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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 Redacted as marked January 26, 2012

EL PASO DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted by the El Paso Corporation director defendants in opposition to plaintiffs' motion for a preliminary injunction that would delay a pending merger in which, at current market prices, the shareholders of El Paso stand to receive approximately $23 billion in consideration.

Plaintiffs' motion should be denied for numerous, independent reasons.

1. The challenged merger is an arm's length transaction. There is no controlling shareholder on the El Paso side. Under our law, El Paso's directors are subject to *Revlon* duties. There is simply no factual or legal basis for plaintiffs' claim that entire fairness is the standard of review.

2. There is no competing bidder for El Paso. Although the break-up fee and no-shop provisions are customary and non-preclusive, no other potential bidders have indicated any interest in acquiring El Paso, either before or after the KMI merger was announced on October 16, 2011. Under this Court's well-established precedents, there is no warrant for taking the decision whether to approve the merger out of the hands of El Paso's shareholders.

3. El Paso's 12-member board includes 11 independent directors, each of whom has a wealth of experience in the energy industry. This board has overseen the divestiture of more than $15 billion in assets since 2003; it is no stranger to the ins and outs of selling a company. There is no allegation or evidence that any of the 11 independent directors was conflicted.

4. The El Paso board has been very active, considering various strategic alternatives and conducting detailed analyses of the valuation of each of the Company's businesses. These reviews culminated in a strategic board session in May 2011, at which the directors approved a tax-free spinoff of El Paso's exploration and production — or

"E&P" — business based on a determination that that alternative would maximize value to El Paso's shareholders. Therefore, the board was intimately familiar with its alternatives and the value of El Paso's businesses when Kinder Morgan, Inc. approached El Paso on August 30, 2011.

5. When the Company was approached, the board immediately held a meeting and retained financial and legal advisors. Although the board was fully aware that Goldman-managed funds had an ownership interest in KMI, the board determined that it was important to keep Goldman Sachs as its financial advisor in light of its prior work on the spinoff and the fact that the spinoff was still a viable alternative. Recognizing the conflict, however, the board retained Morgan Stanley to conduct an independent analysis and ultimately to provide a fairness opinion if required. The board also took additional steps later in the process to restrict Goldman's role by terminating Goldman's involvement in any tactical discussions or negotiations with KMI and by limiting Goldman's work to updating its spinoff valuations in order to help the board evaluate the KMI offer.

6. Although the El Paso board believed that the initial offer from KMI was not adequate in comparison to its spinoff alternative, the board believed that the offer was serious and justified additional consideration. Over the next few weeks, at the direction of the board, the financial advisors updated their analyses. Based on these updates, the board directed Douglas Foshee, El Paso's Chairman and CEO, to engage in a process to attempt to obtain an acceptable price for the El Paso shareholders and provided Mr. Foshee with tactical advice on negotiations. The board remained active throughout the process; it received periodic reports from management and held multiple board meetings and update calls.

7. Ultimately, following strenuous negotiations, El Paso and KMI entered into a transaction that resulted in a premium of 37.2% in relation to the trading price on the date of the announcement. As the record reflects, the board's process was designed to maximize the value to El Paso's shareholders. This record includes Richard Kinder's candid handwritten notes and contemporaneous emails to his board, which show that KMI would not have paid more than it did for El Paso.

8. El Paso does not have the burden of showing on this application that the price it obtained from KMI is "fair" in the eyes of plaintiffs' expert. El Paso was not required to follow plaintiff's preferred "blueprint" for maximizing value. Having said that, the attractiveness of the KMI offer is demonstrated by the parties' hard-fought negotiations and the substantial premium it promises to El Paso's shareholders under a variety of metrics. As of August 30, when KMI's initial offer was conveyed to El Paso, it had a value about 34.8% higher than the trading price of El Paso shares at that time. As noted, the agreed-upon merger consideration reflects a 37.2% premium relative to El Paso's stock price on the date the transaction was announced. And today, because the trading price of KMI shares has increased, the blended value (pro-rating the various elections available to shareholders) of the consideration is at least $29.33, or 49.7% above El Paso's trading price just before the board approved the transaction.

9. Even though *Revlon* does not make directors guarantors that they obtained "the last nickel" from a buyer, the evidence here is that they did. There is no competing bid for El Paso and there is no competing bidder on the horizon. Detailed proprietary information about El Paso (for example, its five-year EBITDA projections) has been in the public domain since November 10, 2011 (when El Paso filed its first draft Form S-4).

The deal protections here — a 3.1% break-up fee, a customary no-shop and match rights — in no way preclude an overbid.

10. As indicated above, the decision of the El Paso board to enter into a merger agreement with KMI was made against the background of El Paso's previous announcement, on May 24, 2011, that it would effect a split-up of its two major business units, pipelines and exploration and production ("E&P"). Prior to the receipt of the KMI offer, the board was reviewing the reaction of the market to the spinoff announcement. Although the market reacted favorably when the spinoff was announced, overall market conditions, as well as volatility in the commodity prices for energy, had resulted in declines in El Paso's share price during the months following the announcement. Thus, when KMI made its unsolicited bid on August 30, 2011, the board knew the market's reaction to the spinoff, which had not increased the market price of El Paso (comparing the pre-announcement stock price to the market price on the day KMI made its offer). The board was also aware that no other bidder had come forward in the months following the announcement of the spinoff, which arguably put El Paso "in play."

11. Following the receipt of the KMI proposal, in addition to obtaining updates in the valuations from its financial advisors, the El Paso board reviewed with management the various risks and opportunities under the spinoff alternative. Although there were various opportunities, there were also various risks in the spinoff strategy, including changes in the financial markets that might impact El Paso's ability to raise new debt for its E&P business, reductions in commodity prices, and the ability of El Paso's pipeline segment to achieve trading values based upon a yield-based security.

12. Despite plaintiffs' attempted characterizations to the contrary, this was not a situation where the El Paso board threw itself into KMI's arms as if KMI were a

preferred buyer. To the contrary, management and the board flatly rejected KMI's earlier September 2010 offer for a transaction at $16.50 per share, and they subsequently announced the spinoff without going back to KMI when the spinoff appeared to be the best alternative for shareholders. KMI's August 30 proposal was entirely unsolicited.

13. Similarly, there is nothing that suggests that El Paso should have sold the E&P business rather than engaging in the KMI transaction. First, the El Paso board considered the sale of the E&P business when it was considering the spinoff strategy. Due to the taxable nature of a sale of the E&P business and the market risks of attempting such a large sale, it was determined that the spinoff strategy was the more appropriate path to follow. Therefore, after August 30, the El Paso board was considering the spinoff alternative against the KMI offer. Second, under the KMI transaction, KMI bears all of the risk of the E&P sales process; there is no financial condition or price adjustment dependent on the outcome of that effort. Third, KMI's process to sell El Paso's E&P assets does not demonstrate that El Paso should have sold the E&P business rather than engaging in the KMI transaction. As KMI's brief explains, [redacted] Indeed, on January 19, 2011, the *Wall Street Journal* reported that in light of the bids KMI has received to date for the entire E&P business, KMI may change its strategy and sell the E&P properties piecemeal.

14. Finally, plaintiffs' effort to characterize this transaction as akin to a management buy-out is based on a hopelessly distorted use of the record. There is and never was a management bid for El Paso or any El Paso assets. The following facts are undisputed: (a) no actual bidder for the E&P assets included any member of El Paso

management or board, nor were any members of management invited to bid by KMI; (b) discussion of some executives' potential interest in making a bid was limited to a single day's worth of one-line emails, after which there is no evidence of any concrete efforts to put together a bid; and (c) before the KMI merger was approved, there was no discussion with anyone at KMI about a potential management bid for the E&P assets, and when the subject was raised with KMI after signing, the discussion went nowhere.

15. Similarly, the argument that Mr. Foshee was somehow able to distort the sale process because of his equity compensation has no basis in logic or the record. Mr. Foshee had accumulated a large amount of common stock and options as a result of his eight years as El Paso's CEO. If the Company were *not* sold, Mr. Foshee had every expectation that he would continue to receive such awards, in addition to his salary and bonus. If the Company were to be sold, he had no incentive to do anything but seek the highest price. And Mr. Foshee had no way whatsoever to cause the 11 independent directors to approve a sale of the Company for his benefit if they did not believe a sale was in the best interests of shareholders.

* * *

Plaintiffs make a variety of arguments, all of which revolve around one fundamental theory — that Goldman had a conflict of interest because it is an investor in KMI; that El Paso did not do enough to ensure that this conflict did not harm the interests of El Paso shareholders; that Goldman tainted its advice in favor of the merger; that the board was influenced by tainted advice; and that the interests of El Paso's shareholders were in fact harmed, and harmed in a way that could only be redressed by an injunction against closing the merger.

The individual defendants were aware from the beginning that Goldman-managed funds owned a very large equity investment in KMI and that Goldman therefore had a potential conflict. Despite this issue, in light of its prior work on the spinoff, El Paso's board and management determined that they wanted to continue to be able to access Goldman's advice. The board determined that it was better to have access to more information, rather than less, in making such a large decision in a relatively quick timeframe. Furthermore, in light of the fact that the spinoff transaction was still being pursued by El Paso in parallel with the evaluation and negotiation of the KMI transaction, the board determined that Goldman should remain fully engaged to continue to pursue the spinoff alternative.

El Paso's board and management did not simply ignore the conflict, however. In response, the board and management (assisted by El Paso's counsel at Wachtell, Lipton) took various steps to address the issue, including retaining Morgan Stanley; ensuring that Goldman maintained a Chinese wall; restricting Goldman's role after September 12 such that Goldman did not participate in any tactical discussions or negotiations in any way; and further limiting Goldman's role after September 15 such that Goldman was only updating its spinoff analysis. In short, El Paso's board and management were aware of the Goldman issue and made rational determinations about the employment of its financial advisors, and it cannot be said that El Paso's limited use of Goldman constituted a breach of duty. Notably, plaintiffs' discovery resulted in nothing from which even plaintiffs could argue that the Chinese wall was in fact breached, or that any information was conveyed by the Goldman team advising El Paso to the Goldman personnel responsible for Goldman's KMI investment.

As to Morgan Stanley, plaintiffs can allege no conflict of interest whatsoever. Morgan Stanley's "success fee" compensation structure is customary and not a conflict under our law. After September 12, the board relied *exclusively* on Morgan Stanley for (a) a fairness opinion, (b) tactical advice, and (c) valuation analyses of KMI's proposals. Morgan Stanley's role included consideration of alternatives, including staying the course on the spinoff. Morgan Stanley worked independently from Goldman — a contemporaneous Morgan Stanley email describes Goldman as having been "hermetically sealed" off.

Plaintiffs argue as if the mere presence of Goldman as an advisor for limited purposes perverted the entire process, but they present no evidence this was so. The board was not and could not have been "misled" by Goldman into approving a transaction manifestly less valuable than the split-up-and-sale that is now being advocated by plaintiffs. Goldman was not calling the shots in the board room. As stated above, El Paso's board is very seasoned and experienced, and there is no evidence to suggest that the board was not independently evaluating the separate advice it was receiving from Goldman and Morgan Stanley in making its decisions. Goldman did not participate in discussions of how to deal with KMI at any board meeting except a September 5 meeting very early in the process; Goldman did not negotiate with representatives of KMI; and Goldman did not render a fairness opinion.

Plaintiffs have no coherent theory as to how Goldman is supposed to have caused any actual harm — that is, how any conduct by Goldman actually resulted in El Paso obtaining a less valuable deal from KMI than it would have otherwise, or that the board was misled by Goldman into choosing a whole-company sale over proceeding with the spin off. In the end, the board relied on Morgan Stanley's valuation numbers and tactical

advice, not Goldman's. There is nothing on which to base an inference that Goldman was "low-balling" its valuations; in fact, Goldman's analyses from early September do not differ significantly from Morgan Stanley's. Similarly, there is no evidence that Goldman ever advised the board to take a KMI deal over the spinoff.

*   *   *

Entirely missing from plaintiffs' papers is any coherent, evidence-based showing that the defendant directors breached any duty. All but one of the 12 directors is indisputably independent; collectively they have enormous industry-specific experience; they were well-informed, having attended a series of lengthy board meetings devoted to the KMI proposal; they were well-advised, having a first-tier investment bank with no conflicts, Morgan Stanley, providing support at every step of the way, and having legal advice from the Wachtell, Lipton firm; and they were engaged, consistently raising questions about the strategic alternatives that were before them. Plaintiffs have not adduced any plausible motive why *any* director — including the CEO, Mr. Foshee — would be motivated to sell the Company to KMI at a price he or she did not consider in the best interests of shareholders. This was a board that sharply dismissed KMI's 2010 overture. This is a board that authorized the May 2011 spinoff proposal. There is no basis to think this board was not aiming to obtain the best outcome for shareholders or was misled out of negligence or some unidentified motive to approve a transaction that the directors did not believe in. Absent any basis for a finding that plaintiffs are likely to be able to show at trial some breach of duty by these directors, there can be no injunction.

STATEMENT OF FACTS

A. El Paso and its board

El Paso Corporation is an energy company incorporated in Delaware and headquartered in Houston, Texas. A decade ago, the common stock of the Company was trading at $3 per share — the result of massive debt, a "costly foray into energy trading, and an overly aggressive power strategy." Ex. 1 at 1.[1] Starting in 2003, a new management team led by defendant Douglas L. Foshee and most of the directors currently on the board turned the Company around.

Between 2003 and 2007, El Paso sold approximately $15.5 billion worth of assets. Foshee Tr. 10:2-6. El Paso is now composed of two main businesses: a pipeline business and an exploration and production business. The pipeline business transports natural gas throughout the United States, largely on long-term contracts and on federally-regulated terms. The E&P business seeks and exploits opportunities to drill and produce oil and natural gas, principally in the United States.

The Individual Defendants in this action are the 12 members of El Paso's board of directors. All the directors other than Mr. Foshee are independent. The members of the board are current and former directors and executives of major public companies who bring to the board substantial financial and management credentials, including extensive expertise and senior management experience in the energy sector.

Robert Vagt, the outside director deposed in this action, previously served as CEO of Seagull Energy Corporation and Global Natural Resources and as the COO of Adobe Resources Corporation. In addition, Juan Carlos Braniff previously served as a director

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[1] Exhibits to the transmittal affidavit of Samuel L. Closic, dated today, are cited herein as "Ex. __." References to deposition transcripts, which El Paso has lodged with the Court, are cited herein as "Tr. __."

and Vice Chairman of Grupo Financíero BBVA Bancomer and as a director of Coca-Cola FEMSA. David W. Crane is the President, CEO and a director of NRG Energy, Inc. and previously served as CEO of International Power plc. Robert Goldman previously served as CFO of Conoco, Inc. and Vice President, Finance of the World Petroleum Council. Anthony Hall, Jr. is the Chairman of the Houston Endowment and previously served as the City Attorney and the Chief Administrative Officer of the City of Houston. Thomas Hix previously served as CFO of Cooper Cameron Corporation and as a director of The Offshore Drilling Company. Ferrell McClean previously headed the investment banking and global energy group at J.P.Morgan & Co. and served as a director of Unocal Corporation. Timothy Probert is President of Halliburton Company's Strategy and Corporate Development and previously served as President of Halliburton Company's Drilling and Evaluation Division. Steven J. Shapiro previously served as CFO and as a director of Burlington Resources and as CFO and a director of Vastar Resources, Inc. J. Michael Talbert, El Paso's lead independent director, previously served as Chairman and CEO of Transocean Ltd. and President of Texas Oil and Gas. John Whitmire previously served as Chairman of CONSOL Energy and Chairman and CEO of Union Texas Petroleum Holdings, Inc. Ex. 2 at 20-26.

B. September 2010: Kinder Morgan approaches El Paso concerning a potential merger and El Paso rejects the offer as inadequate.

In September 2010, Richard Kinder, the CEO of Kinder Morgan, Inc. ("KMI") contacted Mr. Foshee regarding a potential merger of the two companies. Foshee Tr. 60:3-6. At the time, KMI was a private company. KMI proposed that El Paso spinoff its E&P business, and that KMI would purchase the remainder of El Paso using publicly-traded "I-shares" of Kinder Morgan Management LLC as consideration. Sult Tr. 44:8-

16; Ex. 3 at EP00035624-25. KMI stated that the proposal implied a value of $16.50 per share; at the time, El Paso stock was below $12.50 per share. Ex. 4 at EP00003439.

El Paso received advice from Goldman Sachs, Inc., its longtime financial advisor, to aid in evaluating KMI's offer. Sult Tr. 45:20-24; Foshee Tr. 71:13-16; Daniel Tr. 32:20-22. Management believed that the offer undervalued the Company and recommended that the board reject it. Sult Tr. 51:4-13. The board considered the offer at its October 13-14, 2010 board meeting, concluded that the consideration was inadequate, and decided not to engage in negotiations with KMI. Vagt Tr. 29:9-24 ("I do remember a clear expression, and fairly unanimous on the part of the board members, that 16.50 . . . was not adequate."); Sult Tr. 54:8-12; Ex. 3 at EP00035624-25. Mr. Foshee relayed that message to Mr. Kinder. Foshee Tr. 79:24-80:7.

KMI became a public company in February 2011 through an initial public offering. Kinder Tr. 8:14-20. Mr. Kinder testified that the decision to go public in February was driven by KMI's investors, who "wanted to have liquid currency that they could eventually dispose of their interest." Kinder Tr. 9:16-20. Goldman was one of two bookrunners for the KMI IPO and served as lead-underwriter. Daniel Tr. 21:14-19. Currently, several investment funds managed by Goldman collectively own approximately 19% of KMI's stock. Sult Tr. 121:20-122:2; *see* Goldman Br. at 4.

C. El Paso considers whether to spin off the E&P business.

At the end of 2010, El Paso's common stock was trading at $13.76, up 37% for that year. Management believed, however, that further value might be achieved for El Paso's stockholders through a spinoff of its E&P business. Over the years, El Paso had considered the possibility of eventually splitting the pipeline and E&P businesses. Foshee Tr. 82:11-24. But the board recognized that a spinoff of the E&P business would have to wait until the E&P business was successful enough to operate as a standalone

company and until El Paso had reduced its debt level. Foshee Tr. 82:24-83:25. By late 2010, El Paso management believed that both of those milestones were close to being achieved, and started work on what was later called "Project Zygosity" — an in-depth evaluation of the potential separation of the businesses. Foshee Tr. 84:9-85:11; Sult Tr. 64:2-6. As Mr. Foshee explained, Project Zygosity involved "building the models . . . for what a separation might look like, making sure we had kind of a list of all the possible ways you could do a separation and all the other alternatives in addition to a separation." Foshee Tr. 85:16-86:11. Goldman led the effort in advising El Paso on Project Zygosity. Foshee Tr. 86:17-87:12; Sult Tr. 62:2-63:11; Daniel 48:23-49:5; Vagt Tr. 39:13-24.

In this regard, the Company considered "every possible permutation of separation," asking "[s]hould we sell the E&P company, should we spin the E&P company, should we do a partial IPO of the E&P company and then spin it, or should we keep the E&P company and sell the pipeline company or spin the pipeline company or take all the assets in the pipeline company and drop them down into the MLP." Foshee Tr. 248:6-14. Mr. Foshee came to a preliminary view that the best option for El Paso shareholders was to spin off the E&P business. Foshee Tr. 88:8-16 ("Sometime in the, probably by the early spring of 2011, I concluded that the best answer for the shareholders was to do a tax-free spin.").

D. The board meets and evaluates Project Zygosity.

Goldman presented a Project Zygosity analysis to the board at its approximately 16-hour, in-person meeting on March 29-31, 2011. Stephen Daniel, the lead banker from Goldman, discussed various benefits that might follow from a separation of the two businesses: allowing better capital allocation, permitting investors a choice between a pure pipeline investment and a pure E&P business play, and permitting management to focus on separate businesses. Ex. 5 at EP00000010-11. "The thinking was that when

you have all of these pieces together, it's a more complex company to understand," but having two separate companies "would give investors and sell side analysts and so forth a better chance to . . . understand it a whole lot better and price it better." Daniel Tr. 67:8-15.

Goldman also presented valuation work to the board regarding both the value and prospects of El Paso as a single company and as two separate companies. Ex. 6 at EP00000071-74; Ex. 7. [REDACTED] Ex. 6 at EP00000056. Management also made a presentation regarding political and regulatory risks to El Paso's long range plan assumptions, including regulations affecting natural gas demand, pipeline safety and hydraulic fracturing. Ex. 8.

After considering the relative benefits of remaining a single company or splitting in two, the board determined that the spin looked promising and that management and the advisors should continue their work on Project Zygosity. Vagt Tr. 45:10-21.

E. El Paso announces the spinoff.

The board continued its consideration of a potential spinoff at its in-person meeting on May 16 and 17. Goldman presented an updated separation analysis, focused on whether El Paso would offer greater value to shareholders as one or two entities. The analysis contained detailed valuation work of the Company and each of its businesses. Ex. 9; Ex. 10 at EP00000081-82. "The clear weight of the presentation supported the notion of a spin-off." Vagt Tr. 70:19-21. In response to questions from the board, Mr. Daniel also discussed execution risks for the proposed spinoff. Ex. 10 at EP00000082.

On May 24, El Paso publicly announced the spinoff of the E&P business, which it planned to complete by the end of the year. Vagt Tr. 68:2-69:9; Foshee Tr. 95:14-96:5. El Paso's stock price closed the following day up $0.89 (or 4.4%) at $21.11 per share. Ex. 11. Over the summer, El Paso, with Goldman's assistance, continued with its preparations for the spinoff. Vagt Tr. 74:7-24. During that time, El Paso's stock price drifted down, falling below $19 by August 30. Vagt testified that he had been "surprised and a little disappointed" by the stock's performance. Vagt Tr. 76:10-76:16. While he had not thought that all of the value from the spinoff would be realized at once, he had hoped that the spinoff would be better received by the market. Vagt Tr. 75:24-76:16 ("But, personally, I anticipated that within . . . two, maybe three months . . . that it would be significantly reflected in the stock price.").

F. KMI makes an unsolicited $25.50 offer for El Paso.

On August 30, 2011, KMI delivered a letter to El Paso in which KMI offered to acquire El Paso for $25.50 per share, payable 60% in cash and 40% in KMI stock. Foshee Tr. 111:2-7; Sult Tr. 44:15-45-16; Ex. 12 at EP00022806-07. This proposed consideration represented a premium of approximately 34.8% over El Paso's closing price on August 29, 2011. Ex. 12 at EP00022806. That same day, Mr. Kinder also called Michael Talbert, El Paso's lead independent director, and sent him a copy of the letter. Ex. 13 at EP00022794.

Also on August 30, Mr. Foshee discussed the offer with Mr. Talbert and circulated the offer letter to the board. Ex. 12 at EP00022805. The following day, the board held an informational meeting to hear the terms of the offer and discuss next steps. Ex. 14. The directors' initial reaction to the bid was that KMI made a serious offer for the Company that justified consideration, though they understood that the price was unlikely to be KMI's best and final offer. Foshee Tr. 124:3-10; Vagt Tr. 86:24-87:4.

After receiving KMI's unsolicited proposal, El Paso consulted with Goldman on the offer. El Paso also brought in Morgan Stanley as an additional financial advisor, Foshee Tr. 147:15-18; Cox Tr. 24:5-25, as well as Wachtell, Lipton as its legal advisor.[2]

From the moment El Paso began considering the KMI proposal and determining how to use Goldman, El Paso's management and board were aware of Goldman's interest in KMI; the fact that funds managed by Goldman owned about 19% of KMI was public and well-known in the pipeline industry. The El Paso Defendants did not believe this fact meant that Goldman was absolutely disqualified from playing any role advising El Paso going forward. Goldman was advising El Paso on Project Zygosity and helping to bring the spinoff to fruition. Goldman had thus spent months modeling in detail the Company's future income streams, and other key metrics, in order to assess the values inherent in the Company and its major businesses. With the initial meeting to discuss KMI's proposal set to take place within days of the Company's receipt of the offer, El Paso believed that it was desirable to keep Goldman involved because Goldman was "more up to speed on the company and its valuation than anyone else." Foshee Tr. 145:5-13; Sult Tr. 128:24-129:2. In addition, Goldman needed to remain involved with respect to the spin, which had to keep going forward because there was no certainty that an agreement would ever be reached with KMI. Foshee Tr. 147:19-148:5.[3]

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[2] The Morgan Stanley team was led by Jonathan Cox, Steve Munger and Brian McCabe, and the Wachtell, Lipton team was led by David Katz.

[3] Plaintiffs contend that the board's decision to continue to receive advice from Goldman was made "[o]ver Wachtell's objection." This allegation finds no support in the record. To support the claim, plaintiffs rely on a misleadingly edited email from [redacted] Pl. Br. at 3. But when that email is read in its full context, it becomes clear that [redacted] was referring to Wachtell, Lipton's objection, given Goldman's [redacted] Ex. 15 at MS00008953 [redacted]

With respect to the potential for conflict arising out of Goldman's economic interest in KMI, El Paso's board and management took several actions to address the issue. *First*, El Paso ensured that Goldman maintained a "Chinese wall" to prevent any communication with Goldman's private investment group, thereby protecting El Paso from any potential leaks of information to KMI. Foshee Tr. 176:2-10.[4] The uncontradicted evidence confirms that Goldman complied with this obligation at all times.

Second, El Paso retained Morgan Stanley to provide independent financial advice and to provide a fairness opinion if required. Morgan Stanley had no advisory or investment banking relationship with KMI and no conflict in advising El Paso as to responding to KMI, or providing a fairness opinion in connection with a potential KMI transaction. At the outset of its engagement, Wachtell, Lipton, which was advising El Paso, instructed Morgan Stanley that "while initial collaboration with GS is OK, [El Paso] will be looking for independent analysis and judgment from us and our process should reflect that."[5] Ex. 17; Foshee Tr. 147:15-18 ("We obviously knew there was a potential for conflict with Goldman. It's why we brought Morgan Stanley in and began to get them up to speed as quickly as we could."); Sult Tr. 124:14-19 ("[A]s a result of that conflict, a decision was made very quickly early on within days to engage another

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[4] Senior management of Goldman confirmed to Mr. Foshee in this time period that Goldman was well aware of its Chinese wall obligation and, furthermore, that the Goldman-appointed members of KMI's board were recusing themselves from KMI's discussions about the El Paso offer. Foshee Tr. 174:8-22; Ex. 16 at GS-ELP00018225.

[5] The "initial collaboration" is a reference to the fact that the detailed El Paso analytical model was on Goldman's servers, and that Goldman was authorized to provide Morgan Stanley with information needed to get Morgan Stanley up to speed.

financial advisor who would be the advisor that ultimately provided the fairness opinion should some transaction present itself.").[6]

G. The board meets on September 5 and rejects KMI's offer.

The El Paso board met on September 5 to consider KMI's proposal. Both Morgan Stanley and Goldman presented preliminary valuation work to the board. Ex. 18 at EP00000383-85; Ex. 19; Ex. 20.

Goldman informed the board that [redacted] Ex. 20 at EP00024807. The directors discussed the changed market conditions for E&P. Vagt Tr. 106:10-20 ("It was the board members, also, talking about what had happened in terms of commodity prices, in terms of the general economic climate in the world, the enthusiasm had tailed off."). [redacted] Daniel Tr. 142:4-143:7. Notably, the Morgan Stanley financial analysis presented to the board at the same meeting included a "Reference Trading Valuation" for E&P with a range of [redacted] Ex. 19 at EP00024781.

[6] It was also relevant to the board's decision-making that any misconduct by Goldman would likely cause Goldman significantly greater financial harm in the long run — by damaging its reputation and franchise — than Goldman would gain by hypothetically tainting its advice to El Paso to generate a short-term gain on its funds' KMI investment. Foshee Tr. 30:17-31:21.

The board also heard an update from Mr. Foshee regarding the risks and opportunities presented by the planned spinoff. Ex. 18 at EP0000387. Mr. Foshee expressed continued support for the planned spinoff, but "highlight[ed] a shift in the risks associated with the plan, including those associated with the macroeconomic environment and changes in commodity prices." Ex. 18 at EP00000387. The consensus of the meeting was that the KMI offer was serious enough to merit more than an outright rejection, but not high enough to suggest negotiation should be commenced immediately. El Paso's strategy was to use the alternative of the spin as leverage to get KMI to put a better offer on the table. As a result, the board decided to tell KMI that the offer was not "compelling." At the same time, the board directed management to continue work on the spinoff. Ex. 18 at EP00000389; Vagt Tr. 127:10-12; Foshee Tr. 140:19-141:4.

At this September 5 meeting, the board also discussed Goldman's advisory role in light of its ownership stake in KMI. While the directors recognized Goldman's conflict, they wished to continue to avail themselves of Goldman's advice, with the understanding Goldman would be subject to certain restraints and that Morgan Stanley would provide independent financial advice and a fairness opinion. Ex. 18 at EP00000388; Vagt Tr. 149:7-21.

H. KMI responds to the September 5 letter by threatening to go public and Goldman is walled off from the KMI negotiations.

On September 5, Mr. Foshee met with Mr. Kinder to deliver the letter authorized by the board. Ex. 21; Foshee Tr. 168:10-17. At their meeting, Mr. Kinder sought to elicit a counterproposal, but Mr. Foshee refused to make one. Foshee Tr. 168:21-170:5.

On September 9, KMI sent a letter to El Paso stating that "KMI would consider improving its offer" if permitted to "conduct limited due diligence" and that, should the board reject this proposal, KMI "would expect to release our $25.50 per share proposal"

to El Paso's stockholders. Ex. 22 at EP00022969; Foshee Tr. 176:16-177:14. The letter emphasized that "El Paso's current share price reflects the market's view" of the spinoff, and that KMI was offering a premium of 40% to the current share price. Ex. 22 at EP00022969.

El Paso management then met with Goldman and Morgan Stanley to discuss how to respond to KMI's letter. Foshee Tr. 184:7-20. Goldman advised El Paso to consider entering into limited due diligence with KMI prior to establishing a price rather than making a counteroffer. Foshee Tr. 184:9-20. But Morgan Stanley and management felt that supplying proprietary information to KMI without further price movement by KMI was a mistake. Mr. Foshee felt that Goldman's advice was "significantly different . . . from the conclusion . . . [of] the rest of the people in the room." Foshee Tr. 190:13-191:5.[7] Mr. Foshee testified that "the thought crossed my mind" that pressure within Goldman "was a possibility." Foshee Tr. 187:14-21. As a result, El Paso's senior management decided that it would be prudent to reduce Goldman's role to matters directly related to Project Zygosity, including providing the board with benchmarking analysis and financial updates that would enable directors to compare the spin to any proposals from KMI. Management told Goldman of this decision, and, specifically, that it would be walled off from any negotiations with, or tactical advice regarding, KMI's offer. Daniel Tr. 109:24-110:4 ("it was clear that, you know, we were out of the tactical

[7] While El Paso management and Morgan Stanley disagreed, Goldman did have a rationale for its position: Goldman believed that if El Paso did not head off KMI's apparent intention to go public with its offer, the result would likely be a lower final bid from KMI, since once the offer was public, KMI would not want to bid against itself and would rely on stockholder pressure to convince El Paso's board to accept the offer on the table. Daniel Tr. 125:12-126:20. While plaintiffs allege that Goldman's advice on this issue was improperly influenced, Pl. Br. at 31, Mr. Daniel testified unequivocally that neither he nor his team had "receive[d] any pressure from any other part of [Goldman] with respect to the advice" provided to El Paso. Daniel Tr. 211:10-25.

part of the picture"). Accordingly, "Goldman wasn't aware of . . . any of our discussions about what we would do next, about whether we would counter, and if we would counter, . . . at what value, what process we would put in place, what terms and conditions we would consider fair, none of that." Foshee Tr. 197:7-13.

Management also told Morgan Stanley about the new division of responsibilities:

Cox Tr. 46:3-11.

Cox Tr. 30:6-7; 15:17 ("Q. And so in other words, you did not rely on anything from Goldman Sachs? A. That's correct."); 39:14-16 Ex. 15 at MS00008953

I. El Paso proposes a merger with a value of $28.00 per share.

The board met again on September 15 to determine how to respond to KMI's letter of September 9. Mr. Foshee began the meeting by informing the board of management's concerns regarding Goldman and the new limits on Goldman's role. Ex. 23 at EP00000392. The board understood these limits and was comfortable with the revised arrangements. Vagt Tr. 118:23 ("There was a fencing off of Goldman Sachs."); 149:15 ("[W]e walled them off.").[8]

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[8] Goldman had prepared materials relating to an updated valuation of the proposed spinoff and some work relating to Kinder Morgan's proposal. Ex. 23 at EP00000393; Ex 24. Goldman was

Morgan Stanley presented valuation materials to the board. Ex. 23 at EP00000394; Ex 25. Morgan Stanley noted that " Ex. 23 at EP00000394. Morgan Stanley also discussed with the board the likely consequences of KMI going public with its offer, noting that Ex. 23 at EP00000395. In other words, if KMI went public and there was no other bidder, KMI was unlikely to bid against itself and there would be substantial pressure on the board from shareholders to accept KMI's offer. Vagt Tr. 134:2-13.

The board also discussed the possibility of reaching out to other potential bidders but decided against doing so. It reasoned that the universe of bidders with the interest and means to purchase El Paso was extremely limited. Foshee Tr. 167:9-14 ("[T]he collective wisdom of the group was that there wasn't a natural, a natural other buyer for the whole that would compete within a short time window, informed by all kinds of things like our last eight years history."); Vagt Tr. 121:10-12 ("If we looked at who had the potential, the capacity to do a transaction like this, as I recall, it was a fairly limited list."). The directors also took note of the fact that since the announcement of the spinoff, no other bidders had come forward. Vagt Tr. 121:5-10 ("We had been in pla[y]. Since we announced in May that we were going to spin, people who were going to look at the company would have looked at the company, nothing had happened since that time.").

Morgan Stanley was in agreement and recommended against a pre-signing market check. In its presentation, Morgan Stanley noted

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allowed to present those materials, though Mr. Foshee asked directors not to inquire of Goldman regarding Kinder Morgan's proposal and not to rely on Goldman for advice regarding how to respond to that proposal. Foshee Tr. 197:14-22.

Ex. 23 at EP00000395. As Jonathan Cox of Morgan Stanley testified,

Cox Tr. 196:11-24.

Believing that the best strategy was to try to negotiate for more from KMI by putting a number on the table, the board instructed Mr. Foshee to make a counteroffer. Ex. 23 at EP00000396; Foshee Tr. 218:7-219:3; Vagt Tr. 151:22-152:9. The board agreed that Mr. Foshee would have the ability to negotiate a price between $26.50 and $28.00 per share. Ex. 23 at EP00000396. Following the board's direction, Mr. Foshee delivered a letter to Kinder on September 16 proposing a merger at $28.00 per share in stock and cash, provided that El Paso had "absolute certainty of completion" and subject to due diligence concerning "the Kinder Morgan stock component of the potential transaction." Ex. 26. The $28.00 per share price was

Ex. 25 at EP00025134.

J. El Paso and KMI agree on a $27.55 merger price contingent on mutual due diligence.

After Mr. Foshee communicated the $28.00 per share proposal to Mr. Kinder, they had several conversations over the next few days. Foshee 228:17-230:17. Mr. Kinder

indicated that he could go above $25.50, but that $28.00 was too rich. Kinder 80:24-81:3. On September 18, Mr. Kinder proposed $27.50, Mr. Foshee countered with $27.55, and Mr. Kinder accepted, subject to due diligence. Foshee Tr. 229:23-231:15. The board was notified and initial due diligence commenced promptly. Foshee Tr. 233:3-7.

On September 22, the parties exchanged a term sheet. Ex. 27. Among the significant terms was a "hell or high water" provision, which caused KMI to take on the risk of any required regulatory divestures. Ex. 27 at EP00015956. Foshee Tr. 261:22-262:2; Vagt Tr. 220:15-24. There was no financing condition for KMI. Ex. 27 at EP00015956. The term sheet also included a no-shop provision and a provision for KMI voting agreements; additionally, the term sheet provided for El Paso to assist in the sale of the E&P business. Ex. 27 at EP00015956-60; Foshee Tr. 245:3-6. It was significant to the board and management that KMI would be taking on the risk of selling the E&P business. Sult Tr. 277:11-14 ("[KMI is] taking all the risk associated with disposing of the E&P company, whether it's in whole or in part. We also discussed earlier during this time frame the forward commodity prices especially in oil were falling substantially. And that is a substantial risk associated with this transaction, whatever value you can ultimately realize for the E&P company."); Foshee Tr. 262:3-5, 265:12-15 ("[KMI] take[s] the risk on commodity prices going down or capital markets changing, and they get benefits as well.").

K. KMI revises its model based on information obtained in due diligence and decreases the price it is offering.

On September 28, KMI told El Paso that it had discovered that its valuation model for El Paso had been overly aggressive. In particular, it had relied on EBITDA estimates for the pipeline business based on publicly available information that were inconsistent with El Paso's internal numbers, resulting in an EBITDA shortfall in KMI's model of

While KMI had found additional savings of this still left a gap between KMI's model and what it had found in due diligence. Kinder Tr. 122:17-124:5. Evercore, KMI's financial advisor, went through the numbers in detail with Morgan Stanley. Ex. 28; Ex. 29; Ex. 30; Ex. 31; Kinder Tr. 125:20-25.

Mr. Foshee testified that he was not "shocked" by this development, because it is a risk in any negotiation, especially one where a party, such as El Paso, chooses to negotiate a price term prior to giving confidential information to the other side. Foshee Tr. 178:23-179:2.

On September 28, 2011, KMI proposed a revised bid offering El Paso shareholders per-share consideration of $15.30 in cash, 0.3774 of a share of KMI and 0.577 publicly-traded KMI warrants.[9] Ex. 32. Based on KMI's closing price on September 27 of $27.03, the cash and stock had an aggregate value of $25.50. KMI told El Paso that it believed the warrants had a value of $2.05 per El Paso share, for a total merger consideration of $27.55. Ex. 32 at EP00017969. Morgan Stanley advised management regarding the value of the new proposal, which El Paso did not believe amounted to $27.55. *See* Ex. 33. El Paso countered the next day with a merger price of $15.73 in cash, $11.02 in KMI stock (a $26.75 cash and stock mix), and 0.64 of a warrant. Ex. 34. Mr. Kinder responded to Mr. Foshee on September 30 with a revised proposal of $14.65 in cash, 0.4187 of a share of KMI (a $25.67 cash and stock mix), and 0.577 of a warrant. Ex. 35 at EP00005741. KMI indicated to El Paso that that KMI's September 30 proposal was its "last and final" offer. Kinder Tr. 143:14-20.

[9] The warrants were to have an exercise of price of $40.00 per share and a term of five years.

L. The board meets on September 30 and rejects KMI's offer.

El Paso's board met on September 30. At that meeting, Mr. Foshee updated the directors on the negotiations, and Morgan Stanley provided the board with a detailed valuation analysis of the warrants. Ex. 36 at EP00026390-96. Morgan Stanley also explained that [redacted] Ex. 37 at EP00000415.[10] Morgan Stanley noted that [redacted] Ex. 37 at EP00000415. Ultimately, Morgan Stanley observed that [redacted] Ex. 37 at EP00000415; Vagt Tr. 179:8-11.

After discussion, the board decided to reject KMI's "best and final" offer and to continue to negotiate for improved terms. Ex. 37 at EP00000416. Following the board meeting, Mr. Foshee delivered a letter to Mr. Kinder stating El Paso's position that KMI's latest offer reflected a value "clearly less than $27.55," and countering with a merger price of "$26 in cash and stock," a 10% increase in the warrant consideration, and the addition of dividend protection for warrants. Ex 38. Mr. Kinder told Mr. Foshee that El Paso's counteroffer was unacceptable and that KMI's prior offer was really its final offer. Ex. 39; Ex. 40.

Later on September 30, in a private communication, Mr. Kinder wrote to the KMI board of directors that "our final offer stretched as far as we can while still maintaining

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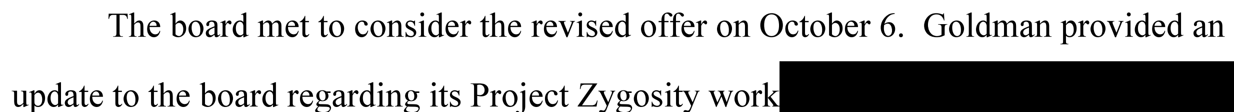
[10] Plaintiffs' assertion that the warrants "would never be worth anything unless KMI's stock rose to $40 during the next five years" is flatly contradicted by the record. Pl. Br. at 17. As Mr. Cox from Morgan Stanley testified, [redacted] Cox Tr. 87:13-21.

value for our shareholders," and that unless El Paso accepted that offer, "you can consider this process at an end." Ex. 39; Kinder Tr. 161:9-10 ("I thought the deal was dead.").

M. KMI raises its offer and the El Paso board directs management to finalize the transaction.

The parties continued having discussions to try to bridge the valuation gap. On October 5, Mr. Kinder sent Mr. Foshee a letter with a revised merger proposal. The new per-share offer was for $14.65 in cash, 0.4187 shares of KMI stock (for an aggregate cash-and-stock value of $25.78, reflecting an increase in KMI's stock price since September 30), and 0.64 KMI warrants, again with an exercise price of $40 per share and a term of five years. The letter stated that the warrants would have protection for extraordinary dividends but not ordinary dividends. The letter emphasized "the impact of the weakness in commodity prices and capital markets since our initial proposal . . . on the value of El Paso's upstream business," noting that since August 30 "crude oil prices have declined across the curve by between 9% and 13% and natural gas prices have also declined across the curve by between 1% and 5%." Ex. 41 at EP00007092.

The board met to consider the revised offer on October 6. Goldman provided an update to the board regarding its Project Zygosity work



The board understood that the reduction in the E&P valuation was the result of lower trading multiples reflected in current market conditions. Vagt Tr. 202:4-11 ("trading multiples for stand-alone E&P companies have gone down"). In considering the E&P valuation, the board specifically "discussed whether adjusting the values based on market trading in the past few weeks created undue emphasis on short term market conditions as opposed to a longer term view of commodity pricing." Ex. 42 at EP00000492.

After the Goldman representatives left the room, Morgan Stanley presented its updated valuation work and analysis of the KMI warrants, explaining that it believed that the 0.64 warrants would be worth between After discussion, the board directed management to proceed to finalize definitive agreements for the merger. Ex. 42 at EP00000493. The consensus of the board was that the KMI proposal offered a greater likelihood of greater value for shareholders than the spin. Vagt Tr. 196:3-9 ("Quite frankly, there was a time at which I worried about losing this relative to the spin, because in my mind this was clearly going to give our shareholders a more immediate opportunity to realize value."). Over the next week, the lawyers exchanged drafts of the merger agreement, and by October 16 all open issues had been resolved.

Ex. 44 at EP00000548-49; Cox Tr. 120:10-122:13.

N. The board approves the merger.

The El Paso board met on October 16 to consider approval of the merger. No Goldman representatives were present. Brian McCabe of Morgan Stanley reported that using KMI's prior closing share price, the merger consideration was valued at $26.87

(using the indicative $0.96 warrant price). Ex. 44 at EP00000548. Mr. McCabe presented the board with a summary of valuation analyses of El Paso. Ex. 45 at EP000021390. The merger consideration exceeded the midpoint valuation range for every valuation metric (in many cases by a wide margin). *See* Ex. 45 at EP000021390. Mr. McCabe noted, among other matters, that [REDACTED] Ex. 44 at EP00000549. Mr. McCabe also noted that [REDACTED] Ex. 44 at EP00000549, [REDACTED] *see* Vagt Tr. 180:2-22 ("I believe that Kinder Morgan stock with the addition of El Paso assets would go above 40 bucks."). Morgan Stanley gave its oral opinion, later confirmed in writing, that the merger consideration was fair, from a financial point of view, to El Paso's shareholders. Ex. 44 at EP00000550.

Counsel reviewed with the board the material terms of the merger agreement. Ex. 44 at EP00000550. Following discussion, the directors unanimously agreed to approve the merger agreement. Ex. 44 at EP00000564.

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARD

In order to obtain the "extraordinary relief" of a preliminary injunction, *In re Toys 'R' Us, Inc. S'holder Litig.*, 877 A.2d 975, 1022 (Del. Ch. 2005) (VCS), plaintiffs must demonstrate: "(1) a reasonable probability of success on the merits; (2) that [they] will suffer irreparable injury if an injunction does not issue; and (3) that the balance of the equities favors the issuance of an injunction." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595 (Del. Ch. 2010) (VCS). This Court has emphasized that "[a] preliminary injunction is a powerful remedy that must be earned," and that it is "cautious about using that remedy where it might endanger or delay stockholders' receipt of a control premium in a situation where no competing bidder has emerged." *In re Pennaco Energy, Inc.*, 787 A.2d 691, 704 (Del. Ch. 2001) (VCS).

II. STANDARD OF REVIEW

The standard of review of defendants' conduct is, with respect to their approval of the proposed merger with KMI, the *Revlon* standard.

> *Revlon* and its progeny stand for the proposition that when a board has decided to sell the company . . . it must act reasonably in order to secure the highest price reasonably available. The duty to act reasonably is just that, a duty to take a reasonable course of action under the circumstances presented. Because there can be several reasoned ways to try to maximize value, the court cannot find fault so long as the directors chose a reasoned course of action. . . . Reasonableness, not perfection, measured in business terms relevant to value creation, rather than by what creates the most sterile smell, is the metric.

In re Lear Corp. S'holder Litig., 926 A.2d 94, 115, 118 & n.19 (Del. Ch. 2007) (VCS) (citing *Paramount Commc'ns Inc.* v. *QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994) (explaining that the court's role is to determine "whether the directors made a reasonable decision, not a perfect decision")).

As shown below, the conduct of defendants clearly meets this standard. Perhaps because of this, plaintiffs have argued that the strictest standard of review possible in this Court — entire fairness — applies. Plaintiffs' arguments to this effect are incorrect. The locus classicus for application of entire fairness is where a controlling shareholder stands on both sides of a transaction. Absent a controlling shareholder, the other circumstance in which the entire fairness standard is applied is where a majority of the board has "divided loyalties." *Lewis* v. *Leaseway Transp. Corp.*, 1990 WL 67383, at *5 (Del. Ch. May 16, 1990) (VCC). As *Lewis* notes, where there is "no non-conclusory allegation[] that a majority of [target] directors were interested or lacked independence," entire fairness will not apply absent a controlling shareholder. *Id.*

No such argument can be made here. Neither KMI nor Richard Kinder exercises any kind of control over El Paso or its board. There is no evidence that El Paso's independent directors were anything other than thoughtful, well-informed, well-intentioned, and in ultimate control of El Paso's decision-making.

Instead, plaintiffs' argument that entire fairness should apply is based on a strained and unconvincing analogy to the events in *Mills Acquisition Co.* v. *Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989). *Macmillan*, of course, involved a "tip" by defendant Evans, a member of management, to one of two bidders, where Evans had a personal interest in favoring that bidder (since he was part of their sponsored buyout group). *Id.* at 1275. While plaintiffs' argument on this point is brief and conclusory, they posit multiple breaches of duty and a "manipulation" of the sale process. Pl. Br. at 27.

On examination, this theory must fail. Each of plaintiffs' three allegations is factually incorrect. *First*, Goldman was in no position to "steer[] the Board towards a sale to KMI." The board did not take orders from Goldman; Goldman's only role after

September 15 was to provide valuation advice with regard to the potential implementation of Project Zygosity. [redacted] The board understood and evaluated that update. Equally important, the Board looked to Morgan Stanley for advice with respect to the KMI offer and alternatives, including the spinoff.[11] And in the end, the board — which included many directors with strong industry backgrounds — made the decision.

Second, plaintiffs allege that Morgan Stanley's advice was tainted because it supposedly "shar[ed] information with Goldman" and because its fee was structured as a success fee. But there is no evidence Morgan Stanley did its work together with Goldman. Morgan Stanley's Jonathan Cox [redacted] Cox Tr. 30:6-7, 30:15-17, 34:25-35:3, 39:14-16, 57:19-58:19. As to the success fee, as the Court is aware, the vast majority of mergers involving Delaware companies for the last two decades have involved financial advisors whose compensation was premised on the closing of the deal and/or provision of a fairness opinion. There is no authority supporting the notion that such a payment arrangement converts a *Revlon* case to an entire fairness case, and many cases directly state the contrary, *e.g.*, *Toys 'R' Us*, 877 A.2d at 1005 & n.44 (applying *Revlon* where the target's financial advisor had a success fee arrangement).

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[11] The fact that Morgan Stanley was conducting an independent analysis of the spinoff would have made it impossible for Goldman to get away with presenting a tainted valuation. Any hypothetical attempt by Goldman to provide a "lowball" analysis of the spinoff would have been obvious to the board when it considered Morgan Stanley's and Goldman's analyses side by side.

Third, and finally, plaintiffs allege that Mr. Foshee was somehow able to "prevail" upon the 11 independent directors to accept a price they did not want, supposedly because he had "buyout aspirations" and because he would receive certain change of control payments and benefit from the acceleration of unvested options and restricted stock (in addition to having the opportunity to exchange for cash and KMI stock El Paso stock and options that he owns free and clear). But there is no evidence that Mr. Foshee could dominate the board in this way, even if he wanted to.

As to the "buyout" talk, whatever thoughts and conversations some members of management may have had about the possibility of bidding for E&P, none of this went beyond the speculation stage.[12] No such bid was ever made, no such bid was ever invited, and the fact that there was some passing speculation about it does not transform this case into an entire fairness case. Similarly, Mr. Foshee's payout is predominantly related to actual vested stock and options he owns, either through purchases made with his own resources or through stock grants from the Company, as well as certain severance payments and accelerated vesting of options and restricted stock, as is "routine" in merger transactions. *In re Openlane, Inc. S'holder Litig.*, 2011 WL 4599662, *5 (Del. Ch. Sept. 30, 2011) (VCN).[13] This equity aligned Mr. Foshee's interests with the public stockholders.

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[12] While Mr. Foshee did indicate to Mr. Kinder after the deal was announced that E&P management (conceivably with some involvement by Mr. Foshee) might be interested in making a bid for the E&P assets to be sold by KMI, KMI did not act in response to that indication, and no follow-up steps were taken either by E&P management or by KMI to further the involvement of E&P management in any such bid.

[13] *See* Ex. 46 (Preliminary Form S-4) at 170-71; Ex. 2 at 27, 58-59.

III. DEFENDANTS ACTED REASONABLY TO SECURE THE HIGHEST VALUE REASONABLY AVAILABLE TO SHAREHOLDERS.

A. *Revlon* is satisfied here because the El Paso board acted reasonably.

Revlon is "not a license for . . . courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith." *Toys 'R' Us*, 877 A.2d at 1000. Instead, when *Revlon* applies, "the court seeks to 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." *Dollar Thrifty*, 14 A.3d at 598. "[W]hen the record reveals no basis to question the board's good faith desire to attain the proper end, the court will be more likely to defer to the board's judgment about the means to get there." *Id*. at 600.

Such deference is particularly appropriate here. There is no allegation, let alone evidence, that calls into question this "board's good faith desire to attain the proper end." *Id*. Eleven of El Paso's 12 directors are independent of management, and plaintiffs do not claim that any of these independent directors had any motivation to pursue a merger with KMI "if a better deal was actually attainable from . . . another source." *Id*.

Nor could plaintiffs make such a claim in light of the board's rejection of KMI's September 2010 proposal for a transaction at $16.50 per share and the board's subsequent decision to pursue a spinoff of the E&P business to unlock additional shareholder value when that transaction appeared to be the best option for El Paso shareholders. *See* pages 11-15, *supra*. The board continued to pursue the spin as a viable alternative until it had successfully negotiated a transaction that, in its judgment, offered superior value for El Paso's stockholders. The record thus reveals that this "majority independent board" conducted a careful review of "strategic options to increase shareholder value, ruling out no option" before agreeing to a third-party merger transaction that promised shareholders

a substantial premium. *Toys 'R' Us*, 877 A.2d at 1002. "[T]his case hardly presents the paradigmatic context for a good *Revlon* claim." *Id.*

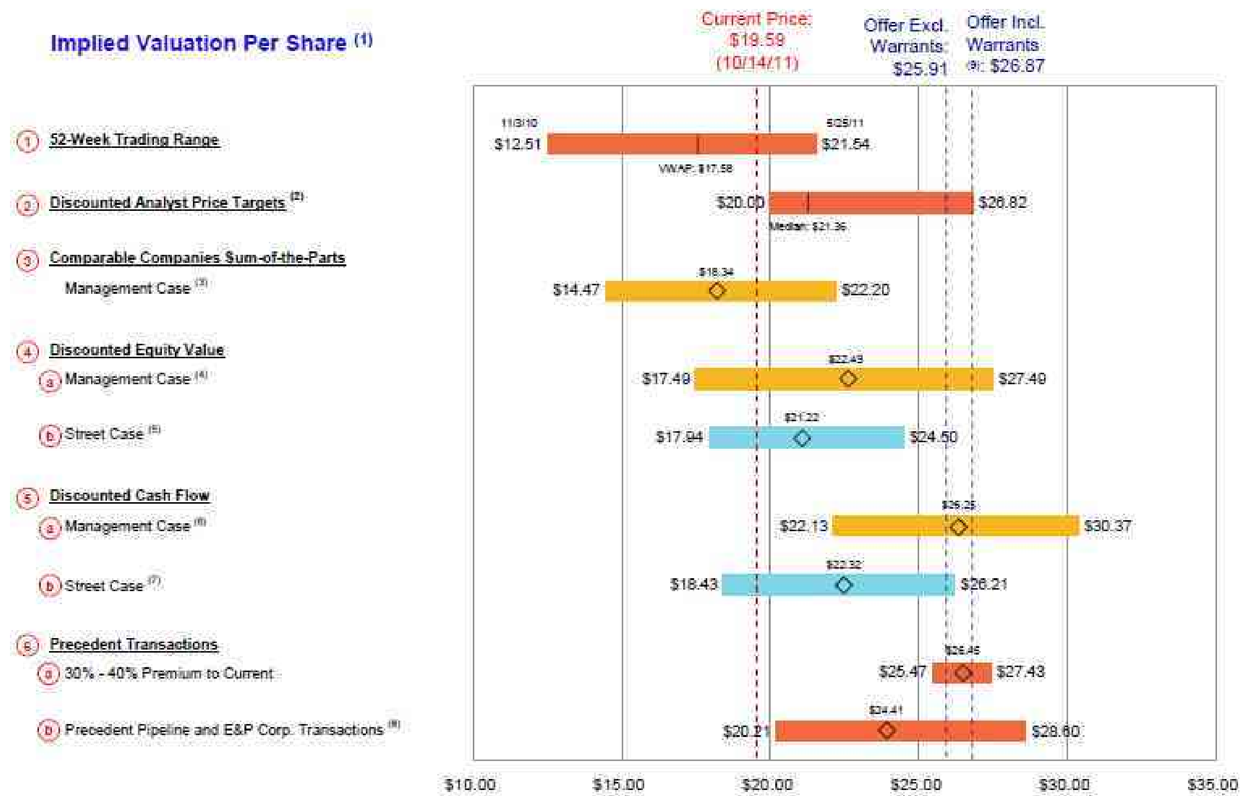
B. The board acted reasonably in choosing the merger over the spinoff and other alternatives.

At the heart of plaintiffs' case is the argument that the board made a strategic mistake. They say that instead of selling the entire company to KMI, the directors should have pursued different strategic alternatives, such as the previously announced spinoff or a fragmented sale of the Company's E&P and pipeline businesses. All *Revlon* demands in the context of directors choosing between such alternatives is that the board be well-informed and act reasonably in pursuit of a goal the directors believe, reasonably, to be in the best interests of shareholders. Here, the board's decision to pursue a sale of El Paso as a whole was a reasonable exercise of business judgment for numerous reasons:

First, the merger offers El Paso's shareholders a substantial premium for their shares. The merger consideration was valued at $26.87 at the October 16 board meeting, a 37.2% premium to the prior closing price of El Paso's stock, a 24.7% premium to El Paso's highest stock price over the preceding 52 weeks, and a 52.8% premium to the volume weighted average price of El Paso's stock over the same period. Ex. 45 at EP00021390. Nor is this a case where KMI made an opportunistic bid timed to exploit a short-term decline in El Paso's stock price; to the contrary, El Paso's stock price *increased* by 48% in the 12 months that preceded the October 16 board meeting, dramatically outperforming the market. Ex. 45 at EP00021387.

Second, the agreed price compared favorably with the analyses of fundamental value conducted by Morgan Stanley, which performed standard valuation work and rendered an opinion that the merger consideration was fair. Ex. 44 at EP00000550. Indeed, the merger consideration of $26.87 exceeded the midpoint of Morgan Stanley's

financial analysis — often by a wide margin — for each valuation metric presented by Morgan Stanley to the board on October 16:



Ex. 45 at EP00021390.

Third, in deciding to accept KMI's final offer of $26.87 per share, the board was informed by its substantial experience and expertise in the energy sector. *See Dollar Thrifty*, 14 A.3d at 602 (observing that courts should "rare[ly]" "second guess[]" decisions by a "business-experienced" board).[14] This consideration is particularly important here in light of El Paso's earlier efforts (aided by the Company's financial advisors) to analyze strategic alternatives that might unlock additional shareholder value. That strategic review, which came to be known as "Project Zygosity," was conducted over several months beginning in late 2010 and resulted in the board's approval of a tax-

[14] *See* pages 10-11, *supra*.

free spinoff of the E&P business in May 2011. *See* pages 12-15, *supra*. "Having taken so much time to educate itself" about strategic alternatives, the El Paso "board was well-positioned to make a reasoned decision" about KMI's premium bid for the entire company when it materialized in late August. *Toys 'R' Us*, 877 A.2d at 980.

Fourth, the announcement of the spinoff transaction and the impact on the market price was known for more than three months prior to the approach by KMI. The board had this information as part of its analysis when it elected to engage in discussions with KMI, which reflects the reasonableness of the board's decision to change course when El Paso was presented with KMI's premium bid. While the market initially reacted favorably and El Paso's stock price increased by $0.89 to $21.11 when the spinoff was first announced, the shares steadily lost value over the next few months and were trading for less than $19 on August 30. *See* Ex. 11. There was a reasonable basis to think that the market's valuation of the spinoff was already reflected in the stock price. Vagt Tr. 75:24-76:16 ("I anticipated that within . . . two, maybe three months . . . that [the spinoff] would be significantly reflected in the stock price."); *see* Kinder Tr. 25:16-23. Thus, when it received KMI's proposal, "the board was presented with a bid that was attractive compared with its chosen strategy," *Toys 'R' Us*, 877 A.2d at 979, and the directors' reasonably "change[d] direction . . . in the stockholders' best interest." *Id.* at 1007.

Fifth, putting aside the market's muted reaction to the planned spinoff, there was substantial risk as to whether El Paso would be able to execute the spin successfully. As the board understood, between May and August, there had been "a shift in the risks associated with the [spinoff] plan, including those associated with the macroeconomic environment and changes in commodity prices." Ex. 18 at EP00000387. KMI's proposal eliminated that risk and offered shareholders a substantial and certain premium to the

market. Ex. 45 at EP00021383; Sult Tr. 277:11-14; Foshee Tr. 262:3-5, 265:12-15. At the same time, the merger provides El Paso's shareholders with the potential to realize incremental value through the appreciation of KMI's stock price — precisely what has occurred since the deal was announced.[15]

Sixth, contrary to plaintiffs' claim, Pl. Br. at 40, the board *did* consider whether pursuing other strategic alternatives — that is, other than the spinoff or the KMI merger — might maximize shareholder value. As Mr. Foshee testified, as part of Project Zygosity, the Company had "analyzed . . . every possible permutation of separation," including selling the E&P company or the pipeline company as standalone businesses. Foshee Tr. 248:5-17.[16] The analysis showed that "the spin of the E&P company within the context of Zygosity was the superior alternative," Foshee Tr. 248:23-25, and on that basis, the board decided to proceed with the spinoff. Vagt Tr. 69:22-70:9.

Because it had the benefit of this prior work, when it received KMI's offer to buy the whole company, there was no need for the board to engage in a formal or lengthy review of the other strategic alternatives, as plaintiffs argue should have happened. By way of example, as Mr. Foshee testified, "we had already determined that the sale of the pipeline company wouldn't be a better alternative than the Zygosity path. So by definition, the sale of the pipeline company to KMI wouldn't be better than the Zygosity path." Foshee Tr. 249:2-25. In other words, once KMI appeared on the scene, the board

[15] Due to such appreciation, the blended value (pro-rating the various elections available to shareholders) of the merger consideration is now at least $29.33, a 49.7% premium to El Paso's trading price just before the transaction was approved.

[16] As to possibility of selling the pipeline business separately, El Paso determined that it would have been "really, really tax inefficient" and ultimately "an inferior alternative economically." Foshee Tr. 248:14-17, 249:2-25. Nor would it have been advisable for El Paso to sell its E&P business in a taxable transaction and then shop the remaining pipeline company, as Mr. Foshee explained. *See* Foshee Tr. 288:11-289:13.

reasonably focused its attention on whether a sale to KMI would provide more value to El Paso's shareholders than the spinoff. *See* Foshee Tr. 289:9-11 ("comparing the value of Zygosity to the offer on the table from Kinder Morgan, the Kinder Morgan offer was superior").

Seventh, the El Paso board considered the alternative of conducting a market check following the receipt of KMI's offer and reasonably determined that doing so would be unlikely to maximize shareholder value.[17] The board received advice from Morgan Stanley on the potential buyers of all or parts of El Paso's businesses. Ex. 23 at EP00000395; Cox Tr. 96:11-24. The board also considered that the Company had essentially been "in play" since the announcement of the spinoff transaction in May 2011 and that no one had come forward with an offer for El Paso or any of its businesses. Vagt Tr. 136:7-137:10; Foshee Tr. 121:5-10. And the board considered the risk that if Kinder Morgan went public with its offer — a very real possibility in the event the board started shopping the Company — the board might lose control of the process and be pressured to accept a subpar bid. Ex. 23 at EP00000395 (Morgan Stanley advised board that [redacted]; *see* Vagt Tr. 132:14-133:3. Based on these considerations, the El Paso board determined that engaging in the KMI discussions was the best course to optimize shareholder value.

Eighth, the transaction approved by the board reasonably allocates the risks and rewards of the sale of the E&P business between El Paso and KMI. While plaintiffs fault the directors for "allowing KMI to take any benefit from flipping the E&P assets," Pl. Br.

[17] By failing to address the issue in their brief, plaintiffs have waived for purposes of this motion the argument that the board breached its *Revlon* duties by failing to conduct a pre-signing market check. *See, e.g.*, *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 958 n.44 (Del. Ch. 2001) (VCS).

at 40, they ignore the fact that KMI is taking all of the risk that it will not be able to sell the E&P business at the levels that KMI projected; the KMI merger is not conditioned on a sale of the E&P business at any particular price. Sult Tr. 264:9-13, 277:11-14.[18] Buyers sell target assets all the time. But in any event, as explained in KMI's opposition brief, [REDACTED] *See* KMI Br. at 24-25. Plaintiffs' complaints about a supposed giveaway to KMI are entirely imaginary.

Finally, if El Paso's shareholders do not like the premium KMI deal and would prefer that the board revisit the spin or pursue some other strategic alternative, then the shareholders are free to vote down the proposed merger. And, if the transaction *is* approved, the shareholders can seek appraisal. As in *Lear*, "plaintiffs are in no position" to ask the Court "to refuse the [El Paso] electorate the chance to freely determine whether a guaranteed $[26.87] per share right now is preferable to the risks of continued ownership of [El Paso] stock." 926 A.2d at 123 (Del. Ch. 2007).

For these reasons, the board's decision to sell to KMI for the merger consideration was "a reasonable choice that a loyal and careful board could adopt in the circumstances." *Dollar Thrifty*, 14 A.3d at 597. Because El Paso's independent directors "selected one of several reasonable alternatives" to maximize shareholder value, the "court should not second-guess that choice." *QVC*, 637 A.2d at 45.[19]

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[18] Plaintiffs grossly distort the record by suggesting that Morgan Stanley believed and told El Paso that "KMI could realize from [REDACTED] more from selling the E&P assets than it had represented to El Paso." Pl. Br. at 40 (citing Ex. 47 at EP00026479). The language cited by plaintiffs reflects Morgan Stanley's advice concerning the position that El Paso should take in negotiating with KMI; it does not reflect Morgan Stanley's actual valuation of the E&P business. At that time, Morgan Stanley's valuation range for the E&P business was [REDACTED] Ex. 48 at 00000701; Cox Tr. 166:4-6, and KMI's assumption that it could obtain [REDACTED] in a sale of E&P [REDACTED]

[19] Plaintiffs make much of the fact that Mr. Vagt, upon being informed of KMI's initial offer, told Mr. Foshee that he "would not take [KMI's] stock in payment for a box of stale Saltines."

C. The board was aware of Goldman's conflict of interest and took appropriate steps to address the conflict and protect its process.

Plaintiffs' arguments about Goldman do not demonstrate a reasonable likelihood of success under the *Revlon* doctrine or under any other cognizable claim known to our law. After KMI approached El Paso, the board did exactly what it should have done: it hired a financial advisor with no potential conflicts (Morgan Stanley) and took steps to assure that no information about its internal deliberations would fall into Kinder Morgan's hands. After the initial September board meeting at which KMI's offer was discussed, Goldman was "hermetically sealed" from the board's deliberations on the KMI offer, was not consulted on tactical issues, and had no input into Morgan Stanley's financial advice. Goldman's role was limited to continuing to work on the spinoff, which was still a viable alternative, and advising the board on any changes relevant to the spin.

The directors knew of Goldman's ownership stake in KMI at the outset and discussed the matter. Ex. 18 at EP00000388. From the beginning, the board understood that it needed to be certain that it was obtaining unquestionably independent financial and strategic advice in regard to KMI's offer. Foshee Tr. 147:15-18; Vagt Tr. 104:20-24; Sult Tr. 115:22-116:6; 124:14-19. At the same time, the board did not want to be deprived of Goldman's deep knowledge of the Company, Sult Tr. 128:24-129:2, 134:15-17, and thought it imprudent to bring in a new advisor to start from scratch on the spinoff. Foshee Tr. 147:25-148:5; Sult Tr. 128:22-24. Moreover, the board recognized that it would need to compare the value of the spinoff and the value of a KMI deal; simply

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Pl. Br. at 4, 12 (quoting Ex. 49 at EP00022792). Mr. Vagt explained at deposition that his skepticism of the KMI currency was a "gut reaction," unsupported by "in-depth company analysis," Vagt. Tr. 95:3-16, and recalled that he had been "open to learning" more about KMI before making a final assessment. Vagt Tr. 99:7-16. Indeed, Mr. Vagt testified that at the end of the process, based in part on Morgan Stanley's advice, his perspective on KMI's stock as merger consideration had changed: "My saltines have turned into a macaroon." Vagt Tr. 179:8-181:5.

firing Goldman would, in the judgment of those involved, have impeded the board's ability to compare the alternatives available to El Paso, particularly in light of the time pressure created by KMI's offer. Vagt Tr. 118:6-13; Foshee Tr. 145:5-16.[20]

El Paso decided to strike a balance between these interests. As conceptualized before September 12, Goldman would continue to provide advice to the board, with the understanding that Goldman would maintain a Chinese wall between its investment banking division and its merchant banking division to prevent leaks. Moreover, Goldman agreed that its personnel who were working for El Paso and who had historically done work for KMI would not work for KMI in any capacity during the course of the El Paso engagement. Ex. 50 at GS-ELP00019062. And El Paso later required Goldman to represent in writing that there had not been, and would not be, any breach of the Chinese wall. Ex. 50 at GS-ELP00019062. In fact, *there is no evidence whatsoever of any breach of that wall throughout this process*, and plaintiffs have cited none.

El Paso's board and management continued to reevaluate Goldman's role during the process, however, and took further steps when they thought they were warranted. When management became concerned regarding Goldman's advice about KMI's September 9 letter, El Paso recalibrated the balance it had struck: after September 12,

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[20] Any conceivable direct gain on these investments Mr. Daniel could have realized by, hypothetically, taking steps to benefit KMI, would be immaterial. *See LC Capital Master Fund, Ltd.* v. *James*, 990 A.2d 435, 453 (Del. Ch. 2010) (VCS) (denying injunction where the plaintiffs did not establish that the hypothetical gain resulting from a director's alleged breach of duty would have been material).

Goldman played no role whatsoever in providing tactical advice or in the negotiations with KMI, and provided no advice at all to the board regarding those negotiations, Daniel Tr. 103:17-106:7; Foshee Tr. 197:5-13; and after September 15, Goldman's only role was to continue its work on Project Zygosity, including by updating its valuations of the spinoff in order to assist the board in its evaluation of a potential transaction with KMI, Ex. 23 at EP00000392; Daniel Tr. 165:24-166:17.

The above facts are effectively undisputed. Nevertheless, plaintiffs insist that Goldman's role warrants an injunction. They contend that Goldman steered the board toward a transaction with KMI by misleading the board about the significance of downward revisions to one of Goldman's financial analyses of the E&P business and that, in any event, by allowing Goldman to represent El Paso even in a limited capacity notwithstanding its ownership interest in KMI, the board conducted a process that was *per se* unreasonable. Both claims fail.[21]

First, the claim that Goldman somehow misled the board about the significance of the downward revisions to its standalone trading analysis of the E&P business is contrary to the record. The evidence shows that the downward revisions were the direct result of the steep declines in the market value of the E&P comparable companies. Goldman explained to the board, and the directors understood, that the change in Goldman's analysis was the result of the effect of economic conditions and falling commodity prices, which was driving down stock prices for E&P companies. Ex. 42 at EP00000491; Ex. 18

[21] Plaintiffs also criticize El Paso for agreeing to pay Goldman a $20 million for its assistance in connection with the board's consideration of the KMI offer. Pl. Br. at 23-24. As explained by El Paso's chief financial officer, the amount of Goldman's fee was determined in consideration of its work in analyzing the spinoff as an alternative to the KMI offer, as well as Goldman's otherwise uncompensated work on Project Zygosity and other strategic advice provided by Goldman over the years. Sult Tr. at 245:5-10.

at EP00000383; Vagt Tr. 106:10-20, 202:4-11; Sult Tr. 155:18-157:9. And Morgan Stanley's analysis [redacted] Cox 160:8-20.[22]

While plaintiffs falsely allege that nobody told the directors that these changes might be short term, in fact, as the minutes reflect, the directors specifically discussed how much weight to assign to what could be short-term changes in trading multiples. Ex. 42 at EP00000492. Given the depth of energy industry experience on this board, the directors hardly needed an investment banker to tell them that commodity prices are volatile and that oil and natural gas prices could go up in the future (or down, for that matter, as has been the case for natural gas prices since October 2011[23]).

Second, plaintiffs suggest that the mere existence of Goldman's conflict, in and of itself, somehow invalidates the merger under Delaware law. Plaintiffs cite no law in support of this argument, and that is because there is none. Defendants are aware of no case in which the Chancery Court has enjoined a transaction simply because the target's advisor had a conflict of interest. On the contrary, Chancellor Allen, faced with a transaction in which the target's financial advisor owned a 10% stake in the buyer, found that the plaintiffs were not entitled to an injunction on likelihood of success grounds, noting that (1) the target board knew about the 10% interest; (2) the target's management was involved in the negotiations; (3) the results of the negotiations were checked against

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[22] Other evidence in the record dispenses with any conceivable suggestion that Goldman was trying to push El Paso's board toward a deal with KMI at a lowball price by walking down its valuation of El Paso. On September 15, Goldman presented to the board preliminary valuation analyses of El Paso based on a discounted-cash-flow model and a present-value-of-future-stock-price model. Ex. 24 at EP00025297. Those valuations placed a *higher* value on El Paso than the valuations prepared by Morgan Stanley that same day. *Compare* Ex. 24 at EP00025297, *with* Ex. 25 at EP00025143.

[23] As reported in the *Wall Street Journal* last week, the price of natural gas recently reached its lowest level since March 2002. Ex. 51.

the board's own view of the target's value; and (4) a second banker gave a second fairness opinion. *See Solash* v. *Telex Corp.*, 1988 WL 3587, at *10 (Del. Ch. Jan. 19, 1988) (CA). This case is *a fortiori* of *Solash*, since Goldman played a much smaller role than the conflicted banker in *Solash*, and since the only fairness opinion (and negotiating advice) here was rendered by Morgan Stanley, which had no conflict.

This Court has made clear that stockholders should be "able to decide for themselves what weight to place on a conflict faced by the financial advisor." *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *16 (Del. Ch. Oct. 2, 2009) (CC). Absent evidence that an advisor's conflict of interest adversely impacted the board's process, Delaware courts will allow a proposed transaction to go to a vote once the conflict has been properly disclosed to the board and to the stockholders. *See* Ex. 18 at EP00000388; Ex. 46 (Preliminary Form S-4) at 100-02, 171-72.[24]

Plaintiffs' reliance on *In re Del Monte Foods Co. Shareholders Litigation*, 25 A.3d 813 (Del. Ch. 2011) (VCL) is misplaced. In that case, because Del Monte's banker (Barclays) concealed its conflict from the board, the directors were unable to "take[] steps to protect the integrity of the process." *Id.* at 833. The court found that Barclays had tainted the process and "materially reduced the prospect of price competition for Del

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[24] *See David P. Simonetti Rollover IRA* v. *Margolis*, 2008 WL 5048692 (Del. Ch. June 27, 2008) (VCN) (enjoining shareholder vote pending disclosure of financial advisor's financial interest in the merger); *In re Art Tech. Grp., Inc. S'holder Litig.*, 2010 WL 5184244 (Del. Ch. Dec. 21, 2010) (VCL) (enjoining shareholder vote pending disclosure of sell-side bank's past engagements by buyer and the amount of its fees); *In re Atheros Commc'ns, Inc. S'holder Litig.*, 2011 WL 864928, at *8-9 (Del. Ch. Mar. 4, 2011) (VCN) (enjoining shareholder vote pending additional disclosure regarding financial advisor's contingent fee arrangement); *In re Zenith Nat'l Ins. Corp. S'holders Litig.*, C.A. No. 5296-VCL (Del. Ch. Apr. 22, 2010) (Tr.) (approving of disclosure in the proxy statement of sell-side financial advisor's "five key engagements" with the bidder as well as the total compensation paid to the advisor by the bidder); *Louisiana Mun. Police Emp. Ret. Sys.* v. *Crawford*, 918 A.2d 1172, 1191 (Del. Ch. 2007) (CC) (enjoining shareholder vote pending disclosure of advisor's contingent fee arrangement).

Monte" by, among other things, facilitating the "surreptitious and unauthorized pairing" of two bidders. *Id.* at 833-34. In *Del Monte*, the court found that the investment banker's conflict in fact resulted in damage to the sales process. Nothing remotely similar happened here; there is no evidence that Goldman's conflict had a "causal influence on [the] board's process." *Toys 'R' Us*, 877 A.2d at 1006.

None of the other cases upon which plaintiffs rely — *Khanna* v. *McMinn*, 2006 WL 1388744 (Del. Ch. May 9, 2006) (VCN), *Ortsman* v. *Green*, 2007 WL 702475 (Del. Ch. Feb. 28, 2007) (VCL), and *In re Prime Hospitality, Inc. Shareholders Litigation*, 2005 WL 1138738 (Del. Ch. May 4, 2005) (CC) — stands for the proposition that a financial advisor conflict that has been disclosed can support an injunction in circumstances where the conflict did not affect the board's process. *Khanna* was decided at the pleading stage, thus requiring the court to "accept as true all well-pleaded allegations," 2006 WL 1388744, at *25; *Ortsman* was a decision granting expedited discovery on the basis of an untested allegation that the financial advisor's "conflict actually affected the sales process, 2007 WL 702475, at *1; and *Prime* involved the rejection of a proposed settlement in part on the ground that while there were "reasons to question" whether the board "received unbiased advice" from a conflicted financial advisor, the record on that issue was "incomplete," 2005 WL 1138738, at *13.

D. Morgan Stanley was not conflicted.

Plaintiffs have also failed to establish a likelihood of success on their claim that Morgan Stanley was conflicted because it supposedly was not "truly independent" of Goldman and because Morgan Stanley's fee was contingent on El Paso agreeing to a sale of the Company. The first of these arguments ignores the record; the second ignores well-settled Delaware law.

The uncontroverted evidence is that Morgan Stanley worked independently from Goldman in preparing its financial analyses and presentations for the board. Morgan Stanley's Jonathan Cox testified that [redacted] Cox Tr. 38:8-39:16. [redacted] Cox. Tr. 29:25-30:17. [redacted] Cox Tr. 33:22-35:3. Even then, however, Morgan Stanley and Goldman were working independently in preparing management and board presentations and conducting their financial analyses. Daniel Tr. 114:22-115:9; Cox Tr. 29:25-30:17, 57:19-61:21.

Having failed to uncover any evidence that Morgan Stanley's advice to El Paso's board was improperly influenced by Goldman, plaintiffs are left to complain about the structure of Morgan Stanley's advisory fee. But the fact that Morgan Stanley's fee was conditioned on the board approving a sale of the entire company as a matter of law cannot establish a conflict. Contingent fees for financial advisors "are undoubtedly routine," *In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *8 (Del. Ch. Mar. 4, 2011), and have repeatedly been "recognized as proper by our courts." *Toys 'R' Us*, 877 A.2d at 1005 & n.44 (citing cases). It was entirely appropriate for Morgan Stanley's compensation arrangement to "provide[] for higher compensation if it found a high-value, whole-Company deal" that could be pursued in lieu of the previously announced spinoff,

as that arrangement created "an incentive for [Morgan Stanley] to seek higher value" for the benefit of El Paso's shareholders. *Id.* at 1005.

E. Mr. Foshee was not conflicted and played an appropriate negotiating role under the board's supervision.

Plaintiffs claim that Mr. Foshee is conflicted because he will receive over $90 million as a result of the merger, and that it was therefore improper for the board to delegate to Mr. Foshee the authority to conduct price negotiations with KMI. Plaintiffs are mistaken on both counts.

First, Mr. Foshee's interests are squarely aligned with those of El Paso shareholders. Mr. Foshee will receive approximately $8.6 million in cash, Ex. 46 (Preliminary Form S-4) at 170-71, and approximately $55 million from unrestricted stock and vested options that he has received over years of service to El Paso and that he could sell at any time, Ex. 2 at 27, 58-59; *see* Foshee Tr. 305:21-306:2 ("I hold today all the stock options that I have ever been granted, but never exercised a stock option, and I hold today all of the shares I've ever been granted, so that other than when they vest paying the taxes, I've never sold a share."). These holdings do not create a conflict of interest; to the contrary, "the fact that [Mr. Foshee] was so heavily invested in the Company's equity no doubt encouraged him to take value-maximizing steps . . . because he recognized that a good deal for [El Paso] stockholders would leave him very wealthy, too." *Toys 'R' Us*, 877 A.2d at 1005.

In addition, Mr. Foshee will receive approximately $26 million from unvested stock options and restricted shares and stock units that vest as a result of the transaction. Ex. 46 (Preliminary Form S-4) at 170-71. Again, as a matter of Delaware law, this accelerated vesting does not render Mr. Foshee conflicted, as Mr. Foshee has a strong financial interest — like every other shareholder — in maximizing his payout on those

holdings. *See Openlane*, 2011 WL 4599662, at *5 (holding that acceleration of options, without more, "does not suffice to impugn the disinterestedness" of a director, and noting that "[t]he accelerating of stock options is a routine aspect of merger agreements"); *Globis Partners, L.P.* v. *Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) (VCP) ("The accelerated vesting of options does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price."); *Krim* v. *ProNet, Inc.*, 744 A.2d 523, 528 n.16 (Del. Ch. 1999) (VCS) ("The vesting of options does not create a conflict as a high exchange ratio for ProNet shares benefits the option-holding directors as much as, if not more than, the regular stockholders.").

It is true that the merger will allow Mr. Foshee to reap the benefits of these otherwise unvested and restricted holdings sooner. But not by much. Most of these options and stock units would have been exercisable or have become unrestricted in the normal course, absent any transaction, within two years (and, in some cases, within a few months). *See* Ex. 2 at 58-59.

Thus, on plaintiffs' theory, Mr. Foshee's financial interest in receiving $8.6 million in cash and accelerating his almost-vested holdings was so significant that it outweighed his interest in maximizing the value of his remaining $55 million stake in El Paso. But there is no evidence whatsoever that Mr. Foshee was in need of an immediate payout, or any other reason why he would have sacrificed his economic self-interest for a quick buck. *Cf. Lear*, 926 A.2d at 115-16 (discussing how the personal financial preferences and goals of the target's CEO potentially misaligned his interests with those of shareholders). Indeed, the proposed merger will put Mr. Foshee out of a job. Foshee Tr. 9:5-7. Given the El Paso board's record of compensating Mr. Foshee's

success in turning El Paso around, there is every reason to believe that the merger, by cutting off Mr. Foshee's opportunity to earn future equity awards, will actually cost him money in the long run. In these circumstances, plaintiffs have not come close to carrying their burden of demonstrating that Mr. Foshee's "economic circumstances" somehow "made it improbable that [he] could perform [his] fiduciary duties . . . without being influenced by [his] overriding personal interest." *In re General Motors Class H S'holder Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999) (VCS).

Second, even if Mr. Foshee were somehow conflicted — which he was not — plaintiffs' attack on Mr. Foshee's role in the merger negotiations is belied by the record and rejected by the case law. The board was reminded of Mr. Foshee's personal financial interests, Foshee Tr. 227:23-229:4; Sult Tr. 172:19-21, considered the incentives those interests created, and reasonably concluded that Mr. Foshee was best situated to speak for the Company in negotiations with his counterpart at KMI. *See Openlane*, 2011 WL 4599662, at *5 ("Even if [the CEO] were conflicted, his efforts in negotiating the Merger Agreement and dealing with other potential acquirers do not taint the process. The Board was aware of [the potential conflict] and was fully committed to the process."). As CEO for the past eight years, Mr. Foshee had led a remarkably successful turnaround at El Paso and had earned the directors' trust. Vagt Tr. 228:25-229:2. Delaware law respects that judgment. *See In re Nymex S'holder Litig.*, 2009 WL 3206051, at *7 (Del. Ch. Sept. 30, 2009) (VCN) ("It is well within the business judgment of the Board to determine how merger negotiations will be conducted, and to delegate the task of negotiating to . . . [the CEO]."); *In re Ply Gem Indus., Inc. S'holder Litig.*, 2001 WL 755133, at *10 (Del. Ch. June 26, 2001) (VCN) ("In most instances, the chief executive officer is the person most knowledgeable about the company, its value, and the industry in which it operates.").

At the same time, the board was "closely engaged at all relevant times in making decisions about how to handle the negotiations" with KMI. *Dollar Thrifty*, 14 A.3d at 602. The board was kept informed at each stage of the negotiations; plaintiffs do not argue that there was any material information that Mr. Foshee failed to promptly share with the board. *See, e.g.*, Ex. 52 at EP00022802 (Foshee email to Vagt on August 30: "I just want to make sure that the board knows everything I know and that we are aligned on a path forward from now to a response.").[25]

The board gave Mr. Foshee guidance for how to respond to KMI, and at each step, Mr. Foshee's communications with Kinder were memorialized in letters that were reviewed by the board.[26] After Mr. Foshee's in-person meetings with Kinder, and, later, after important developments in management's discussions with KMI, general counsel Bob Baker circulated a detailed description of what had occurred to the full board.[27] Mr. Foshee also consulted with the lead independent director, Michael Talbert, throughout the process. Foshee Tr. 114:8-19, 143:2-15, 182:4-12. As Mr. Vagt explained: "At no point was Doug a free agent. Did he have latitude to plumb the depths? Absolutely. But there was never a time when Doug had carte blanche." Vagt Tr. 228:14-20.

Ultimately, it was the board, not Mr. Foshee, that chose to negotiate with KMI, that determined how to respond in the face of KMI's refusal to pay $27.55 per share, that credibly threatened to walk away from the merger and pursue the spin, and that, in the

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[25] For example, the directors received detailed status updates at each of the relevant board meetings. *See, e.g.*, Ex. 18 at EP00000383, EP00000387-88; Ex. 23 at EP00000392, EP00000396-97; Ex. 37 at EP00000414-16; Ex. 42 at EP00000490, EP00000493.

[26] *See* Ex. 12; Ex. 22; Ex. 53; Ex. 41.

[27] *See, e.g.*, Ex. 54; Ex. 55; Ex. 56; Ex. 57; Ex. 58; Ex. 59; Ex. 60.

end, approved the merger. In short, the board did what it was supposed to do under Delaware law. *See In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9, 20 (Del. Ch. 2004) (VCL) (board properly allowed CEO to conduct merger negotiations, despite alleged conflict of interest, where the board "actively supervised [the CEO's] negotiations" and "repeatedly demonstrated its independence and control").[28]

Mr. Foshee's supposed "buyout aspirations" do not change the analysis. To the extent Mr. Foshee was ever truly interested in potentially pursuing a management buyout of the E&P business, the idea never got off the ground. Prior to the execution of the merger agreement, there was never any discussion with KMI about a management purchase of the E&P assets. Following the execution of the merger agreement, management has never made a bid for the E&P business or been asked to submit a bid, and there is no evidence that KMI and management ever seriously discussed a management buyout.

Nor have plaintiffs even begun to explain how Mr. Foshee's speculation about a hypothetical buyout could possibly have affected the board's process. The best plaintiffs can muster is the argument that "the less KMI paid for [El Paso], the lower the price [Mr. Foshee] would have to pay KMI for the E&P assets." Pl. Br. at 38. But this is nonsense. Because the merger agreement allocates to KMI all of the risks and rewards of the E&P sales process, KMI has every incentive to maximize the price it receives for E&P in the ongoing auction process, and there is thus no basis to believe that KMI would sell E&P for anything less than the highest available price.

[28] Plaintiffs suggest that Mr. Foshee did not follow the board's instruction after the September 30 board meeting to counter KMI's offer with an offer with a floor of cash and stock of $26.50 per share. *E.g.*, Pl. Br. at 17. This is a quibble that turns on ignoring the warrant portion of the counteroffer communicated by Mr. Foshee, which brought the total package of cash and securities above $26.50 per share. Ex. 38.

Finally, plaintiffs have entirely failed to posit a plausible causal link between the alleged motives of Mr. Foshee and the board's decision-making. They have suggested no logical reason why 11 independent directors with distinguished business careers and deep knowledge of the energy industry would casually assent to anything resembling an unreasonable proposal from Mr. Foshee. Mr. Foshee has no hold over this board; he does not "dominate" it within the meaning of Delaware law. If the board did not believe a whole-company sale was the best alternative, or if it believed the price was insufficient, there is no reason why these directors would not have simply said no.

F. The deal protections in the merger agreement are appropriate.

Plaintiffs claim that the board improperly agreed to certain deal protections in the merger agreement — a "no-shop" provision with a "fiduciary out" that cannot be triggered unless the board receives a proposal for more than 50% of El Paso's assets or equity securities, and a $650 million termination fee that is approximately 3.1% of the equity value of the transaction. Pl. Br. at 41-44. Provisions like these are routinely upheld by Delaware courts: no-shop provisions of the sort employed here are "rather ordinary," *McMillan* v. *Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000) (VCS); and the termination fee falls squarely within the range of fees consistently upheld by the Delaware courts, *Pennaco Energy*, 787 A.2d at 707 & n.27 ("The plaintiffs' attack on the termination fee's [3%] level is make-weight and at odds with precedent upholding the validity of fees at this level.").

Plaintiffs nevertheless insist that the deal protections here should be enjoined because the 50% threshold on the fiduciary out prohibits the board from considering a bid for the E&P business alone, and because the size of the termination fee, while modest relative to El Paso as a whole, will deter third parties from bidding on the pipeline business alone. These arguments fail, because "[t]he record just will not sustain the

notion that the board unreasonably foreclosed a valuable strategic avenue by agreeing to deal protections that inhibited its ability to receive bids for [the E&P business or the pipeline business] alone." *Toys 'R' Us*, 877 A.2d at 1022.

First, El Paso's announcement of the spinoff in May "presented an obvious opportunity" for third parties "who thought a combination with all or part of the Company made sense for them, to come forward with a proposal." *Id.* at 1008. Nonetheless, between May and August, no third-party proposals to acquire either the E&P business or the pipeline business emerged. It was thus perfectly reasonable for the board to conclude that a sale of either the E&P business alone or the pipeline business alone was not "a viable strategy" that needed to be accounted for in negotiating the deal protection devices. *Id.* at 1022.

Second, when KMI made its August 30 proposal, the board had already concluded, based on the work done in connection with Project Zygosity, that a spinoff of E&P was a superior alternative to selling either the E&P business or the pipeline business. Foshee Tr. 248:5-17. This was due in significant part to tax considerations.[29] Sult Tr. 42:24-43:17; Foshee Tr. 249:13-250:21; *Toys 'R' Us*, 877 A.2d at 1022 ("the adverse tax implications of such a strategy are profound and were flagged"). In evaluating KMI's offer, therefore, the board reasonably focused on the spinoff as the relevant benchmark and the only viable strategic alternative. For this additional reason, it was reasonable for the board to negotiate the deal protection devices in the manner that it did.

Finally, as to the termination fee specifically, "it is not clear why [KMI] should receive less of a termination fee simply because the Company signs up a deal selling a

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[29] El Paso's assets have a low tax basis, and therefore if El Paso sold its E&P or pipeline assets in a taxable transaction, the value of the transaction would be decreased, either by the payment of taxes or by the use of NOLs to offset the tax liability.

significant part of the assets [KMI] contracted to buy." *Id.* at 1022. It was thus reasonable for the KMI to insist on a termination fee that was based on the size of the deal it made with El Paso, and it was equally reasonable, under the circumstances, for El Paso's board to agree to that arrangement. Plaintiffs have not cited the Court to any instances where a selling company managed to obtain a reduced break-up fee for piecemeal acquisition overbids.[30]

G. Plaintiffs' attack on Morgan Stanley's valuation methodology is meritless.

Plaintiffs, relying on the report of David G. Clarke, claim that Morgan Stanley's fairness opinion contained errors "that should have caused the Board to question Morgan Stanley's conclusion that the Merger was fair to El Paso's shareholders." Pl. Br. at 44. But on a preliminary injunction application in which the *Revlon* standard applies, the court need not resolve valuation disputes. Rather, 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. *Lear*, 926 A.2d at 122; *see also In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *24 (Del. Ch. May 20, 2011) (VCP). In any event, Clarke's report is fatally flawed, and plaintiffs' criticism of Morgan Stanley's work is mistaken.[31]

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[30] Plaintiffs also argue that Section 5.3 of the merger agreement is unduly restrictive in that it does not provide for the board to be able to change its recommendation of the KMI transaction in favor of a proposal to acquire some portion of the company smaller than 50%. (If the proposal is for more than 50%, the El Paso board has the customary freedom to change its recommendation if a "Superior Alternative" is presented.) Plaintiffs cite no case law supporting their position. Manifestly, a proposal for less than 50% of the company is unlikely to be a genuinely superior proposal when compared to a premium deal for 100% of the company, especially where the partial sale is taxable and the whole-company sale is not. It is probably a null set.

[31] Mr. Clarke also claims that certain aspects of Goldman's valuation work were deficient. Because Goldman did not provide a fairness opinion in connection with the merger, the El Paso defendants do not address these meritless claims. In any event, the Expert Report of

As to most of Morgan Stanley's valuation work, Clarke has nothing to say. He offers no criticism whatsoever of most of the valuation metrics used by Morgan Stanley to value El Paso and KMI. Indeed, the Clarke report does not identify any supposed flaws in Morgan Stanley's valuation of El Paso's E&P business or El Paso's NOLs. Clarke Tr. 30:25-31:8. Rather, he takes one DCF analysis that Morgan Stanley used to value El Paso's pipeline business[32] and one discounted dividend model that Morgan Stanley used to value KMI, and changes certain inputs, resulting in revised models that dramatically increase the value of the pipeline business and dramatically decrease the value of KMI. Clarke does not stand by these revised models: he testified that this was not his valuation work, Clarke Tr. 116:7-8; that he did not conduct an independent valuation of El Paso, Clarke Tr. 27:5-7; that he was not offering an opinion as to what El Paso is worth, Clarke Tr. 27:8-10; that he would not have relied on a single DCF model to value El Paso but rather would have considered comparable company and comparable transaction analyses, Clarke Tr. 35:19-36:17; that he has no view as to whether the merger consideration is fair, Clarke Tr. 177:24-178:5; and that he has no view as what merger consideration would be fair, Clarke Tr. 178:6-10. In light of these concessions, there is no basis for concluding that the board could not reasonably rely on Morgan Stanley's fairness opinion. As to the particulars of Clarke's criticisms:

First, Clarke attacks Morgan Stanley for using a 10x terminal EBITDA multiple to calculate the terminal value for its DCF of the pipeline business, and claims that the

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Mr. Kenneth M. Lehn addresses the material criticisms leveled by Mr. Clarke against Goldman's valuation work.

[32] While Clarke critiques Morgan Stanley's DCF valuation of the pipeline business on an aggregated basis, his report says nothing concerning Morgan Stanley's DCF valuation of the disaggregated pipeline business. Clarke Tr. 69:14-22.

resulting implied perpetuity growth rate of [redacted] is too low. Clarke Rep. at 9. Clarke does not do any valuation work to calculate what the perpetuity growth rate for the pipeline business should be. Instead, he takes the [redacted] implied perpetuity growth rate from Morgan Stanley's discounted dividend model for KMI and uses that as a perpetuity growth rate to value the pipeline business. Clarke's revised calculation is thus based on KMI's implied perpetuity growth rate and the pipeline segment's discount rate. He offers no explanation for this erroneous mixing and matching. Expert Report of Kenneth M. Lehn ("Lehn Rep.") ¶ 16. Nor can Clarke justify the terminal EBITDA multiples of 13x to 17x implied by his changes to Morgan Stanley's model. Clarke Rep. Exs. 1B, 1C. Such a range is out of line with El Paso's historical EBITDA multiple, as well as the EBITDA multiple for other pipeline companies. Lehn Rep. ¶ 17. Indeed, speaking of a 17x multiple, Clarke conceded that "[i]f I was doing a valuation, a standalone valuation, I might find that to not be reasonable." Clarke Tr. 77:3-5.

In addition, Clarke's change to Morgan Stanley's analysis implies growth without net investment. This is simply inconsistent with basic principles of financial economics. Lehn Rep. ¶ 19.

Second, using this modification to the DCF, Clarke generates a value for the pipeline business alone of $24.18-$34.42 per share. Clarke Rep. 14. Before the merger was announced, El Paso stock closed at $19.59 per share. Thus, if Clarke's revision to the DCF is correct, *the value of the pipeline business is greater than the value the market was placing on all of El Paso*. Clarke Tr. 109:20-110:15. And on Clarke's account, the equity value of the entirety of El Paso is $33.57-43.81 per share, a 71% to 124%

premium above the pre-merger-announcement market price. Clarke Rep. 15; Clarke Tr. 110:16-11:5; Lehn Rep. ¶ 21. These numbers defy reality, and are reason enough to reject Clarke's changes to Morgan Stanley's work. Clarke simply has no explanation for the huge gap between his modified DCF and the trading value observed in the market.

Third, Clarke says that Morgan Stanley erred when, using the capital asset pricing model ("CAPM"), it calculated a cost of equity for KMI. Clarke Report 19. Clarke did not create his own CAPM model for KMI. Clarke Tr. 133:18-22. Rather, he takes the cost of equity that Evercore generated in its CAPM for KMI, and claims that Morgan Stanley should have used that number instead. Clarke Report at 19. In his report, Clarke offers no explanation for selecting a cost of equity over a cost of equity. He testified, however, that he chose Evercore's number over Morgan Stanley's number because Evercore had calculated KMI's beta based on the beta of comparable companies, while Morgan Stanley had calculated KMI's beta based on KMI's trading history; in Clarke's opinion, in light of KMI's eight month trading history, the use of comparable companies was a preferable means of calculating beta. Clarke Tr. 136:13-138:12. But under the circumstances, there was nothing unreasonable with Morgan Stanley's use of historical beta. Lehn Rep. ¶ 26. And in any event, Clarke testified that he did not believe that there were *any* companies that were comparable to KMI; plaintiffs can hardly be heard to complain that Morgan Stanley failed to look to comparable companies, when their own expert claims that such companies do not exist. Clarke Tr. 138:13-22.

Fourth, based on Clarke's report, there is a gap between what El Paso is actually worth and what KMI is paying. Lehn Rep. ¶ 24. On Clarke's account, a topping bidder could pay more and still be getting a bargain. Clarke

Tr. 141:12-144:9. But there has been no such bidder, and Clarke's revisions to Morgan Stanley's work imply a market for corporate control that is utterly inefficient. Clarke offers no explanation for such extraordinary inefficiency, and that is because there is none.

H. Plaintiffs have waived their disclosure claims.

Plaintiffs devoted a significant portion of their consolidated complaint to an attack on the adequacy of El Paso's public disclosures about the proposed merger. Consol. Compl. ¶¶ 119-47. But none of these claims are even referenced, much less developed, in plaintiffs' opening brief, and all of plaintiffs' disclosure claims have therefore been waived for purposes of the preliminary injunction hearing. *Lear*, 926 A.2d at 110 ("In their complaint, the plaintiffs purport to set forth a Denny's buffet of disclosure claims. But, in their briefs, the plaintiffs argue only three of these supposed deficiencies in disclosure. I therefore only address those contentions, as the others have been waived."); *In re Staples, Inc. S'holder Litig.*, 792 A.2d 934, 958 n.44 (Del. Ch. 2001) (VCS) (deeming disclosure claims "waived for purposes of the preliminary injunction motion" where the plaintiffs failed to present the argument in their opening brief).

IV. PLAINTIFFS HAVE NOT SHOWN IRREPARABLE HARM.

The stockholders face no threat of irreparable harm if the Court permits the vote to go forward, for "it is they who in the end will decide whether or not the company will be sold now." *McMillan* v. *Intercargo Corp.*, 1999 WL 288128, at *4 (Del. Ch. May 3, 1999) (VCJ). This Court has routinely refused to find irreparable injury where stockholders can freely exercise their fundamental right of corporate ownership by voting to approve or reject a deal. *See, e.g.*, *Toys 'R' Us*, 877 A.2d at 1023.

It is well settled, moreover, that the extraordinary relief of a preliminary injunction "should not be granted if the injury to Plaintiff is merely speculative or if the injury can be fully compensated after a full trial on the merits, either by an award of damages or by

any other form of final equitable relief." *Cantor Fitzgerald, L.P.* v. *Cantor*, 724 A.2d 571, 586 (Del. Ch. 1998) (VCS). Plaintiffs' attack on the merger consideration and process is simply a claim about money, and as such is entirely remediable in damages. *See, e.g., In re CNX Gas Corp. S'holder Litig.*, 4 A.3d 397, 420 (Del. Ch. 2010) (VCL) ("No question has been raised, much less evidence presented, to cast doubt on CONSOL's solvency or ability to satisfy a damages award. The plaintiffs therefore have not shown any threat of irreparable harm.").

Plaintiffs can also point to no basis in the record to demonstrate imminent, non-speculative injury absent injunctive relief. In the eight months since the spin was announced and the three months since the merger was announced, no one has come forward to make a competing bid to top KMI's offer. El Paso's projections and other key proprietary financial information have been in the public domain since November 10, 2011, when the first preliminary proxy was filed with the SEC, and still, no other bidder has emerged. As Delaware courts have repeatedly explained, "the abstract possibility of a higher offer cannot serve as a predicate for finding plaintiff's harm to be irreparable." *Norberg* v. *Young's Mkt. Co.*, 1989 WL 155462, at *5 (Del. Ch. Dec. 19, 1989) (VCC) (denying preliminary injunction of merger because "money damages or appraisal constitute a sufficient remedy").

V. THE EQUITIES TIP DECISIVELY AGAINST PLAINTIFFS.

A preliminary injunction could jeopardize the El Paso shareholders' opportunity to accept the KMI deal and receive an immediate premium. Our courts are particularly disinclined to enjoin premium transactions where, as here, no competing offer is available to shareholders. *See, e.g.*, *Pennaco*, 787 A.2d at 715 ("this court is justifiably reluctant to enjoin a premium-generating transaction when no other option is available").

As this Court has explained, it would be inequitable to allow a subset of shareholder plaintiffs to "put at risk the opportunity for other Company stockholders to vote to accept [a] northerly price." *Toys 'R' Us*, 877 A.2d at 1023; *accord Solash*, 1988 WL 3587, at *13. At the very least, entering an injunction would create needless uncertainty and delays — to the detriment of El Paso's shareholders. *Dollar Thrifty*, 14 A.3d at 617-18 ("Although an injunction would not release [the buyer] at this point, it would introduce a period of uncertainty and delay"); *Toys 'R' Us*, 877 A.2d at 1023 (recognizing that shareholders are harmed by a "delay of their receipt of the merger consideration"). The more appropriate course, as this Court has repeatedly recognized, would be to allow El Paso's shareholders the opportunity to decide for themselves whether they want to accept KMI's premium offer. *Lear*, 926 A.2d at 123; *Dollar Thrifty*, 14 A.3d at 618; *Toys 'R' Us*, 877 A.2d at 1023.

VI. THE RELIEF SOUGHT BY PLAINTIFFS IS NOT AVAILABLE ON A PRELIMINARY RECORD.

By their "preliminary" injunction motion, plaintiffs seek an order (a) enjoining the shareholder vote; (b) enjoining the enforcement of the deal protection provisions in the merger agreement; and (c) directing the board to "retain[] 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." Pl. Br. at 48. Plaintiffs' idea, evidently, is that the board would be ordered to "shop the Company and its component businesses" between now and June 30 and, "if no superior transactions emerge," consummate the KMI merger. *Id.* at 47-48. But as this Court explained in *Toys 'R' Us*, ordering such "mandatory relief would . . . be inappropriate on disputed facts." 877 A.2d at 1022-23. At this preliminary stage, 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. *Id.*

VII. PLAINTIFFS MUST BOND ANY INJUNCTION.

Plaintiffs seek to delay — and thus possibly prevent — a deal with a current market value of $23 billion, reflecting an approximately $7.6 billion premium over the pre-announcement price. Should this Court grant plaintiffs' motion, a bond will provide the only protection for the Company and its stockholders against the risk that an improvidently issued injunction derails the transaction. When such an injunction is granted, a "bond is the sole scope of the remedy against which someone can recover." *In re CNX Gas Corp. S'holder Litig.*, C.A. No. 5377-VCL, at 29 (Del. Ch. May 26, 2010) (Tr.) ("CNX"); *see also LC Capital Master Fund, Ltd.* v. *James*, 990 A.2d 435, 454 (Del. Ch. 2010) (VCS) (noting that "great harm could result to the common stockholders" if the court granted an injunction improvidently). Any injunction should therefore be "condition[ed] . . . on indemnification from the plaintiffs for losses suffered by the plaintiffs' class." *CNX* at 29 (requiring bond equal to 5% of the premium).

CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction should be denied.

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