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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 12

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

MEMORANDUM OF LAW IN SUPPORT OF THE MANAGEMENT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants Richard D. Kinder, C. Park Shaper, Steven J. Kean, Kimberly Dang, David Kinder, James Street, and Joseph Listengart (the "Management Defendants"), by and through their counsel, and pursuant to Kansas Supreme Court Rule 141, respectfully submit this memorandum of law in support of their motion for summary judgment dismissing Plaintiffs' claims against them in their entirety and with prejudice.

PRELIMINARY STATEMENT[1]

Almost four years ago, on August 28, 2006, the Board of Directors of Kinder Morgan, Inc. ("KMI") accepted an offer of $107.50 per share from the Chief Executive Officer of the Company, defendant Richard D. Kinder ("Kinder"), and the Management Buyout Group (the "MBO Group").[2] It is undisputed that the nine directors of KMI who unanimously voted to enter into the merger agreement with a wholly-owned subsidiary of the MBO Group were disinterested and independent directors. Not one was a member of the MBO Group, worked for KMI, or had any interest in the proposed transaction different from that of the public shareholders of KMI. These nine directors constituted a majority of the twelve persons on the KMI Board. The remaining three directors, defendants Richard Kinder, Michael Morgan, and Fayez Sarofim, were members of the MBO Group. They did not participate in any of the Board's deliberations concerning the buyout proposal. Nor did they participate in the Board's vote on the merger.

Plaintiffs moved to prevent the shareholders from meeting on December 19, 2006 to vote on whether to approve the proposed merger at $107.50 per share. In seeking to block the

[1] The Preliminary Statement is an outline and summary of the issues before this Court and arguments made in this Memorandum of Law, which will be substantiated in the Uncontroverted Fact and Argument sections which follow.

[2] The MBO Group refers to the Management Defendants, Fayez Sarofim, Michael C. Morgan, William V. Morgan, Knight Holdco LLC and the equity sponsors.

transaction, Plaintiffs advanced the same arguments that can be found today in their Fourth Consolidated and Amended Class Action Petition (the "Petition"). Specifically, Plaintiffs contended that the business judgment rule standard of review, which protects the good faith decisions of independent and informed directors from second-guessing by a subsequent finder of fact, should be discarded in favor of requiring defendants to establish "the entire fairness" of the proposed merger. Plaintiffs further argued, as they will, no doubt, in response to this motion, that the price of $107.50 was simply "unfair" (*i.e.*, not enough) and, therefore, that unanimous approval of the merger by KMI's independent directors constituted a breach of fiduciary duty by those directors. And Plaintiffs argued that the 149-plus page KMI Proxy Statement, mailed to shareholders in advance of the December 19, 2006 meeting, contained material misstatements and omissions.

After a thorough review of the extensive discovery record,[3] Special Master Joseph Walsh issued a 21-page report and recommendation on December 18, 2006 (the "Dec. 18, 2006 Special Master Report") denying Plaintiffs' motion:

- The Board's Approval: The Special Master found that Plaintiffs had failed to carry their heavy burden of showing that the business judgment rule did not apply to protect the Board's decision to enter into the merger agreement at $107.50 per share. The Special Master further found that the record completely refuted the notion that Richard Kinder had somehow controlled,

[3] The Special Master had before him a factual record that included some fourteen depositions, including depositions of two of the three Special Committee members, the financial advisers to the Special Committee, two representatives from Goldman Sachs and the key members of the MBO Group: Messrs. Richard Kinder, David Kinder, Park Shaper and Joseph Listengart. This record is essentially identical to that currently before this Court. Since the Special Master's decision, Plaintiffs have not taken the depositions of any of the other independent directors who voted to approve the transaction (other than Special Committee member Austin), nor taken the depositions of any members of senior management involved in the formulation of the proposal.

dominated, "or strong armed" the KMI independent directors. To the contrary, Special Master Walsh concluded that a Special Committee of KMI directors, which had been formed to evaluate the buyout proposal, test the market for better offers, and negotiate with the MBO Group (if appropriate), had "functioned effectively, was well informed, and made its recommendation [to accept the $107.50 proposal] in good faith." Dec. 18, 2006 Special Master Report at 18.

- The Shareholder Vote: Special Master Walsh rejected the notion "that the shareholders do not have the complete story," and concluded that: "[t]he Proxy Statement distributed by KMI contains a full description of the events leading up to the formulation of the MBO, the work of the Special Committee, and the negotiations that led to the tender price. The Proxy Statement is also replete with financial data concerning KMI's past performance and should be sufficient to permit shareholders to make an informed choice." Dec. 18, 2006 Special Master Report at 19.

One day after the denial of Plaintiffs' preliminary injunction motion, KMI shareholders met and overwhelmingly voted to approve the $107.50 merger and take the approximately 27% premium to the unaffected $84.41 per share trading price of KMI's stock before the MBO Group made its initial $100 per share offer. After obtaining required regulatory approvals, the merger closed on May 30, 2007. As a result, each share of KMI common stock not already owned by the MBO Group was acquired for $107.50 per share, KMI became a private company, and the class members ceased being KMI shareholders.

This litigation, however, did not come to an end. Rather, in a futile effort to avoid the application of the business judgment rule and the clear import of Special Master Walsh's Report, Plaintiffs took the unusual step of *dismissing* from this action the very fiduciaries -- the nine independent KMI directors -- who had unanimously voted to approve the merger under Kansas law, conceding that they could never recover damages from them. The case has continued, however, against the directors (and officers) who were members of the MBO Group (but who did *not* vote on the merger), and against the financial sponsors who allegedly aided and abetted the alleged breaches of fiduciary duty.

Although Plaintiffs changed the line-up of defendants, they have never changed the central theme of their case. As Special Master Walsh explained in addressing Plaintiffs' motion for class certification, "[u]ltimately, the nub of Plaintiffs' claim is that all remaining Defendants promoted a merger price that was unfair to KMI stockholders." Jan. 9, 2009 Special Master's Report & Recommendation at 4. Indeed, the only theory of damages advanced by Plaintiffs in this action after four years is that they are entitled to the difference between the merger consideration ($107.50) and the allegedly higher fair value of the KMI stock. According to Plaintiffs' expert, the appraised value of the KMI stock on the date the merger closed was greater than $107.50.[4]

* * *

Under Kansas law, a valid merger requires two steps: approval by the company's board of directors and an affirmative vote of the shareholders. Both occurred here. As we

[4] Kansas law already provided an appraisal remedy to any shareholders who chose not to accept the $107.50 per share. *See* § 17-6712. Although apprised in the proxy of their appraisal right (Uncontroverted Fact No. 40), no KMI shareholder made use of the appraisal remedy permitted by Kansas statute.

explain below, all of Plaintiffs' challenges to this properly approved merger fail as a matter of law.

First, just as they did on the preliminary injunction motion, Plaintiffs in their Petition improperly nit-pick the Special Committee's three-month process and the myriad of judgments it reached along the way to its recommendation to accept the $107.50 offer. But as Special Master Walsh correctly found, the familiar business judgment rule is the appropriate standard of review, and as a result, there can be no factual inquiry into the wisdom of the Board's decision to accept the merger consideration. Every single one of Plaintiffs' alleged "issues" for trial does not come close as a matter of law to establishing a triable issue as to the application of the business judgment rule's presumption.[5] And that presumption precludes a trial on whether the merger consideration was "fair" or "enough." *See* Point I, *infra*.

Second, Plaintiffs' challenge to the shareholder vote fails because, as the Special Master concluded in connection with Plaintiffs' class certification motion, it is simply "too late" as a matter of law to seek entirely speculative damages at trial based on "disclosure" claims which were rejected *before* the shareholder vote. In addition, the overwhelming number of former KMI shareholders who voted in favor of the merger, and to accept the approximately 27% premium it provided, should be held, as a matter of law, to have acquiesced in the transaction. *See* Point II, *infra*.

Third, Plaintiffs' attempt to end-run these fundamental principles of Kansas law by dropping the independent directors who approved the merger and focus instead on the conduct of the MBO Group before and after it made its initial proposal -- while continuing to

[5] Throughout their Petition, Plaintiffs offer a myriad of factual assertions supposedly supporting alleged breaches of fiduciary duty. We disagree with many of those factual assertions but our motion and the application of the business judgment rule does not turn, in any respect, upon those factual contentions.

attack the fairness of the $107.50 merger price approved by those directors -- fails not only on multiple legal grounds, but as a matter of plain common sense. As an initial matter, there is no legal support for Plaintiffs' novel contention that KMI insiders were prohibited from developing a buyout proposal using KMI information, supposedly without the permission of the KMI Board. *See* Point III, A, *infra*.

Moreover, no matter what wrongs the MBO Group allegedly committed in formulating its initial buyout proposal, once that proposal had been submitted, the fiduciary duty for dealing with it rested exclusively with KMI's independent directors. It was those independent directors through the Special Committee -- and *not* the members of the MBO Group -- who evaluated the proposal, who conducted the market check to look for other bidders, who negotiated on behalf of the public shareholders (negotiations which increased the merger consideration by over $800 million), and who ultimately determined to enter into the merger agreement. Simply stated, there would have been no merger and no alleged harm to shareholders, without (i) the unanimous decision of the independent KMI directors to enter into the merger, and (ii) the decision of the KMI shareholders to accept it. Defendants' alleged conduct, therefore, could not and did not "cause" the alleged injury, *i.e.*, the alleged unfair merger consideration. *See* Point III, B, *infra*.

And finally, even if there were any legal merit to Plaintiffs' claims relating to the conduct of the MBO Group in allegedly misusing corporate information and assets to formulate the buyout proposal, and there is none, any such claim is "derivative" in nature. As a Texas court has previously ruled, any derivative claims arising from the merger were extinguished when the transaction closed, and Plaintiffs (as former KMI shareholders) therefore have no standing to prosecute any such claims. *See* Point III, C, *infra*.

STATEMENT OF UNCONTROVERTED FACTS

For purposes of this motion for summary judgment, the Management Defendants contend the following statements are uncontroverted:

The KMI Board of Directors

1. During the period May 28, 2006 (when the MBO Group made its initial $100 per share buyout proposal) through May 30, 2007 (when the merger closed at $107.50 per share), KMI's board of directors consisted of the following twelve directors: Richard D. Kinder ("Kinder"), Stewart A. Bliss, Edward H. Austin, Jr., Charles W. Battey, William J. Hybl, Ted A. Gardner, Michael C. Morgan, Edward Randall, III, Fayez Sarofim, James M. Stanford, H.A. True, III, and Douglas W.G. Whitehead. (June 8, 2010 Joint Stipulations of Fact and Law ("Stipulated Fact") Nos. 10, 33, 34 and 99)

2. Between May 28, 2006 and May 30, 2007, directors Bliss, Austin, Battey, Gardner, Hybl, Randall, Stanford, True and Whitehead were not officers or employees of KMI or any of its affiliates. The only director of KMI who was also an officer of KMI was Richard Kinder, who served as Chairman of the Board of Directors and Chief Executive Officer. (Stipulated Fact Nos. 4, 11, 14, 16, 18, 20, 22, 24, 26, 28 and 30)

3. The only KMI directors who were members of the MBO Group were Messrs. Kinder, Sarofim and Michael C. Morgan. (Stipulated Fact No. 12)

4. Messrs. Bliss, Austin, Battey, Hybl, Gardner, Randall, Stanford, True, and Whitehead have been dismissed without prejudice from this action. (Stipulated Fact No. 13)

The May 28, 2006 Proposal

5. Prior to the beginning of a May 28, 2006 special telephonic KMI Board meeting, Kinder delivered a letter (the "May 28, 2006 Letter") to the Board setting forth a

proposal, on behalf of the MBO Group, for the purchase of all the outstanding shares of KMI common stock at a cash price of $100 per share. (Stipulated Fact Nos. 32-34)

6. The May 28, 2006 Letter conditioned any binding obligation on the execution and delivery of definitive documentation satisfactory to the MBO Group, recommended by a special committee and approved by the KMI Board of Directors. (Joint Stip. Ex. 1 at p. 2)[6]

7. As of May 28, 2006, Richard Kinder had direct beneficial ownership of 23,994,577 shares of common stock of KMI, and may have been deemed to have beneficial ownership of an additional 250 shares, representing approximately 17.96% of the Company's outstanding shares. (Stipulated Fact No. 5)

8. At the time the proposal was submitted, the members of the MBO Group collectively owned approximately 28.2 million shares of the common stock of KMI, representing approximately 21% of KMI's outstanding shares. (Allerhand Aff. Ex. A at p. 5; Joint Stip. Ex. 39 at p. 3)[7]

Creation of the Special Committee

9. At the May 28, 2006 KMI board meeting, after a brief discussion of the May 28, 2006 Letter, all directors (Messrs. Kinder, Sarofim and Morgan) and members of management who would participate in the proposal disconnected from the conference call and the meeting continued with the remaining directors present. (Joint Stip. Ex. 2 at p. 1)

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[6] Exhibits to the June 8, 2010 Joint Stipulations of Fact and Law are referred to herein as "Joint Stip. Ex. __."

[7] Exhibits attached to the July 15, 2010 Affidavit of Joseph Allerhand are referred to herein as "Allerhand Aff. Ex. __."

10. At the May 28, 2006 meeting, the directors of KMI who were not members of the MBO Group established the Special Committee, consisting of Messrs. Austin, Bliss, and Gardner, none of whom was a member of the MBO Group. (Stipulated Fact Nos. 16, 18, 20 and 38)

11. Each member of the Special Committee owned shares of the common stock of KMI. Each of the other directors also owned shares of the common stock of KMI. (Joint Stip. Ex. 39 at p. 112)

12. Pursuant to the resolution adopted by the KMI directors who were not members of the MBO Group, the Special Committee was delegated the full power and authority, among other things, to "take any and all actions and to make any and all decisions" regarding the buyout proposal and any alternatives, including to reject it, or in the alternative, recommend it or a revised or alternative proposal to the other directors who were not members of the MBO Group. (Joint Stip. Ex. 2 at pp. 1-5; Stipulated Fact No. 39)

13. The Special Committee retained the law firm of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") as legal counsel, and Morgan Stanley & Co., Incorporated ("Morgan Stanley") and The Blackstone Group, L.P. ("Blackstone") as its financial advisors. (Stipulated Fact Nos. 40 and 42)

The Work of the Special Committee

14. During the approximately 3-month period of its existence, the Special Committee formally met telephonically or in-person on at least 23 occasions. Minutes were prepared of such meetings. The Special Committee provided updates to the other KMI Directors who were not members of the MBO Group on at least 4 separate occasions. (Stipulated Fact Nos. 44, 45, 47-66 and 68-72)

15. In June and July 2006, the Special Committee, through its financial advisors, conducted a "market check," contacting some 35 potential bidders, in an effort to solicit competing bids for KMI's publicly held outstanding shares of common stock. (Joint Stip. Ex. 36 at p. 5; Bliss Dep. Tr. at 128:24-129:15 (Allerhand Aff. Ex. B); Munger Dep. Tr. at 158:14-22, 160:13-23, 162:18-21 (Allerhand Aff. Ex. C); Joint Stip. Ex. 39 at p. 17)

16. None of the 35 entities contacted by the Special Committee submitted a competing bid to purchase KMI's outstanding shares of common stock at any time between May 28, 2006 and May 30, 2007; and there is no evidence in the record that any competing bid was ever made. (Joint Stip. Ex. 36 at p. 5; Joint Stip. Ex. 39 at p. 17)

The Negotiations: The Special Committee Says "No" Several Times

17. In its negotiations with the MBO Group, the Special Committee had the authority to say "no" to the MBO Group, and it exercised that power on a number of occasions. (Stipulated Facts Nos. 39, 73-79, 81-82 and 85-86; Austin Dep. Tr. at 88:6-13 (Allerhand Aff. Ex. D); Joint Stip. Ex. 2 at pp. 2-5)

18. On July 17, 2006, Bliss, chairman of the Special Committee, informed Richard Kinder that the Special Committee did not view the MBO Group's $100 per share offer as compelling value for KMI's unaffiliated shareholders. (Stipulated Fact Nos. 18 and 73)

19. On August 2, 2006, representatives of the investment banking area of Goldman Sachs (noting that they were not authorized to make any higher offers), asked representatives of Morgan Stanley and Blackstone how those advisors thought the Special Committee would react if the MBO Group were to increase its offer to $102 per share. (Stipulated Fact Nos. 74 and 75)

20. Morgan Stanley and Blackstone responded that while they could not speak for the Special Committee, it was their initial reaction that the Special Committee would not accept an offer of $102 per share. (Stipulated Fact No. 76)

21. On August 3, 2006, advisors to the Special Committee communicated to advisors to the MBO Group that unless the MBO Group was prepared to make a substantially higher offer for KMI, the Special Committee believed that the current process should be brought to an end. (Joint Stip Ex. 39 at p. 19)

22. On August 8, 2006, representatives of the investment banking area of Goldman Sachs asked Morgan Stanley and Blackstone their thoughts on how the Special Committee would react if the MBO Group could be persuaded to increase its offer to $103.55 per share. (Stipulated Fact No. 78)

23. At the August 8, 2006 meeting, Morgan Stanley and Blackstone said that while they could not speak for the Special Committee, it was their initial reaction that an offer of $103.55 per share would not be accepted. (Stipulated Fact No. 79)

24. On August 14, 2006, following a meeting with the KMI directors who were not members of the MBO Group, the Special Committee met and decided that there was insufficient basis to continue discussions with the MBO Group, and that the Special Committee would inform Richard Kinder that it believed that the offer should be withdrawn and the process brought to an end. (Stipulated Fact Nos. 80 and 81)

25. On August 15, 2006, the Special Committee met personally with Messrs. Kinder and Shaper and informed them that it believed the MBO Group's offer should be withdrawn and the process ended. (Stipulated Fact No. 82)

26. During the August 15, 2006 meeting, Kinder asked the Special Committee for three days to come up with a proposal that the Special Committee might find acceptable. (Stipulated Fact No. 83)

27. At an in-person meeting on August 18, 2006, Kinder informed the Special Committee that the MBO Group was prepared to increase its offer to $107.30 per share assuming satisfactory resolution of contract terms. (Stipulated Fact No. 85)

28. On August 21, 2006, the Special Committee informed the MBO Group that it was not prepared to accept an offer of $107.30 per share. (Stipulated Fact No. 86)

29. On the evening of August 21, 2006, the MBO Group informed the Special Committee that it would not offer more than $107.50 per share and that $107.50 would represent its final offer. The Special Committee authorized its legal and financial advisors to determine whether a definitive merger agreement could be reached with the MBO Group. (Joint Stip. Ex. 39 at p. 20; Stipulated Fact No. 87)

30. On August 27, 2006, the Special Committee and the MBO Group came to an agreement on the terms of a merger agreement, providing for the purchase of all of the outstanding shares of KMI's common stock not owned by the MBO Group for $107.50 per share. (Stipulated Fact No. 88)

31. The Special Committee met on August 27, 2006 and unanimously resolved to recommend that the Board approve the merger and the merger agreement, and further to recommend that KMI stockholders (other than members of the MBO Group) adopt the merger agreement. (Stipulated Fact No. 89)

32. The $107.50 price represented an approximately 27.4% implied premium over the $84.41 per share price at which KMI common stock closed on May 26, 2006, the last closing price before the proposal was made public. (Joint Stip. Ex. 39 at p. 37)

33. During the negotiation process, the Special Committee did not consider any alleged statements made by members of the MBO Group regarding the predicted consequences of rejecting the proposal (including a decline in KMI's stock price) as impacting its deliberations or its negotiations with the MBO Group or its decision to accept the $107.50 merger price. (Austin Dep. Tr. at 82:5-22, 93:22-94:1 (Allerhand Aff. Ex. D); Bliss Dep. Tr. at 244:9-245:11 (Allerhand Aff. Ex. B))

The KMI Directors Approve the Merger

34. On August 27, 2006, at a meeting of the directors of KMI who were not members of the MBO Group, Morgan Stanley and Blackstone provided the Board with opinions that the merger consideration of $107.50 per share was fair, from a financial point of view, to KMI's shareholders other than the MBO Group. (Stipulated Fact Nos. 90 and 91)

35. The following directors of KMI, none of whom was a member of the MBO Group, unanimously voted on August 27, 2006 to approve the merger agreement and to recommend that KMI's public shareholders vote in favor of the merger agreement: Messrs. Austin, Hybl, Gardner, Battey, True, Stanford, Randall, Bliss, and Whitehead. (Joint Stip. Ex. 37 at pp. 1-2 and Exhibit A thereto; Stipulated Fact No. 93)

The Proxy Statement and Shareholders Meeting

36. On November 17, 2006, the Proxy Statement was mailed to KMI shareholders in connection with the shareholders meeting scheduled for December 19, 2006 for the purposes of voting on the merger transaction. (Stipulated Fact No. 96; Joint Stip. Ex. 39)

37. A shareholder's meeting was held on December 19, 2006 to vote on the merger transaction. Shareholders could vote for or against the proposed merger or abstain. The affirmative vote of at least two-thirds of the outstanding shares of KMI common stock was required to approve and adopt the merger agreement. (Stipulated Fact No. 97; Austin Dep. Tr. at 95:21-25 (Allerhand Aff. Ex. D); Joint Stip. Ex. 39 at p. 3 (and attached proxy card))

38. The KMI shareholders voted to approve the merger agreement on December 19, 2006. (Stipulated Fact No. 98)

39. Of the approximately 100 million shares voted at the December 19, 2006 shareholder's meeting, approximately 97 million voted in favor of the adoption of the merger agreement. (Allerhand Aff. Ex. F)

40. Shareholders were advised that appraisal was available under Kansas law for any shareholder who voted not to accept the $107.50 in the merger. (Joint Stip. Ex. 39 at pp. 71-73)

<u>The Merger Closes</u>

41. The merger closed on May 30, 2007. (Stipulated Fact No. 99)

42. As a result of the May 30, 2007 merger, Class Representatives Douglas Geiger and J. Robert Wilson, as well as the members of the Class in this action, ceased to be KMI shareholders. (Stipulated Fact No. 100)

PROCEDURAL BACKGROUND

1. Immediately following announcement of the MBO Group's proposal, numerous putative class action lawsuits were filed in Texas and Kansas state courts. Lead Plaintiffs Douglas Geiger and Robert Wilson, among others, filed complaints alleging that the directors had breached their fiduciary duties; such allegations were made long before the Board approved the merger and recommended it to shareholders. Petition, *Dr. Douglas Geiger v.*

Edward H. Austin, et. al., No. 06 C 854 (Kan. Dist. Ct.-Shawnee County June 9, 2006); Plaintiff's Original Petition Based Upon Self Dealing and Breach of Fiduciary Duty, *J. Robert Wilson v. Kinder Morgan, Inc., et al.*, No. 2006-40027 (Tex. Dist. Ct.-Harris County June 26, 2006).

2. In late June 2006, the Kansas and Texas courts issued separate orders consolidating all actions filed in their respective jurisdictions. Order Consolidating Actions, *Michael Morter v. Richard D. Kinder, et. al.*, No. 06 C 801 (Kan. Dist. Ct.-Shawnee County June 23, 2006); Order, *Mary Crescente v. Kinder Morgan, Inc., et al.*, No. 2006-33011 (Tex. Dist. Ct.-Harris County June 26, 2006). By Order filed August 1, 2006, this Court appointed interim lead plaintiffs and interim lead counsel; interim class counsel in the Texas action was subsequently appointed. Order Appointing Interim Lead Plaintiffs and Lead Counsel, *In re Kinder Morgan, Inc. S'holders Litig.*, No. 06 C 801 (Kan. Dist. Ct.-Shawnee County Aug. 1, 2006); Order Granting Motion to Appoint Interim Class Counsel, *Mary Crescente v. Kinder Morgan, Inc., et al.*, No. 2006-33011 (Tex. Dist. Ct.-Harris County Aug. 4, 2006).

3. On October 12, 2006, this Court, after consultation with the Texas court, issued a memorandum decision and order regarding the appointment of a Special Master to address pre-trial matters in both actions. Memorandum Decision and Order, *In re Kinder Morgan, Inc. S'holders Litig.*, No. 06 C 801 (Kan. Dist. Ct.-Shawnee County Oct. 12, 2006).

4. By Order filed on November 21, 2006, former Delaware Supreme Court Justice Joseph T. Walsh was appointed Special Master. Order, *In re Kinder Morgan, Inc. S'holders Litig.*, No. 06 C 801 (Kan. Dist. Ct.-Shawnee County Nov. 21, 2006).

5. Following discovery, which consisted of some 14 depositions and extensive document productions by both parties and non-parties, on December 9, 2006, Plaintiffs

filed a joint motion for a preliminary injunction seeking, *inter alia*, to enjoin the shareholder meeting. On December 18, 2006, the Special Master issued a Report and Recommendation denying Plaintiffs' motion.

6. On January 25, 2008, Plaintiffs jointly moved for certification of a single nationwide class covering the Texas and Kansas actions, which Defendants opposed. Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, *In re Kinder Morgan, Inc. S'holders Litig.*, No. 06 C 801 (Kan. Dist. Ct.-Shawnee County); Defendants' Memorandum of Law in Opposition to Plaintiffs Motion for Class Certification, *In re Kinder Morgan, Inc. S'holder Litig.* No. 06 C 801 (Kan. Dist. Ct-Shawnee County July 1, 2008). After oral argument on Plaintiffs' motion, the Special Master urged the Plaintiffs to select one forum to prosecute their remaining claims. The Plaintiffs thereafter indicated that they would proceed in Kansas only. By Order dated November 19, 2008, the Texas court entered an order staying that action in all respects pending entry of a final judgment, with all rights of appeal exhausted, in the Kansas action "at which time plaintiffs will dismiss with prejudice this case." Order to Stay Proceedings, *Mary Crescente v. Kinder Morgan, Inc., et al.*, No. 2006-33011 (Tex. Dist. Ct.-Harris County Nov. 19, 2008).

7. On January 9, 2009, the Special Master issued his Report, recommending that Plaintiffs' class certification motion be granted and that Dr. Douglas Geiger and Robert Wilson be appointed class representatives. On February 20, 2009, this Court entered an agreed order certifying a class consisting of all shareholders of KMI stock during the period August 28, 2006 through May 30, 2007 (excluding the Defendants and certain related persons) without prejudice to Defendants' right to seek decertification of the class or modification of the class

definition. Agreed Order, *In re Kinder Morgan, Inc. S'holders Litig.*, No. 06 C 801 (Kan. Dist. Ct.-Shawnee County Feb. 20, 2009).

8. On June 9, 2009, following a status conference, this Court entered an agreed case management order establishing a pre-trial schedule and relieving the Special Master of any further responsibilities. Case Management Order, *In re Kinder Morgan, Inc. S'holders Litig.*, No. 06 C 801 (Kan. Dist. Ct.-Shawnee County June 9, 2009). Pursuant to the case management order, Plaintiffs filed a Fourth Consolidated and Amended Petition, alleging: (a) breach of fiduciary duty of loyalty against the management members of the MBO Group (Count I); (b) breach of the duty of disclosure against certain members of the MBO Group (Count II); (c) aiding and abetting the alleged breaches in Count II against the equity sponsors and others (Count III); (d) breach of fiduciary duty of care against the management members of the MBO Group (Count IV); and (e) aiding and abetting the alleged breaches in Count IV against the equity sponsors and others (Count V).

9. Defendants filed answers to the Petition on July 14, 2009.

10. The parties completed fact discovery on October 30, 2009 and expert discovery on June 23, 2010.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate under Kansas law when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." K.S.A. § 60-256(c) (2007). "'To avoid summary judgment, the nonmoving party must establish each element of his or her cause of action.'" *Dozier v. Dozier*, 252 Kan. 1035, 1041, 850 P.2d 789, 794 (1993) (citation omitted). And thus the movant is entitled to summary judgment if the nonmoving party fails to come forward with evidence to support an "essential element of its case with respect to which it has the burden of proof." *Id.*

Although reasonable inferences are drawn in its favor, the non-moving party must nevertheless produce evidence establishing a dispute as to a fact "material to the conclusive issues in the case." *Bergstrom v. Noah*, 266 Kan. 847, 872, 974 P.2d 531, 552 (1999). "An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. The disputed question of fact which is immaterial to the issue does not preclude summary judgment." *Id.* Plaintiffs' "speculation is ... insufficient .... '[a] party cannot avoid summary judgment on the mere hope that something may develop later during discovery or at trial.'" *Chesbro v. Bd. of County Comm'rs of Douglas County*, 39 Kan. App. 2d 954, 959-60, 186 P.3d 829, 834 (2008) (citation omitted).

LEGAL ARGUMENT AND AUTHORITIES

Plaintiffs' claim for money damages in this action is premised entirely upon the theory that the $107.50 price paid by the MBO Group for each share of KMI common stock in the May 30, 2007 merger was too low and that KMI's public shareholders were injured by receiving that inadequate price. This is the "*nub*" of Plaintiffs' claims. *See* Jan. 9, 2009 Special Master Report at 4 (emphasis added). It is undisputed, however, that the decision to approve this merger was made *not* by any of the remaining defendants in this action, but rather by the independent directors -- following a recommendation from the Special Committee -- *and* KMI shareholders, who voted overwhelmingly to approve the merger.

Indeed, under Kansas law, two actions are required for a corporate merger: (a) the "board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation" (K.S.A. § 17-6701(b)), and (b) the merger agreement "shall be submitted to the stockholders of each constituent corporation at an annual or special meeting thereof for the purpose of acting on the agreement." K.S.A. § 17-6701(c)(1). Here, both the KMI Board of Directors and the KMI shareholders voted to approve the merger.

As we explain in Sections I and II below, Plaintiffs cannot now challenge either action: the decision by the independent KMI directors is protected by the powerful presumption of the business judgment rule, which forecloses a trial on the fairness of the merger consideration; and any attack on the shareholder vote is too late as the Special Master previously rejected Plaintiffs' allegations that the Proxy Statement was incomplete or misleading.

I. THE DECISION OF THE INDEPENDENT KMI DIRECTORS TO APPROVE THE MERGER PURSUANT TO K.S.A. § 17.6701(b) IS PROTECTED BY THE BUSINESS JUDGMENT RULE

The question of which standard of review applies to a corporate decision made by directors is "'often of critical importance'" and usually outcome determinative. *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994), *aff'd after remand*, 669 A.2d 79 (Del. 1995) (citation omitted); *see also* Dec. 18, 2006 Special Master Report at 12 (if "the decision of the Special Committee is protected by the business judgment rule .... [Plaintiffs'] prospect of ultimate success ... is in considerable doubt").

Specifically, if the decision of KMI's independent directors to enter into the merger is entitled to the presumption of the business judgment rule -- that "'in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest'" -- then the decision will not be overturned if attributable to any rational business purpose; alternatively, if the entire fairness standard applies, the defendants must establish that the transaction was the product of both fair dealing and fair price. *Kan. Heart Hosp. L.L.C. v. Idbeis*, 286 Kan. 183, 209, 184 P.3d 866, 885 (2008) (citation omitted).[8]

__The Presumption of the Business Judgment Rule Applies__

The business judgment rule reflects the fundamental principle that the "Board of Directors is the business manager of the corporation" and thus its good faith decisions ordinarily "... are not reviewable in the courts. The courts are not the business managers of corporations ...." *Nat'l Reserve Life Ins. Co. v. Moore*, 114 Kan. 456, 219 P. 261, 262 (1923); *see also Wayne County Employees Ret. Sys. v. Corti*, Civ. A. No. 3534-CC, 2009 WL 2219260, at *10 (Del. Ch. July 24, 2009), *aff'd*, Nos. 483, 2009, 2010 WL 2164530 (Del. May 28, 2010) ("The appropriate starting place in evaluating plaintiff's fiduciary duty claims, however, is with the well-established presumption of the business judgment rule, which reflects and promotes the role of the board of directors, and not the Court, as the appropriate body to manage the business and affairs of the corporation."). In Kansas, "the business judgment rule precludes the courts from interfering with the discretion of corporate directors on 'questions of corporate management, policy or business.'" *In re Stoico Rest. Group, Inc.*, No. Civ. A. 00-2109-KHV, 2000 WL 1146122, at *2 (D. Kan. July 20, 2000) (citation omitted).

Because a board is presumed to have acted properly, "'the burden rests with the party challenging the decision to establish facts rebutting the presumption.'" *Kan. Heart Hosp., L.L.C.*, 286 Kan. at 209, 184 P.3d at 885 (citation omitted). "The fact that [the directors] choose a course of action [plaintiffs] disagree[] with does not affect the applicability or reduce the protection of the business judgment rule." *Gray v. Manhattan Med. Ctr., Inc.*, 28 Kan. App. 2d

[8] The parties agree that Kansas substantive law applies (June 8, 2010 Joint Stipulations of Fact and Law, Stipulation of Law No. 1), and further that Kansas courts look to Delaware for guidance on fiduciary duty and corporate law issues (Dec. 4, 2006 Kansas and Texas Pls.' Jt. Statement of Legal Standards Applicable to Pls.' Forthcoming Jt. Mot. for Prelim. Inj. at 1).

572, 579, 18 P.3d 291, 298 (2001). Thus, a shareholder plaintiff assumes the burden of providing evidence that the board of directors, in reaching the challenged decision, breached either its duty of loyalty or care or that the board acted in bad faith. *See generally Wayne County Employees Ret. Sys.*, 2009 WL 2219260, at *10 ("As the party challenging the directors' decision, the burden is on the plaintiff to establish facts that rebut the presumption of the rule").

The powerful presumption of the business judgment rule applies equally to decisions made by directors in the context of a sale or merger of the company:

> For its entire history, [Delaware] corporate law has tried to insulate the good faith decisions of disinterested corporate directors from judicial second-guessing for well-known policy reasons. The business judgment rule embodies that policy judgment. When mergers and acquisitions activity became a more salient and constant feature of corporate life, our law did not cast aside the values of the business judgment rule. Rather, to deal with the different interests manager-directors may have in the context of responding to a hostile acquisition offer or determining which friendly merger partner to seek out, our law has consistently provided an incentive for the formation of boards comprised of a majority of independent directors who could act independently of management and pursue the best interests of the corporation and its stockholders.

LC Cap'l Master Fund, Ltd. v. James, 990 A.2d 435, 451-52 (Del. Ch. 2010) (citations omitted).

"Entire fairness" review is sparingly invoked only in the limited circumstances where plaintiffs can prove that a controlling shareholder stood on both sides of the transaction or where a majority of the Board was interested in the transaction or lacked independence (*i.e.*, was dominated or controlled by the interested directors). *See, e.g., Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997) ("when a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed under the more exacting standard of entire fairness as opposed to the more deferential business judgment standard"). "The policy rationale requiring some variant of entire fairness review ... substantially, if not entirely, abates if the transaction in question involves a large though not controlling shareholder. In other words, because the absence of a controlling shareholder removes the prospect of retaliation, the business judgment rule should apply to an independent special committee's good faith and fully informed recommendation." *In re Western Nat'l Corp. S'holders Litig.*, C.A. No. 15927, 2000 WL 710192, at *26 (Del. Ch. May 22, 2000). Thus, in the case of even a large, but not controlling, shareholder, the presence of an independent board majority will invoke the business judgment standard of review.

In addressing the standard of review issue, the Court is not writing on a blank slate. Special Master Walsh previously held, in denying Plaintiffs' motion for a preliminary injunction, that the business judgment rule protects the Board's decision to approve the merger. *See* Dec. 18, 2006 Special Master Report at 17-19. The Management Defendants respectfully submit that the Special Master correctly decided this question.

First, there was no controlling shareholder. It is uncontroverted that Kinder and the MBO Group collectively owned approximately 21% of KMI's outstanding shares. (Uncontroverted Fact No. 8) Neither Kinder alone nor the MBO Group "had the votes" either at the Board or at the shareholder meeting to "control" the decision on the proposed merger. No Kansas or Delaware authority treats such an ownership position as a control block. *See, e.g., In re Western Nat'l Corp. S'holders Litig.*, C.A. No. 15927, 2000 WL 710192, at *6 (Del. Ch. May 22, 2000) (46% equity position not controlling shareholders: "substantial non-majority stock ownership, without more, does not indicate control"); *Kohls v. Duthie*, 765 A.2d 1274 (Del. Ch. 2000) (business judgment rule applies even where CEO, a member of the buyout group, controlled 35% of the shares). As the court explained in *Lewis v. Leaseway Transp. Corp.*, Civ. A. No. 8720, 1990 WL 67383, at *5 (Del. Ch. May 16, 1990), applying the business judgment rule to a transaction where the majority of stock was held by disinterested shareholders, "[i]t ... goes without saying that the challenged transaction was not the type in which a majority stockholder had its way with the minority stockholders, *i.e.*, a freeze-out merger. There was no helpless minority, [rather,] the transaction depended on the affirmative vote of [the company's] stockholders."

Second, none of the KMI directors who voted to approve the transaction was "interested" in the merger in any way different from KMI's public shareholders. *See In re RJR Nabisco Inc. S'holders Litig.*, No. Civ. A. 10389, 1989 WL 7036, at *14 (Del. Ch. Jan. 31, 1989) ("The sort of 'interest' that qualifies to disarm a board at the outset of the benefits of a business judgment approach is a financial interest in the transaction adverse to that of the corporation or its shareholders."); *Kan. Heart*, 286 Kan. at 212, 184 P.3d at 887 (directors not interested where they did not receive any benefit "that was not shared equally by all the remaining shareholders"). Not one was a member of the MBO Group or an officer of KMI; each was a shareholder, and there is no evidence that they did not otherwise stand in the same shoes as KMI's public shareholders. (Uncontroverted Fact Nos. 1-3, 11; Dec. 18, 2006 Special Master Report at 18 ("Plaintiffs concede that the members of the Special Committee do not lack independence by reason of self-interest ....")) Nor is there any evidence even suggesting that the Special Committee members or the other independent directors received any merger consideration different in any way from that received by all other shareholders.

Third, there is no triable issue of material fact as to whether Kinder "dominated or controlled" the three independent KMI directors who comprised the Special Committee and the nine independent directors who voted to approve the merger.[9] As Special Master Walsh explained in his Report: "... proof of dominance by a shareholder lacking a clear majority of shares is a task not easily met. The dominance must be such that other constituencies in the corporate governance apparatus are not free to pursue a course contrary to the wishes of the controlling shareholder. ... The present focus is on whether [] Kinder dominated the functioning of the Special Committee to the extent that it, and the KMI Board, forfeited its entitlement to the protection of the business judgment rule." Dec. 18, 2006 Special Master Report at 14-15. Plaintiff bears the burden of proving such domination by demonstrating through facts, not conjecture, that because of "'personal or other relationships the directors are beholden to the controlling person'" or so under their influence that "'their discretion would be sterilized.'" *In re CompuCom Sys., Inc. Stockholders Litig.*, No. Civ. A. 499-N, 2005 WL 2481325, at *8 (Del. Ch. Sept. 29, 2005) (citations omitted).

Plaintiffs made no such showing at the preliminary injunction stage, and they cannot do so now. Not one of the directors who approved the merger was a KMI employee or officer. (Uncontroverted Fact No. 2) The directors belonging to the MBO Group did not participate in the selection of the Special Committee members, serve on the Special Committee, or participate in the Board vote on the merger agreement. (Uncontroverted Fact Nos. 9, 10, 35). There is nothing in the evidentiary record even remotely suggesting that any of those directors were beholden to Richard Kinder or the MBO Group in any way. Plaintiffs themselves do not allege that the KMI directors who unanimously approved the merger were conflicted or disloyal.

[9] Plaintiffs attempt to argue that Kinder is a dominating stockholder because he and management "have charted KMI's course and business strategy and have vital expertise, knowledge, and judgment regarding KMI's values, prospects and strategic alternatives." (Petition ¶ 133) This, however, proves little; indeed, the same could (and hopefully should) be said about every management team, even one that owns a *de minimus* number of shares.

(Petition ¶ 52) In fact, Plaintiffs have *dismissed* from the case the independent directors -- including each member of the Special Committee -- on grounds that they are "shielded from monetary liability for breaches of fiduciary duty of care" under K.S.A. § 17-6002(b)(8) and KMI's Certificate of Incorporation. (Uncontroverted Fact No. 4; Petition ¶ 52) As duty of loyalty and bad faith claims are not extinguished by such provisions, Plaintiffs' voluntary dismissal of the independent directors concedes that they have no legal or factual basis to argue that the independent directors acted in bad faith or without fidelity to KMI.

Rather, as Special Master Walsh found, the Special Committee repeatedly showed its independence from Kinder by rejecting offers it deemed inadequate and negotiating a better deal for shareholders at significant cost to the MBO Group:

> In my view, the key indicator of the Special Committee's independence and negotiating skill was its willingness to reject the MBO plan *in toto* in the final state of negotiations. On August 15, in a face-to-face meeting with Richard Kinder, the Special Committee conveyed the clear impression that, upon the advice of its financial advisors, the MBO team's latest offer of $103.55 per share was not in the best interests of shareholders and should be withdrawn in order to spare the parties the embarrassment of a rejection by the Special Committee. If Richard Kinder had hoped that his direct negotiations would force the Special Committee to acquiescence in the MBO team's "final" offer he was clearly mistaken. The Special Committee's August 15 message to Richard Kinder that the MBO should be abandoned had the effect of producing an offer that was almost $800 million over the initial offer and clearly benefited the public shareholders.

Dec. 18, 2006 Special Master Report at 16-17; *see also* Uncontroverted Fact Nos. 12, 17-25, 27-28 (describing negotiation process).

Accordingly, the presumption of the business judgment rule applies to the independent directors' decision to approve the merger, thereby precluding Plaintiffs' challenge to the fairness or adequacy of the merger consideration.

Plaintiffs Cannot Meet Their Burden of Overcoming the Presumption of the Business Judgment Rule

Plaintiffs cannot overcome the presumption of the business judgment rule. As an initial matter, Plaintiffs have failed to prove claims of any type against a majority of the KMI Board. Defendants' counsel is aware of no case finding liability for breach of duty in connection with a merger where (as here, in the absence of a controlling or dominating shareholder) Plaintiffs did not and cannot show that a majority of the board was either grossly negligent or conflicted. *See, e.g., In re NYMEX S'holder Litig.*, Nos. Civ. A. 3621-VCN, 3835-VCN, 2009 WL 3206051, at *6 (Del. Ch. Sept. 30, 2009) ("Plaintiffs must plead sufficient facts to show that *a majority of the Board of Directors* breached the fiduciary duty of loyalty") (emphasis in original).

Plaintiffs, as discussed above, have abandoned any claim that the independent directors acted in bad faith or breached their duty of loyalty. Accordingly, Plaintiffs' only remaining alternative is to show a triable issue as to whether, in approving the merger, the independent directors breached their fiduciary duties of due care by acting with gross negligence, "defined as a 'reckless indifference to or a deliberate disregard of the whole body of stockholders' or actions which are 'without the bounds of reason.'" *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 750 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (citation omitted); *see also Malpiede v. Townson*, 780 A.2d 1075, 1096 n.77 (Del. 2001) ("[i]n the corporate context, '[d]irector liability for breaching the duty of care 'is predicated upon concepts of gross negligence''") (citation omitted). Plaintiffs cannot meet this exacting standard: there is simply no evidence showing the existence of a material disputed fact as to whether the independent directors acted with gross negligence in recommending the merger to KMI's public shareholders. In assessing a Board's actions, "[c]ourts give deference to directors' decisions reached by a proper process, and do not apply an objective reasonableness test in such a case to examine the wisdom of the decision itself." *Brazen v. Bell Atlantic Corp.*, 695 A.2d 43, 49 (Del. 1997).

Far from showing gross negligence or recklessness on the part of the independent directors (representing a majority of the Board) who approved the merger, Plaintiffs in their Petition simply nit-pick the work of the Special Committee, offering a series of disagreements with the various decisions it reached along the way, inviting this Court to do precisely what the business judgment rule forecloses: substitute its judgment for that of the directors. Such an exercise is inherently improper because there "is no single blueprint that a board must follow" in selling a company. *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). The law does not "proscribe any specific steps that must be taken by a board before selling control of the corporation" and "does not hold directors liable for failing to carry out a perfect process in the sale of control." *Wayne County, supra*, 2009 WL 2219260, at *14-15 and *13 n.71 ("Delaware law does not require perfection."); *see also In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005) (a sale of control does not grant "a license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith"). Under Kansas law, directors are entitled to rely upon professional advisors, including lawyers and investment bankers, in reaching their judgments. K.S.A. § 17-6301(e).

Within this legal context, we briefly address each of Plaintiffs' supposed "issues" for trial as to the performance of the independent directors and the Special Committee:

<u>Access to Information</u>: Plaintiffs allege that the Special Committee could not "do its job" because it did not have adequate information to make an informed decision, largely because the MBO Group allegedly refused to provide it with certain documents and "convinced"

it to not follow up on certain inquiries, particularly with respect to how an alternative transaction might be treated by the rating agencies and certain Goldman analysis. (Petition ¶¶ 137-145) But "the amount of information that it is prudent to have before a decision is made is itself a business judgment of the very type that courts are institutionally poorly equipped to make." *In re RJR Nabisco, supra*, 1989 WL 7036, at *19. Directors are not required to know *every* fact, but need only be "reasonably informed" -- in other words, to have access to material information that is important to them in their decisionmaking. *See, e.g.*, *Brehm v. Eisner*, 746 A.2d 244, 259-60 (Del. 2000); *see also Gray*, 28 Kan. App. 2d at 579, 18 P.3d at 298 (directors need only review the "material information reasonably available" to them); *In re Fort Howard Corp. S'holders Litig.*, No. Civ. A. 9991, 1988 WL 83147, at *15 (Del. Ch. Aug. 8, 1988) ("[s]ince the financial experts decided that they did not need specific information regarding Fort Howard's secret technology, it is difficult to conclude that it is likely that at trial it will be established that not providing the information constituted" a breach of duty).

In any event, these same contentions were advanced and rejected at the preliminary injunction stage. As Special Master Walsh ruled, Special Committee members "Bliss and Gardner were emphatic that the Special Committee possessed sufficient information to negotiate with the MBO group and did not believe they were handicapped in their negotiations by management's obstructive tactics, if they occurred." Dec. 18, 2006 Special Master Report at 16.[10]

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[10] Plaintiffs complain that the MBO Group did not turn over to the Special Committee its internal valuations and strategies. But, as a matter of law, bidders are not required to disclose such information. *See Kahn v. Tremont*, 694 A.2d at 432 (the "normal standards of arms-length bargaining" apply to negotiations between a MBO Group and a special committee, which necessarily includes the expectation that each side will withhold information "adverse to its interest" in those negotiations); *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 451 (Del. Ch. 2002) ("[o]ur law contemplates the possibility of price negotiation in negotiated mergers

Efficacy of the Market Check: Plaintiffs attack the market check conducted by the Special Committee, largely premised on the allegations that the process was supposedly "corrupted" by so-called exclusivity agreements Kinder and potential financial sponsors signed, which bound them to work only with Goldman. But, there is no requirement as a matter of law that a Board even conduct a formal market check to attempt to find other potential bidders; independent directors "may approve [a management buyout] even without conducting an active survey of the market." *Barkan v. Amsted Indus.*, 567 A.2d at 1287, 1286 (finding no breach of fiduciary duty even where Special Committee was instructed not to engage in an active search for alternatives as "there is no single blueprint that a board must follow to fulfill its duties"); *see also In re First Boston, Inc. S'holders Litig.*, No. Civ. A. 10338, 1990 WL 78836, at *7 (Del. Ch. June 7, 1990) (even if committee could not conduct a market check, it had the power to say no).

Here, the independent directors were free to contact any firms they wanted and in fact reached out to 35 contacts (none of whom expressed any interest). (Uncontroverted Facts Nos. 15-16) If a board can approve a transaction even where it is forbidden from pursuing alternatives, Plaintiffs' speculation and quibbling about the process here can hardly be said to amount to a due care violation.[11]

involving a controlling stockholder, a practical impossibility if the reserve price of the controlling stockholder must be revealed"). Moreover, Plaintiffs' contentions that the Special Committee was not provided with all of the details relating to management's communications with the rating agencies and should have contacted the agencies on their own, are unavailing. As Special Master Walsh found, "[a]lthough the Special Committee believed it would be unwise to contact the rating agencies directly, their financial advisors were able to calculate the merits of alternative plans." Dec. 18, 2006 Report at 16. It can hardly be said to be a breach of the duty for the Special Committee to have relied on its advisors in this manner. To the contrary, Kansas law anticipates that directors will rely on advisors in such circumstances. K.S.A. § 17-6301(e).

[11] And while Plaintiffs have floated a host of speculative theories, there is not a shred of evidence to suggest that any exclusivity agreements, terminated or otherwise, deterred any one of the 35 entities contacted, or anyone else, from making a competing bid during the seven months

Threats/Coercion: Plaintiffs allege that the Special Committee breached its fiduciary duties by succumbing to improper pressure and threats from the MBO Group in the form of various "doomsday predictions" for KMI and its stock price if the offer was spurned. (Petition ¶ 151) Even if there were any factual merit underlying these allegations, pointing out negative factual consequences that may flow from the approval or disapproval of a transaction -- such as a drop in the stock price to pre-offer levels -- is not considered unlawful "coercion." *See In re John Q. Hammons Hotels Inc. S'holder Litig.*, Civ. A. No. 758-CC, 2009 WL 3165613, at *14 (Del. Ch. Oct. 2, 2009) (the "mere possibility that the situation would return to the status quo ... is not, standing alone, sufficient 'coercion' to render a Special Committee ineffective," even under entire fairness standard); *see also Williams v. Geier*, 671 A.2d 1368, 1383 (Del. 1996) (holding that it was not coercive to inform shareholders in a proxy that failure to approve a proposed transaction could lead to NYSE de-listing).[12]

Control Premium: Plaintiffs claim that the Special Committee's alleged failure to obtain some form of a separate "control premium" for shareholders in its negotiations with the MBO Group constituted gross negligence, even though it is undisputed that the $107.50 price represented an approximately 27% premium to the unaffected KMI stock price before the proposal was made. This argument -- which asks this Court first to evaluate if a control premium

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between the public disclosure of the MBO Group's initial proposal on May 28, 2006 and the shareholder vote on December 19, 2006.

[12] It is also uncontroverted that these alleged "threats" fell on deaf ears; there is absolutely no evidence that these supposed statements had any impact on the Special Committee process; in fact, the evidence is to the contrary. (Uncontroverted Fact No. 33) Moreover, the allegations surrounding the supposed threat that Richard Kinder would quit or "blow up the company" make little sense. As he explained, why would he threaten to quit or hurt a company in which he owned approximately 18% and in which most of his net worth was tied up; Richard Kinder was *not* in any position to "pick up his marbles" and go home. (Kinder Dep. Tr. at 124:21-125:20 (Allerhand Aff. Ex. E))

was paid and then use the results of that analysis to determine whether the directors breached their fiduciary duty by accepting a supposedly inadequate price -- stands the business judgment rule on its head. As Chancellor Chandler held recently in rejecting this very argument:

> [A] reviewing court properly focuses on the board's decision making process rather than making an independent business judgment of whether the consideration obtained for the shareholders was adequate. Plaintiff has reversed the order of the Court's inquiry .... [P]laintiff's allegation that the board failed to obtain a "control premium" for [its] shareholders is, at most, a thinly veiled attack on the adequacy of the price the board obtained in the sale of control. If the directors fulfilled their fiduciary duties in the sale of control, however, the Court will not second guess the business decision of the board. This process-based approach to evaluating director action in a sale of control is consistent with the business judgment rule and the foundational principles of Delaware corporate law that the directors, and not the Court, properly manage the corporation.

Wayne County, 2009 WL 2219260, at *15-16 (citations omitted). A court is not to "substitute its business judgment for that of the directors" on such matters. *Cron v. Tanner*, 171 Kan. 57, 64, 229 P.2d 1008, 1013 (1951).

* * *

In sum, Plaintiffs have raised no triable issue of fact that the KMI Board's decision to enter into the challenged merger was made with "reckless indifference" to, or "deliberate disregard" of, the other shareholders, or in any way lacked a rational business purpose. The business judgment rule thus applies and forecloses Plaintiffs' attempt to attack at trial the wisdom of that decision and the fairness of the $107.50 per share consideration received by KMI shareholders in the merger.

II. THE DECISION OF THE KMI SHAREHOLDERS TO APPROVE THE MERGER CANNOT BE CHALLENGED AND SHAREHOLDERS WHO VOTED FOR THE MERGER CANNOT NOW SEEK DAMAGES

It is undisputed that the merger required a two-thirds vote of the outstanding shares of KMI common stock, and that the MBO Group (owning approximately 21% of the shares) did *not* control the outcome of that vote. (K.S.A. § 17-6701(c)(4); Undisputed Fact No. 8, 37) It is also undisputed that KMI shareholders voted to approve the merger. (Uncontroverted Fact No. 37-39)

Plaintiffs' current attack on the vote is based entirely on alleged deficiencies in the KMI Proxy Statement mailed to shareholders on November 17, 2006 (Uncontroverted Fact No. 36) that are essentially the same ones they advanced years ago before the Special Master. At that time, Plaintiffs argued that these deficiencies threatened irreparable harm to the shareholders and that the shareholder meeting to vote on the merger should be enjoined. Special Master Walsh, however, rejected all of Plaintiffs' arguments, holding that the Proxy: (a) "contain[ed] a *full description* of the events leading up to the formulation of the MBO, the work of the Special Committee, and the negotiations that led to the tender price," (b) was "replete with financial data concerning KMI's past performance," and (c) was "*sufficient to permit shareholders to make an informed choice*." Dec. 18, 2006 Special Master Report at 19 (emphasis added).

There is no reason to revisit these determinations three and one-half years after the shareholder vote. As Special Master Walsh stated in addressing Plaintiffs' motion for class certification, "[t]o the extent that Plaintiffs continue to pursue claims for breach of the fiduciary duty of disclosure, whether directly against the management insider members of the Buyout Group or against aiders and abettors, I conclude that such claims do not appear viable under Delaware decisional law." Jan. 9, 2009 Special Master Report at 8.

Indeed, the Delaware courts have recognized that disclosure claims should be considered *before* the shareholder vote based on a Proxy alleged to be deficient as "an after-the-fact damages case is not a precise or efficient method by which to remedy disclosure deficiencies." *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 360 (Del. Ch. 2008). "[T]he appropriate course is for the Court to address disclosure claims before the shareholder vote, rather than after the vote and the challenged transaction have occurred and 'the metaphorical merger eggs have been scrambled.'" *Wayne County, supra*, 2009 WL 2219260, at *9 (citation omitted). The rationale underlying this rule is that "once this irreparable harm has occurred – *i.e.*, when shareholders *have* voted without complete and accurate information – it is, by definition, too late to remedy the harm." *Transkaryotic*, 954 A.2d at 361 (citation omitted) (emphasis in original).

Here, Plaintiffs had the opportunity to litigate their disclosure claims at the time it mattered, and they were found to be without merit. There is no reason to reconsider the same disclosure claims on the same record long after the transaction has closed.

In addition, given that full disclosure was made here, under the doctrine of acquiescence, the Class members who voted in favor of the merger should be barred from recovery. Kansas law provides that a plaintiff cannot recover for damages where there has been "'acceptance of the result of an act with an intent to ratify, and with full knowledge of all material circumstances.'" *Cherryvale Grain Co. v. First State Bank of Edna*, 25 Kan. App. 2d 825, 830, 971 P.2d 1204, 1208 (1999) (quoting *Prather v. Colo. Oil & Gas Corp.*, 218 Kan. 111, 117, 542 P.2d 297, 303 (1975)) (emphasis omitted). In the corporate context, the Delaware Supreme Court has applied this estoppel doctrine to hold that "a shareholder who votes in favor of the merger ... cannot assume a pose of approval in the voting process and then seek to litigate under a contrary position ...." *Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 176-77 (Del. 1991). So long as a shareholder casts a fully informed and uncoerced vote, acquiescence is a complete bar to that shareholder's recovery.

The Delaware Court of Chancery has refused to award damages to shareholders who voted in favor of a transaction even after determining, following a trial on the merits, that they had been cashed out at an unfair price following an unfair process. *See In re PNB Holding Co. S'holders Litig.*, No. Civ. A. 28-N, 2006 WL 2403999, at *21-33 (Del. Ch. Aug. 18, 2006). As that court explained:

> If informed, uncoerced stockholders wish to challenge a transaction, the least that can be expected of them is that they not endorse it through a yes vote in the first instance. That is, if a stockholder says "yea" in the election, she cannot say "nay" in court if her vote was informed and uncoerced. The ballot box is the most important place to register opposition, not the courthouse. Therefore, the ... stockholders who cast yes votes are barred by the doctrine of acquiescence from challenging the Merger.

Id. at *21. The very same reasoning applies to members of the Class here who voted in favor of the KMI merger. The Court accordingly should enter summary judgment dismissing the claims of all such shareholders.

III. PLAINTIFFS' ATTEMPT TO CHALLENGE THE MERGER BY FOCUSING ON THE CONDUCT OF THE MBO GROUP FAILS AS A MATTER OF LAW

Because they cannot successfully challenge the KMI directors' decision to approve the merger or the shareholder vote, Plaintiffs purport to focus their claims on the alleged misconduct of the MBO Group, first in allegedly misusing company information to make the initial $100 buyout proposal without Board permission, and second, by allegedly dealing unfairly with the Special Committee in the negotiation process. These claims too fail as a matter of law and, in any event, provide no basis for a trial on the alleged unfairness of the merger consideration.

A. Management Did Not Breach Any Fiduciary Duties In Making The Proposal

Delaware courts have been reviewing management-led buyout transactions for over two decades, yet to counsel's knowledge, no court has required that management first obtain board approval to explore an offer; nor has any court accepted Plaintiffs' contention that a management buyout approved following a special committee process constitutes a breach of fiduciary duties because the initial proposal was formulated using internal corporate information. As a court stated one month before the KMI shareholders voted to approve the merger:

> As a matter of law, there is no *per se* breach of fiduciary duty for an insider making a bid to purchase a company or its assets. Were it otherwise, every management led buyout would be a *per se* breach of fiduciary duty, yet the Delaware courts have held otherwise.

In re Radnor Holdings Corp., 353 B.R. 820, 845 (Bankr. D. Del. 2006) (citations omitted). The law permits management to submit an offer to the Board, but subjects it to the cleansing effect of a "neutral decision-making body," *Willams v. Geier*, 671 A.2d at 1379 n.23, typically a special committee, through which the company's independent directors gain control of the process and are charged with ensuring that the shareholders' interests are protected, whether by rejecting the proposal, pursuing an alternative transaction, or engaging in negotiations with the management for a better price. The law thus looks to ensure that management can formulate premium offers, a process that advances shareholder wealth maximization.

In the words of Special Master Walsh, management had the "legal right to launch" its May 28, 2006 offer even without first obtaining the Board's permission to use company information and to make the offer. Dec. 18, 2006 Special Master Report at 20.[13] In these circumstances, no breach of fiduciary duty occurs because the use of corporate information

[13] By definition, every buyout proposal made by management will rely on company information (projections, budgets, etc.) of which management obviously has full knowledge.

and other aspects of, in Plaintiffs' words, a company's "strategic machinery" (*see, e.g.*, Petition ¶¶ 2, 3, 104-120, 162, 203-204, 215) does not provide management some unfair benefit at the expense of public shareholders. Just the opposite is true. Here, the MBO Group developed a premium-to-market proposal which was expressly made *subject to* the evaluation and approval of the independent directors who then retained their own expert advisors to help them study and assess the proposal, including reviewing the exact same underlying company information available to management. And, after the offer was made, the Special Committee and the independent directors had the fiduciary responsibility to act on behalf of the public shareholders, while the MBO Group sought (on the other side of the table) to negotiate the lowest price possible -- as it was legally entitled to do under the circumstances. *See, e.g., Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 440-41, 443-44 (Del. 1996). The ultimate decision, of course, was left to the public shareholders, who decided for themselves whether the consideration offered was sufficient.

Shorn of their rhetorical flourishes, Plaintiffs' breach of fiduciary claim represents little more than a disagreement with the law as it exists today, which permits the making of buyout offers by management and assumes management will formulate such offers using what they know as managers.

B. Plaintiffs' Claims Fail Because They Cannot Show Management's Conduct Caused Any Injury

Even if Plaintiffs could show a breach -- and Defendants dispute that any breach occurred -- their claims still fail because they cannot offer any evidence that anything the MBO Group did or did not do caused the alleged harm to shareholder.

In Kansas, "[a] breach of fiduciary duty claim, like most other tort claims, includes elements of causation and damages." *Koch v. Koch Indus., Inc.*, 37 F. Supp. 2d 1231, 1241 (D. Kan. 1998), *aff'd in part, rev'd in part*, 203 F.3d 1202 (10th Cir. 2000) ("'[a]n essential element of breach of fiduciary duty is causation'"); *see also In re Stoico Rest. Group, supra*, 2000 WL 1146122, at *3 (causation is an element of a claim for breach of fiduciary duty); *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.*, No. 03-4165 (JAR), 2008 WL 53665, at *17 (D. Kan. Jan. 2, 2008) ("[t]o establish a breach of fiduciary duty," the plaintiff must show "damages proximately caused by the breach of the duty").

The burden of proving causation rests with the plaintiff. *Koch*, 37 F. Supp. 2d at 1242. "Although the question of whether a defendant's actions proximately caused a plaintiff's injury is normally a question of fact for the jury, where the facts of a case are susceptible to only one conclusion, the question is one of law and may be properly subject to summary judgment." *Lay v. State,* 23 Kan. App. 2d 211, 215, 928 P.2d 920, 924 (1996); *see also Hale v. Brown,* 287 Kan. 320, 324, 197 P.3d 438, 441 (2008) ("when all the evidence on which a party relies is undisputed and susceptible of only one inference, the question" of causation becomes one of law).

Here, to proceed to trial, Plaintiffs must put forth non-speculative, credible evidence demonstrating that the allegedly improper conduct of the MBO Group in supposedly misusing KMI information to make an "improper" buyout offer caused Plaintiffs' injury (*i.e.*, receipt of the $107.50 merger payment). Plaintiffs cannot make this showing. Even assuming that management engaged in the alleged misappropriation of KMI's "strategic machinery" before making the initial $100 buyout offer, three distinct events occurred between submission of the offer on May 28, 2006 and the closing of the merger a year later:

> (1) the Special Committee negotiated the increase to $107.50 per share and decided to recommend the merger transaction to the independent directors;
>
> (2) the independent directors unanimously voted to approve the merger; and

(3) the shareholders then overwhelmingly voted to accept the deal.

(Uncontroverted Facts Nos. 30, 31, 35, and 39) As a factual matter, had any one of these three events *not* occurred, the merger itself "would not have occurred," and the class would not have suffered the claimed injury, *i.e.*, the receipt of $107.50 per share for their KMI common stock in the merger.

Once the MBO Group submitted its proposal, the power to decide whether the proposal would go on to the next step solely resided with KMI's independent directors. The independent directors, and not the MBO Group, had the responsibility and duty to protect the interests of shareholders and to decide whether to enter into the merger agreement and recommend it to the shareholders. In other words, once the offer was made by the MBO Group, it was the Special Committee's obligation to address any alleged taint that management's actions may have caused.[14]

C. Plaintiffs Lack Standing To Assert Derivative Claims

Finally, even if Plaintiffs could show (i) that a breach of fiduciary duty occurred in connection with the alleged improper conduct of the MBO Group in employing company information to formulate the buyout offer (Petition ¶ 104), and (ii) that such a breach caused them any harm, any such claim is a classic derivative claim that they lack standing to prosecute because they are no longer KMI shareholders.

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[14] *See, e.g., McCleaf v. State*, 945 P.2d 1298, 1303 (Ariz. Ct. App. 1997) ("when a responsible actor assumes control of a situation from another, ... the rule is that the negligence of the initial actor will not be found to be a proximate cause of harms that befall after the authoritative and effectual decision as to the same matter has been made by another person empowered to make it") (citations omitted); *Conn. Jr. Rep. v. Doherty*, 478 N.E.2d 735 (Mass. App. Ct. 1985) (where individual had the ability to prevent harm to plaintiff caused by a lawyer's inadvertent change in will beneficiaries, but rather ratified earlier decision, lawyer not legally responsible for any resulting injury).

A derivative claim is one that is brought by a stockholder, on behalf of the corporation, to recover for harms done to the corporation. An individual must be a shareholder with "'a present possessory interest in the stock of the corporation'" to assert a derivative claim. *Quality Dev., Inc. v. Thorman*, 29 Kan. App. 2d 702, 705, 31 P.3d 296, 301 (2001) (citations omitted). This requirement reflects the basic tenet of corporate law that "'only a party with an on-going proprietary interest in the corporation will adequately represent the corporation's interests in a derivative action.'" *Id.* (citations omitted). Then-Justice Walsh explained the rationale underlying this rule:

> [T]his Court has held that a plaintiff must also maintain his shareholder status throughout the derivative litigation....
> ...
> Essentially, a shareholder is permitted to intrude upon the authority of the board by means of a derivative suit only because his status as a shareholder provides an interest and incentive to obtain legal redress for the benefit of the corporation. Once the derivative plaintiff ceases to be a shareholder in the corporation on whose behalf the suit was brought, he no longer has a financial interest in any recovery pursued for the benefit of the corporation.

Alabama By-Products Corp. v. Cede & Co., 657 A.2d 254, 264, 265 (Del. 1995). Whether a claim is direct or derivative turns on two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). While some Delaware courts have found certain challenges to a merger to be direct claims, those circumstances are not present here, and simply "'mentioning a merger ... does not talismanically create a direct action.'" *NYMEX*, 2009 WL 3206051, at *10 (citation omitted).

Plaintiffs' claims relating to the allegedly improper use of corporate assets (in particular KMI information) by the MBO Group constitutes a classic derivative claim. Such alleged "misuse" of corporate assets "gives rise to a derivative claim, not a class claim." *Cooke v. Oolie*, Civ. A. No. 11134, 2000 WL 710199, at *18 (Del. Ch. May 24, 2000) (holding that allegations of misappropriation of non-public company information constituted a derivative claim). Similarly, Plaintiffs' contention that management took various actions (*e.g.*, signing exclusivity agreements) allegedly designed to "deter[] other bids" and prevent shareholder "value maximization" (Petition ¶ 65) would be derivative "because the company suffers the harm, having been 'precluded from'" pursuing an alternative transaction. *NYMEX*, 2009 WL 3206051, at *9; *see also Agostino v. Hicks*, 845 A.2d 1110, 1123 (Del. Ch. 2004) (claim premised on conduct allegedly designed to preclude the company "from entering into a transaction that would have maximized the return on its assets" is derivative).

As the Lead Plaintiffs and each member of the class ceased being KMI shareholders once the merger closed on May 30, 2007 (Uncontroverted Fact Nos. 41-42), they cannot now prosecute any such claim in this action. Significantly, derivative claims were dismissed by the Texas courts for lack of standing because the plaintiffs there, who stood in the same capacity as the class members do here, were no longer KMI stockholders by reason of the merger. *City of Inkster Policeman & Fireman Ret. Sys. v. Kinder*, Case No. 2006-52653, 2008 WL 4360221 (Tex. Dist. Ct.- Harris County Feb. 21, 2008), *aff'd*, No. 01-08-00308-CV, 2009 WL 1562909 (Tex. App.-Hous. June 4, 2009). Here, too, the claims are derivative and Plaintiffs lack standing to pursue the claims.

CONCLUSION

For the foregoing reasons, the Management Defendants respectfully request that the Court grant their motion for summary judgment in its entirety, dismissing all of Plaintiffs' claims against them in this action with prejudice.

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Respectfully submitted,

WEIL, GOTSHAL & MANGES LLP

By: ______, R. Patrick Riordan, #15518
for Joseph S. Allerhand (Admitted *Pro Hac Vice*)
Seth Goodchild (Admitted *Pro Hac Vice*)
Michael J. Firestone (Admitted *Pro Hac Vice*)
Tamika Montgomery (Admitted *Pro Hac Vice*)
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

BERKOWITZ, OLIVER, WILLIAMS
SHAW & EISENBRANDT, LLP,
James L. Eisenbrandt (KS #06839)
Kirk A. Peterson (KS #14862)
2600 Grand, Suite 1200
Kansas City, MO 64108
Telephone: (816) 561-7007
Facsimile: (816) 561-1888

– and –

PALMER, LEATHERMAN, WHITE & DALTON, LLP
Jerry R. Palmer (KS #6362)
2348 SW Topeka Blvd.
Topeka, KS 66611-1286
Telephone: (785) 233-1836
Facsimile: (785) 233-3703

Attorneys for Defendants Richard D. Kinder, C. Park Shaper, Steven J. Kean, Kimberly Dang, David Kinder, James Street, and Joseph Listengart

CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of July, 2010, I caused a true and correct copy of the foregoing to be sent via electronic mail to:

John R. Hamilton
HAMILTON, LAUGHLIN, BARKER, JOHNSON & WATSON
3649 SW Burlingame Rd., Ste. 200
Topeka, Kansas 66611
jhamilton@hamiltonlaughlin.com

Diane A. Nygaard
THE NYGAARD LAW FIRM
11050 Roe Ave., Suite 212
Overland Park, Kansas 66211
diane@nygaardlaw.com

Pamela S. Tikellis
Robert J. Kriner, Jr.
A. Zachary Naylor
Scott M. Tucker
CHIMICLES & TIKELLIS LLP
222 Delaware Avenue, Suite 1100
P.O. Box 1035
Wilmington, Delaware 19899
pamelatikellis@chimicles.com
robertkriner@chimicles.com
zacharynaylor@chimicles.com
scotttucker@chimicles.com

Randall J. Baron
A. Rick Atwood
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Ste. 1900
San Diego, CA 92101
randyb@rgrdlaw.com
ricka@rgrdlaw.com

R. Patrick Riordan
GAY, RIORDAN, FINCHER, MUNSON & SINCLAIR, PA
3500 SW Fairlawn, Suite 210
Topeka, Kansas 66614
riordan@grfmslaw.com

Amelia T.R. Starr
Russell Capone
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
amelia.starr@dpw.com
russell.capone@davispolk.com

Katie M. Moore
ARMSTRONG TEASDALE LLP
2345 Grand Boulevard, Ste. 2000
Kansas City, Missouri 64108
kmoore@armstrongteasdale.com

Michael Thompson
Lyndsey J. Conrad
HUSCH BLACKWELL SANDERS LLP
4801 Main Street, Ste. 1000
Kansas City, MO 64112
michael.thompson@huschblackwell.com
lyndsey.conrad@huschblackwell.com

Kenneth B. Forrest
Paul K. Rowe
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street Manhattan, NY 10019
kbforrest@wlrk.com
pkrowe@wlrk.com

J. Christian Word
David A. Becker
Michael Songer
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
christian.word@lw.com
david.becker@lw.com
michael.songer@lw.com

James L. Eisenbrandt
BERKOWITZ, OLIVER, WILLIAMS, SHAW & EISENBRANDT, LLP
4200 Somerset Dr., Ste. 150
Prairie Village, KS 66208
jeisenbrandt@bowse-law.com

Kirk A. Peterson
BERKOWITZ, OLIVER, WILLIAMS, SHAW & EISENBRANDT, LLP
2600 Grand Blvd., Ste. 1200
Kansas City, MO 64108
kpeterson@bowse-law.com

Jerry Palmer
Gary White
PALMER, LEATHERMAN, WHITE & DALTON, LLP
2348 SW Topeka Blvd.
Topeka, KS 66611
palmerjer@jpalmerlaw.com
gwhite@jpalmerlaw.com

Joseph S. Allerhand
Seth Goodchild
Michael Firestone
WEIL GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
joseph.allerhand@weil.com
seth.goodchild@weil.com
michael.firestone@weil.com

With chambers copies hand-delivered to:

The Honorable David E. Bruns
District Court Judge
Division 12
Shawnee County Courthouse
200 SE 7th Street
Topeka, KS 66603

____