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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

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KMI'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiffs seek to enjoin a shareholder vote on a proposed merger that, if approved, will provide El Paso stockholders with a 37% premium to the price of El Paso common stock on October 14, 2011, the last trading day prior to the deal announcement. Following expedited discovery, Plaintiffs filed their opening brief on January 13, 2012.

Kinder Morgan, Inc.[1] files this response to highlight the nature and substance of the negotiations leading to the proposed transaction as seen through the eyes of Richard Kinder, KMI's Chief Executive Officer and largest stockholder. In addition to Mr. Kinder's deposition testimony, which addresses the negotiations in detail, the record contains Mr. Kinder's handwritten notes and talking points which he prepared contemporaneously for his own use in connection with his discussions with El Paso's Chief Executive Officer, Douglas Foshee, and in addressing the KMI Board.[2] These notes provide a "real time" record of the negotiations.

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[1] Kinder Morgan, Inc. and its wholly-owned subsidiaries Sherpa Merger Sub, Inc. and Sherpa Acquisition, LLC are hereinafter referred to collectively as "KMI."

[2] A set of these handwritten notes, in chronological order, is contained at Ex. A-1 to A-10. References to "Ex. __" herein are to the Affidavit of Bradley R. Aronstam, Esq., dated January 23, 2012. The El Paso Defendants have lodged all deposition transcripts cited herein, and have included the current version of the preliminary proxy (referred to herein as "Proxy") as Exhibit 46 to the Affidavit of Samuel L. Closic, Esq.

Plaintiffs' brief largely ignores this available record in arguing that El Paso's directors all but allowed KMI to "steal" the company at a price not reflective of the true value of El Paso's two core businesses, much less a fair premium. As set forth below, over a six-week period, KMI and El Paso engaged in hard-fought, protracted negotiations which resulted in a "resolute" El Paso Board squeezing the "last pennies" out of KMI's pockets to obtain a 37% premium to a stock market price that already incorporated the value to be realized through El Paso's announced plan to unlock value by spinning off its exploration and production business ("E&P" business) (the "Spin"). And while Plaintiffs complain about "upsides" to KMI that the deal hopefully offers (upsides in which El Paso's stockholders will share), they gloss over the significant and continuing risks from market forces, especially from volatile commodity pricing and its impact on El Paso's E&P business.

FACTUAL BACKGROUND

Some background is helpful in understanding how KMI approached the negotiations and the parameters it employed.

Kinder Morgan

KMI is a leading pipeline transportation and energy storage company in North America. Ex. B (Oct. 19, 2011 Press Release) at 2. Primarily through its subsidiary, Kinder Morgan Energy Partners, L.P. ("KMP"), a master

[redacted]

limited partnership which has publicly traded limited partnership units, KMI owns an interest in or operates some 37,000 miles of pipelines transporting natural gas, crude oil, gasoline and other products, as well as 180 terminals that store petroleum products and chemicals and handle bulk materials like coal and petroleum coke. *Id*. at 1-2. Unlike "upstream" companies, which are involved in the production of oil and gas, "midstream" companies transport these materials from production areas to the ultimate distribution points. Kinder Tr. at 6:21-7:8.

KMI has a somewhat unusual capital and operating structure. KMI itself makes limited capital expenditures as virtually all of its pipeline projects are built and owned by its subsidiary KMP, which finances those projects through the issuance of debt and equity. *See* Ex. C (Dec. 6, 2011 Presentation) (available on KMI's public website). KMI's principal asset (and source of revenue) is its ownership of the general partner interest in KMP as well as approximately 11% of the limited partner interests. Ex. B (Oct. 19, 2011 Press Release) at 1; Ex. C (Dec. 6, 2011 Presentation) at 22, 24. KMI is very much a yield-based stock, trading off the dividends it pays out based on cash flow received from KMP: "[W]e are valued off of the yield that we provide. And the higher the dividend we pay and the more consistent we can be in increasing that dividend . . . the higher the price." Kinder Tr. at 166:10-15.

[redacted]

Plaintiffs' mantra that KMI needed the El Paso acquisition because of its supposed "limited ability to grow organically" by reason of this structure (Pls. Br. at 2) is simply wrong. This assertion is belied not only by KMI's recent IPO, which was one of the largest in history and placed a high valuation on the company, but also by KMI's announcement that it expects per unit limited partner distributions from KMP to grow by 8.3% in 2012, *separate and apart from any impact owing to the proposed El Paso acquisition*. Ex. C (Dec. 6, 2011 Presentation) at 12.

KMI, formed in 1997, was taken private in May 2007 by a group of investors which included members of management, led by CEO Richard Kinder, as well as private equity sponsors, including several investment funds managed by Goldman Sachs ("Goldman"). Kinder Tr. at 7:9-8:3. In February 2011, KMI became public once again through an initial public offering undertaken not as a prelude to acquiring El Paso as Plaintiffs suggest, but because the "sponsors who invested" in the buy-out "wanted to have liquid currency [so] that they could eventually dispose of their interest in the company." Kinder Tr. at 8:14-20, 9:11-10:5.

The 2010 Proposal is Dead on Arrival

KMI regularly analyzes and considers potential transactions with other industry players. Kinder Tr. at 10:20-11:4. In September 2010, KMI

[redacted]

submitted an acquisition proposal to El Paso at an indicative value of $16.50 per share. Proxy at 97. The offer went nowhere. El Paso, advised by Goldman, rejected this offer as inadequate for a "whole host of reasons . . . most of which revolved around valuation."[3] Foshee Tr. at 104:8-12. As Mr. Foshee testified: "our view was it was so far away from something that we should consider that it wasn't worth our time." *Id.* at 79:22-80:7. This short-lived proposal hardly represented the "seed" (Pls. Br. at 2) of the current transaction, and no further communications about a possible combination occurred between the companies until August 30, 2011.

El Paso Announces its Spin and KMI's Board Authorizes an Offer

On May 24, 2011, El Paso announced that it planned to spin off its E&P business to its current stockholders in a tax-free transaction as the best means of unlocking the value of its two core businesses (pipeline and E&P). Upon the announcement, Mr. Kinder sent a congratulatory note to Mr. Foshee. Ex. D (May 30, 2011 Email). But after a slight initial increase following the announcement (some $2 per share), El Paso's stock stalled in August and thereafter traded in the high teens.

[3] There is nothing in the record even remotely suggesting that Goldman (in Plaintiffs' view hopelessly conflicted and seeking to push El Paso into the arms of KMI for its own pecuniary interests) pressed El Paso to pursue this proposal.

One month later, and at the initiative of Evercore Group L.L.C. ("Evercore"), members of KMI senior management met to hear Evercore's ideas about an acquisition of El Paso. Kinder Tr. at 12:18-13:6. Although rejecting the structure initially suggested by its bankers, KMI management continued throughout the summer, with Evercore's assistance and based solely on public information, to analyze a bid for El Paso. *Id.* at 21:20-22:3, 24:4-8, 43:16-17; Pacha Tr. at 51:11-32:2; *see also* Ex. A-1 (Kinder Notes) at KMI-EP009396.

As a result of these efforts, Mr. Kinder scheduled a telephonic conference for August 26 with the KMI directors to address a potential El Paso transaction, the first in what would be a series of Board calls (without the Goldman directors participating) conducted throughout the subsequent negotiations. From the outset of these Board discussions, it was clear that there were limits on what KMI could and would be prepared to pay to acquire El Paso. Although Evercore had included in its initial models a price range of [redacted] per El Paso share, Mr. Kinder was adamant that KMI could not go above [redacted], and the materials provided in advance of this call, as well as the subsequent Board discussion, reflected this cap. Kinder Tr. at 40:12-25, 41:9-12, 43:2-44:7; *see also* Ex. E (Aug. 25, 2011 Email attaching slides) at KMI-EP017605; Ex. A-1 (Kinder Notes) at KMI-EP009396.

[redacted]

KMI's approach was driven by its goal to provide its stockholders with dividend accretion after an acquisition of El Paso "in the [redacted] cent range" by 2015 – a result KMI management did not, based on the publicly available information, consider possible if the acquisition price went much above [redacted]. Kinder Tr. at 43:13-44:7, 45:3-46:24.[4] As Mr. Kinder explained:

> All of this is an art, not a science. But I've been in this business a long time and I am the largest shareholder. And I just felt it would not be worth taking on the enormous risks that we're taking on in this transaction unless there is something at the end of the process that really is very much a positive for KMI. And if you can get a [redacted], but at least we've got, we're in the range as the deal was finally done. Then it is worth going through all of this. If all you can get is [redacted] or [redacted] of accretion, then it is just not worth taking on the risk. It is a risk/reward scenario balance, in my opinion.

Id. at 46:9-24. Following a discussion of the risks and opportunities associated with buying El Paso, the KMI Board expressed its support for management proceeding with an acquisition proposal. *Id.* at 24:4-17; Ex. A-1 (Kinder Notes) at

[4] The time frame through which KMI viewed acceptable accretion levels arises from its plan, over the next [redacted] years, to "drop down" the El Paso pipeline assets for fair consideration to KMP (or the corresponding El Paso master limited partnership), which must issue debt or equity to do so. Kinder Tr. at 26:12-27:16. One of the risks of the El Paso acquisition to KMI is that "the market is not there to support the ability of those MLPs to issue equity or to issue debt to accomplish" those drop downs. *Id.* at 26:25-27:16.

[redacted]

KMI-EP009396 (noting that the deal was "not w/out risk," citing "selling E&P" and "executing" asset drop downs); Proxy at 99.

Goldman is Not Involved in KMI's Consideration and Implementation of the Offer

Despite Plaintiffs' best efforts to shift the focus entirely to Goldman's conduct, Goldman played no role whatsoever on the KMI side of the deal.

Goldman's two designees on the KMI Board, Kenneth Pontarelli and Henry Cornell, did not attend the August 26 discussion regarding the proposal, recusing themselves in advance because of Goldman's work for El Paso.[5] Kinder Tr. at 73:17-74:7 (Mr. Pontarelli "called before the first board meeting and said that they would not be participating . . . [He] said that Goldman would not be participating in any meetings or deliberations or calls regarding the El Paso matter"); Ex. F (notes of Joseph Listengart, KMI General Counsel) at KMI-EP009412 ("GS not participating"). In fact, Mr. Kinder opened the August 26 KMI Board call by informing the directors "that Goldman would not be

[5] The August 26 Board materials referencing the potential proposal to El Paso were circulated to the two Goldman designees. Ex. E (Aug. 25, 2011 Email attaching slides). Prior to this meeting, neither Mr. Cornell nor Mr. Pontarelli were aware of the discussions within KMI regarding El Paso. Proxy at 99. The Goldman designees did request (and were sent) the materials being provided the other directors in connection with the October 16, 2011 meeting (addressed below) given that Goldman would be signing the voting agreement as a stockholder of KMI. *Id.* at 110.

participating in this process." Kinder Tr. at 76:6-16. Shortly after this initial call, the Goldman designees confirmed to KMI management that they would not be participating in any subsequent KMI Board discussions and meetings relating to a potential transaction with El Paso. Proxy at 99; Kinder Tr. at 72:24-73:5.

The Goldman designees had nothing to do with KMI's consideration, assessment or negotiation of the transaction. *See, e.g.*, Kinder Tr. at 73:6-74:7, 74:21-75:10 ("to my knowledge, there were absolutely no substantive calls with regard to . . . this merger"); *see also* Proxy at 99. Nor did any Goldman representative participate on El Paso's behalf in any negotiating sessions involving Mr. Kinder or any other member of the KMI deal team. Plaintiffs never once mention, let alone rebut, Goldman's non-participation on the KMI side.

KMI Makes a Proposal and Enters into Negotiations with El Paso

On August 30, 2011, Mr. Kinder delivered a letter to Mr. Foshee proposing to acquire all of El Paso for $25.50 per share, payable 60% in cash and 40% in KMI stock, a premium of some 34.8% over El Paso's August 29 closing price ($18.91), a price that already incorporated the value the market placed on the proposed Spin, which of course envisioned that the value of the two businesses separated would exceed the sum of the whole. Kinder Tr. at 53:17-54:21; *see also* Ex. G (Aug. 30, 2011 Letter) at KMI-EP009394 (offer also represented "an 18.4% premium to El Paso's 52-week intra-day high"). After advising Mr. Kinder that El

Paso was "very far along" with the Spin, a regular refrain of El Paso throughout the discussions, Mr. Foshee said he would "talk to his management team and his board and get back" to KMI. Kinder Tr. at 55:8-16.

On September 5, after an El Paso Board meeting, Mr. Foshee hand delivered a letter to Mr. Kinder rejecting KMI's proposal as "not compelling" and telling him that while a merger between their companies "made a lot of sense" strategically, $25.50 per share was inadequate. Kinder Tr. at 56:2-57:3; Ex. A-2 (Kinder Notes) at KMI-EP009386 (summarizing discussion with Mr. Foshee); Ex. H (Sept. 5, 2011 Letter). Although Mr. Kinder pressed, Mr. Foshee would not proffer a number of his own. Not surprisingly, Mr. Kinder did not want to bid against himself: "I tried to get him to what did he think was a fair price. And he wouldn't give me any price. He's very skillful at negotiating, of course, always try to make the other guy trade with himself. But I couldn't get a price out of him." Kinder Tr. at 63:3-8.

Negotiations Continue and KMI Says it May Go Public with its Offer

What followed over the next five weeks was, from KMI's perspective, a hard-fought negotiation in which El Paso sought to determine the maximum consideration KMI would pay and whether that price would provide its stockholders greater value than the Spin (which the El Paso directors had previously concluded, after extensive assessment and deliberation, represented the

best means for maximizing stockholder value). The process ended with KMI agreeing to a price at the [redacted] of its range.

Mr. Kinder and Mr. Foshee were hardly, as Plaintiffs suggest, "left alone" at any point during the negotiations (Pls. Br. at 16), but rather were guided every step of the way by their respective Boards, while constantly interacting with their management teams. *See, e.g.*, Exs. A-2, A-4, A-6, A-10 (Kinder Notes re: KMI Board discussions); Ex. A-3 (Kinder Notes) (citing Mr. Foshee as saying that: "[Board] is big component"); Vagt Tr. at 191:22-192:5 ("[T]here was going to be no decision made other than by the board. So while [Mr. Foshee] was doing the negotiation, and I trust him implicitly, he did not get the keys to the car."); *Id.* at 228:14-20 ("[T]he board makes the decision. At no point was [Mr. Foshee] a free agent . . . there was never a time when [he] had carte blanche.").

On September 9, following a KMI Board discussion about the proposal (Ex. A-2 (Kinder Notes)), Mr. Kinder sent a letter to Mr. Foshee indicating that KMI "would consider improving its offer for your shareholders if we were permitted to conduct limited due diligence," a process it told El Paso could be completed "on a short timetable." Ex. I (Sept. 9, 2011 Letter) at EP00004440. Noting that "[a]ny further improvement" would make an already compelling proposal "even more attractive," the letter advised that "should the El Paso Board of Directors reject [KMI's] proposal even with this additional

[redacted]

potential price flexibility. . . [KMI] would expect to release [its] $25.50 per share proposal to [El Paso's] shareholders and to the public." *Id.*[6]

Mr. Kinder considered the "go public" option a "compelling argument for [Mr. Foshee] and the El Paso board to take even more seriously our offer if they knew there was a high likelihood that it was going to become public, that they had turned down an offer that was so far above any of their historic trading range[s]." Kinder Tr. at 70:8-17. But, Mr. Foshee was not moved by this, asserting during subsequent negotiations that El Paso "had a very seasoned board" that "was very resolute" and would oppose any acquisition effort by KMI if no agreement could be reached. *See* Kinder Tr. at 66:19-25; Ex. A-3 (Kinder Notes); *see also* Foshee Tr. at 226:4-17 ("I said . . . that we had a very seasoned board and . . . our board was very resolute in its understanding of what was in the best interest of our shareholders"). Indeed, El Paso recognized that time was on its side as it was moving forward with its Spin, a point it stressed throughout the negotiations.

[6] Responding to El Paso's description of the anticipated benefits from the proposed Spin, KMI stated that the Company had "already outlined the potential advantages of the proposed spin-off publicly, and El Paso's current share price reflects the market's view of that strategy." Ex. I (Sept. 9, 2011 Letter) at EP00004440. As Mr. Kinder told Mr. Foshee during the negotiations, "the markets are the market. And the market is telling you that they're only willing to pay 17, 18, $19 for your stock." Kinder Tr. 34:9-11.

Having received confirmation in writing that KMI would consider enhancing its offer following diligence, on September 15 the El Paso Board authorized Mr. Foshee to tell KMI that it would pursue a deal at $28 in cash and stock. *See* Proxy at 104. The next day, Mr. Foshee delivered a letter to Mr. Kinder which reiterated that KMI's existing proposal was "not compelling," asserting, among other things, that it was "subject to significant completion risks that do not exist in relation to the planned separation of our exploration and production business. Those risks raise questions about the timing, value and certainty of completion of your proposal." Ex. J (Sept. 16, 2011 Letter). The letter, however, indicated that El Paso would be willing to pursue a deal at $28 provided KMI could provide "absolute certainty of completion" and the company could satisfy itself as to the value of the stock component of the consideration. *Id.* Consistent with KMI's position from the deal's very inception, Mr. Kinder rejected this proposal, stating that it represented "too rich a price for us," but nevertheless indicated he would "talk to his management team and get back to [Mr. Foshee]." Kinder Tr. at 79:4-19.

Following these internal discussions, Mr. Kinder called Mr. Foshee later that evening and said that, while KMI could not pay $28, it might be willing (subject to Board approval) to consider a transaction at $26.50 and possibly higher subject to due diligence. Kinder Tr. at 94:13-17; Proxy at 105. When Mr. Foshee

refused to budge, Mr. Kinder suggested they talk the next day, Saturday, September 17. Kinder Tr. at 80:12-81:9. During that subsequent conversation, Mr. Kinder asked if Mr. Foshee was free to make any movement down from $28 to which Mr. Foshee "said not significantly or not substantially. If you want the number to start with a 27, he said, something to the effect, the board would probably allow [him] to go down to 27.80. . . . In other words, instead of a 28 number, it is a 27.80 number. So not much of a reduction, 20 cents." *Id.* at 96:12-97:7; *see also id*. at 94:19-23; Ex. A-4 (Kinder Notes) at KMI-EP 009389.

To induce KMI to raise its offer above $26.50, Mr. Foshee cited a number of "positive" factors, in particular El Paso's [redacted] to [redacted] billion in net operating loss carry forwards ("NOLs"), a higher amount than the [redacted] billion in NOLs that KMI had previously assumed. Kinder Tr. 82:5-83:2; Ex. A-3 (Kinder Notes) (summarizing conversation with Mr. Foshee). He again stressed that El Paso was rapidly pressing forward with the Spin and KMI accordingly needed to move very quickly. Kinder Tr. at 90:5-9; *see also* Ex. A-4 (Kinder Notes); Ex. A-6 (Kinder Notes). This call did not result in an agreement. Kinder Tr. at 81:5-23.

Following internal discussions among KMI's deal team, Mr. Kinder on September 18 sought the "consensus" of the KMI Board to increase the offer to $27.50 per share, the first time he had discussed with the directors a price greater than [redacted]. Kinder Tr. at 98:21-99:7; *see also* Ex. A-4 (Kinder Notes) at KMI-

[redacted]

EP009390. The value that the increased NOLs provided enabled Mr. Kinder to go above the [redacted] cap. Kinder Tr. at 83:16-20. Mr. Kinder made clear that he would present KMI's next proposal as a "take it or leave it final offer" to El Paso subject both to due diligence and formal board approval. Kinder Tr. at 99:8-17; Ex. A-4 (Kinder Notes) at KMI-EP009390. By this time, Mr. Kinder had concluded that "if we didn't come to an agreement with them, even if we went public, they would probably be able to go ahead and stonewall us, for lack of a better word. Just refuse to accept the offer and go ahead and complete the spin." Kinder Tr. at 101:24-102:17.

Mr. Kinder told Mr. Foshee later that day, citing the revised NOL numbers, that KMI was willing to stretch to $27.50 per share to acquire El Paso, but that it had "shaken all the pennies out of our pocket" to do so. *Id.* at 110:15-17; Ex. A-5 (Kinder Notes). Mr. Foshee responded that he could not go from $27.80 to $27.50, but if Mr. Kinder increased the offer to $27.55, he would seek Board approval at that price. Kinder Tr. at 110:5-21. Mr. Kinder agreed at $27.55. *Id.*; *see also* Ex. A-5 (Kinder Notes). Both CEOs acknowledged, however, that the understanding they had reached on price remained subject to due diligence, approval by their respective boards, and negotiation of a merger agreement. Proxy at 105; Foshee Tr. at 231:16-232:10.

[redacted]

Due Diligence Reveals an EBITDA Shortfall

Mutual due diligence commenced on September 22. During this process, El Paso management provided a forecast for its pipeline business that "was from an EBITDA basis, substantially lower than what [KMI and its bankers] had been using based on our view of publicly available information." Pacha Tr. at 200:17-201:4. In addition, based on its review of El Paso's information during diligence, KMI developed a [redacted] than El Paso's management had, even accounting for the lower EBITDA starting point. *Id.* at 203:4-22. The combination of these two diligence findings created a "gap that started at [redacted] million of EBITDA and grew to approximately [redacted] [million.]" *Id.* at 203:20-22. Mr. Kinder brought this shortfall to the attention of the KMI Board on September 25. Ex. A-6 (Kinder Notes).

The KMI and El Paso deal teams, including their bankers, subsequently engaged in numerous discussions about this shortfall, with El Paso, among other things, supplying additional information to demonstrate that KMI was not according sufficient value to the pipeline business and KMI "doing everything [it] could to find the value." Kinder Tr. at 125:21-126:7, 130:20-131:22; *see also* Pacha Tr. at 201:5-202:7, 205:8-23; Kinder Tr. at 122:23-123:17, 125:21-22. KMI identified "some additional value that cut that to a shortfall of

[redacted]

[redacted] to [redacted] million" – including from cost savings and the value of El Paso's headquarters building – but even this revised EBITDA number reduced the anticipated accretion from [redacted] cents to as low as [redacted] cents by 2015. Kinder Tr. at 122:23-123:22, 124:2-25. Nothing in the record supports Plaintiffs' suggestion that this gap was manufactured by KMI as a negotiating ploy to strike a more favorable deal as opposed to a real problem that surfaced. *See also* Sult Tr. at 253:11-23.

To bridge the gap, Evercore devised an additional form of consideration, *i.e.*, warrants to purchase KMI stock that would enable El Paso stockholders to benefit from the success of the combined companies if KMI's stock hit $40 per share within five years. *See* Kinder Tr. at 135:12-136:9, 184:14-17, 189:10-21 (describing the warrants as a "success premium" that "if the company is successful as I believe it will [be], [. . .] represents real additional value" to El Paso stockholders).[7] On September 28, KMI told El Paso that this value gap prevented it from proceeding on the terms previously discussed, but proposed alternative terms: $15.30 in cash, 0.3774 of a share of KMI stock and 0.577 warrants for each share of El Paso stock. Proxy at 107. KMI believed that this would provide El Paso stockholders with an indicated aggregate value per El

[7] The warrants are also tradeable, so that even if KMI common stock were not to reach $40, the warrants could still prove valuable.

[redacted]

Paso share equal to the $27.55 total consideration previously agreed to by Mr. Foshee and Mr. Kinder. *Id.*

Contrary to any notion that El Paso simply rolled over, during the next two days the parties engaged in a vigorous back-and-forth negotiation that nearly cratered the transaction. On September 29, following discussions with Morgan Stanley, El Paso made an alternate proposal consisting of $15.73 in cash, $11.02 worth of KMI Class P common stock and 0.640 warrants. Proxy at 107. KMI rejected this proposal the very next day, countering on September 30 with an offer of cash, KMI stock, and warrants that would provide El Paso stockholders with a total value that "could significantly exceed $27.55 given our expectations for KMI's future share price performance." Ex. K (Sept. 30, 2011 Letter) at EP00009967; Kinder Tr. at 142:17-143:13. Mr. Kinder told Mr. Foshee that "this was our last and final offer." Kinder Tr. at 143:14-20; *see also* Ex. A-7 (Kinder Notes) ("Last & Final").

When El Paso nevertheless sought even better terms, $26 in cash and stock along with dividend-protected warrants worth 10% more in the aggregate than those that KMI had offered (Ex. L (Sept. 30, 2011 Letter)), Mr. Kinder told Mr. Foshee that he meant what he said earlier that day and that KMI could not "go any higher." Kinder Tr. at 160:2-7; *see also id*. at 160:19-25 ("[W]e were just to the end. There is no sense in doing a stupid deal and that is where we were").

[redacted]

KMI rejected El Paso's proposal and "emphasized again that we had made our last and final offer." Ex. M (Sept. 30, 2011 Email attaching slides) at KMI-EP018120. Mr. Kinder subsequently sent an email to KMI's directors (other than the Goldman designees) informing them that unless something changed, they could "consider this process at an end" and then "[t]ook [his] wife out to dinner at a good Italian restaurant and said well, I've wasted a lot of hours these last few weeks because I think this deal is dead." Kinder Tr. at 160:12-15; *see also* Ex. M (Sept. 30, 2011 Email attaching slides) at KMI-EP018120; Kinder Tr. at 161:8-10 ("if you look at my memo to the board, I said, I thought the deal was dead").

But the deal teams kept talking, exploring whether a means existed to close the gap. And although market conditions had worsened, negatively impacting the value of El Paso's E&P business, KMI nevertheless improved its offer on October 5, increasing the number of warrants per share from 0.577 to 0.640.[8] This revised proposal represented a 46% premium to El Paso's closing share price from the day before even without ascribing *any* value to the warrants. Ex. N (Oct. 5, 2011 Letter) at EP00009961. El Paso had emptied KMI's pockets:

[8] As KMI stated, "the most comparable publicly traded upstream companies have declined in value by an average of 22% since our initial proposal . . . and an average of 46% since [El Paso] announced [its] proposed spin-off on May 24, 2011. This substantial change in the valuation of comparable upstream companies obviously impacts the value [El Paso's] shareholders will receive in [the] proposed spin-off. . . ." Ex. N (Oct. 5, 2011 Letter) at EP00009962.

[redacted]

"[W]e just couldn't go any further. . . . [Y]ou can only shake the pennies out of your pockets so many times . . . all the nickels were gone and I was down to a couple of pennies by this time. This was a very long, hard fought . . . negotiation. And we were just really straining at the end of our leashes to how far we could go." Kinder Tr. at 164:7-165:13.

In fact, when Evercore's Chairman Roger Altman pressed KMI on a conference call just to increase the cash component by what had been called a "token" amount (some [redacted] cents a share, a total of [redacted] million), Mr. Kinder:

> got so mad, I stood up and yelled into the phone, it may not be big to you, Roger, but it is [redacted] million blankety blank dollars. And that is a lot of money to us and we can't afford to do that. . . . We've gone as far as we can with regard to cash and with regard to stock ratio. And I further said, the trouble with you investment bankers is you never met a deal you didn't like. And we are not going to do the deal on those kind of, if it takes those kind movements to do it . . . .

Kinder Tr. at 173:10-174:13.

The Deal is Finalized

The El Paso Board met on October 6 to discuss the revised proposal and, following extensive discussion and the receipt of further analysis from Morgan Stanley, authorized Mr. Foshee to negotiate a transaction based on the

[redacted]

terms set forth in KMI's October 5 letter. Proxy at 108-09.[9] Mr. Foshee so advised Mr. Kinder. Kinder Tr. at 181:6-22; Ex. A-9 (Kinder Notes).

Over the next ten days, the companies completed their diligence of each other and finalized the deal documents, which included the closing certainty that El Paso had demanded. As Mr. Kinder testified, "El Paso was very intent on making sure that there were no risks to closing. That they were going to make certain our hands were tied to the wheel as far as getting the transaction closed and that it was, you know, a really tough negotiation between the two sides." Kinder Tr. at 117:24-118:10. To this end, El Paso bargained for and obtained, among other things, (i) a "hell or high-water" antitrust provision in the merger agreement (binding KMI to the deal even in the event of adverse action by the FTC) (Foshee Tr. at 261:20-262:2; Vagt Tr. at 220:15-24); and (ii) the absence of a "financing out" for KMI. Proxy at 113.

On October 16, the Board of Directors of each company held separate special meetings and unanimously voted to approve the merger agreement

[9] The letter explained that the warrants would not carry conventional dividend protection, which "is neither 'customary' nor reasonable with respect to a security such as KMI," the value of which increases in proportion with the amount of quarterly dividends. Ex. N (Oct. 5, 2011 Letter) at EP00009961; *see also* Kinder Tr. at 166:10-18 (given how KMI's stock trades "to put some kind of limit on how fast we can grow those dividends is a restriction that we just couldn't live with"). Ultimately, KMI agreed to provide El Paso shareholders with protection from extraordinary, special dividends. *Id.* at 166:19-23; Ex. A-10 (Kinder Notes) at KMI-EP009371.

and the transactions contemplated thereby. Consistent with their practice since the deal's inception, the Goldman designees on KMI's Board did not attend the meeting or participate in the vote. Ex. O (Oct. 16, 2011 Draft KMI Board Minutes) at KMI-EP000504, 506. The deal was announced that day.

KMI's Intent to Sell the E&P Business

Plaintiffs devote an inordinate amount of energy to the unremarkable point that KMI intended to sell the E&P business contemporaneously with or as soon as possible after the closing. Plaintiffs characterize this *publicly* stated intention as some kind of "red flag" unearthed in expedited discovery. Pls. Br. at 19. But that KMI was planning to promptly sell the E&P business surely came as no surprise to El Paso, its directors (many of whom had extensive experience in the energy business) or anyone else in the industry, given that KMI's principal focus is its pipeline business. *See* Foshee Tr. at 66:17-22; 68:17-19 (Kinder "has been fairly outspoken about the fact that he likes being in the midstream business, broadly speaking, and not being in the E&P business. . . . So it wouldn't surprise me to find out that he wasn't interested in the E&P business"). Nor is it unusual in the annals of merger and acquisitions deals for a buyer to dispose of non-core assets to help pay down acquisition debt. (What is unusual here, however, is that the market had already valued El Paso *assuming* the separation of the E&P business.)

Plaintiffs' view that the merger deprives the El Paso stockholders of the true value of the E&P business, preventing them from participating in any upside by "transferring" the value of those assets to KMI (Pls. Br. at 40), is just plain wrong. Not only does this gloss over the fact that El Paso stockholders will indeed share in any upside (through their 30% equity interest, not to mention the success premium offered by the warrants), but it ignores the real risks inherent in the E&P business. Indeed, the sale of the E&P assets is perhaps the [redacted] to KMI from the El Paso transaction, something that was clear to both sides from the very start. Unlike KMI's core pipeline operations, essentially a "toll road," the value of E&P assets is "directly dependent" on commodity prices; a decline in oil and natural gas prices thus reduces the worth of the overall business, leaving purchasers of such assets very much at the mercy of market events. *See* Kinder Tr. at 27:17-29:3.

Recent developments underscore how misguided Plaintiffs' attempt to substitute their own judgment for that of the El Paso directors on value and risk truly is. As *The Wall Street Journal* reported just the day before Plaintiffs filed their brief: "U.S. energy companies are pumping so much natural gas out of the ground that prices are plummeting, and the cheap gas isn't likely to evaporate any time soon . . . [P]rices are expected to remain low for at least the next couple of years." Ex. P (Russell Gold, *et al*., Wall St. J., *Glut Hits Natural-Gas Prices*, Jan.

[redacted]

12, 2012) at A1. In fact, the [redacted] since the deal was announced. Pacha Tr. at 208:11-14. And of course there is no discussion in Plaintiffs' papers of protection to KMI on the "downside" [redacted] because there is none in the merger agreement.

The E&P Sale Process

Since the October 16 announcement, KMI, through its bankers, has been actively engaged in a broad-based effort to sell the El Paso E&P business.[10] Contrary to Plaintiffs' suggestion that KMI is targeting a "relatively low price" (Pls. Br. at 6), KMI unquestionably has every incentive to get the highest price for these assets, a goal that they share with El Paso's stockholders who will own 30% of the combined company. *See* Kinder Tr. at 195:5-8 ("[w]e're obviously going to try to get as much for it as we can"); *see also* Foshee Tr. at 259:25-260:4, 260:22-261:2. [redacted]

[10] KMI has said from the start that it prefers selling the business "as a whole," but if unable to obtain a satisfactory price, it will break the assets up into packages and market them to different buyers. Kinder Tr. at 194:2-10. According to a recent *Wall Street Journal* article, this alternative "sell in pieces" strategy may soon be underway. Ex. Q (Anupreeta Das & Gina Chon, Wall St. J., *Kinder Mulls Piecemeal Sale Of El Paso Exploration Unit*, Jan. 19, 2012).

[redacted]

The relevant facts are easily summarized. [redacted]

Finally, relying on some email traffic, Plaintiffs create the specter of a management led purchase of the E&P assets. But no member of El Paso management has even had substantive discussions with KMI about a deal, let

[11] [redacted]

alone submitted an indication of interest or other proposal for the business. This is a complete non-issue.

ARGUMENT

Plaintiffs Are Not Entitled to the Relief They Seek

For the reasons set forth in the El Paso Defendants' Brief, which arguments are incorporated by reference herein, Plaintiffs have not demonstrated why this Court should grant them the unusual injunction sought – *i.e.*, to delay the vote and compel the El Paso Board to retain an "independent financial advisor to assist it in evaluating its strategic alternatives" (Pls. Br. at 49), given, among other things, that an independent financial advisor (Morgan Stanley) has already issued a fairness opinion with respect to the proposed merger and El Paso has effectively been "in play" since its announcement of the Spin last May. Plaintiffs have failed to meet their heavy burden of justifying an injunction preventing stockholders from voting on an offer that not only provides a significant premium, but allows them to share in the growth and success of the combined companies.

We add a simple point that appears self-evident from the factual record: the El Paso directors in fact extracted the maximum value that KMI was and is prepared to pay for the company, a price which they concluded exceeded the value that the El Paso stockholders would have obtained under the Spin. And contrary to the illogical assertions by Plaintiffs of some unexplored alternative for

maximizing shareholder value, KMI's premium bid came *after* the El Paso Board announced, and the market assimilated, the Spin, which presupposed the separation of El Paso's pipeline and E&P businesses. There is no hidden, unexplored alternative to yield more value and, [redacted], the sale of the E&P business comes with substantial process and execution risk in the current marketplace.

There can of course be no aiding and abetting claim in these circumstances; indeed, Plaintiffs' brief is silent on this issue. In any event, Plaintiffs cannot demonstrate either an underlying breach of fiduciary duty or that, even if such a breach occurred, KMI knowingly participated in it. *See Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001); *Morgan v. Cash*, 2010 WL 2803746, at *4 (Del. Ch. July 16, 2010).[12]

[12] Even if a breach could be shown, the record above demonstrates that KMI engaged in extended arms-length negotiations with El Paso, which alone bars an aiding and abetting claim. *See Morgan*, 2010 WL 2803746, at *8 ("[T]he long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism."); *see also In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *13 n.116 (Del. Ch. Sept. 30, 2009) ("This Court has consistently held that 'evidence of arm's-length negotiation with fiduciaries negates a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries.'") (citation omitted).

[redacted]

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Briefs of the El Paso Defendants and Goldman Sachs, Plaintiffs' motion for a preliminary injunction should be denied in all respects.

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Dated: January 23, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2012, a copy of the foregoing *Redacted Public Version of KMI's Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction* was served by LexisNexis File & Serve upon the following counsel of record:

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