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Case No. 6949-CS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE EL PASO CORPORATION SHAREHOLDER LITIGATION	)	Consolidated C.A. No. 6949-CS

PLAINTIFFS' REPLY TO OBJECTIONS TO MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND PLAN OF ALLOCATION, CERTIFICATION OF THE CLASS, AND AN AWARD OF ATTORNEYS' FEES

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PRELIMINARY STATEMENT

Plaintiffs have moved for final approval of a $110 million settlement (the "Settlement") of a class action brought on behalf of shareholders of El Paso Corporation ("El Paso" or the "Company"), and for an award of attorneys' fees amounting to approximately 23.6% of the common fund created by the Settlement. While notice of the proposed Settlement and attorneys' fee request was mailed to over 256,500 El Paso shareholders and/or nominee holders of El Paso shares, only four objections have been received. None of these objections warrant denial of either the proposed Settlement or Co-Lead Counsel's request for attorneys' fees.

FACTUAL BACKGROUND

On November 8, 2012, Plaintiffs moved for final approval of a proposed Settlement of a class action on behalf of El Paso shareholders, alleging that the El Paso board of directors (the "Board") breached its fiduciary duties in connection with the sale of El Paso to Kinder Morgan, Inc. ("KMI") (the "Merger"), and that KMI and the Board's financial advisor, Goldman Sachs & Co. ("Goldman"), aided and abetted the Board's breaches. Under the terms of the Settlement, defendants will pay $110 million, which will be shared among the El Paso shareholders who held their shares on the effective date of the Merger. For their efforts in securing this $110 million monetary recovery, Co-Lead Counsel seek an award of $26 million in attorneys' fees, inclusive of approximately $700,000 in litigation expenses.

Copies of the Notice of Proposed Settlement of Class Action, Settlement Hearing, and Right to Appear (the "Notice") were mailed to more than 256,500 potential Class Members and/or brokers and other nominee holders. *See* Affidavit of Stephen J. Cirami

Regarding (A) Mailing of the Notice and Claim Form; and (B) Publication of the Summary Notice, at ¶¶ 2-5.[1] The Court-approved Summary Notice was published in *The Investor's Business Daily* and transmitted over *PR Newswire* on October 11, 2012. *Id.* at ¶ 7. The deadline for Class members to object to the Settlement passed on November 23, 2012.

Despite the substantial number of Notices mailed and the widespread publication of the Settlement, only four objections – each from a retail investor – were received. The objections are as follows:

- Patricia E. Clark ("Ms. Clark") objected on the grounds that "the notice does not include a 'realistic time-window for ownership other than a one-day window'";[2]

- James W. Sturrock ("Mr. Sturrock"), who held 37 shares of El Paso stock individually and an additional 37 shares jointly with his wife, objects to (1) the $10 *de minimis* provision which results in no payments being made to El Paso shareholders who would receive less than $10; and (2) the amount of the Settlement, which he believes is insufficient to hold defendants accountable for their actions;[3]

- Mathis B. Bishop and Catherine O. Bishop (the "Bishops"), who together held thirteen shares of El Paso stock, (1) object to the plan of allocation to the extent that it excludes Class members who sold their El Paso shares before the effective date of the Merger;[4] and (2) object to any award of attorneys' fees, because Co-Lead Counsel purportedly "have unfairly and

[1] The Cirami Affidavit was filed on November 8, 2012, in connection with Plaintiffs' Motion For Final Approval Of Proposed Settlement And Plan Of Allocation, Certification Of The Class, And An Award of Attorneys' Fees (the "Approval Motion").

[2] Ms. Clark's objection was received in advance of the filing of the Approval Motion and was addressed on pages 18-20 therein.

[3] A true and correct copy of Mr. Sturrock's objection is attached as Exhibit A to the accompanying Supplemental Declaration of Megan D. McIntyre (the "McIntyre Supp. Decl.").

[4] Ms. Clark objected to the Plan of Allocation on the same grounds. As that objection was addressed in the Approval Motion, it will not be re-addressed in detail herein.

improperly favored the Class members that held shares as of May 25, 2012 at the expense of those that did not";[5] and

- Austin M. O'Toole ("Mr. O'Toole"), who held 19,800 El Paso shares, objects on the grounds that (1) the Notice was materially misleading because it did not disclose an estimated per share recovery and purportedly failed to disclose the amount of attorneys' fees sought; and (2) Co-Lead Counsel allegedly have a conflict of interest, because they were involved in negotiating their fee at the same time they were "purport[ing] to act on behalf of and in the best interest of the class members."[6]

The small number of objections weighs heavily in favor of approval of the Settlement, the Plan of Allocation, and Co-Lead Counsel's request for an award of attorneys' fees. Moreover, as discussed below, none of these objections has any merit.

ARGUMENT

I. THE $10 MINIMUM PAYMENT THRESHOLD IS FAIR AND APPROPRIATE

Mr. Sturrock objects to the $10 *de minimis* payment threshold. A minimum of this sort is a common and necessary feature of class action allocation plans. These provisions benefit shareholder classes as a whole by eliminating payments to claimants as to whom the cost to the fund of processing claims, printing and mailing checks, and related follow up would be disproportionate in relation to the value of their claim. Such minimum payment thresholds have been upheld repeatedly by other courts, and should be upheld here as well. *See, e.g., Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328-29 (3d Cir. 2011) (affirming district court's decision to approve $10 minimum over objections; "As other courts have observed, '*de minimis* thresholds for payable claims are beneficial to

[5] A true and correct copy of the Bishops' objection is attached to the McIntyre Supp. Decl. as Exhibit B.

[6] A true and correct copy of Mr. O'Toole's objection is attached to the McIntyre Supp. Decl. at Exhibit C.

the class as a whole since they save the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs and courts have frequently approved such thresholds, often at $10.'") (citation omitted).[7] The $10 minimum payment threshold is perfectly appropriate and should not be a bar to approval of the proposed Plan of Allocation.

II. THE $110 MILLION COMMON FUND CREATED BY THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

Mr. Sturrock also takes issue with the size of the $110 million settlement fund, which he characterizes as "meager" and a mere "slap-on-the-wrist," particularly in light of Goldman's substantial revenues. As set forth in the Approval Motion, however, this $110 million Settlement stands among the largest recoveries in the long history of this Court. Further, while Goldman may be a "deep pocket," the depth of its pockets in relation to the amount of the Settlement is no reason to reject the Settlement, for several reasons. First, in ruling on Plaintiffs' motion for a preliminary injunction, this Court

[7] *See also In re Mutual Funds Inv. Litig.*, 2011 WL 1102999 (D. Md. Mar. 23, 2011) (overruling objection to $10 minimum payment threshold); *In re Am. Bus. Fin. Servs. Inc. Noteholders Litig.*, 2008 WL 4974782, at *9 (E.D. Pa. Nov. 21, 2008) (upholding $10 minimum over objections); *In re Merrill Lynch & Co. Res. Reports Sec. Litig.*, 2007 WL 4526593, at *12 (S.D.N.Y. Dec. 20, 2007) (approving $50 minimum distribution amount and noting that "courts have approved minimum payouts in class action settlements in order to foster the efficient administration of the settlement"); *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007) (approving $5 *de minimis* threshold and noting that "courts have frequently approved such thresholds, often at $10"); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1268 (D. Kan. 2006) ($25 minimum distribution amount approved); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) (approving $10 *de minimis* provision and noting that "[c]lass counsel are entitled to use their discretion to conclude that, at some point, the need to avoid excessive expense to the class as a whole outweighs the minimal loss to the claimants who are not receiving their de minimis amounts of relief"); 3 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 10:14, at 512 n.12 (4th ed. 2002) ("most distribution schemes for class recovery provide a minimum threshold amount of a claim for eligibility to participate").

expressed skepticism about Plaintiffs' ability to prevail on their only claim against Goldman – an aiding and abetting claim which the Court characterized as notoriously difficult to prove. *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 448-49 (Del. Ch. 2012). Second, Goldman and the other defendants adamantly denied liability throughout the duration of this action and hotly contested Plaintiffs' allegations. Indeed, even at the settlement stage, Goldman felt compelled to make a rather remarkable submission that disputes Plaintiffs' characterization of the evidence, and in which Goldman contends that it would have ultimately prevailed in its defense against Plaintiffs' claims. While Plaintiffs disagree, and believe the facts supporting this case and surrounding the Settlement undermine some of the indignation in Goldman's submission, Goldman would surely prove a vigorous adversary. Third, the Settlement was reached following extensive arms-length negotiations between some of the most formidable mergers and acquisitions litigators in the nation, conducted under the auspices of former Judge Daniel Weinstein. Fourth, Plaintiffs' insistence that Goldman – at a minimum – give up its entire fee in relation to the Merger is a testament to Plaintiffs' resolve in seeking to hold Goldman accountable for its actions.

Under these circumstances, the $110 million common fund is fair, reasonable, and adequate.

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

The Bishops assert that Co-Lead Counsel are not entitled to any attorneys' fees, because they purportedly favored those Class members who held El Paso stock on the effective date of the Merger to the detriment of those who sold their shares before the Merger. As noted in the Approval Motion, however, the proposed Plan of Allocation is

fair and reasonable under the circumstances. Because Plaintiffs' claims were for damages suffered by shareholders as a result of the Board's failure to maximize the Merger consideration – *i.e.*, the receipt of inadequate consideration for the El Paso shares that were exchanged in the Merger – there is nothing unfair or improper about permitting only those El Paso shareholders who actually received the challenged consideration to share in the recovery. While alternative plans of allocation could be supported here or in other cases, there is no basis to reject the good faith and non-conflicted judgment of Co-Lead Counsel in connection with the Plan of Allocation.

As set forth in the Approval Motion, the fees requested by Co-Lead Counsel are well within the range of fees awarded in similar actions. Accordingly, the Bishops' objection is no bar to awarding Co-Lead Counsel the full fees requested.

IV. THE NOTICE IS NOT MATERIALLY MISLEADING OR INCOMPLETE

Mr. O'Toole claims that the Notice is materially misleading or incomplete because it (1) fails to disclose an estimated per-share recovery and (2) fails to disclose the amount of the attorneys' fees Co-Lead Counsel are requesting.

First, Mr. O'Toole is simply wrong in his assertion that a per-share estimate was either possible or had to be disclosed. While Mr. O'Toole correctly notes that only shareholders who held El Paso stock as of May 25, 2012 will share in the recovery and that the number of shares outstanding was a "known quantity," that does not mean that any ***reasonably reliable*** estimate of a per-share recovery was possible. Numerous unknown variables will determine the per-share recovery to El Paso's shareholders, including: (1) how many of the El Paso shares outstanding on May 25, 2012 were held by

persons who are otherwise excluded from the Class;[8] (2) how many otherwise eligible Class members have a claim exceeding the $10 minimum threshold; (3) how many Class members actually submit claims; and (4) the amount of the claims administration costs (which will depend, in part, on how many claims are submitted).

Any attempt to quantify a per-share recovery would have been at best a guess, and the law does not require this type of speculation in a settlement notice. *See, e.g., In re Phila. Stock Exchange, Inc.*, 945 A.2d 1123, 1135-36 & n.13 (Del. 2008) (affirming rejection of objection based on failure to disclose the amount of individual class member recoveries where those amounts were not yet known, and finding settlement notice adequate); *Frazer v. Worldwide Energy Corp.*, 1991 WL 74041, *5 (Del. Ch. May 2, 1991) (rejecting objection that settlement notice failed to disclose how settlement proceeds would be allocated, where "any allocation determination would be uninformed" and there was no evidence that non-disclosure precluded shareholders from making informed decisions). For this reason, approved notices frequently include no estimate of a per-share recovery. *See, e.g., id.*; *In re Del Monte Foods Co. S'holder Litig.*, C.A. No.

[8] The following are excluded from the Class: (i) the Individual Defendants and each member of their Immediate Families; (ii) El Paso (including El Paso Corporation) and the Kinder Morgan Defendants, their respective parents, subsidiaries, and affiliates, as well as each Person who served as a Section 16 Officer, director, partner or member of El Paso (including El Paso Corporation) or any of the Kinder Morgan Defendants during the Class Period and each member of their Immediate Families; (iii) the Goldman Defendants and Morgan Stanley and their respective parents, subsidiaries, and affiliates (including, without limitation, the GS Entities), as well as each Person who served as a Section 16 Officer, director (including managing directors), partner or member of any of the Goldman Defendants or Morgan Stanley during the Class Period and each member of their Immediate Families; and (iv) any Person in which any Defendant or El Paso (including El Paso Corporation) has or had a Controlling Interest.

6027-VCL, Notice of Pendency And Proposed Settlement Of Class Action ($89.4 settlement fund; no per-share estimate provided); *Louisiana Mun. Employees' Ret. Sys. v. Fertitta*, C.A. No. 4339-VCL, Notice Of Proposed Settlements Of Shareholder Litigation, Settlement Fairness Hearing, And Applications For Attorneys' Fee And Reimbursement Of Litigation Expenses ($14.5 million recovery for 2008 Transaction Subclass; no per-share estimate provided).

Moreover, to the extent that Mr. O'Toole suggests that Co-Lead Counsel should have simply divided the settlement amount by the number of outstanding shares and reported the result in the Notice, any shareholder can readily perform that calculation. The Notice discloses that the settlement amount is $110 million, and the number of outstanding shares is publicly available (772,860,126 as of February 20, 2012). *See* El Paso Corp. Form 10-K filed on Feb. 27, 2012 (McIntyre Supp. Decl. Ex. D).[9] Dividing these figures yields a gross recovery of approximately 14 cents per share (though the actual amount received will be affected by the factors described above). A settlement notice is "not required to eliminate all occasion for initiative and diligence on the part of the stockholders," and need not disclose information that is publicly available. *Braun v. Fleming-Hall Tobacco Co.*, 92 A.2d 302, 309 (Del. 1952) (settlement notice was

[9] One of the other objectors, Mr. Sturrock, appears to have had no difficulty ascertaining the approximate number of shares outstanding. *See* McIntyre Supp. Decl. Ex. A ("Even an idiot realizes that with a float of about 700M shares …"). The number of outstanding shares was also stated in paragraph 150 of Plaintiffs' Consolidated Complaint (771,852,913 shares as of October 13, 2011), which has been posted at all relevant times on the El Paso settlement website (www.elpasoshareholderlitigation.com), and on page 21 of Plaintiffs' brief in support of the Settlement (nearly 773 million shares as of February 20, 2012), which has been posted on that website since November 9, 2012. McIntyre Supp. Decl. ¶ 4.

sufficient where it fairly described the settlement and where allegedly omitted details were publicly available).[10]

Second, Mr. O'Toole's claim that Class members did not have sufficient information about the amount of fees Co-Lead Counsel would request is simply wrong. The Notice disclosed that Co-Lead Counsel would seek a fee of up to 24% of the Settlement fund – placing, as Mr. O'Toole himself calculated, a $26,400,000 cap on the amount of the fees to be requested. This is sufficient information for Class members to decide whether to object, and indeed many approved class action notices contain similar language concerning the amount of attorneys' fees to be requested. *See, e.g., In re The Pepsi Bottlers Group S'holders Litig.*, C.A. No. 4526-VCS, Notice Of Pendency Of Class Action, Proposed Class Action Determination, Proposed Settlement Of Class Action, Settlement Hearing, And Right To Appear (stating that the attorneys would request fees "not to exceed" $7,775,000); *In re Del Monte Foods Co. S'holder Litig.*, C.A. No. 6027-VCL, Notice of Pendency And Proposed Settlement Of Class Action (stating that attorneys would request fees in an amount "not to exceed $22,300,000"); *Louisiana Mun. Employees' Ret. Sys. v. Fertitta*, C.A. No. 4339-VCL, Notice Of Proposed Settlements Of Shareholder Litigation, Settlement Fairness Hearing, And Applications For Attorneys' Fee And Reimbursement Of Litigation Expenses (stating that attorneys would request

[10] *See also Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 71 (Del. 1989) (disclosure not required where information "would not have altered in a significant way the 'total mix' of information otherwise available to the … shareholders through publicly available documents"); *Geller v. Tabas*, 462 A.2d 1078, 1080-81 (Del. 1983) ("The fact that the notice described the challenged investments in terms of the number of U.S. Treasury Bond contracts rather than in terms of their dollar values cannot be considered misleading when a stockholder could easily have found out the value of a U.S. Treasury Bond.").

fees "not to exceed $8,000,000" in connection with 2009 Deal Settlement and "not to exceed 25% of the Settlement Fund" in connection with 2008 Class Settlement).[11]

The Notice was not in any respect incomplete or misleading.

V. CO-LEAD COUNSEL DO NOT HAVE A CONFLICT OF INTEREST

Mr. O'Toole's claim that Co-Lead Counsel have an "inherent conflict of interest" because they negotiated the amount of attorneys' fees they would request while representing the Class is baseless. The amount of Co-Lead Counsel's fee was never discussed or negotiated with defense counsel. *See* McIntyre Supp. Decl. at ¶ 3. Because this is a common fund case, the fee will come out of the common fund and the defendants have no economic interest in the amount of the fee award. When negotiating the Settlement, Co-Lead Counsel focused their full attention on achieving the best possible result for El Paso's shareholders. *Id.* Mr. O'Toole has not identified any conflict of interest that would warrant the denial of attorneys' fees.[12]

[11] Mr. O'Toole's suggestion that the Court appoint an "independent reviewer" to examine Co-Lead Counsel's fee request and make a "recommendation" to the Court on an appropriate fee is unnecessary. This Court is more than equipped to review and evaluate, as it has in countless cases, Co-Lead Counsel's fee request.

[12] Mr. O'Toole incorrectly contends that "Delaware Co-Lead Counsel are proposing that Plaintiffs' counsel collectively receive the lion's share of the settlement." The requested fees (inclusive of expenses) amount to ***less than a quarter*** of the Settlement amount.

CONCLUSION

For the reasons stated herein and in Plaintiffs' November 8, 2012 submission, the objections lack merit and the Court should approve the Settlement, the Plan of Allocation, and Co-Lead Counsel's request for attorneys' fees.

Dated: November 28, 2012

Respectfully submitted,

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