IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 12

IN RE KINDER MORGAN, INC. SHAREHOLDERS LITIGATION	:	Consol. Case No. 06 C 801

BRIEF IN SUPPORT OF FINAL APPROVAL OF CLASS SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS

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I. PRELIMINARY STATEMENT

Lead Plaintiff respectfully submits this Brief in Support of Final Approval of Settlement and Plan of Allocation of Class Settlement Proceeds.[1] The Settlement on the terms set forth in the Stipulation of Settlement dated as of September 7, 2010 resolves the Action in its entirety. The Settlement was only achieved after more than four years of vigorous and hard fought litigation and extensive settlement negotiations with the substantial assistance of the Honorable William J. Cahill (ret.) (the "Mediator"), a highly respected retired Judge who has extensive experience in the mediation of complex class actions. Defendants[2] adamantly denied liability and fought Plaintiffs at every step of the litigation. Lead Plaintiff believes that the $200 million settlement is the largest common fund to be recovered in a post merger litigation case and is an excellent result by any measure.

The essence of the claims in this Action is that the Inside Members of the Buyout Group breached their fiduciary duties by engaging in wrongful self-dealing and the wrongful diversion of KMI's strategic machinery secretly to pursue a buyout of the Company and then unfairly interfered with the Special Committee approval process.[3] The

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[1] The Declaration of Lead Plaintiff Douglas Geiger is attached as Exhibit 2 to the Declaration of Pamela S. Tikellis and Randall J. Baron in Support of Final Approval of Settlement and Plan of Allocation and Award of Attorneys' Fees and Expenses (the "Joint Declaration").

[2] Lead Plaintiff adopts herein all of the defined terms in the Declaration of Pamela S. Tikellis and Randall J. Baron in Support of Final Approval of Settlement and Plan of Allocation and Award of Attorneys' Fees and Expenses.

[3] The Inside Members of the Buyout Group are Richard D. Kinder ("Kinder"), Fayez Sarofim ("Sarofim"), Joseph Listengart ("Listengart"), C. Park Shaper ("Shaper") and Michael Morgan ("M. Morgan").

Plaintiffs claim that the Inside Members of the Buyout Group breached their fiduciary duty of disclosure by failing to disclose all material information when asking for stockholder approval of the Merger. The Plaintiffs further claim that the Non-Management Buyout Defendants aided and abetted these breaches of fiduciary duty by the Inside Members of the Buyout Group.

The effort to achieve the Settlement was substantial. This substantial Settlement was only achieved through substantial dedication and effort, often in the face of extreme time pressures and against some of the best known and well-capitalized law firms in the Country. In all, Lead Counsel reviewed well over 650,000 pages of document discovery produced by Defendants and third parties. Decl. at ¶ 51.[4] Lead Counsel also took the depositions of sixteen Defendants, or representatives of Defendants, as well as depositions of: two Morgan Stanley representatives; a Blackstone representative; five representatives of private equity firms and four of Defendants' experts. Lead Counsel defended the Class Representatives, Dr. Geiger, Mr. Wilson, and Interim Lead Plaintiff Robert Land, Lead Plaintiff's experts Robert Reilly, Professor John C. Coffee and Israel Shaked at their depositions.   Decl. at ¶50.

Expert discovery took place from December 2009 to May 2010, and resulted in both initial Reports and rebuttal Reports prepared by Defendants' three experts, Drs. Bradford Cornell and Audra Boone, and former Delaware Supreme Court Justice Andrew

[4] The Declaration of Pamela S. Tikellis and Randall J. Baron in Support of Final Approval of Settlement and Plan of Allocation and Award of Attorneys' Fees and Expenses is cited herein as "Decl. at ¶ ___."

G.T. Moore, II, and Plaintiffs' two experts, Robert Reilly and Professor John C. Coffee.[5] Each expert was also deposed, with Mr. Reilly being deposed twice.

Throughout the years of hard fought litigation, the Parties engaged in several discussions regarding the possibility of settling the litigation. These discussions were not successful and preparations for trial continued. On February 20, 2009, the Parties retained the Honorable William J. Cahill (ret.) to assist the Parties to attempt to reach a settlement of this Action. A formal mediation session was held in Denver, Colorado on March 31, 2009. Although an agreement was not reached at the session, the Parties agreed to remain open to resuming the mediation efforts at a later time. Thereafter, the Mediator monitored the litigation and from time to time engaged in discussions with certain counsel for the Parties. (Decl. at ¶61).

After fact and expert discovery closed, the Parties began the briefing process on five separate motions for summary judgment. After the Defendants served their opening briefs in support of their motions for summary judgment during August 2010, the Mediator reconnected with the counsel for the parties to discuss whether and by what methods and means a resolution of the Action could be achieved. After considering the positions of the Parties at the prior mediation, and after reviewing the motions for summary judgment, the Mediator submitted a "take it or leave it" proposal to settle the Action for $200,000,000 (the "Proposed Settlement"). On August 12, 2010, Lead Plaintiff Geiger, on behalf of himself and the Class, accepted the Proposed Settlement.

[5] Mr. Reilly's Professional Qualifications and Professor Coffee's CV are attached hereto as Tucker Aff. Exs. 1 and 2.

Lead Plaintiff and his counsel carefully studied and reviewed all of the facts, law and practical consequences of continued litigation as well as the significant hurdles to achieving a more favorable outcome for the Class through further litigation. Before accepting the Mediator's proposal, Lead Plaintiff and his counsel also took great care in considering what legal standard of review may ultimately apply to Defendants' conduct – in particular the likelihood that the Court or trier of fact may apply the business judgment rule to the conduct at issue - and the inevitable battle of experts with respect to the appropriate measure of damages. Based on these considerations, as set forth in greater detail below and in the Joint Declaration, Lead Plaintiff and Lead Plaintiff's Counsel accepted the Mediator's proposal with the firm belief that the Settlement, which provides a $200 million recovery, is in the best interests of the Class as a whole and should be approved.

II. SUMMARY OF THE CORE CLAIMS AND CONTENTIONS

The litigation in this action was extremely hard fought by the Parties over many years. The claims, based on the substantial discovery record amassed, are set forth in Plaintiffs' Fourth Petition, filed June 2, 2009. Defendants' responses are set forth in their Answers and Motions for Summary Judgment.[6]

The core battleground contentions of the Parties can be briefly summarized as follows. Plaintiffs alleged that during the pre-offer period in the Spring of 2006, Richard Kinder and other insiders at the Company improperly developed a proposal to take KMI private without receiving permission of the KMI Board to do so. Specifically, Plaintiffs contended that Richard Kinder and others used the Company's confidential information and consulted with the Company's financial advisors to develop a proposal. Not surprisingly, Defendants denied any such improper conduct and argued that at all times they were acting consistently with their fiduciary duties to seek to maximize value and under clear authority from the KMI Board of Directors.

A $100 per share buyout proposal was made on May 28, 2006. Almost immediately thereafter, the KMI Board formed a Special Committee of independent directors which retained independent financial and legal advisors. Plaintiffs alleged that over the course of the next three months, the Special Committee did not function

[6] The relevant facts are discussed in detail in the Parties' pleadings and the Defendants' Summary Judgment motions which are currently filed under seal. Class members wishing to obtain a copy of these documents should request them from Lead Plaintiff's Counsel by contacting Scott M. Tucker, Esq. at SMT@chimicles.com, or (302) 656-2500.

effectively and that Richard Kinder and the other defendants attempted to improperly influence the process and did not provide all of the documents that the Special Committee requested, and that the Special Committee failed to pursue other alternative transactions, including a public leveraged recapitalization, based on management's expressed derogation of that alternative. Again, the Special Committee and all Defendants vigorously denied these allegations and argued that the Special Committee process functioned effectively and resulted in raising the offer price from $100 to $107.50, an approximately 28% premium over the pre-offer price of KMI common stock.

As explained in detail below, Plaintiffs faced a number of significant legal and factual hurdles in addressing the issues on the merits, as well as significant trial risks and uncertainties inherent in an action challenging a complex corporate transaction. In view of these substantial hurdles, risks and uncertainties, Lead Plaintiff's Counsel submit that the Settlement is a tremendous result for the Class.

III. <u>THE PROPOSED SETTLEMENT IS FAIR AND REASONABLE AND SHOULD BE APPROVED</u>

A. <u>Applicable Standard</u>

Kansas law encourages the voluntary settlement of contested claims.[7] In approving a class action settlement, the Court is called upon to "determine if the settlement is fair, reasonable, and adequate, and to exercise discretion in such a manner that protects the interests of class members who are parties to the action only through their representatives."[8] The Court must exercise its own business judgment in determining whether the settlement is fair and reasonable.[9] The Court's duty in reviewing a settlement agreement is to consider the nature of the claims asserted, the possible defenses, and the legal and factual circumstances of the case, and "[i]f such considerations lead to the conclusion that the settlement [is fair and reasonable],…then the action of the plaintiffs in compromising the suit should be approved."[10] Absent

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[7] *See Bright v. LSI Corp.*, 254 Kan. 853, 858 (Kan. 1994); *Ellis v. Union Pacific R.R. Co.*, 231 Kan. 182, 192 (1982).

[8] *Smith v. MCI Telecommunications Corp.*, 1993 U.S. Dist. LEXIS 6114, at *7 (D. Kan. Apr. 28, 1993) *citing Seiffer v. Topsy's Int'l*, 70 F.R.D. 622, 627 (D. Kan. 1976); *See also J.L. Schiffman & Co., Inc. Profit Sharing Trust v. Standard Indus., Inc.*,, 1993 Del. Ch. LEXIS 143, at *7 (July 15, 1993).

[9] *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 383 (1996) *citing Polk v. Good*, 507 A.2d 531, 535 (Del. 1986); *See also Williams Foods, Inc. v. Eastman Chemical Co.*, 2001 WL129887, *2 (Kan. Dist. Ct. Aug. 8, 2001) ("[t]he authority to approve a settlement of a class action is entirely within the discretion of [the] Court").

[10] *Quality Developers, Inc. v. Thorman*, 29 Kan. App. 2d 702, 716; (2001). *See also Kahn v. Sullivan*, 594 A.2d 48, 59 (Del. 1991) (*quoting Polk v. Good*, 507 A.2d 531, 585 (Del. 1986)).

fraud or over reaching, the Court should not substitute its business judgment over that of counsel.[11]

B. The Settlement Class Is Proper

On September 8, 2010, the Court certified the following Class for purposes of the Settlement:

> All holders of KMI Common Stock during the period May 29, 2006 through May 30, 2007, and their transferees, successors and assigns. Excluded from the Class are Defendants and members of their immediate families or trusts for the benefit of any Defendant or his or her immediate family members and any majority-owned affiliates of any Defendant. Also excluded from the Class are those persons who timely and validly request exclusion in accordance with the requirements set forth in the notice.

The Class is consistent with the Class definition routinely certified in corporate litigation and settlements.[12] In addition, the Class also has the element of an opt-out right.[13] Lead Plaintiff respectfully submits that the Settlement Class is proper under K.S.A. §60-223.

C. Likelihood of Success on the Merits Through Further Litigation Versus the Valuation of the Settlement

Of particular importance in assessing the fairness of the Settlement is the balance of the "likelihood of success on the merits…weighed against the amount and form of

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11 *Williams*, 2001 WL 1298887, *2.

12 *See In re Prodigy Communications Corp. Shareholders Litigation*, 2002 Del. Ch. LEXIS 95, at *12 (July 26, 2002). The Kansas General Corporation Code is patterned after the Delaware General Corporation Law and the Kansas Courts look to the extensive body of Delaware case law relating to corporation litigation. *Garko Investments LLP v. Sprint Corp.,* 2005 WL 327021, *4 (Kan. Dist. Ct. February 1, 2005).

13 Most transactional cases are certified as non-opt out classes.

relief contained in the settlement."[14] It is this balance of risk of continued litigation against the availability of immediate recompense which justifies the "substantial compromise[] of the relief that could be obtained through litigation [through trial]."[15]

Here, the risks of continued litigation are substantial, and the $200 million common fund, the largest of its kind in an action such as this, more than justifies compromising a potentially greater recovery at trial. As detailed below, the Class not only risks the very real possibility of not being able to demonstrate liability, but also risks a finding of limited or <u>NO</u> monetary recovery even if liability is established.

1. Substantial Legal and Factual Hurdles

a. The Applicable Legal Standard

From the outset of this litigation, the parties have hotly disputed the legal standard to be applied by the Court and trier of fact when challenging this transaction. Defendants have contended that the "business judgment rule" applies. Plaintiffs have contended that the "entire fairness" standard applies. The ultimate determination regarding which standard applies is potentially outcome determinative. Indeed, were the Court or the trier of fact to apply the "business judgment rule" [16] to the Special Committee's and Board's

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[14] *Williams v. Sprint/United Mgmt. Co.*, 2007 U.S. Dis. LEXIS 67368, at *26 (D. Kan. Sept. 11, 2007); *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1285-86 (Del. 1989).

[15] *Williams v. Sprint/United Mgmt. Co*., 2007 U.S. Dis. LEXIS 67368, at *27.

[16] The business judgment rule is a substantive rule of law and not merely a defense. *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995); *Williams v. Geier*, 671 A.2d 1368, 1377-78 (Del. 1996).

approval of the $107.50 Merger Agreement, Lead Plaintiff would be unlikely to prevail in establishing liability at all, thereby yielding **NO** monetary recovery for the Class.

This Court has not yet ruled on the issue of which legal standard applies in this case. However, the Special Master appointed by this Court to conduct and decide pre-trial proceedings decided the issue against Plaintiffs and in favor of Defendants in ruling on Plaintiffs' application for preliminary injunctive relief based on some of the same evidence Lead Plaintiff would present in opposition to summary judgment and at trial. The Special Master concluded:

> Since I conclude that the Special Committee functioned effectively notwithstanding the alleged attempted dominance of its principal stockholder, its recommending the merger price of $107.50 per share enjoys the protection of the business judgment rule.[17]

This Court accepted the Report of the Special Master.[18]

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[17] (Decl. Ex. 1 at 18). The findings in the Special Master's Report that Plaintiffs would have to overcome during the liability phase of trial included: The Buyout Group's decision not to cooperate with the Special Committee was understandable, if not wholly defensible because it was in the Buyout Group's interest to defend the deal and the Special Committee's job to scrutinize the proposal; (Decl. Ex. 1 at 15); The Special Committee's willingness to reject the Proposal *in toto* demonstrated their independence and negotiating skill; (*Id*. at 16); The Special Committee functioned effectively, was well informed and made its recommendation in good faith; (*Id*. at 18); The Special Committee performed an effective market check; (*Id*.); Despite attempted dominance by Kinder, the Special Committee functioned effectively, therefore its decision to recommend the merger price of $107.50 is protected by the business judgment rule. (*Id*.); The Proxy contained a full description of the events leading up to the formulation of the Proposal, the work of the Special Committee and the negotiations that led to the $107.50 consideration price. (*Id*. at 19).

[18] Other Courts have similarly applied the business judgment rule to bar recovery in actions by stockholders challenging self-dealing transactions with controlling stockholders. For example, in support of their motions for summary judgment, Defendants cited *In re Western National Corp. Shareholders Litig.*, C.A. No. 15927,

The risk of this outcome is substantial. The record in further litigation would not establish that any, much less a majority, of the members of the Special Committee or the other KMI directors who approved the Merger Agreement had a disabling interest in approving the transaction.[19] In fact, Mr. Kinder and the other participating insiders abstained from the formal Board approval vote.

To avoid the business judgment rule as a complete bar to a judgment for damages against Defendants, Lead Plaintiff would be required to establish that Mr. Kinder exercised actual control of the business affairs of KMI,[20] or that Mr. Kinder breached his duty of loyalty in developing, proposing and negotiating the transaction.[21] This Court previously accepted the Special Master's Report which decided the issue against Plaintiffs in favor of Defendants based on substantially the same evidence Lead Plaintiff would now advance.

b. The Special Committee Process Established Fairness

Even if Lead Plaintiff prevailed to obtain application of the entire fairness standard, Lead Plaintiff still faced a substantial risk of obtaining **NO** monetary recovery for the Class, as it is well-settled that the Court and the jury could conclude that the

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2000 WL 710192, at *6 (Del. Ch. May 22, 2000) and *Kohls v. Duthie*, 765 A.2d 1274 (Del. Ch. 2000).

19 In support of the motion for summary judgment, Defendants cited *Kan. Heart Hospital, LLC v. Duick*, 286 Kan. 183, 212 (Kan. 2008) for the proposition that directors are not "interested" where they did not receive any consideration that was different than what was received by all shareholders.

20 *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1113-15 (Del. 1994).

21 *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1145-46 (Del. Ch., 1994)

Special Committee process established entire fairness.[22] In this regard, "a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm's length is strong *evidence* that the transaction meets the test of fairness."[23]

Based on the record here and decisions in cases addressing similar issues,[24] the prospect of a successful attack on the KMI Special Committee process was uncertain. Even where faults and imperfections have been found, Courts have commonly found Special Committee processes nevertheless established fairness if the faults and imperfections have not adversely impacted the negotiating process and result.

This is exactly what happened in *Emerald Partners v. Berlin.*[25] Plaintiff filed an action challenging a self dealing merger between May Petroleum and corporations owned by May's controlling stockholder.[26] After fifteen years of litigation and multiple appeals, the trial Court entered judgment against plaintiff, concluding that the entire fairness standard applied to the merger but that the evidence nonetheless established fair dealing and fair price.[27] Importantly, the Court found that the controlling stockholder and another director affiliated with the controlling stockholder did not scrupulously follow

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22 *Weinberger v. UOP*, 457 A.2d 701, 711 (Del. 1983) (entire fairness requires "fair dealing" and "fair price").

23 *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d at 1115 (*quoting Weinberger*, 457 A.2d at 711) (emphasis in original).

24 The Delaware Court of Chancery does not have a jury and thus the Court acts as a fact finder.

25 2003 Del. Ch. LEXIS 42 (April 28, 2003).

26 *Id.*

27 *Id.*

the "procedural safeguards for the negotiation of what clearly would be a conflict transaction," and the non-affiliated directors were to be faulted for not insisting that the insiders absent themselves from their deliberations.[28] The Court nevertheless concluded that "[n]o adverse consequences resulted from those procedural lapses," and that the credible evidence showed that at all times the outside directors "negotiated the merger terms in good faith, at arm's length, and in an adversarial manner, in reliance on the advice of their financial and legal advisors."[29] The Court further concluded that "the credible evidence establish[ed] that neither [the controlling stockholder nor the affiliated director] influenced the non-affiliated directors' decisions in any significant way."[30] The Court also rejected the valuation analyses of plaintiff's experts which were posited to attack the fairness of the merger price.[31]

Similarly, in *Kahn v. Lynch Communication Systems, Inc.*, the Delaware Supreme Court concluded that Alcatel, a 43% stockholder of Lynch Communications, had in fact coerced the Lynch Special Committee to accept an Alcatel-proposed cash merger of Lynch and Alcatel.[32] After trial following remand, the trial Court concluded that the coercive threats made by Alcatel to the Special Committee did not upset the entire

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28 *Id. at *25.*

29 *Id.* at *26.

30 *Id.*

31 *Id.* at *102-*110; *See also Cinerama*, 663 A.2d at 1155 (after 8 years of litigation and multiple appeals, the Court concluded that the transaction was "in all respects fair to the shareholders of Technicolor and as a consequence neither the directors of the company nor the acquiring company have any liability to plaintiff.").

32 638 A.2d at 1121-1122.

fairness of the process.[33] The trial Court observed "[t]he fact is that an independent committee was empowered to retain investment advisors and legal counsel. Those independent sources provided assistance in the negotiations . . . and in evaluating alternatives."[34] The Court also rejected the valuation of plaintiff's trial expert and accepted the opinions of the Special Committee's financial advisors as evidence of fairness of the transaction price.[35]

In *In re Cysive*, the trial Court applied the entire fairness standard to a going private transaction led by the Company's Chairman, Chief Executive Officer, director and largest stockholder (35%).[36] The Court concluded that the Special Committee of outside directors took its responsibility seriously and bargained hard with the controlling stockholder for a higher price.[37] Although the Court found that the Special Committee had not been subjected to threats from or strong armed by the controlling stockholder, the Court found that the Company's CFO, a buyout participant, improperly failed to turn over to the Special Committee and its advisors certain revised budget information he prepared.[38] The Court concluded, however, that the failure "did not materially impair effectiveness of the negotiation and approval process because the document . . . did not contain reliable information that would have changed the outcome of the committee's

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33 *Kahn v. Lynch Communication Systems, Inc.*, 1995 Del. Ch. LEXIS 44, *7 (Del. Ch. April 17, 1995) *aff'd*, 669 A.2d 79 (Del. 1995).

34 *Id.* at *4-*5.

35 *Id.* at *5-*6.

36 *In re Cysive, Inc. Shareholder Litig.*, 836 A.2d 531, 533 (Del. Ch. 2003).

37 836 A.2d at 554.

38 *Id.*

deliberations.[39] The Court also concluded that plaintiff's valuation expert did not undermine the fairness of the deal price, which was supported by, among other things, the failure of a better bid to emerge and the premium of the price to the pre-offer trading price of the Company.[40]

As discussed above, the record in this case would show that the members of the KMI Special Committee were sophisticated, had no disabling interests in the transaction and were fully empowered by the KMI Board. The Special Committee retained highly regarded independent legal and financial advisors. Further, the Special Committee rejected three (3) increased offers[41] and were prepared to recommend that KMI remain independent, prior to ultimately accepting the $107.50 offer. Thus, Lead Plaintiff would be required to overcome some of the classic hallmarks of a well-functioning special committee process.

Further, the record includes substantial contemporaneous evidence regarding fair price, including the opinions and valuation analyses of the Special Committee's financial advisors. The valuation ranges of the Special Committee's advisors in the May through August 2006 time period show consistent ranges of value for KMI from $74 to$129 per share. [42] While Plaintiffs' valuation expert estimated ranges which included higher

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39 *Id.*

40 *Id.* at 556-557.

41 The Special Committee rejected increased offers of $102, $103.55 and $107.30 per share.

42 In its May 31, 2006 pitchbook, Morgan Stanley valued KMI in a sum-of-the-parts analysis between $82 and $122. (Tucker Aff. Ex. 3). The so-called football field in the July 11, 2006 presentation to the Special Committee shows the following ranges: 52 week pre-announcement trading range, $75-$101; analyst price targets, $96-$107; public

values, the advisors' contemporaneous valuations would be defended vigorously by Defendants and the advisors at trial.[43]

In addition, a jury could conclude that other contemporaneous market indicators constitute evidence of fair price. For example, although the market was aware of the $100 offer and eventually the $107.50 price, and the Special Committee and its advisors contacted a list of potential bidders, no better offer from another bidder emerged. Further, the equity sponsors refused to fund the increase to the $107.50 price, resulting in a renegotiation of the deal between the insiders and the equity sponsors in which, among other things, the insiders agreed to convert their KMI equity on a basis equivalent of $105 per share, rather than $107.50.

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market trading comps, $85-$105, $83-$99, $75-$100, $74-$114; discounted equity value 2009 EPS including public restructuring $100-$123; transaction comps including premia paid, $74-$114; discounted cash flow, $95-$126; LBO, $80-$105; Sum of parts, $85-$129. (Tucker Aff. Ex. 4). Similarly, the August 21, 2009 Presentation to the Special Committee shows the following ranges: 52 week pre-announcement trading range, $75-$101; analyst price targets, $96-$107; public market trading comps, $85-$105, $82-$98, $75-$100, $74-$112; discounted equity value 2009 EPS including public restructuring $100-$123; transaction comps including premia paid, $74-$112; discounted cash flow, $95-$125; LBO, $80-$105; sum of parts, $85-$128. (Tucker Aff. Ex. 5) . The value ranges supporting the August 27 fairness opinions are consistent with these previous valuations. The so-called football field in the August 27, 2006 Presentation to the Board shows the following valuation ranges: 52 week pre-announcement trading range, $75-$101; analyst price targets, $96-$107; public market trading comps, $85-$105, $82-$98, $75-$100, $74-$112; discounted equity value 2009 EPS including public restructuring $100-$123; transaction comps including premia paid, $74-$112; discounted cash flow, $93-$124; LBO, $90-$108; sum of parts, $84-$128. (Tucker Aff. Ex. 6).

[43] *See Kahn v. Lynch Communication Systems, Inc.*, 1995 Del. Ch. LEXIS 44, at *7 *aff'd*, 669 A.2d at *87-*88 ("when faced with differing methodologies or opinions the court is entitled to draw its own conclusions from the evidence. So long as the court's ultimate determination of value is based on the application of recognized valuation standards, its acceptance of one expert's opinion, to the exclusion of another, will not be disturbed.") (citation omitted).

Thus, while Lead Plaintiff believes that the Class could prevail both at summary judgment and trial, Lead Plaintiff and Lead Plaintiff's Counsel are well-aware of the substantial risks associated with trying to prove liability. Weighing that risk against a $200 million recovery now for the Class more than justifies compromising a potentially greater recovery after summary judgment, trial and likely appeal.

c. The Alleged Misconduct Did Not Cause an Unfair Result

Lead Plaintiff faced the substantial risk that the Court or a jury could conclude that the alleged misconduct, even if established, did not adversely impact the fairness of the Special Committee process or cause injury.[44] The core misconduct alleged includes (1) management's pre-offer secret development of the transaction with the Company's advisors and confidential information, (2) management's failure to provide the Special Committee with all documents generated in that process, (3) management's derogation of the viability of a public leveraged standalone restructuring alternative raised by the Special Committee, and (4) Mr. Kinder's attempt to influence the Special Committee during the process, including the so-called "genie back in the bottle" remarks on August 15, 2006.[45]

According to the Special Committee testimony, the secret pre-offer actions of Mr. Kinder and the Buyout Group during the Spring of 2006 did not impede or unfairly

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[44] *See Cysive*, 836 A.2d at 557 & n.42.

[45] This refers to remarks allegedly made by Mr. Kinder to the Special Committee on August 15, 2006 to the effect that turning back from a buyout transaction to resume standalone business as usual was not a viable option, that is, the "genie" cannot be put back in the bottle. *See* Fourth Petition at ¶ 151.

impact the Special Committee process and result.[46] In fact, the Special Committee members would testify that the potentially troublesome elements of the pre-offer conduct, the lock up and exclusivity agreements, were eliminated at the insistence of the Special Committee, and that the Special Committee and its advisors thereafter proceeded freely to canvass other potential bidders.[47]

Further, the Special Committee members would testify that management's negative views regarding the public standalone restructuring alternative raised by the Special Committee did not cause the Special Committee to prefer the Buyout. When the offer was raised to $103.55, the Special Committee had analyzed the offer price as well as standalone public restructuring alternatives with a range of incremental debt assumptions, and was fully prepared to reject the offer and continue as a standalone company possibly to pursue the leveraged restructuring alternative.[48] As the buyout offer was increased, however, the Special Committee reduced its interest in the leveraged recapitalization alternative because the buyout price became more attractive than the alternatives.[49] Further, the Special Committee members deny that management prevented the Special Committee from communicating with the ratings agencies regarding the public restructuring alternatives.[50]

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46 Tucker Aff. Ex. 7 at 33, 51-54; Ex. 8 at 95.

47 Tucker Aff. Ex. 9 at 128-131; Ex. 10 at 90-91, 152-154; Ex. 7 at 53-54. Defendants also would argue that any pre-offer misconduct gives rise to a derivative claim for which the Class cannot recover.

48 Tucker Aff. Ex. 7 at 138, 142-43, 166-68, 222-228.

49 Tucker Aff. Ex. 7 at 228-229.

50 Tucker Aff. Ex. 7 at 228; Ex. 8 at 67-69.

The Special Committee members also deny that the failure to obtain the documents that were requested from but not provided by the Buyout Group adversely impacted their deliberations. While they asked for it and would have found it interesting, they would testify that they did not regard it as necessary to their work.[51] They had confidence in the valuation information generated by their own advisors.[52]

The members of the Special Committee deny that the Committee was coerced by Mr. Kinder to accept $107.50.[53] Moreover, the record shows that the Special Committee had freely targeted a price of $110 per share prior to any alleged exertion of influence by Mr. Kinder. Early in the Special Committee process, the Special Committee, after consultation with its advisors, communicated to the Buyout Group that the Committee believed that the offer needed to be at least $110 per share.[54] The Special Committee had discussed a range of $100 to $110 based on its work with its advisors in July and August.[55] Mr. Kinder's "genie out of the bottle" remarks, if made,[56] were made long

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[51] Tucker Aff. Ex. 7 at 26-28; Ex. 8 at 31-33, 37-39.

[52] Tucker Aff. Ex. 9 at 171; Ex. 7 at 26, 104-105. In *Kahn v. Tremont Corp.*, the Court concluded that the buyout group had no duty to disclose its valuations to the Special Committee and the proper focus was on whether a well advised committee could have learned the same information from its own advisors. 1997 Del. Ch. LEXIS 150, *4 (Oct. 27, 1997)

[53] Tucker Aff. Ex. 7 at 228; Ex. 8 at 93-94; Ex. 9 at 245.

[54] Tucker Aff. Ex. 7 at 124-125.

[55] *Id.* at 124-125.

[56] Whether the remarks were actually made by Mr. Kinder to the Special Committee is a contested fact.

after the Special Committee targeted $110.[57] A jury could thus conclude that the only effect of Mr. Kinder's actions, if any, was to influence the Special Committee to accept the $107.50 price rather than the Special Committee's $110 per share target and that thus the maximum value lost as a result of the unfair influence was the difference between $107.50 and $110 per share.[58] The $200 million Settlement achieves nearly the same result, risk free.[59]

d. No Valuable Disclosure Claim

The Special Master's Report also concluded, and Defendants argued in support of their motions for summary judgment, that Plaintiffs had not established any material omission of information from the Proxy Statement based on which the KMI stockholders approved the transaction. Moreover, no judgment for money damages on any disclosure claim would be obtainable unless Lead Plaintiff established a breach of the duty of loyalty "by the directors who authorized the disclosures."[60]

2. Substantial Trial Risks and Uncertainties

In addition to the forgoing, Lead Plaintiff faced substantial additional risks and uncertainties inherent in a jury trial in the context of claims challenging a complex

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[57] According to William Oglesby of Blackstone, as of August 2, Mr. Oglesby did not think KMI was worth more than $110 per share. (Tucker Aff. Ex. 10 at 188-89). He regarded the Special Committee's $110 per share position as "a negotiating tactic." (*Id.*).

[58] *See e.g.*, *International Telecharge v. Bomarko*, 766 A.2d 437, 440-441 (Del. 2000) (court measured damages for breach of loyalty by controlling stockholder as what "shares would have been worth at the time of the Merger if Haan had not breached his fiduciary duties").

[59] 106 million public shares x $2.50 = $265 million (As of the Form 10-Q for the period ended March 31, 2007)

[60] *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 362 (Del. Ch. 2008).

corporate transaction where the Defendants and their affiliates are the primary, if not, only witnesses to the challenged conduct.

a. Lead Plaintiff Would Need to Establish the Case Through Antagonistic Witnesses

The key witnesses to establish unfairness and injury include Defendants and their affiliates, including Special Committee members, former Defendants, all of whom are antagonistic to Lead Plaintiff's claims and have an interest in validating their actions. As discussed above, the Special Committee members would testify that they conducted a fully independent and effective process and achieved an excellent result. These witnesses have a substantial interest in defending and validating their actions. Their advisors, likewise, have a substantial interest in validating and defending their actions and work.

This presents a formidable task for Lead Plaintiff. While Lead Plaintiff believes the tool of cross examination would be effective, the weight of the testimony of the actors who will deny fault is heavy.

b. Uncertain Outcome of a Battle of the Valuation Experts

Ultimately, evidence on the issues of fair price and damages would include the Parties' principal valuation experts.[61] Each of the Parties would argue that their respective expert's valuations are the more appropriate evidence of fair price and damages, if any. In addition, as discussed above, the Parties would argue over the extent

[61] On Defendants' Motion to Exclude, the Court substantially limited the scope of admissible testimony by Plaintiffs' corporate governance expert, Professor John Coffee.

to which any elements of value identified by Plaintiffs' expert were lost as a result of the alleged wrongdoing.[62]

Indeed, the Parties each have highly credentialed and regarded valuation experts. Yet, the valuations of the respective experts are widely divergent.[63] According to Defendants' expert, Bradford Cornell, the Kinder-led Buyout Group significantly overpaid for the KMI stock at $107.50 per share. According to Cornell, the fair market value of KMI was $82.75 to $91.06 per share on August 27, 2006, $86.44 to $99.73 per share on December 19, 2006, and $104.42 to $111.89 on May 30, 2007.[64] According to Plaintiffs' expert, Robert Reilly, the stock value was $135.05 to $166.83 as of May 20, 2007 (the time of the Merger), $125.52 to $155 per share as of August 27, 2006 and $110.01 to $162.81 as of December 19, 2006.[65]

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62 In this regard, Defendants would likely argue lack of causation because Plaintiffs' valuation expert provided no opinion relating lost value to the alleged wrongdoing. Defendants would further argue that Plaintiffs' expert performed an appraisal valuation, and such valuation is not an appropriate damage analysis here.

63 The Delaware Court of Chancery observed that "valuing an entity is a difficult intellectual exercise, especially when business and financial experts are able to organize data in support of wildly divergent valuations for the same entity. For a judge who is not an expert in corporate finance, one can do little more than try to detect gross distortions in the expert opinions." *Cede & Co. v. Technicolor, Inc*., 2003 Del. Ch. LEXIS 146 , at *6 (Del. Ch. Dec. 31, 2003). A jury is likely to be at least as daunted as the Delaware Court in evaluating competing expert valuations of KMI.

64 Tucker Aff. Ex. 11 at pg. 4. The parties disagreed regarding the appropriate valuation date. Plaintiffs contended that the appropriate date was the date of the Merger, May 20, 2007. Defendants contended that either the date of the Board approval, August 28, 2006, or the date of stockholder approval, December 19, 2006, was the appropriate valuation date.

65 Tucker Aff. Ex. 12 at pg. 35 and Ex. 13 at pgs. 41 and 80. Under Kansas law, in assessing damages, "it is within the discretion of the trial court to apply equitable standards in order that the plaintiff may be made whole." *Gillespie v. Seymour*, 250 Kan. 123, 143 (1991), *quoting Seaman U.S.D. No. 345 v. Casson Construction Co.*, 3

Importantly, all of the experts, and indeed the financial advisors for both the Buyout Group and the Special Committee as well, had the same underlying KMI financial data and forecasts for their valuation analyses. Accordingly, most of the divergence between the Parties' valuation experts, including the contemporaneous financial advisors, results from differences in subjective and professional judgments regarding metrics such as the appropriate discount rates, perpetual growth assumptions, control premia and selection of comparable public company trading multiples. These judgments produced widely divergent values from essentially the same KMI financial data. And although this divergence is commonplace in litigation, it creates substantial uncertainty in attempting to forecast an outcome from a wide range of possible valuations and damages calculations.

A jury would not be required to accept the valuation of either expert and could accept some or all elements of either. Even with the highest confidence that Lead Plaintiff's expert has the better value opinion, high uncertainty and risk remain as to the ultimate valuation decision by the Court and the jury.

D. <u>THE PROPOSED PLAN OF ALLOCATION IS FAIR AND REASONABLE</u>

The approval of a plan of allocation of a class action is governed by the same standards of review applicable to approval of a settlement as a whole, that is, the Court

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Kan.App.2d 289 (1979). It is not necessary that damages be calculated to a mathematical certainty. *Louisana Const. Co. v. New Cedar Estates Corp.*, 1989 Kan. App. LEXIS 751, at *9 (Nov. 3, 1989). The test "is not whether the remedy fashioned is the best remedy that could have been devised, but whether the remedy so fashioned is erroneous as a matter of law or constitutes a breach of trial court discretion." *New Dimensions Products, Inc. v. Flambeau Corp.*, 17 Kan.App.2d 852, 858 (1993).

must ensure that the distribution of funds is fair, reasonable and adequate.[66] When the plan of allocation is formulated by competent and experienced class counsel, "an allocation plan need only have a reasonable, rational basis."[67]

The Proposed Plan of Allocation here was formulated based on well settled law applied to fiduciary duty claims for many damages. The Delaware Court of Chancery has stated: "When a claim is asserted on behalf of a class of stockholders challenging the fairness of the terms of a proposed transaction…the class will ordinarily consist of those persons who held shares as of the date the transaction was announced and their transferees, successors and assigns."[68] Because it is possible that a shareholder might sever its economic ties with the company by selling its shares, the claim relating to the fairness of the transaction will pass to the purchaser, who will enjoy the benefits of the settlement. Id. As the Court of Chancery has stated, "[i]t is only the one who is there at the end that has a claim."[69] A fair and reasonable way to determine which class members are "there at the end" is to require all class members to file a Proof of Claim.[70]

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66 *Law v. National Collegiate Athletic Association*, 108 F.Supp.2d 1193, 1196 (D.Kan. 2000); *In re Sprint Corp. ERISA Litig.*, 443 F.Supp.2d 1249, 1262 (D.Kan 2006) (citations omitted).

67 *Sprint Corp.*, 443 F.Supp.2d at 1262.

68 *In re Prodigy*, 2002 Del. Ch. LEXIS 95, at *12.

69 *In re: Freeport McMoran Suphur, Inc. Shareholder Litig.*, C.A. No. 16729-NC (Lamb, V.C.), Jan. 13, 2005 (Tr. at 11).

70 *See, e.g., In re UnitedGlobalCom, Inc. Shareholders Litigation*, 2008 Del. Ch. LEXIS 202, at *12 (May 16, 2008), (holding that a plan of allocation where class members were required to submit a proof of claim as fair, reasonable, adequate and in the best interests of the class).

As discussed in Section III.2 of the Brief in Support of Lead Plaintiff's Counsel's Award of Attorneys' Fees and Expenses, Lead Plaintiff's Counsel in this Action are competent and highly experienced in the field of shareholder class litigation, whose reputations have been the subject of repeated favorable comments by both state and federal courts. Consistent with the guidance from the Court *In re Prodigy*, counsel propose a Plan of Allocation that will distribute the Net Settlement Fund on a pro rata basis to class members who held KMI stock on May 30, 2007, and were cashed out for $107.50 per share. This is a fair and reasonable method of distributing the settlement proceeds to the Class and will ensure that those shareholders who were "there at the end," and not those who severed their economic ties by selling their shares, will enjoy the benefits of the settlement.

III. CONCLUSION

For all the reasons set forth herein, Lead Plaintiff respectfully submits that the proposed settlement is fair, reasonable and adequate, and in the best interests of the Class. Accordingly, Lead Plaintiff respectfully requests that the proposed settlement be approved by the Court.

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CERTIFICATE OF SERVICE

I do hereby certify that I have hand delivered a true and correct Chamber's copy and served a true and correct copy of the above and foregoing document on counsel of record by placing the same in the **(_x_) via e-mail to the address listed below**, (__) facsimile to the phone number(s) listed below, and that the transmission was reported as complete and without error and that the facsimile machine complied with Supreme Court Rule 119(b)(3), or (___) hand delivery, on this, the 13th day of October 2010 to:

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