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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PLAINTIFFS' BRIEF IN SUPPORT OF 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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 3

A. Background Of The Litigation 3

B. Overview Of The Litigation 6

C. Negotiation And Settlement Terms 10

ARGUMENT 13

I. THE SETTLEMENT SHOULD BE APPROVED AS FAIR, REASONABLE AND ADEQUATE 13

A. Balancing The Strengths Of Plaintiffs' Claims And The Risks Of Continued Litigation Against The Benefits Secured For The Class 14

B. The Settlement Was Reached Through Arm's-Length Negotiations With The Assistance Of A Mediator 16

C. The Experience And Opinion Of Co-Lead Counsel And Their Clients Weigh In Favor Of Approving The Settlement 17

II. THE PLAN OF ALLOCATION SHOULD BE APPROVED 17

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED 20

A. Class Certification Is Proper Under Court Of Chancery Rule 23(a) 20

1. Numerosity 21

2. Commonality 22

3. Typicality 23

4. Adequacy of Representation 24

B. Class Certification Is Proper Under Court of Chancery Rules 23(b)(1) and 23(b)(2) 25

IV. THE REQUEST FOR AN AWARD OF ATTORNEYS' FEES SHOULD BE APPROVED 27

A. The Litigation Conferred Substantial Benefits On The Class 28

B. Counsel Expended Substantial Effort Litigating This Action On A Fully Contingent Basis....................29

C. The Standing And Ability Of Counsel....................31

CONCLUSION....................32

TABLE OF AUTHORITIES

Page(s)

CASES

In re Abercrombie & Fitch Co. S'holders Derivative Litig.,
886 A.2d 1271 (Del. 2005) 29

In re ACS S'holders Litig.,
C.A. No. 4940-VCP (Del. Ch. Oct. 22, 2009) (Order) 22, 24

In re ACS S'holders Litig.,
C.A. No. 4940-VCP (Del. Ch. Aug. 24, 2010) (Order) 28

Americas Mining Corp. v. Theriault,
51 A.3d 1213 (Del. 2012) 27

In re Atlas Energy Res. LLC Unitholders Litig.,
C.A. No. 4589-VCN (Del. Ch. May 14, 2012) (Order) 19

Barkan v. Amsted Indus., Inc.,
567 A.2d 1279 (Del. 1989) 13

In re Celera Corp. S'holder Litig.,
C.A. No. 6304-VCP, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012) 26

In re Chaparral Res., Inc. S'holders Litig.,
C.A. No. 2001-VCL (Del. Ch. Mar. 13, 2008) (Order) 29

CME Group, Inc. v. Chicago Bd. Options Exchange, Inc.,
C.A. No. 2369-VCN, 2009 WL 1547510 (Del. Ch. Jun. 3, 2009) 18

In re Compellent Tech., Inc. S'holder Litig.,
C.A. No. 6084-VCL (Del. Ch. Jan. 19, 2011) (Order) 21, 24

In re Countrywide Corp. S'holders Litig.,
C.A. No. 3464-VCN, 2009 WL 2595739 (Del. Ch. Aug. 24, 2009) 26

In re Crocker S'holders Litig.,
C.A. No. 7405, 1985 WL 11550 (Del. Ch. May 21, 1985) 17

In re Del Monte Foods Co. S'holder Litig.,
C.A. No. 6027-VCL (Del. Ch. Dec. 1., 2011) (Order) 19, 24

In re Del Monte Foods Co. S'holder Litig.,
C.A. No. 6027-VCL (Del. Ch. Dec. 1., 2011) (Transcript) 28

In re Delphi Fin. Group S'holder Litig.,
C.A. No. 7144-VCG (Del. Ch. July 31, 2012) (Order)....28

Deutschman v. Beneficial Corp.,
132 F.R.D. 359 (D. Del. 1990) 21

In re Digex, Inc. S'holder Litig.,
C.A. No. 18336 (Del. Ch. Apr. 6, 2001) (Transcript)....30

Dragon v. Perelman,
C.A. No. 15101 (Del. Ch. Aug. 29, 1997) (Transcript) 31

Dubroff v. Wren Holdings, LLC,
C.A. No. 3940-VCN, 2010 WL 3294219 (Del. Ch. Aug. 20, 2010) 22, 23

In re El Paso Corp. S'holder Litig.,
41 A.3d 432 (Del. Ch. 2012)....9, 15, 16

Emerald Partners v. Berlin,
564 A.2d 670 (1989) 24

Emerald Partners v. Berlin,
C.A. No. 9700, 1991 WL 244230 (Del. Ch. Nov. 15, 1991)....22

Farley v. Baird, Patrick & Co., Inc.,
1992 WL 321632 (S.D.N.Y. Oct. 28, 1992) 21

In re Fox Entm't Group, Inc. S'holders Litig.,
C.A. No. 1033-CC (Del. Ch. Sept. 19, 2005) (Transcript) 30

Franklin Balance Sheet Inv. Fund v. Crowley,
C.A. No. 888-VCP, 2007 WL 2495018 (Del. Ch. Aug. 30, 2007)....30

Frazer v. Worldwide Energy Corp.,
C.A. No. 8822, 1990 WL 61192 (Del. Ch. May 3, 1990) 23, 24

Frazer v. Worldwide Energy Corp.,
C.A. No. 8822, 1991 WL 74041 (Del. Ch. May 2, 1991) 16

Garfinkel v. Memory Metals, Inc.,
695 F. Supp. 1397 (D. Conn. 1988)....22

Gen. Tel. Co. of S.W. v. Falcon,
457 U.S. 147 (1982)....24

In re Genentech, Inc. S'holder Litig.,
C.A. No. 3911-VCS (Del. Ch. July 9, 2009) (Transcript) 30

In re GSI Commerce, Inc. S'holders Litig.,
C.A. No. 6346-VCN (Del. Ch. Nov. 15, 2011) (Order) 28

Hynson v. Drummond Coal Co., Inc.,
601 A.2d 570 (Del. Ch. 1991) 23

In re Intek Global Corp. S'holders Litig.,
C.A. No. 17207 (Del. Ch. Apr. 24, 2000) (Order) 29

In re J. Crew Group, Inc. S'holders Litig.,
C.A. No. 6043-CS (Del. Ch. Dec. 16, 2011) (Order) 19

Kahn v. Sullivan,
594 A.2d 48 (Del. 1991) 13

Krinsky v. Helfand,
156 A.2d 90 (Del. 1959) 13

Leon N. Weiner & Assocs., Inc. v. Krapf,
584 A.2d 1220 (Del. 1991) 22, 23

In re Lin Broadcasting Corp. S'holders Litig.,
C.A. No. 14039 (Del. Ch. Sept. 15, 1995) (Order) 31

Louisiana Mun. Police Employees' Ret. Sys. v. Crawford,
C.A. No. 2635 (Del. Ch. June 9, 2007) (Order) 30

Marie Raymond Revocable Trust v. MAT Five, LLC,
980 A.2d 388 (Del Ch. 2008) 29

Marshall v. Elec. Hose & Rubber Co.,
68 F.R.D. 287 (D. Del. 1975) 21

In re Mellon Bank S'holders Litig.,
120 F.R.D. 35 (W.D. Pa. 1988) 21

In re Mobile Commc'ns Corp. of Am., Inc.,
C.A. No. 10627, 1991 WL 1392 (Del. Ch. Jan. 7, 1991) 26

In re NASDAQ Market-Makers Antitrust Litig.,
94 Civ. 3996 (RWS), 2000 WL 37992 (S.D.N.Y. Jan. 18, 2000) 18

In re NCS Healthcare S'holders Litig.,
C.A. No. 19786, 2003 WL 21384633 (Del. Ch. May 28, 2003) 30

Neponsit Inv. Co. v. Abramson,
405 A.2d 97 (Del. 1979) 17

Nottingham Partners v. Dana,
564 A.2d 1089 (Del. 1989) 13, 25

Oliver v. Boston Univ.,
C.A. No. 16570-NC, 2002 WL 385553 (Del. Ch. Feb. 28, 2002)..............................25

In re Plains Res. Inc. S'holders Litig.,
C.A. No. 071-N, 2005 WL 332811 (Del. Ch. Feb. 4, 2005).................................27, 29

Polk v. Good,
507 A.2d 531 (Del. 1986) 13, 17

Prezant v. De Angelis,
636 A.2d 915 (Del. 1994) 20

Rome v. Archer,
197 A.2d 49 (Del. 1964) 17

Ryan v. Gifford,
C.A. No. 2213-CC, 2009 WL 18143 (Del. Ch. Jan. 2, 2009)..........................13, 17, 29

Schultz v. Ginsburg,
965 A.2d 661 (Del. 2009) 17

Seinfeld v. Coker,
847 A.2d 330 (Del. Ch. 2000)...28, 29

Singer v. Magnavox Co.,
C.A. No. 4929, 1978 WL 4651 (Del. Ch. Dec. 14, 1978) 23

Sugarland Indus., Inc. v. Thomas,
420 A.2d 142 (Del. 1980) 27, 28

In re Talley Indus., Inc. S'holders Litig.,
C.A. No. 15961, 1998 WL 191939 (Del. Ch. Apr. 13, 1998)....................................24

Tandycrafts, Inc. v. Initio Partners,
562 A.2d 1162 (Del. 1989) 27

In re TD Banknorth S'holders Litig.,
C.A. No. 2557-VCL (Del. Ch. June 25, 2009) (Order) 28

In re Telecommc'ns, Inc. S'holders Litig.,
C.A. No. 16470-NC (Del. Ch. Feb. 1, 2007) (Order) 29

In re Telecorp PCS, Inc. S'holders Litig.,
C.A. No. 19262 (Del. Ch. Aug. 20, 2003) (Order) 29

In re Triarc Cos., Inc. Class & Deriv. Litig.,
791 A.2d 872 (Del. Ch. 2001)..13

Turner v. Bernstein,
768 A.2d 24 (Del. Ch. 2000)...23, 26

Van de Walle v. Salomon Bros., Inc.,
C.A. No. 9894, 1997 WL 633288 (Del. Ch. Oct. 2, 1997)..24

White v. National Football League,
822 F. Supp. 1389 (D. Minn. 1993)...18

Zimmerman v. Home Shopping Network, Inc.,
C.A. Nos. 10911 & 10919, 1990 WL 118363 (Del. Ch. Aug. 14, 1990) 22

OTHER AUTHORITIES

Court of Chancery Rule 23 .... *passim*

PRELIMINARY STATEMENT

Plaintiffs filed this action on behalf of shareholders of El Paso Corporation ("El Paso" or the "Company"), alleging that the El Paso board of directors (the "Board") breached its fiduciary duties by agreeing to a less-than-value-maximizing merger transaction between El Paso and Kinder Morgan, Inc. ("KMI") (the "Merger"), and that the Board's financial advisor, Goldman Sachs & Co. ("Goldman Sachs" or "Goldman"), and KMI aided and abetted the Board's breaches.

During the litigation, Plaintiffs uncovered a series of disturbing conflicts of interest that tainted the El Paso sale process. First, the Board let Goldman Sachs serve as one of its financial advisors in connection with the Merger even though Goldman held a $4 billion (or 19%) equity stake in KMI. Goldman's massive KMI investment gave the investment bank a clear financial incentive to push the Board away from its previously announced spin-off (the "Spin-Off") of El Paso's exploration and production ("E&P") division and towards a sale to KMI at the lowest price the Board would accept. Second, when the Board hired Morgan Stanley as a co-advisor in a feeble effort to cleanse Goldman's conflict, Goldman saw to it that Morgan Stanley had its own financial incentive to favor the Merger over the Spin-Off. Faced with the choice between receiving nothing at all if the Board chose to stick with the Spin-Off versus receiving $38 million in fees if the Board sold to KMI, Morgan Stanley slanted its financial advice to justify a sale to KMI.

Third, El Paso Chief Executive Officer Douglas Foshee ("Foshee") served as the Company's sole negotiator of the Merger terms, without ever disclosing to the Board that he and his senior management team were privately considering the opportunity to buy the

E&P assets from KMI in a management buyout (the "MBO"). Since Foshee knew a sale to KMI would offer that MBO opportunity (as KMI intended to sell the E&P assets) while other alternatives likely would not, he had personal incentives that compromised his ability to fulfill his fiduciary duties to El Paso's shareholders. Guided by these deeply conflicted fiduciaries, the Board struck a deal to sell El Paso to KMI without pushing for the best possible price.

Although Plaintiffs' motion for a preliminary injunction was denied, the Court recognized that Plaintiffs had a reasonable likelihood of success on the merits of their claims for breach of fiduciary duty. The Merger closed, and Plaintiffs pressed forward with the prosecution of their claims to recover damages resulting from the inadequacy of the Merger price. At the same time, Plaintiffs were mindful that the Court had expressed skepticism about their ability to establish aiding and abetting claims against Goldman and KMI, and that whatever sum they might extract from Foshee was unlikely to cover shareholders' losses due to Defendants' conduct. Against these odds, Plaintiffs were able to negotiate a valuable cash settlement that ranks among the largest settlements ever achieved in the Court of Chancery.

Plaintiffs now seek approval of the Settlement[1] of this case, which provides a $110 million monetary recovery for the shareholders who held El Paso stock on May 25,

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[1] The "Settlement" refers to the agreement embodied in the Stipulation and Agreement of Settlement, dated September 7, 2012, between and among the parties to the above-captioned action (the "Settlement Agreement"). The Settlement Agreement was filed with the Court on September 7, 2012, and a copy (without exhibits) is attached for the Court's convenience as Exhibit 3 to the Declaration of Megan D. McIntyre In Support Of Plaintiffs' Motion For Final Approval Of The Proposed Settlement And Plan Of Allocation, Certification Of The Class, And An Award Of Attorneys' Fees ("McIntyre Decl.") submitted herewith. All capitalized terms used herein shall have the meanings set forth in the Settlement Agreement unless otherwise specified.

2012 (the effective date of the Merger), to supplement the consideration they received in the Merger. For their efforts in achieving this result, Co-Lead Counsel[2] seek an award of $26 million in attorneys' fees, inclusive of approximately $700,000 in litigation expenses.

FACTUAL BACKGROUND

A. BACKGROUND OF THE LITIGATION

Prior to the Merger, El Paso operated in both the natural gas transmission (*i.e.*, Pipelines) and E&P sectors of the energy industry. El Paso owned North America's largest interstate natural gas pipeline system and was one of North America's largest independent E&P companies.

KMI – as one of the leading pipeline transportation and energy storage companies in North America – long had its eye on acquiring El Paso's Pipelines business. To this end, in September 2010, KMI proposed that El Paso spin-off its E&P business to its shareholders and then sell its Pipelines business to KMI. KMI's overture failed because KMI (then a private company) did not have any publicly-traded shares to use as acquisition currency.

In February 2011, KMI solved this problem by going public in the largest private equity-backed IPO in U.S. history. Goldman was the lead underwriter of KMI's IPO. Following the IPO, Goldman controlled two seats on KMI's board and owned 19% of KMI's stock (valued at approximately $4 billion).

While Goldman was helping KMI go public, El Paso engaged Goldman to advise it on a potential spin-off of El Paso's E&P business. Based on that advice, on May 24,

[2] Bernstein Litowitz Berger & Grossmann LLP ("BLBG"), Grant & Eisenhofer P.A. ("G&E"), and Labaton Sucharow LLP ("Labaton") are Co-Lead Counsel.

2011, the El Paso Board unanimously decided that the Spin-Off was in the best interests of the Company's shareholders, publicly announcing it that day. The Spin-Off was to occur in a tax-free distribution of shares, with El Paso retaining its Pipeline business, its midstream group, and its interests in El Paso Pipeline Partners. El Paso paid Goldman $5 million for its work on the Spin-Off and committed to pay $20 million more if the Spin-Off was successfully completed, which was expected to happen by year's end. Wall Street analysts were bullish on the Spin-Off, and El Paso's stock price increased.

Soon after El Paso announced the Spin-Off plan, KMI renewed its efforts to acquire El Paso. On August 30, 2011, KMI formally offered to buy all outstanding shares of El Paso for $25.50 per share (60% in cash and 40% in KMI stock). KMI's renewed interest in acquiring El Paso placed Goldman in a clear position of conflict: while Goldman had been retained to act as El Paso's exclusive financial advisor in connection with the Spin-Off, Goldman's 19% stake in KMI gave the investment bank an incentive to "kill" the Spin-Off so KMI could acquire El Paso on favorable terms. Recognizing this untenable conflict, the two Goldman managing directors who sat on KMI's board recused themselves from discussions involving KMI's contemplated acquisition of El Paso. However, Goldman did not recuse itself from advising El Paso, and instead served as co-advisor to the Board concerning the Merger and as the Board's exclusive advisor concerning the Spin-Off. Additionally, although the Board only learned this fact through discovery in this litigation, the lead Goldman banker on the El Paso engagement, Steve Daniel ("Daniel"), personally held (either directly or indirectly) roughly $300,000 worth of stock in KMR, the "I shares" attached to KMI's master limited partnership, and had a substantial stake in at least one of the Goldman private

equity funds that owned KMI shares (in addition to Daniel's owning a significant number of Goldman shares whose value would benefit from a low-priced acquisition of El Paso by KMI).

In a failed, insufficient attempt to neutralize Goldman's conflict, the Board retained a second financial advisor, Morgan Stanley, to assist it in evaluating KMI's offer. In response, 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. Thus, Morgan Stanley's entire $38 million fee was contingent upon the Board choosing to pursue a deal with KMI in lieu of the Spin-Off or a sale to any other suitors – the exact outcome Goldman wanted. With Morgan Stanley not eligible for any fee in the event of the Spin-Off, Morgan Stanley presented valuation analyses to the Board that made a sale to KMI look like a more appealing alternative than the Spin-Off. Among other things, Morgan Stanley's valuation methodology implied an absurdly low perpetuity growth rate of El Paso's Pipeline business that was well below the projected rate of inflation.

Compounding its reliance on conflicted financial advisors, the Board delegated to Foshee the task of negotiating with KMI's CEO Rich Kinder. Foshee suffered from his own undisclosed conflict of interest because he and at least one other El Paso executive – knowing that KMI had no interest in El Paso's E&P assets and was planning to sell them – were contemplating making an offer to buy the E&P business from KMI. As a potential bidder for these assets, Foshee had a powerful incentive to ensure that KMI was the winning bidder for El Paso, because other bidders might not want to sell off the E&P business, and a standalone or Spin-Off strategy would raise burdensome fiduciary duty

issues in any management-sponsored E&P buyout effort. By selling the Company as a whole to KMI, even if doing so was not the best alternative for El Paso's shareholders, Foshee could later bid for E&P, free from the public scrutiny that was sure to have resulted if he attempted a direct MBO of the E&P assets from El Paso while it remained a public company.

Under Foshee's conflicted guidance, the Board was persuaded to counter Kinder's initial $25.50 offer – which had been roundly rejected as patently inadequate – with an offer of just $28, setting a cap on a deal at only 10% above the initial offer. Then, after Foshee and Kinder preliminary agreed to a deal at $27.55 per share in cash and KMI stock, the El Paso Board allowed KMI to revise the deal price downward under the guise of a $500 million "modeling error" that the Company was never able to substantiate.

In the end, guided by conflicted financial advisors and a CEO who hid his buy-side aspirations from the Board, El Paso agreed to a deal with KMI valued at $26.87,[3] comprised of a mix of cash, KMI stock, and out-of-the-money warrants on KMI stock that were of questionable value.

B. OVERVIEW OF THE LITIGATION

Following the announcement of the Merger, El Paso shareholders filed a total of thirteen putative class actions in this Court, alleging that the Merger was the product of breaches of fiduciary duty by the El Paso Board (collectively, the "Delaware Cases"). On November 18, 2011, the Court entered an Order consolidating the Delaware Cases under the caption *In re El Paso Corporation Shareholder Litigation*, C.A. No. 6949-CS (the "Consolidated Action"), appointing Plaintiffs as Co-Lead Plaintiffs in the Consolidated

[3] Based on the closing price of KMI stock the day before the final deal was announced.

Action, and appointing BLBG, G&E and Labaton as Co-Lead Counsel. The Court also appointed an Executive Committee of plaintiffs' counsel, chaired by Pomerantz Haudek Grossman & Gross LLP and Motley Rice LLC, with additional members Murray Frank LLP, Berman DeValerio, Vianale & Vianale LLP, and Sarraf Gentile LLP (collectively, the "Executive Committee").

On November 29, 2011, Co-Lead Plaintiffs filed their Verified Consolidated Class Action Complaint (the "Consolidated Complaint"). The Consolidated Complaint alleged that the Merger was the product of breaches of fiduciary duty by El Paso's directors, aided and abetted by Goldman and KMI, and that the preliminary proxy for the Merger contained material misstatements and omissions.

In addition to the Delaware Cases, eight putative shareholder class actions challenging the Merger were filed in the District Court of Harris County, Texas (the "Texas Cases") on behalf of El Paso shareholders. The Texas Cases were consolidated under the caption *Rebecca Johnson v. El Paso Corporation*, Cause No. 2011-62339 (the "Texas Action"). By agreement dated November 2, 2011, the parties in the Texas Action agreed that any motion for preliminary injunctive relief would be heard in this Court. Plaintiffs in the Texas Action were given access to all discovery conducted in the Consolidated Action.

On November 7, 2011, a putative class action was filed on behalf of El Paso shareholders against Goldman in the Supreme Court of the State of New York, under the caption *Grossman v. The Goldman Sachs Group, Inc.* (Index No. 11112770) (the "New York Action"). Plaintiff in the New York Action agreed with Goldman to examine discovery produced in the Consolidated Action.

Co-Lead Counsel, with assistance from members of the Executive Committee, conducted extensive discovery on a highly compressed timeframe, to develop a record upon which the Court could consider Plaintiffs' motion for a preliminary injunction. Between the filing of their Consolidated Complaint on November 29, 2011 and the filing of the opening brief in support of their motion for a preliminary injunction on January 13, 2012, Co-Lead Counsel and the Executive Committee obtained and reviewed over 450,000 pages of documents produced by Defendants and third parties relating to, among other things, the Board's decision to jettison the Spin-Off in favor of the Merger, the negotiation process leading to the Merger, the conflicts of interest plaguing the Board's financial advisors and certain Company insiders, and the value of the consideration to be received by El Paso's shareholders in connection with the Merger.

During this same time period, Plaintiffs took seven depositions, including individuals affiliated with El Paso, KMI, Goldman Sachs, Morgan Stanley, and Evercore Group LLC (KMI's financial advisor). Co-Lead Counsel also retained, worked with and defended at deposition a financial expert, David G. Clarke, ASA, who submitted a report identifying the most significant flaws in the valuation analyses and advice provided to the Board by Goldman and Morgan Stanley.

In the weeks following the filing of the Consolidated Complaint, Defendants on three occasions amended the preliminary proxy for the Merger to address certain of the omissions Plaintiffs had challenged – first on December 14, 2011, again on January 3, 2012, and finally on February 1, 2012. These amendments provided El Paso shareholders with additional information concerning (1) the value of the KMI stock and warrants that certain El Paso shareholders would receive as part of their consideration in connection

with the Merger, (2) Goldman's conflicts of interest with respect to the Merger, (3) the parties' negotiations with respect to the Merger, and (4) the financial analyses Goldman and Morgan Stanley provided to El Paso's Board when it was weighing its strategic options. As a result of these amendments, the final Merger proxy provided El Paso's shareholders with far more complete disclosures than had been provided prior to Plaintiffs' filing this action. However, Plaintiffs continued to believe that the Merger price was unreasonably low and was the product of a flawed process, and thus they pressed forward with their motion to enjoin the Merger.

On February 9, 2012, the Court heard oral argument on Plaintiffs' motion for a preliminary injunction. Over the course of the six-hour hearing, counsel vigorously debated the merits of Plaintiffs' claims and the availability of injunctive relief. On February 29, 2012, the Court issued a lengthy written opinion, finding that "[P]laintiffs [had] a reasonable likelihood of success in proving that the Merger was tainted by disloyalty," but that the "balance of harms counsel[ed] against a preliminary injunction." *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 434 (Del. Ch. 2012).

Following the issuance of the Court's opinion, El Paso adjourned the stockholder vote on the Merger until March 9, 2012, allowing shareholders to digest the Court's opinion. On that date, El Paso held its special meeting, and the Merger was approved. The Merger closed on May 24, 2012 and became effective on May 25, 2012. As such, the Merger consideration was paid to those shareholders who held El Paso stock as of May 25, 2012.[4] Depending upon whether they elected to receive their Merger

[4]*See* July 9, 2012 Form 8937 filed by El Paso with the Internal Revenue Service, at Attachment, Statement #1-C.1 (indicating that the "Second Merger" occurred on May 25,

consideration in the form of cash, KMI stock, or a combination thereof, the value of the consideration that El Paso's shareholders received ranged from $27.13 to $29.34 per share.[5] Upon closing of the Merger, El Paso's former shareholders owned approximately 32% of KMI.

Following the denial of Plaintiffs' motion for a preliminary injunction, Co-Lead Counsel continued to aggressively litigate this action in pursuit of a monetary damages remedy to compensate El Paso's shareholders for the Board's failure to maximize the Merger price. To that end, Co-Lead Counsel served additional discovery requests on Defendants and third parties, received and reviewed over 175,000 additional pages of documents, noticed an additional 18 depositions, prepared an amended complaint, and moved for class certification. On April 23, 2012, the Court scheduled this action for trial commencing on March 4, 2013.

C. NEGOTIATION AND SETTLEMENT TERMS

From time to time throughout the pendency of this litigation, the parties' counsel engaged in discussions concerning a potential resolution of this action. Prior to the injunction hearing, Defendants declined to make an offer containing even the minimum components that Plaintiffs insisted on as a framework for a settlement. After the injunction hearing and before the Court's injunction opinion was issued, Defendants discussed potential settlements that would put this case in the upper tier of resolutions of Delaware merger litigations. Notwithstanding the strong temptation to pursue a

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2012, and that the Merger consideration was paid to holders of stock immediately prior to the effective time of the Second Merger) (McIntyre Decl. Ex. 4).

[5] *See* McIntyre Decl. Ex. 4, at Attachment, Statement #2.

resolution instead of risking a negative opinion from the Court, Plaintiffs firmly believed that this case warranted a more significant recovery for shareholders than Defendants' settlement overtures contemplated. Even after the Court's Opinion, Defendants took aggressive negotiating positions, making clear their own confidence in their defense.

With all parties agreeing that a settlement of this action made sense, but no party willing to play in the other's proverbial sandbox in terms of the magnitude of that settlement, the parties chose to present the matter to a mediator. On June 8, 2012, counsel participated in a mediation session with former judge Daniel Weinstein (the "Mediator"). While this mediation session did not result in a settlement, the parties agreed to continue their dialogue with the Mediator. As a result of those ongoing discussions, on July 18, 2012, the parties reached an agreement in principle to settle, dismiss and release all claims asserted in the Consolidated Action for $110 million.

Throughout the settlement negotiations, including the discussions that predated the Court's injunction opinion, Plaintiffs insisted that Goldman relinquish, at the very least, the entire $20 million fee El Paso had agreed to pay for Goldman's role in the Merger. Although Defendants did not tell Co-Lead Counsel at the time (surely because they did not want to lose settlement leverage), Plaintiffs subsequently learned that in anticipation of the need to settle this litigation and because of the central role Goldman's misdeeds played in making this case a strong one for the shareholder-plaintiffs, Goldman "agreed" not to collect from El Paso either that $20 million fee or any indemnity payments allegedly owed to Goldman under the terms of its engagement. The waiver of indemnity is itself surely worth, at a minimum, several million dollars. Accordingly, while Goldman did not actually write any checks in connection with the Settlement, well

over $20 million of the $110 million in Settlement proceeds represents money that Goldman was forced to relinquish.

Before accepting this Settlement, Plaintiffs and Co-Lead Counsel carefully evaluated its merits, mindful of their duties to El Paso's shareholders and of the danger of "gambling" with the large sum that had been offered by Defendants to settle this action. Co-Lead Counsel strongly believe that the Settlement represents an exceptional result for El Paso's former shareholders.

In accordance with the Court's September 14, 2012 Scheduling Order, copies of the Notice of Proposed Settlement of Class Action, Settlement Hearing, and Right to Appear (the "Notice") were mailed to over 26,500 potential Class Members and more than 2,000 brokers on September 28, 2012. *See* Affidavit of Stephen J. Cirami Regarding (A) Mailing of the Notice and Claim Form; and (B) Publication of the Summary Notice ("Cirami Aff."), at ¶ 2. Subsequently, more than 230,000 additional Notices were mailed in response to requests from individual shareholders and from brokers and other nominee holders. *Id.* at ¶¶ 3-5. Additionally, 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. Although the deadline for submitting objections has not yet passed, to date Co-Lead Counsel have received only one objection. *See* McIntyre Decl. at ¶ 10 & Ex. 5. The objector does not take issue with the adequacy of the Settlement or with the fee request but, rather, appears to object only to the plan of allocation. As discussed below, the proposed plan of allocation for the Settlement proceeds is fair and reasonable and should be approved.

ARGUMENT

I. THE SETTLEMENT SHOULD BE APPROVED AS FAIR, REASONABLE AND ADEQUATE

Delaware has long favored the voluntary settlement of contested claims. *See, e.g., In re Triarc Cos., Inc. Class & Deriv. Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001) ("Delaware law favors the voluntary settlement of corporate disputes."); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1102 (Del. 1989) ("Delaware law favors the voluntary settlement of contested issues."). In reviewing a proposed settlement, the Court is "not required to decide any of the issues on the merits." *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986). Rather, the Court must determine whether the settlement is fair and reasonable. *See, e.g., Polk*, 507 A.2d at 536; *Krinsky v. Helfand*, 156 A.2d 90, 94 (Del. 1959).

In determining whether the proposed settlement is fair, the Court should consider the nature of the claims asserted, the possible defenses, the legal and factual obstacles to be faced by the plaintiffs at trial, and the delay, expense and complexity of the litigation. *See, e.g., Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991). Of particular importance is balancing the strength of the claims being compromised against the benefits secured by the settlement for class members. *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989); *Polk*, 507 A.2d at 535.

Proposed settlements are particularly favored where they are reached following arm's-length negotiations (*see, e.g., Ryan v. Gifford*, C.A. No. 2213-CC, 2009 WL 18143, at *5 (Del. Ch. Jan. 2, 2009) (approving settlement "after vigorous arms-length negotiations following meaningful discovery")), and where they are supported by experienced counsel and their clients (*see, e.g., Polk*, 507 A.2d at 536 (noting that the

Court considers "the views of the parties involved" in determining "the overall reasonableness of the settlement")). A review of these factors supports approval of the Settlement.

A. Balancing The Strengths Of Plaintiffs' Claims And The Risks Of Continued Litigation Against The Benefits Secured For The Class

The claims asserted in this action are well-known to the Court and were considered extensively in connection with Plaintiffs' motion for a preliminary injunction. While Plaintiffs believe their claims were and are meritorious, victory at trial was by no means guaranteed. Throughout the litigation, Defendants have adamantly denied any liability and repeatedly stated that they believed Plaintiffs' claims were without merit. Yet the parties agreed on some things; this case clearly presented complex corporate law issues and novel factual circumstances, requiring extensive factual and legal analysis regarding, among other things, application of the Delaware courts' jurisprudence under *Revlon, Inc. v. MacAndews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and *Paramount Communications, Inc. v. QVC, Inc.*, 637 A.2d 34 (Del. 1994), and their progeny.

In litigating this action, Plaintiffs faced at least three difficult issues. First, Plaintiffs would have encountered difficulty in obtaining money damages from the director defendants due to the exculpation clause in the Company's charter for claims for monetary damages in the absence of bad faith. In addressing this issue at the preliminary injunction phase, the Court noted:

> On this record, it appears unlikely that the independent directors of El Paso – who are protected by an exculpatory charter provision – could be held liable in monetary damages for their actions. Although they should have been more keen to Goldman's conflict, they were given reason to

> believe that that conflict had been addressed by the hiring of Morgan Stanley and by cabining Goldman's role. . . . Most important, the independent directors' reliance upon Foshee seems to have been made in good faith. From the standpoint of the independent directors, Foshee seems to have been well positioned as a large holder of El Paso stock and as a trusted executive to get the best deal for El Paso's stockholders. The independent directors were not trusted with the information that Foshee (and El Paso managers like Sult and Smolik) were mulling over a bid to Kinder Morgan for the E & P assets.

El Paso, 41 A.3d at 448.

Although Plaintiffs believe they would have been able to prove bad faith conduct by Foshee, this would have been small consolation because, as the Court recognized, it is unlikely that he would be able to pay a substantial judgment. *Id.* Moreover, El Paso's director and officer liability insurance carrier would undoubtedly have denied coverage for any conduct by Foshee that was self-interested.

Second, as the Court stated in its opinion on Plaintiffs' motion for a preliminary injunction, Plaintiffs may have encountered difficulties prevailing on their aiding and abetting claims against Goldman and KMI:

> [A]lthough Goldman has been named as an aider and abettor and it has substantial, some might say even government-insured, financial resources, it is difficult to prove an aiding and abetting claim. Given that Goldman's largest conflict was surfaced fully and addressed, albeit in incomplete and inadequate ways, whether the plaintiffs could ultimately prove Goldman liable for any shortfall is, at best, doubtful, despite Daniel's troubling individual failure of disclosure.
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> Nor do I find any basis to conclude that Kinder Morgan is likely to be found culpable as an aider and abettor. It bargained hard, as it was entitled to do. From its perspective, it appeared that steps were taken by El Paso and Goldman to address Goldman's conflict of interest. And Foshee's concealed interest in an MBO was not expressed by Foshee to Kinder until after the deal terms were firmed up and signed into agreement, and it is not clear that Rich Kinder had any reason to know Foshee was acting without the consent of the El Paso Board.

Id. at 448-49. Notably, Plaintiffs took the position during all settlement negotiations that notwithstanding this admonition, any resolution had to include Goldman giving up its entire fee, at the least.

Finally, Plaintiffs may have had difficulty proving damages in a case in which no one will ever know what would have happened if the Defendants had implemented a conflict-free sales process aimed solely at maximizing shareholder value. While the Court's opinion suggested a method of calculating damages under which classwide damages could arguably have exceeded $530 million, this by no means ensured that Plaintiffs would have been able to prove – let alone collect – damages approaching that amount. *Id.* at 447-48.

In light of these obstacles, Plaintiffs faced a significant risk of recovering substantially less, or possibly nothing, for the Class had they continued to litigate. Through the Settlement, Plaintiffs secured a $110 million recovery for El Paso shareholders – among the largest settlements ever in the long history of this Court. Weighing this substantial recovery against the obstacles and risks Plaintiffs would have faced through continued litigation supports approval of the Settlement. *See, e.g., Frazer v. Worldwide Energy Corp.*, C.A. No. 8822, 1991 WL 74041, at *4 (Del. Ch. May 2, 1991) (settlement that guarantees substantial recovery is fair and reasonable when weighed against the "quite plausible risk that the class might recover far less or even nothing").

B. THE SETTLEMENT WAS REACHED THROUGH ARM'S-LENGTH NEGOTIATIONS WITH THE ASSISTANCE OF A MEDIATOR

The Settlement was the product of hard fought arm's-length negotiations between highly experienced counsel following discovery, a formal mediation session, and

numerous subsequent discussions under the auspices of the Mediator. These circumstances support approval of the Settlement. *See, e.g., Ryan,* 2009 WL 18143, at *5 (approving a settlement that was reached "after vigorous arms-length negotiations following meaningful discovery"); *In re Crocker S'holders Litig.*, C.A. No. 7405, 1985 WL 11550, at *2 (Del. Ch. May 21, 1985) (approving settlement that was the "result of continued arms-length negotiations between the parties").

C. THE EXPERIENCE AND OPINION OF CO-LEAD COUNSEL AND THEIR CLIENTS WEIGH IN FAVOR OF APPROVING THE SETTLEMENT

This Court considers the opinion of experienced counsel and their clients in determining a settlement's fairness. *See generally Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964); *Polk,* 507 A.2d at 536 (noting that the court considers "the views of the parties involved" in determining "the overall reasonableness of the settlement"). The Settlement was reached after careful deliberation by both Co-Lead Counsel and Plaintiffs – deliberation that was informed by the discovery taken in the case. These circumstances support approval of the Settlement. *See Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99 (Del. 1979) (approving settlement and noting that plaintiff's counsel concluded the purchase price was fair and that the deal was in the best interests of the company after considerable pre-trial discovery).

II. THE PLAN OF ALLOCATION SHOULD BE APPROVED

In connection with Plaintiffs' request for approval of the Settlement, Plaintiffs respectfully request that the Court approve the proposed plan by which the Settlement proceeds will be allocated among Class Members. "An allocation plan must be fair, reasonable, and adequate," but it "does not need to compensate Class members equally to be acceptable." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009).

In determining the fairness and reasonableness of a proposed plan of allocation, courts have given great weight to the opinion of class counsel. *See CME Group, Inc. v. Chicago Bd. Options Exchange, Inc.*, C.A. No. 2369-VCN, 2009 WL 1547510, *10-11 (Del. Ch. Jun. 3, 2009) ("Class counsel, in the Court's judgment, came to a fair and reasonable balancing of the various interests of all class members."); *In re NASDAQ Market-Makers Antitrust Litig.*, 94 Civ. 3996 (RWS), 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000) ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' Class Counsel") (citation omitted); *White v. National Football League*, 822 F. Supp. 1389, 1420 (D. Minn. 1993) (in approving settlement involving allocation of fund among class members with different types of claims, court "affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved").

Under the proposed Plan of Allocation set forth in the Notice, those Class Members who held El Paso stock on the effective date of the Merger – *i.e.*, the shareholders who received the Merger consideration – will share in the settlement proceeds (assuming that they submit timely and valid claim forms), while those who sold prior to the effective date will not. *See* Notice at 7-8 (Cirami Aff. Ex. A). This appears to be the basis of the sole objection that has been received to date: the objector sold her shares in October 2011, and complains that "the notice does not include a 'realistic time-window for ownership other than a one-day window.'" *See* McIntyre Decl. Ex. 5.

The proposed Plan of Allocation is fair and reasonable under the circumstances. Class counsel consider various factors in reaching judgments about how to distribute

funds in any case involving a post-closing monetary recovery, including the nature of the claims made, the size of the recovery, and the number of potential claimants. In this case, Plaintiffs' remaining claims in the action are for the damages suffered 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. Given this and other relevant factors, including the complexity of allocating among potentially many millions of investors who held El Paso shares at various times between the deal's announcement and its closing, Co-Lead Counsel made the reasonable judgment to allocate settlement consideration only to the holders as of the closing. The reasonableness of that judgment is underscored by the fact that this Court has approved similar plans of allocation in other class actions challenging the adequacy of merger consideration. *See, e.g.*, *In re J. Crew Group, Inc. S'holders Litig.*, C.A. No. 6043-CS (Del. Ch. Dec. 16, 2011) (Order) (certifying settlement class consisting of persons who held stock between August 11, 2010 and March 7, 2011; settlement agreement defined "Settlement Payment Recipients" as only those shareholders who held stock on the effective date of the merger and received consideration in the merger); *In re Del Monte Foods Co. S'holder Litig.*, C.A. No. 6027-VCL (Del. Ch. Dec. 1., 2011) (Order) (certifying settlement class consisting of persons who held stock between November 25, 2010 and March 8, 2011; settlement agreement defined "Settlement Payment Recipients" as only those shareholders who held stock on the effective date of the merger and received consideration in the merger); *In re Atlas Energy Res. LLC Unitholders Litig.*, C.A. No. 4589-VCN (Del. Ch. May 14, 2012) (Order) (certifying settlement class consisting of persons who held Atlas Energy Resources LLC between April 27, 2009 and

September 29, 2009; settlement agreement provided for payment to be divided among those who held units "immediately prior to" the effective date of the merger).

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

The Court must make a class certification decision in connection with a proposed settlement of a class action. *See Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994). The Plaintiffs seek certification of a class consisting of all Persons who held El Paso Corporation common stock at any time during the period beginning on August 30, 2011 through and including May 25, 2012 (the "Class Period") (including, without limitation, the Texas Plaintiffs and the New York Plaintiff), and each of their transferees, successors and assigns (the "Class").[6] The Court has already preliminarily certified this Class in the Scheduling Order dated September 14, 2012, and because Court of Chancery Rules 23(a) and 23(b)(1) and (b)(2) are readily satisfied, the Court should grant final certification of the Class.

A. CLASS CERTIFICATION IS PROPER UNDER COURT OF CHANCERY RULE 23(A)

Court of Chancery Rule 23(a) sets forth the threshold requirements that must be met for a class to be certified: (1) the class is so numerous that joinder of all members is

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[6]Excluded from the Class are the following: (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.

impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Ch. Ct. R. 23(a). All four elements are present here.

1. Numerosity

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Impracticability does not mean impossibility, only difficulty or inconvenience in joining all members of the class. *See Farley v. Baird, Patrick & Co., Inc.*, 1992 WL 321632, at *2 (S.D.N.Y. Oct. 28, 1992) (citing *Northwestern Nat'l Bank v. Fox & Co.*, 102 F.R.D. 507, 510 (S.D.N.Y. 1984)); *In re Mellon Bank S'holders Litig.*, 120 F.R.D. 35, 36-37 (W.D. Pa. 1988). Precise enumeration or identification of the class members is not required for the litigation to proceed as a class action. *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 371 (D. Del. 1990); *Marshall v. Elec. Hose & Rubber Co.*, 68 F.R.D. 287, 291 (D. Del. 1975); *see also* 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, §3.13 (5th ed. 2011) ("A contrary rule would foreclose much class litigation, as the impossibility and/or expense of identifying all class members at the outset … would make most class suits unduly burdensome.").

Plaintiffs clearly satisfy the numerosity requirement of Rule 23(a)(1). El Paso's common stock was traded on the New York Stock Exchange and, as of February 20, 2012, there were nearly 773 million shares outstanding. Where, as here, the action involves a large number of class members who are geographically dispersed, courts have found the numerosity requirement of Rule 23(a)(1) to be satisfied. *See, e.g., In re Compellent Tech., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 19, 2011)

(Order granting class certification); *In re ACS S'holders Litig.*, C.A. No. 4940-VCP (Del. Ch. Oct. 22, 2009) (Order granting class certification); *Zimmerman v. Home Shopping Network, Inc.*, C.A. Nos. 10911 & 10919, 1990 WL 118363, at *12 (Del. Ch. Aug. 14, 1990).

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." It is not necessary that *all* issues affecting class members be identical; it is enough that there is no "significant factual diversity." *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991). Indeed, the commonality requirement is satisfied by demonstrating that a single question of law or fact is common to the class. *See Emerald Partners v. Berlin*, C.A. No. 9700, 1991 WL 244230, at *3 (Del. Ch. Nov. 15, 1991). Thus, an alleged common course of conduct will suffice to satisfy Rule 23(a)(2). *Garfinkel v. Memory Metals, Inc.*, 695 F. Supp. 1397, 1402 (D. Conn. 1988) (citations omitted).

Plaintiffs' claims are based on the director defendants' breaches of fiduciary duties in connection with Merger, which were aided and abetted by Goldman and KMI. Defendants engaged in a course of conduct that affected all Class Members equally. Because Plaintiffs' and the Class's claims arise out of the same nucleus of operative facts and are based on a common legal theory, the existence of common questions of fact and law cannot be doubted. Such circumstances provide a classic case for class certification. *Dubroff v. Wren Holdings, LLC,* C.A. No. 3940-VCN, 2010 WL 3294219, at *5 (Del. Ch. Aug. 20, 2010) (certifying class where common questions included "whether the Board breached its fiduciary duties to the minority shareholders, whether the notice provided to

the minority shareholders following the Recapitalization contained inadequate disclosures or omitted material facts, whether the Class has sustained damages, as well as the proper measure of those damages, and whether any disclosure failures led to those damages"); *Turner v. Bernstein*, 768 A.2d 24, 26 (Del. Ch. 2000) (same, with respect to a merger); *Hynson v. Drummond Coal Co., Inc.*, 601 A.2d 570, 575 (Del. Ch. 1991) ("An action seeking to prove a breach of [fiduciary] duty is inescapably a true class action" because "[r]elief … will be determined by reference to the effects of the fiduciary's wrong on … the corporation or all of its stockholders as a class.").

3. Typicality

Rule 23(a)(3) requires that the claims of the representative parties be typical of the claims or defenses of the class they seek to represent. The typicality requirement is satisfied where the named representatives' interests arise from the same event or course of conduct that gives rise to the claims of other class members, and the claims are based on the same legal theory. *Dubroff*, 2010 WL 3294219, at *7; *Leon N. Weiner & Assocs.*, 584 A.2d at 1226; *see also* 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 3.29 (5th ed. 2011).

Plaintiffs' claims, like the claims of all Class Members, arise out of the same misconduct by Defendants and are based on the same legal theories – breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Plaintiffs' claims are thus typical of the Class. *Singer v. Magnavox Co.*, C.A. No. 4929, 1978 WL 4651, at *2 (Del. Ch. Dec. 14, 1978) (citation omitted); *see also Frazer v. Worldwide Energy Corp.*, C.A. No. 8822, 1990 WL 61192, at *2 (Del. Ch. May 3, 1990). Indeed, Delaware courts regularly certify classes in cases involving alleged breaches of fiduciary duty in connection with a

proposed merger. *See In re Del Monte Foods Co. S'holder Litig.,* C.A. No. 6027-VCL (Del. Ch. Dec. 1, 2011) (Order granting class certification); *In re ACS S'holders Litig.*, C.A. No. 4940-VCP (Del. Ch. Oct. 22, 2009) (Order granting class certification); *In re Compellent Tech., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 19, 2011) (Order granting class certification); *In re Talley Indus., Inc. S'holders Litig.*, C.A. No. 15961, 1998 WL 191939, at *9 (Del. Ch. Apr. 13, 1998) ("Because all Class members face the same injury flowing from the defendants' conduct in connection with the merger, the typicality requirement is satisfied.").

4. Adequacy of Representation

Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class. This requirement is satisfied where, as here, (i) the named plaintiffs' interests are not antagonistic to other members of the class, and (ii) the plaintiffs' attorneys are qualified, experienced, and generally able to conduct the litigation. *Emerald Partners v. Berlin*, 564 A.2d 670, 673-74 (1989); *Van de Walle v. Salomon Bros., Inc.*, C.A. No. 9894, 1997 WL 633288, at *2 (Del. Ch. Oct. 2, 1997).

Plaintiffs were stockholders of El Paso upon the announcement of the Merger. As such, Plaintiffs are members of the Class they seek to represent, and they "possess the same interest and suffer[ed] the same injury" as the other Class Members. *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *E. Texas Motor Freight Sys., Inc. v. Rodriquez*, 431 U.S. 395, 403 (1977)). In pursuing their own claims, Plaintiffs have necessarily protected and promoted the interests of the Class Members. *See Frazer*, 1990 WL 61192, at *2. There are additionally no conflicts of interests between Plaintiffs and the other Class members.

Co-Lead Counsel are leading practitioners in shareholder class action litigation and have successfully prosecuted numerous securities and breach of fiduciary duty class action suits on behalf of injured stockholders in this Court and throughout the country. Co-Lead Counsel are qualified and capable of conducting this litigation on behalf of the Class and in the interests of all Class Members, as they have demonstrated in their vigorous prosecution of Plaintiffs' motion for a preliminary injunction, and in their negotiation of the Settlement.

Given the lack of conflict and the retention of competent counsel, Plaintiffs have satisfied the adequacy requirements of Rule 23(a)(4). *See Oliver v. Boston Univ.*, C.A. No. 16570-NC, 2002 WL 385553, at *7 (Del. Ch. Feb. 28, 2002).

B. Class Certification Is Proper Under Court of Chancery Rules 23(b)(1) and 23(b)(2)

Once the Court finds that the provisions of Rule 23(a) are satisfied, it must determine whether the action fits within the framework provided for in Rule 23(b). *Nottingham Partners*, 564 A.2d at 1095. Rules 23(b)(1) and (2) provide for class certification where:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
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> > (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect interests; or
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> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final

> injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

Here, Rules 23(b)(1)(A) and (B) are satisfied because if separate actions were commenced by members of the Class, Defendants would be subject to the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct and would, as a practical matter, be dispositive of the interests of other Class Members. Alternatively, class certification should be granted pursuant to Rule 23(b)(2) because, in agreeing to the Merger, Defendants engaged in a single course of conduct that affects all members of the Class, such that damages flowing from violation of fiduciary duties owed equally to all Class Members is appropriate with respect to the entire Class. "'Delaware courts repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2).'" *In re Celera Corp. S'holder Litig.*, C.A. No. 6304-VCP, 2012 WL 1020471, at *17 (Del. Ch. Mar. 23, 2012) (citation omitted). *See also In re Countrywide Corp. S'holders Litig.*, C.A. No. 3464-VCN, 2009 WL 2595739, at *2-3 (Del. Ch. Aug. 24, 2009) ("Over and again our courts certify actions challenging the propriety of director behavior in connection with a merger as a (b)(1) or (b)(2) class."); *Turner*, 768 A.2d at 31-33 (certifying class pursuant to Rule 23(b)(1) where shareholders sought monetary damages as a remedy for directors' alleged misconduct in a merger context); *In re Mobile Commc'ns Corp. of Am., Inc.*, C.A. No. 10627, 1991 WL 1392, at *15-16 (Del. Ch. Jan. 7, 1991) (an action challenging directors' approval of merger should be certified under Rule 23(b)(1) or (b)(2)).

Thus, the requirements of Rule 23(b) are satisfied.

IV. THE REQUEST FOR AN AWARD OF ATTORNEYS' FEES SHOULD BE APPROVED

Co-Lead Counsel respectfully request an award of $26 million in attorneys' fees, inclusive of approximately $700,000 in litigation expenses, to be allocated by Co-Lead Counsel among themselves, the Executive Committee and other firms that contributed to the litigation of the Delaware Cases, as well as counsel in the Texas Action and the New York Action.[7] An award of attorneys' fees is warranted where, as here, counsel's "efforts result in the creation of a common fund . . . or the conferring of a corporate benefit." *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989) (internal citations omitted). As discussed below, Co-Lead Counsel's requested fees are reasonable and should be awarded from the $110 million common fund created by the litigation.

"The determination of any attorney fee award is a matter within the sound judicial discretion of the Court of Chancery." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012). In exercising its discretion, this Court should consider: (1) the benefits achieved in the action; (2) the efforts of counsel and the time spent in connection with the case; (3) the contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel. *Id.*; *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980); *In re Plains Res. Inc. S'holders Litig.,* C.A. No. 071-

[7] Although Co-Lead Counsel are not requesting reimbursement of litigation expenses over and above their request for fees, for the Court's reference the litigation expenses incurred by Co-Lead Counsel and the Executive Committee firms are detailed in declarations submitted by each firm in conjunction with this motion. *See* McIntyre Decl. at ¶¶ 5-6 & Ex. 2; Declaration of Mark Lebovitch ("Lebovitch Decl.") at ¶¶ 7-8 & Ex. 2; Declaration of Ira A. Schochet ("Schochet Decl.") at ¶ 7; Declaration of Marc I. Gross ("Gross Decl.") at ¶ 3; Declaration of William S. Norton ("Norton Decl.") at ¶ 3; Declaration of Benjamin D. Bianco ("Bianco Decl.") at ¶ 3; Declaration of Norman Berman ("Berman Decl.") at ¶ 3; Declaration of Ronen Sarraf ("Sarraf Decl.") at ¶ 3; Declaration of Jeffrey R. Krinsk ("Krinsk Decl.") at ¶ 3.

N, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005). These factors fully support the requested attorneys' fees.

A. THE LITIGATION CONFERRED SUBSTANTIAL BENEFITS ON THE CLASS

The benefit achieved through litigation is the factor accorded the greatest weight in determining an appropriate fee award. *Sugarland,* 420 A.2d at 149-150. *See also Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000) ("*Sugarland's* first factor is indeed its most important – the results accomplished for the benefit of the shareholders."). As detailed herein, the benefits conferred on El Paso's shareholders are extraordinary. Co-Lead Counsel's litigation acumen led to the creation of a $110 million common fund, one of the largest recoveries in a shareholder class action in the history of this Court.

Co-Lead Counsel's requested fee award of $26 million is approximately 23.6% of the common fund. A request of this amount is squarely within the range of reason. *See, e.g., In re Delphi Financial Group S'holder Litig.*, C.A. No. 7144-VCG (Del. Ch. July 31, 2012) (Order) (awarding 24.5% of $49 million settlement); *In re Del Monte Foods Co. S'holders Litig.*, C.A. No. 6027-VCL, Tr. at 58 (Del. Ch. Dec. 1, 2011) (acknowledging that an award of 25% of $89.4 million settlement fund would be appropriate); *In re GSI Commerce, Inc. S'holders Litig.*, C.A. No. 6346-VCN (Del. Ch. Nov. 15, 2011) (Order) (awarding 21% of $23.7 million settlement fund); *In re ACS S'holders Litig.,* C.A. No. 4940-VCP, Order (Del. Ch. Aug. 24, 2010) and Stip. of Settlement at 16 (Del. Ch. May 19, 2010) (awarding 25% of $69 million settlement fund plus expenses); *In re TD Banknorth S'holders Litig.*, C.A. No. 2557-VCL (Del. Ch. June 25, 2009) (Order) (awarding attorneys' fees of 27.5% of $50 million settlement fund); *In*

re Chaparral Resources, Inc. S'holders Litig., C.A. No. 2001-VCL (Del. Ch. Mar. 13, 2008) (Order) (awarding attorneys' fees of 33% of $36,780,554 settlement fund).[8]

B. COUNSEL EXPENDED SUBSTANTIAL EFFORT LITIGATING THIS ACTION ON A FULLY CONTINGENT BASIS

Co-Lead Counsel's fee request is further supported by their efforts in litigating multiple complex issues – on a fully contingent basis[9] – in a compressed timeframe. Substantial efforts were expended in litigating this action, with Co-Lead Counsel and the Executive Committee devoting 10,243 hours to this action.[10] This included taking discovery, briefing and arguing complex legal issues, and presenting expert testimony, all on an expedited schedule.

A lodestar "backstop check," while not required, confirms the reasonableness of the requested fees. *In re Abercrombie & Fitch Co. S'holders Derivative Litig.*, 886 A.2d 1271, 1273 (Del. 2005). As noted above, Co-Lead Counsel and the Executive Committee

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[8] *See also Marie Raymond Revocable Trust v. MAT Five, LLC*, 980 A.2d 388, 410 n.71 (Del Ch. 2008) (collecting cases where the court has approved fee requests of 30% or more of the benefits of a settlement); *In re Telecommc'ns, Inc. S'holders Litig.*, C.A. No. 16470-NC (Del. Ch. Feb. 1, 2007) (Order) and Stip. of Settlement (Del. Ch. Nov. 17, 2006) (awarding 30% of $52 million fund); *In re Telecorp PCS, Inc. S'holders Litig.*, C.A. No. 19262 (Del. Ch. Aug. 20, 2003) (Order) and Settlement Tr. at 102 (Del. Ch. Aug. 20, 2003) (awarding 30% of $47.5 million fund); *In re Intek Global Corp. S'holders Litig*., C.A. No. 17207 (Del. Ch. Apr. 24, 2000) (Order) (cited in *Seinfeld*, 847 A.2d at 337 n.31) (awarding 33% of quantifiable portion of benefit).

[9] The Delaware courts have recognized that when counsel's compensation is contingent on recovery, a premium over counsel's hourly rate is appropriate. *See, e.g., Seinfeld*, 847 A.2d at 333-334; *Ryan,* 2009 WL 18143, at *13; *Plains Res.,* 2005 WL 332811, at *6.

[10] *See* McIntyre Decl. at ¶ 7. This figure includes the hours expended by Finkelstein & Krinsk and Liebesman Law LLC, which served as co-counsel and Delaware counsel, respectively, to Executive Committee member Murray Frank. It does not include the time spent by counsel in the Texas Action (who attended depositions) or the New York Action, or the other firms that filed complaints in this Court, though Co-Lead Counsel expect to allocate a portion of any fee award to a number of those firms.

expended 10,243 hours in litigating this action, representing a total lodestar of $5,336,573 at their current, standard hourly rates. *See* McIntyre Decl. ¶ 7.[11] The fee requested is roughly 4.9 times the total lodestar and represents an effective hourly rate of approximately $2,538. Both are within the ranges approved by this Court in comparable cases. *See, e.g., In re Genentech, Inc. S'holder Litig.*, C.A. No. 3911-VCS, Tr. at 7 (Del. Ch. July 9, 2009) (case resulted in minority shareholders receiving increased consideration in corporate acquisition; court awarded a $24.5 million fee where "the multiple of the lodestar is something like 11.3"); *Franklin Balance Sheet Inv. Fund v. Crowley*, C.A. No. 888-VCP, 2007 WL 2495018, at *14 (Del. Ch. Aug. 30, 2007) (awarding a fee that represented an effective rate of $4,023 per hour, in a breach of fiduciary duty case that created a $32 million common fund); *Louisiana Municipal Police Employees' Ret. Sys. v. Crawford*, C.A. No. 2635 (Del. Ch. June 9, 2007) (Order) (in case where merger consideration was increased following institution of litigation, court awarded fees of $20 million representing a lodestar multiple of 6.5); *In re Fox Entm't Group, Inc. S'holders Litig.*, C.A. No. 1033-CC, Tr. at 70 (Del. Ch. Sept. 19, 2005) (litigation resulted in increased consideration in exchange offer; fee represented effective rate of $3,000 per hour); *In re NCS Healthcare S'holders Litig*., C.A. No. 19786, 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003) (litigation resulted in enhanced merger consideration; fee represented an effective hourly rate of approximately $3,030); *In re Digex, Inc. S'holder Litig.*, C.A. No. 18336, Tr. at 141-47 (Del. Ch. Apr. 6, 2001) (in merger litigation that resulted in creation of $165 million common fund, fee was 9 times

[11] *See also id.* at ¶¶ 2-3 & Ex. 1; Lebovitch Decl. at ¶¶ 3-5 & Ex. 1; Schochet Decl. at ¶¶ 3-5 & Ex. 1; Gross Decl. at ¶ 2; Norton Decl. at ¶ 2; Bianco Decl. at ¶ 2; Berman Decl. at ¶ 2; Sarraf Decl. at ¶ 2; Krinsk Decl. at ¶ 2; Declaration of Julie Prag Vianale at ¶ 2.

lodestar); *Dragon v. Perelman*, C.A. No. 15101, Tr. at 48-51 (Del. Ch. Aug. 29, 1997) (litigation resulted in improvement of merger consideration; fee represented an effective hourly rate of approximately $3,500); *In re Lin Broadcasting Corp. S'holders Litig.*, C.A. No. 14039 (Del. Ch. Sept. 15, 1995) (Order) (litigation resulted in enhanced consideration; fee represented an effective hourly rate of more than $3,800).

C. THE STANDING AND ABILITY OF COUNSEL

Co-Lead Counsel were selected from many firms competing for control of this action. In selecting Co-Lead Counsel, the Court noted their "very strong record of achievement." *See* Transcript of November 14, 2011 hearing at 14-15. Co-Lead Counsel are among the foremost firms in the nation in the field of M&A and other shareholder litigation, and the fees sought are reflective of their standing and experience. Moreover, Co-Lead Counsel had to, and did, employ all of their skills in opposing an exceptionally formidable team of defense lawyers, including some of the best corporate representatives in the nation.

CONCLUSION

For the reasons stated herein, Co-Lead Counsel respectfully request that the Court (1) approve the Settlement; (2) approve the proposed Plan of Allocation; (2) certify the Class; and (3) approve an award of $26 million in attorneys' fees, inclusive of litigation expenses, to Plaintiffs' counsel, to be allocated by Co-Lead Counsel.

Dated: November 8, 2012

Respectfully submitted,

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