IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

GOLDMAN SACHS'S MEMORANDUM OF LAW IN CONNECTION WITH SETTLEMENT

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Dated: November 16, 2012

STATEMENT IN CONNECTION WITH SETTLEMENT

Defendants The Goldman Sachs Group, Inc., and Goldman, Sachs & Co. ("Goldman Sachs") submit this brief statement in connection with the proposed settlement of this action. While Goldman Sachs has entered into the Settlement to resolve this litigation and therefore supports its approval by the Court, it denies wrongdoing or liability in all respects and reserves all rights to contest any facts or legal analyses set forth in Plaintiffs' submission in the event that, for any reason, the Settlement is not approved and litigation of the claims herein resumes.

While Goldman Sachs disagrees with much of Plaintiffs' factual description and the legal analysis in their submission, we take this occasion in particular to respond briefly to their position that the record establishes that, in its role as an advisor to El Paso Corporation ("El Paso"), Goldman Sachs tainted the cleansing effect of El Paso's retention of a second financial advisor, Morgan Stanley & Co. LLC ("Morgan Stanley"). Specifically, Plaintiffs assert that "Goldman saw to it that Morgan Stanley had its own financial incentive to favor the Merger over the Spin-Off" (Brief at 1), and "Goldman skewed Morgan Stanley's incentives in favor of the KMI deal over the Spin-Off by refusing to waive the exclusivity provision in its Spin-Off advisory engagement" (*id.* at 5).

While the Court's preliminary injunction ruling expressed concern that Goldman Sachs had "tainted the cleansing effect" of Morgan Stanley, *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432 at 442 (Del. Ch. 2012), the more fully developed post-

preliminary injunction record has in fact confirmed that Goldman Sachs had no involvement at all in the fee negotiations between El Paso and Morgan Stanley, and that El Paso was free to pay Morgan Stanley anything it wished.[1] As the Court noted in its ruling, Goldman Sachs was asked about its willingness to waive its exclusivity as to its role as financial advisor on the previously announced Spin-Off transaction, and without being presented with any specifics as to the reasoning underlying the request or being pressed further by El Paso, the firm's lead banker declined as a commercial matter. That limited interaction on the narrow commercial question posed is quite different, however, from affirmatively "interven[ing]" (*id*. at 434), by preventing El Paso from paying Morgan Stanley as it saw fit, or otherwise playing an active role in the structuring or negotiation of Morgan Stanley's fees.

Indeed, no evidence has emerged to suggest that Goldman Sachs ever attempted to exert any control over El Paso's compensation structure or overall fee with Morgan Stanley. El Paso was free to compensate Morgan Stanley any way it deemed appropriate, including with a fee structure that would not have been dependent on the

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[1] At argument, the Court asked whether Goldman Sachs had taken the position with El Paso that "If you do the spin, we are the sole advisor. You pay us and you pay only us. Right? Correct?" Goldman Sachs' counsel erroneously responded "Correct." (Prelim. Inj. Hr'g Tr. 247:23 – 248:3.) In fact, Goldman Sachs's lead banker declined to waive the firm's exclusivity as financial advisor on a spin-off, but El Paso was still free to pay Morgan Stanley however it wished based on any outcome or transaction. The banker's commercial reaction merely reflected that the Spin-Off had previously been announced with Goldman Sachs as financial advisor, he may have believed he was being asked strictly about league table credit because there was obviously nothing stopping El Paso from paying Morgan Stanley based on any outcome, and El Paso did not pursue the matter further.

completion of a KMI merger, rather than the contingent fee to which both El Paso and Morgan Stanley agreed. (Retainer fees and/or "independence fees" which provide for a fee in the event that a sale is not consummated are common in advisory engagements involving an unsolicited offer.) As one of Morgan Stanley's lead bankers testified at his deposition, Morgan Stanley understood from El Paso management that, if the Spin-Off was consummated instead of the KMI merger, Morgan Stanley would play a meaningful role in that transaction. (*See* Cox Dep. at 44.)

In short, the more fully developed record shows that, while the August 25, 2011 Engagement Letter between Goldman Sachs and El Paso gave Goldman Sachs an exclusive role as financial advisor for the Spin-Off, it was never used by Goldman Sachs (nor could it be) to preclude El Paso from agreeing to pay another advisor as it saw fit. Without evidence of such an affirmative "tainting," Plaintiffs' "aiding and abetting" claim against Goldman Sachs was even more tenuous than this Court observed when it recognized that Plaintiffs' "aiding and abetting" claim against Goldman Sachs was "at best, doubtful." *In re El Paso Corp. S'holder Litig.*, 41 A.3d at 448.

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