right? A. Uh-huh. Q. That wasn't expressed as a preference; right? A. No, they reiterated that the floor value for the cash and stock was 26.50.") (Ex. 12).

[118] Foshee Tr. at 293:11-17 (Ex. 12).

D. Injunctive Relief Is Not Foreclosed By The Fact That The Merger Represents A Premium

While Defendants claim immunity because the Merger price represents a premium over El Paso's trading price, this does not render injunctive relief inappropriate. *See, e.g., Del Monte*, 25 A.3d at 844-45 (enjoining vote on deal offering a 40% premium). The Board needed to take steps to achieve a value-***maximizing*** price, not just a price exceeding the market price. A price above the Board's first rejection and below its own floor should raise serious questions, even before getting to the odd circumstances leading to the Board accepting that marginal bid. Moreover, having made no effort whatsoever to market the Pipeline and E&P businesses separately, the Board has no way of knowing whether the two components could have been sold for consideration exceeding the Merger price and providing an even greater premium over El Paso's trading price.

Nor is it relevant that, due to a recent run-up in KMI's stock price, the Merger consideration is worth more today than on the day the deal was announced. The Court should view the reasonableness of Defendants' conduct from the perspective of what they knew at the time they approved the Merger, and should not give them the benefit of fortuitous and potentially temporary stock price movements. *See In re Cogent, Inc. S'holder Litig.,* 7 A.3d 487, 497 (Del. Ch. 2010) (in *Revlon* context, court must review directors' decisions "viewed from the point in time during which the directors acted") (citing *Paramount Commc'ns Inc. v. QVC Network Inc*, 637 A.2d 34, 45 (Del. 1994)). In addition, as noted

above, KMI's post-announcement price necessarily incorporates the market's continuing view as to the prospects of the acquired company, El Paso, in comparison to what will be paid in consideration for that value.

E. Defendants Cannot Rely On Their Supposed Exploration Of Alternatives A Year Earlier To Satisfy Their Fiduciary Duties

Finally, Defendants' argument that there was no need for the Board to explore alternative transactions after receiving KMI's proposal is wrong. The fact that the Board had considered and decided against selling the E&P and Pipeline businesses separately back in 2010 is irrelevant. After all, the Board concluded that the Spin it had found so compelling as recently as May 2011 should be abandoned only five months later. Having been told that there was unlikely to be any bidding competition for the entirety of El Paso but that bidders may be interested in the separate component businesses, it was incumbent upon the Board to make a reasoned, educated decision about whether pursuing separate sales would produce a greater return for the shareholders than the Merger. Had KMI paid a price exceeding the Board's demands, perhaps this would be a close case. But KMI did nothing of the sort, and the Board failed in its prescribed duties.

F. The Deal Protections Are Unreasonable

Defendants imposed unreasonable deal protection devices, including the overly restrictive "fiduciary-out" and high termination fee, that ensure that there will never be a competing offer for El Paso or its component businesses. This is not a situation in which such deal protections might arguably be justified. There

was no pre-signing market check, KMI was not offering a "blow-out" price, and KMI had not expended significant resources in the transaction process. Additionally, the Board knew that third parties would be interested in purchasing some, but not all, of the Company's assets, yet the Board neither negotiated with bidders other than KMI, nor insisted on a termination fee that made bids for El Paso's parts realistically feasible. Moreover, the Board knew that KMI intended to "flip" the E&P assets to third parties immediately after closing the Merger, yet they disabled themselves from testing the price that KMI had agreed to pay for El Paso as a whole or determining whether the Merger was a better alternative for El Paso shareholders than selling the Company in discrete pieces. These facts distinguish this case from *Toys 'R' Us*, where the Court upheld deal protections precluding a sale of the company's Babies 'R' Us division, noting that there was no evidence that such a sale was a "viable strategy." 877 A.2d at 1022.

Defendants' assertion that it was reasonable for the Board to agree to the "fiduciary-out" provision because El Paso did not receive any offers for the E&P business following the announcement of the Spin is baseless. [REDACTED] Notably, the Board never instructed its bankers to pick up the phone and "test the waters."

Defendants' related assertion – that the narrow "fiduciary out" provision is justified because of tax considerations associated with the Spin – is also inapposite. There may have been tax reasons (*e.g.*, not wanting to "burn" the NOLs) as to why the Spin was more advantageous than a sale of the E&P assets

when El Paso intended to continue operating the Pipeline business. However, once KMI submitted its offer to acquire the entire Company, the calculus changed. There is simply no reason (and Defendants fail to posit one) why El Paso could not have sold the component businesses separately and used the NOLs to shield a significant portion of the subsequent tax burden.

Once the Board decided to abandon the Spin, the question it faced was how to maximize shareholder value. The Board knew throughout the process that there would be bidders interested in some, but not all, of the El Paso assets. Thus, when considering the deal protections, the Board was required to hold open the possibility that shareholders might be better off if the Company was sold in parts. Its failure to do so violated its fiduciary duties.

III. EL PASO'S SHAREHOLDERS FACE IRREPARABLE HARM ABSENT AN INJUNCTION

Plaintiffs face the threat of imminent, irreparable harm absent injunctive relief: the loss of the right to be presented with a transaction that was negotiated free from the taint of conflicts of interest. In contending that Plaintiffs' claim is "about money" and therefore "remediable in damages," Defendants are incorrect on the law regarding conflicted transactions and seem to be drawing a fine, semantic line about the availability of damages.[119]

In *Del Monte*, as here, a board of directors was steered by a conflicted financial advisor (and in this case conflicted management) into approving a

[119] El Paso Br. at 59-60.

corporate sale governed by *Revlon*. Even though the transaction provided a 40% premium over the target's trading price, the Court enjoined the vote based on concerns that the conflicted advisor's involvement may have prevented the board from obtaining a value-maximizing transaction. 25 A.3d at 816. The Court held that monetary damages would provide an inadequate remedy because "deriving the price [the] shareholders might have received in an untainted process and comparing that to what they actually received" would necessarily "involve imprecise estimates." *Id.* at 838. *See also Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1090 (Del. Ch. 2004) (absent an injunction, any post-merger damages inquiry may "involve imprecise estimates," causing "difficulty of shaping monetary relief" and resulting in irreparable injury). Under these circumstances, the Court found that only injunctive relief could ensure that Del Monte's shareholders were presented with a chance to vote on a deal negotiated free from the taint of conflict of interest. *Id.* ("Absent an injunction, the Del Monte stockholders will be deprived forever of the opportunity to receive a pre-vote topping bid in a process free of taint from Barclays' improper activities. The threatened foreclosure of this unique opportunity constitutes irreparable injury."). The same is true here.

In the *CNX* case, the Court declined to grant a preliminary injunction despite a showing of an adequate probability of success, on the basis that money damages were available. *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 420 (Del. Ch. 2010). In a subsequent ruling, the Court made clear that it would have

been more likely to grant an injunction if it had evaluated the claims under a legal standard (*e.g.*, *Pure Resources*) that did not provide a viable means to recover post-closing money damages.[120] Here, Defendants will argue that the Board is immune from liability for money damages under the exculpatory provision in El Paso's charter pursuant to 8 *Del. C.* § 102(b)(7). A finding that Plaintiffs have shown an adequate probability of success on the merits of potentially exculpated claims would leave Plaintiffs with no remedy for a wrong: itself an inequitable result. In order to conclude that money damages are actually available (and thereby accept Defendants' position about irreparable harm), the Court must conclude that there is an adequate likelihood of success as to ***non-exculpated*** claims against some or all Defendants, thus leaving a realistic opportunity for the class to collect money damages. To the extent the Court harbors any doubts about the ultimate availability of money damages, injunctive relief is the only viable remedy for Defendants' wrongdoing. *See Openlane, Inc.*, 2011 WL 4599662, at *16 n.97 ("With an independent and disinterested board that is [] protected by a Section 102(b)(7) charter provision, the Court's options for post-merger relief are limited.") (citing *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009)); *Del Monte*, 25 A.3d at 838 ("Defenses to monetary damages … weigh in favor of pre-vote relief. Exculpation under Section 102(b)(7) can render empty the promise of post-closing damages."); *Police & Fire Ret. Sys. of City of Detroit v.*

[120] *In re CNX Gas Corp. S'holders Litig.*, C.A. No. 5377-VCL, Transcript at 17-18, 23 (Del. Ch. May 26, 2010).

Bernal, 2009 WL 1873144, at *3 (Del. Ch. June 26, 2009) ("[T]he shareholders' only realistic remedy for certain breaches of fiduciary duty in connection with a sale of control transaction may be injunctive relief.").

Defendants also miss the mark with their contention that El Paso shareholders have not suffered an "imminent, non-speculative injury" because "no one has come forward to make a competing bid to top KMI's offer."[121] Defendants cite no authority for the proposition that Plaintiffs must show that a competing bid exists to establish entitlement to injunctive relief. And, in any event, Plaintiffs have established that the absence of a competing bid was not pre-ordained but was a consequence of Defendants' strategic bidding (in the case of Rich Kinder) and the willingness of Foshee, the Board, and El Paso's advisors to preclude competition for bids for El Paso's parts or its entirety.

Foshee testified that "there wasn't a natural other buyer for the whole that would compete with a short time window" with KMI.[122] Morgan Stanley made clear to the Board that while they could expect bidders interested in either the E&P business or the Pipelines business, it was highly unlikely anyone would compete to buy El Paso as a whole, even if the price offered by KMI was not compelling.[123] Explaining the absence of competing bidders, Morgan Stanley's Jonathan Cox testified as follows:

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[121] El Paso Br. at 60.

[122] Foshee Tr. at 167:9-14 (Ex. 12).

[123] Foshee Tr. at 166:17-24 (Ex. 12).

> In our view, those parties that would be interested in El Paso would be most interested in either the pipelines business or the exploration/production business … and those parties that were in a position to pay a significant price … a price that competed with or exceeded the price that Kinder Morgan was implicitly paying for the pipeline business – were parties that … not only largely didn't have the financial means to acquire both, but in our judgment would, even if they did in some cases have the financial means, would be disinclined to do so.[124]

Notwithstanding Morgan Stanley's advice that a real auction would be possible for the Company's component parts, the El Paso Board failed to consider that option, choosing instead to focus only on the transaction that it knew would *not* generate competing bids.

The shareholders' ability to vote the deal down does not prevent irreparable harm. Given that the Merger offers a premium over El Paso's pre-announcement trading price, its shareholders are likely to approve the transaction, but this surely does not mean it constituted a value-maximizing transaction. Absent an injunction, the shareholders will never know whether a more favorable option was available, and will forever lose the ability to receive the benefits of any such option. *See Del Monte*, 25 A.3d at 838.

IV. THE BALANCE OF EQUITIES FAVORS ISSUANCE OF A PRELIMINARY INJUNCTION

Defendants' concerns about the delay caused if the Court issues an injunction are meritless. The SEC just approved the Proxy and a shareholder vote

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[124] Cox Tr. at 196:11-24 (Ex. 8).

will not happen until March 6 in all events.[125] If the Court granted the narrowest meaningful relief – enjoining the application of any deal protections until the currently scheduled vote so that bids for all or parts of El Paso can be submitted – there would literally be no delay. Moreover, even a modest delay of the shareholder vote would not cause undue harm. Given the need for regulatory approvals, the Merger can close no earlier than the second quarter of 2012. Accordingly, there is ample time – more than is usually available in expedited deal litigation – for Defendants to use a modest delay in the shareholder vote to run a process devoid of conflicts that genuinely seeks to maximize value for El Paso's shareholders.

While Defendants cite *In re Pennaco Energy, Inc. Shareholders Litigation*, 787 A.2d 691, 715 (Del. Ch. Feb. 5, 2001) for the proposition that the Court is "reluctant to enjoin a premium-generating transaction when no other option is available," El Paso has several options readily available other than sale of the

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[125] Plaintiffs' opening brief addresses material facts that did not appear in the preliminary proxy, including troubling details about the perpetuity growth rate Morgan Stanley assumed for El Paso (Op. Br. at 23) and El Paso management's interest in a buyout of the E&P business (Op. Br. at 37). Because the final proxy statement had not been issued, Plaintiffs recognized that arguments as to the deficiency of disclosure of these facts were premature and reserved. Defendants cite *In re Staples, Inc. Shareholder Litigation*, 792 A.2d 934 (Del. Ch. 2001), which simply ruled, as Defendants concede, that disclosure claims not argued in an opening brief are waived solely "for purposes of the preliminary injunction motion." *Id.* at 958 n.44. Defendants were on notice as to what Plaintiffs contend are material facts. Having failed to include these material facts in the final proxy statement, Defendants cannot later claim that the shareholder vote was based on knowledge of all material facts.

entire Company to KMI. Before KMI resurfaced in the fall of 2011, the Board was marching full-steam towards the Spin. There is nothing prohibiting the Board from resuming that course. Moreover, the Board could sell the Pipeline assets and E&P assets separately.

V. THE RELIEF SOUGHT BY PLAINTIFFS IS AVAILABLE ON A PRELIMINARY RECORD

This Court is renowned for its ability to reach respected and thoughtful judgments quickly and on a partial record. At bar, Plaintiffs request that the Court "enjoin the shareholder vote on the Merger as well as the enforcement of the deal protection provisions, so the Board can fulfill its fiduciary duty to maximize shareholder value by retaining an independent financial advisor to assist it in evaluating its strategic alternatives, including but not limited to the Spin and/or sales of the E&P and Pipeline businesses to separate buyers."[126] Plaintiffs' requested relief is substantially similar to the relief granted on a preliminary record by this Court in *In re Topps Co. Shareholders Litigation*, 926 A.2d 58, 92-93 (Del. Ch. 2007) (enjoining consummation of a merger until defendant granted waiver of standstill agreement to allow party to make competing offer) and by Vice Chancellor Laster in *Del Monte*, 25 A.3d at 818-19 (enjoining shareholder vote and enforcement of deal protections for twenty days).

Plaintiffs are not asking the Court to *mandate* that the Board retain an independent advisor and shop the Company, but rather to give the Board an

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[126] Op. Br. at 49.

opportunity to do so by removing the temporal and structural obstacles that otherwise exist (*i.e.*, the looming shareholder vote and the deal protections). The relief sought is no more affirmative than any other ruling that gives a defendant a chance to correct its prior misdeeds. If, even after being told that Plaintiffs have a reasonable probability of success on their breach of fiduciary duty claim arising from the original sale process, the Board does not avail itself of the opportunity to obtain unconflicted advice and conduct a broader sale process, then it proceeds at its peril and at risk of losing the protections of 8 *Del. C.* §§ 141(e) and 102(b)(7).

Defendants argue that "plaintiffs are not entitled to ask the Court to 'blue-pencil' the merger agreement and order what amounts to a do-over of the board's sales process."[127] This argument fails for at least two reasons. First, Plaintiffs are not asking the Court to blue-pencil the Merger Agreement; they are simply asking the Court to preliminarily enjoin enforcement of the deal protection provisions. Absent such relief, an injunction of the shareholder vote or consummation of the Merger would be a hollow victory. As long as the overly narrow "fiduciary-out" and unreasonably high termination fee are operative, there will not be any topping bids for the E&P or Pipeline businesses separately. Given that there is no expectation of any competing bidders emerging for the entire Company, any postponement in the shareholder vote without elimination of the deal protections would only delay the inevitable. Second, Plaintiffs are certainly not asking for a

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[127] El Paso Br. 61-62.

"do-over." Rather, Plaintiffs are simply asking the Court to give the Board an opportunity do now what any board acting reasonably and in good faith would have done before signing the Merger Agreement.

VI. A SUBSTANTIAL INJUNCTION BOND IS NOT WARRANTED

Despite Defendants' attempt to impose a daunting expense on Plaintiffs by declaring a bond necessary for injunctive relief, the circumstances of this case justify no more than a nominal bond. In *In re CNX Gas Corp. Shareholders Litigation*, which Defendants cite, the Court noted that "for a substantial bond to be required, it should be supported either by facts of record or by some realistic as opposed to yet unproven legal theory from which damages could flow to the party enjoined."[128] Defendants offer no legal theory or fact in the record that would satisfy this requirement.

KMI is not going anywhere if the Merger is delayed to give the Board an opportunity to seek the advice of an unbiased financial advisor and to fully explore the Company's strategic alternatives. A preliminary injunction does not trigger any right to terminate the Merger, and the Merger Agreement does not permit KMI to walk away prior to June 30, 2012. Thus, there is ample time for the Board to evaluate other options and still consummate the Merger if it turns out to be the best available transaction. In sum, while Defendants seek a bond to protect

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[128] C.A. No. 5377-VCL, Transcript at 9 (Del. Ch. May 26, 2010).

against "the risk that an improvidently issued injunction derails the transaction,"[129] they fail to explain any circumstance in which that might occur, or how shareholders would be harmed if, following an injunction, the Board abandons the Merger for a more favorable strategic alternative.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

Dated: February 3, 2012

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[129] El Paso Br. at 62.

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I hereby certify that on this 17th day of February, 2012, a true and correct copy of the foregoing was served by *LexisNexis File & Serve* on the following:

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