IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE EL PASO CORPORATION SHAREHOLDER LITIGATION	:	Civil Action No. 6949-CS

Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, February 9, 2012
9:40 a.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Chancellor.

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ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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THE COURT: Good morning, everyone.

Good morning, Mr. Wolfe.

MR. WOLFE: Good morning. May it please the Court. Together with my several colleagues who are with me from Potter Anderson this morning, I represent the El Paso defendants in this matter. Since we've already turned in a full line-up card for our team, I will introduce just two, for the moment. First, we're pleased to have with us Bob Baker, the general counsel of El Paso.

THE COURT: I've been enjoying your e-mails.

MR. WOLFE: And Paul Rowe of Wachtell, whose e-mails you'd not have seen.

THE COURT: Not in this context.

MR. SEITZ: Good morning, Your Honor. I'd like to introduce from the Kinder Morgan side, you know Joseph Allerhand from the Weil Gotshal firm. Brad Aronstam formerly of the Weil Gotshal firm but now with me. And I'd like to introduce David --

THE COURT: I know you're reunited, but I don't want to know whether it feels so good.

MR. SEITZ: And David DeVeau, who is the deputy general counsel at Kinder Morgan, is with

me today.

THE COURT: Good morning.

MR. DICAMILLO: Ray DiCamillo for Goldman Sachs. I'd like to introduce my colleague from Sullivan & Cromwell, John Hardiman.

THE COURT: Thank you, Mr. DiCamillo.

MR. GRANT: Good morning, Your Honor. Today I have the emcee role as opposed to the leading argument role, which Mark Lebovitch is going to take from the Bernstein Litowitz firm. You know my partner Megan McIntyre. And Ira Schocket and Christine Azar from the Labaton firm.

MR. LEBOVITCH: Good morning, Your Honor.

THE COURT: Good morning.

MR. LEBOVITCH: This is the time for argument on the plaintiffs' motion for a preliminary injunction.

Before delving into the facts of this case, I want to make two preliminary broader points which I think may help the Court's approach to the case.

THE COURT: That are untethered to the record.

MR. LEBOVITCH: They are tethered.

THE COURT: There have been some very successful lawyers in this town who have specialized especially in appellate work that involved a total disregard for the record below. And some of the iconic rulings of Delaware corporate law are based on those arguments. So I'll try to base this one on the record. I think one that involves looking to the sky and seeing three things particularly comes to mind.

MR. LEBOVITCH: The first point is that the defendants' core positions here actually represent a somewhat cynical view of Delaware law that I think presents a doctrinal challenge to the Court. I would like to touch on the practical reality of the standard of judicial review, but I'll be brief.

First, one of the great well-known virtues of Delaware law is its flexibility, its nuanced nature. I think the defendants' petition in this case threatens to turn that virtue into a vice. The defendants are going to essentially say, Everything is normal here. There is nothing to see here. Move along. No, it's not, and they know it, Your Honor.

A banker owning $4 billion of a

corporate bidder while advising the target in an exclusive negotiation is an absurd notion.

You're going to see a lot of the straight-faced defense, Your Honor, but everyone in the room -- everyone -- everyone in the room when Goldman shows up understands what they are doing here. And the question is, how do they rationalize it? How do they get around it?

And I think that's the cynicism because, make no mistake, Your Honor, Goldman is here because they said they want to make the $20 million. They want to get the lead table's credit for this deal. And they don't believe there is any real-world consequence.

THE COURT: What you're referring to as the lead table's deal is that men and women of very expensive suits act like sixth-graders about who gets the banner lead on these deals, and all this kind of stuff. You're betting that Goldman is going to chalk this up in their share of the market cap for the year.

MR. LEBOVITCH: I think they'll like to say it, but I'm telling Your Honor, if they thought there was a negative consequence to being involved in the deal, then they wouldn't be sixth-graders about

this. It's their rationale. And the problem is that they can handle the criticism.

They're counting on the fact that in the end, Your Honor will say, Shame on you. But I think if you're Goldman Sachs, your attitude is everyone is saying, Shame on you. They can deal with the Shame on you. Their client is not going to, in the end, be upset with them if all that happens is there is a slap on the wrist saying, God, I wish you wouldn't do that, because they know they shouldn't have done it.

And letting them in the room -- the indifference of everyone involved to Goldman's being in the room set the tone for this transaction, Your Honor. Why do you think it is that management decided that they were comfortable not disclosing their own very serious conflict of interest? It set the tone.

Defendants are really saying that under Delaware law --

THE COURT: And that's not disclosed in the proxy statement either, is it?

MR. LEBOVITCH: No, it's not, Your Honor.

The defendants are saying under Delaware law, that flexibility that's a virtue really means there is no limits, no rules; we can rationalize anything.

Now, the plaintiffs here, Your Honor, we are just not that cynical. We think under Delaware law, letting Goldman play in this sandbox was not okay. If there is a line anywhere, if there is going to be any limit to the type of conflicts among bankers that would be stopped, this case has to be it. Its jut that unique set of facts.

And the board's reliance on Goldman in this case actually tends to show an absence of good faith and tends to show why they can't rely on Rule 141(e) in this case.

Now, I just want to turn briefly to --

THE COURT: You're going to have to deal with -- obviously, they're going to say they're very high-quality legal advisors. They brought in another high-quality financial advisor. They took steps to cabin the conflict of interest.

MR. LEBOVITCH: Yes.

THE COURT: Now, I know we're going to have to deal with things like why, if someone is

stepping out of a process, they're getting involved as an advisor on the other banker's compensation and tilting the other banker's compensation in a way where the other banker is supposed to objectively benchmark the two options, and they only get paid for the one option, and it's the option that the other bank has a conflict in. And I don't really understand how that's standing behind a Chinese Wall. And I really am anxious to hear about that role and about that. It didn't seem to be immediately a logical role for the conflicted banker to play.

MR. LEBOVITCH: Absolutely, Your Honor. And actually, while people are thinking about that, I will get to this, but the separation of Goldman from this deal to the extent there was a separation, it didn't matter because, as you know, they were involved up to the point that the board countered at a price, $28, that was less than 10 percent above the 25.50 offer that they had just rejected as so low, so inadequate, they didn't even want to engage. They didn't want to do due diligence. They didn't want to counter.

And the CEO, after a conversation with Rich Kinder comes back and says, Hey, let's counter.

The board turns around with Goldman in the room and Morgan Stanley in the room and their advisors, and they say, Yeah, let's counter at less than 10 percent.

And what I'll get to, Your Honor, is when he counters like that, I don't want to micromanage negotiations, but in the bigger picture of this case, when you look at all the odd decisions of this board cumulatively, it has to raise a serious suspicion that when they counter at 28 when Goldman was still involved, it's a done deal.

I mean, you went from flirting and having some mystery about how the night is going to end. That's it. The rest is just getting the deal done. It's foreplay. But they know they're going to have a deal when they counter that low.

THE COURT: I'm looking at this room and, with rare exceptions, you bring to mind images that I just don't want to have. I think just for the aesthetic benefit of us all, if we could steer clear. I know Valentine's Day is on your mind.

MR. LEBOVITCH: It is, Your Honor.

Briefly, on the standard of review, I think that we could debate Revlon and entire fairness. I think there is a reality of the way Your Honor has

applied Revlon that makes the debate a little bit more about labels. Obviously, the big question here is going to be good faith. But I think three of Your Honor's cases, Dollar Thrifty, Lear, and Netsmart, really lay out how Your Honor can, should, and I hope --

THE COURT: Is Dollar Thrifty your favorite?

MR. LEBOVITCH: Today it is. Today it is, Your Honor. Revlon does require the Court to substantively assess a board's judgments. There was no --

THE COURT: I think we all share in some of this. We're all waiting on Avis.

MR. LEBOVITCH: Yes. It's unusual for the Court to substantively assess a board's judgments. I think what happened in Dollar Thrifty is, the crux of it, is that the degree to which the Court will actually substantively question and be skeptical about the board's judgments in a Revlon context turns on whether that omnipresent specter in Revlon and Unocal has a basis in the reality of that deal.

THE COURT: Right. And what you're saying is in terms of Dollar Thrifty, there was a

situation where I understand you had a lot of concerns about the fact that there was no motive for any --

MR. LEBOVITCH: That was your point, Your Honor. In the end, what Your Honor said is, after looking at the record, it reveals no evidence providing a motive and, therefore, the Court's assessment of the board's decisions was more deferential.

THE COURT: Whereas here, you have the financial advisor plus the principal negotiator of the deal.

MR. LEBOVITCH: Yes. And therefore, when you apply the second prong of Revlon or entire fairness, one way or another, Your Honor can and should be highly skeptical of board judgments that seem to have been influenced, seem to be odd, especially when you look at them cumulatively, which is what I'm going to get to. So I think Your Honor kind of understands my point.

Lear, there was a soft conflict, nothing like the conflicts here. And yet, Your Honor did give a close look to judgments that just seemed a little bit unusual. And in Netsmart, what Your Honor had is an independent, seemingly disinterested board

making a bunch of really weird decisions.

And I think what happened is Your Honor realized the power of management and advisors to tilt the way the board is thinking about something. You said that in that case, the board appears to have been influenced by management and William Blair because they all favor the private equity outcome.

I think that if that's right, we should start with the motivations of everyone involved and then turn to the board's decisions, and we'll see how they hold up to the scrutiny.

I do have to bring home how different Goldman's situation in this deal is from I think anything that we really think of as a banker conflict.

THE COURT: This is what you're saying. This is not a situation where Goldman did investment banking or just did investment banking work for Kinder Morgan in the past.

MR. LEBOVITCH: Right.

THE COURT: They have a $4 billion equity stake. They've got two of their senior people on the actual board of the company.

MR. LEBOVITCH: Right. This is not

Barclays having a $25 million debt be on one side and 23 on another.

THE COURT: There's the famous banker who is so famous that I don't even need to use his name who says, Get over it. We're all conflicted. This isn't what he's talking about.

MR. LEBOVITCH: Your Honor, the word "conflict" doesn't do it justice, and that's because of the 4 billion. A conflict suggests that you're trying to balance competing interests. There was no conflict here, Your Honor. There was no balancing.

When you think about it, the idea that you are not only protecting your $4 billion investment, if you get to advise the target on that deal, you do it for free. These guys are actually getting paid $20 million to do this.

THE COURT: Won't that prove their point, that these are really -- it's more like a nation comprised of islands of capitalist geniuses, and each of the islands, within them, the people compete heavily to prove their own titanic capabilities. And so the team that was representing -- that was on the island of traditional investment banking is just going to do its job, and it

should get paid for it, and it's going to do it with zenith because its incentive structure and all its credibility and honor is based on that island. And the island of private equity has a different structure, and they were out of it.

MR. LEBOVITCH: Your Honor --

THE COURT: And they all can play their codes of honor, and they can all play hard within it. And that's why they want their own fee because, frankly, they kick butt.

MR. LEBOVITCH: Your Honor --

THE COURT: And they want a fee for their services. And, frankly, they're compensated based on the services they bring in, and, you know, their unit would get penalized if they did free work.

MR. LEBOVITCH: When you actually have bankers just giving advice and getting fees, maybe that, you know, island analogy, isn't totally artificial.

THE COURT: That's a different island, the Island of Investment Bankers. There's the Island of Traders, and there is the Island of Private Equity, and there are different islands. These are financial institutions that are very large. Remember --

MR. LEBOVITCH: My partners --

THE COURT: -- last week, the sell was commercial banking plus investment banking, but it turned out to be commercial banking plus investment banking plus casino.

MR. LEBOVITCH: Now plus the proprietary investments.

THE COURT: That's what I mean by "casino."

MR. LEBOVITCH: Yes. Okay. This is not something you can balance because you may know what your partners are doing --

THE COURT: It's not so much a casino. It's your own -- when you've got the casino and then you've got when you go to the casino.

MR. LEBOVITCH: When you have an investment like this, I don't think the island analogy works, but even still, the investment banker who is advising the target here is invested in the buyer, has a six-figure investment in the buyer. Okay? The Goldman stock investments.

THE COURT: And it also has fiduciary duties to the buyer.

MR. LEBOVITCH: Has fiduciary

duties --

THE COURT: Because two of its affiliates are directors of the buyer.

MR. LEBOVITCH: Absolutely, Your Honor.

THE COURT: So it's not simply its equity investment; right? It's also a fiduciary.

MR. LEBOVITCH: And nothing needs to be said when you're talking about a magnitude like this. No one needs to say, Hey, Steve, you know what to do. You need to get this deal done. You need to get it at a good price. When it's $4 billion, people understand. Okay. People understand what they have to do. I tried to put myself --

THE COURT: How would you deal with the idea, look, you've got an independent board. They're aware of the conflict. There's expertise to be gained. They've been paying Mr. Daniel and his team for a long time. They know a lot about the business.

At a critical point in the company's history, do you want it totally out of the process, or do you want to take advantage of their expertise but recognize their conflict and proceed in that kind of

open-end adult basis. And what they're going to say is, That's what we did. We cabined their influence. We took the steps we did, but we also wanted to make sure that we were privy to their expertise.

MR. LEBOVITCH: Two answers, Your Honor. One is -- I'll get to this -- they didn't. I mean, I want to lay out that they really didn't cabin it properly. But, more broadly, again, this is the indication of the situation. Is it even fair to ask Steve Daniel to give you that advice?

And this isn't the hostile bid that's pending that has the ten-day ticking clock. You've had a lot of advice from Goldman over the years. That's fine. In real life, when a bid is made, people get a banker. People get bankers involved.

For $38 million, you know, Morgan Stanley, they're pretty smart people too. They can get up to speed pretty quickly. And the reality is from August 30th to September 5th, I mean, there's bankers, with a six-day turnaround, they can come in pretty new to a company. They know the industry. They can give advice.

So someone has to think, and I think it has to start with the CEO. The chairman has to set

the tone and say, I'm going to let you guys decide whether there is a conflict here and whether we should even hear from Goldman before we hear from them.

And I don't know if it was made clear in our briefs, Your Honor, but at that first meeting, the CEO who set the agenda, I asked him. He was clear: I set the agenda. I said, Why did you let Goldman give its advice before you let the board even assess the conflict? And he said, essentially, it was inconceivable they were going to push Goldman out. That's because he wasn't recommending it. They weren't going to push them out. But how could Steve Daniel do this?

It's like if someone asks me to go argue for the abolition of shareholder litigation, it's an absurd notion. I could never tell my partners I would do that. I could never do that. And the Chamber of Commerce could never hire me to do that.

THE COURT: Well, I mean, if you're good at it --

MR. LEBOVITCH: I would be good at it, but I wouldn't do it. And no one could think that's a logical --

THE COURT: I heard of somebody one

time waxing eloquent on how they would never be unfaithful to their spouse, and it's just an outrage, these NBA and Hollywood people. And I said -- you know, I looked at them like, I suppose from the position that you're in of minimal opportunity, that's a fairly -- but if you walked into every major American hotel and there were like 20 beautiful people waiting for you, you know, I just wonder whether -- as opposed to the reality of your life, it wouldn't be so easy.

So I'm just saying, I'm glad that you're fervent in your threshold, and perhaps you'll never be tested by the offer of a fee that will put you to the ultimate test.

MR. LEBOVITCH: Well, here, Your Honor, the fee --

THE COURT: It's just obscene -- my sense of things is that people's scruples sometimes get rationalized away as the pile of money increases.

MR. LEBOVITCH: That's true. And that's kind of exactly maybe a point here. It is up to Your Honor to decide if there is a limit, and if there is a point at which the pile of money on one side of the conflict is so severe that it is just not

reasonable to ask --

THE COURT: Don't you have to --

MR. LEBOVITCH: -- the banker to separate the two.

THE COURT: Don't you have to try to sort of link that to some sort of probabilistic harm to the stockholders as a result of that?

MR. LEBOVITCH: I am --

THE COURT: Part of what you're saying is that there is also a couple of levels at which conflicts operate. One is that even if people are acting in what they say is subjective good faith, they're trying to do the right thing, it's kind of difficult to put the mountain of money on the other side of the equation side. And the second is they might actually be influenced.

There is another way of looking at it. Some people can react to proceeding in the face of a conflict by actually being more aggressive in the role, depending on how they want to protect their reputational interests.

MR. LEBOVITCH: It's all conceivable. We could all speculate on it. The board didn't ask those questions. No one did. Because there was a

discussion where Goldman presented its analysis and then there was discussion about the existence of the conflict. That was it. There was no one saying, Steve, how are you going to handle this?

THE COURT: When was the last time -- I read the board books, and it appears that Morgan -- that Goldman Sachs at some point kind of stopped presenting any banker books, really, about the Kinder offer; right?

MR. LEBOVITCH: Well, September 5th, they were introduced to give advice about the spin they presented on the Kinder offer. September 15th, they were again introduced as providing advice on the spin. They gave advice about the Kinder offer.

After that, I think the books focus on the valuation of the E&P business. But, I mean, the highlights -- this was not a board in the usual course. In the usual course, a board has on the one hand its decision that it knows all about, which is the stand-alone option: Run this business. That's what, under Delaware law, they're supposed to do, and they're expert at.

This is a board that needed advisors for either of its binary options, they way the board

saw it. Either do the spin, for which they clearly needed advice, or do the deal. And obviously, if your economic incentive is to get the deal done, if you make the Option A of the spin look worse, Option B looks that much better on a relative basis. So I don't really understand how having them do the advice really works.

THE COURT: You're also faulting -- you're saying they should have looked at a third option, which was essentially a strategic sale of the separate businesses.

MR. LEBOVITCH: Yes, Your Honor. And there is actually a wealth of precedent for that. I guess we haven't seen the breakup hostile tender offers for a little while, but back in the 80s when we did, the natural response, the given response, is to take a look and say, Why is Asher Adelman going to make more money than we could, breaking this up? Let's look at our own structuring options. Let's see if we can save a part of the business but sell things off. People would respond that way. I mean, this is kind of black letter banking strategy.

THE COURT: But it didn't appear that Morgan Stanley viewed that as a good option, did they?

Is there even any consideration of that option?

THE WITNESS: There was absolutely none. And I asked Doug Foshee. No. There was no consideration of it. What we heard in the litigation, not through the evidence, but afterwards, in the briefing, we heard, Well, they actually did consider it the prior spring.

THE COURT: But not when Kinder Morgan came on the scene. For example, there was the e-mail -- there was a few of them. Completely realized Kinder Morgan didn't want competition. That's typical of potential buyers. But there was no even soft market check done by any of the bankers about whether you could get interest in the separate parts of the business.

MR. LEBOVITCH: Absolutely none. And I'm glad Your Honor is aware that there are the e-mails. I don't know if I -- we put in directors' handwritten notes on the original Kinder offer.

THE COURT: The directors that had written a couple of them had written that on the --

MR. LEBOVITCH: They understood. They understood why Kinder was doing what he was doing. And it was a good strategy, but how do you not counter

it? Think of it this way: Everyone knows, Morgan Stanley was clear, Goldman, Doug Foshee was clear, there was not really anyone who could bid for the whole company. But when you announce the spin -- I mean, the defendants argue, you had a soft market check --

THE COURT: Kinder Morgan, they're bidding for the whole company, but they only wish to keep a portion of it.

MR. LEBOVITCH: It's a corporate breakup. That's what it is. It's just not done as a hostile raid. It's done as a friendly negotiated deal.

THE COURT: Your friends say that's the perfect way to do it because the execution risk is on Kinder Morgan.

MR. LEBOVITCH: Well, but here's the thing. When the spin gets announced, all those potential bidders that Morgan Stanley and Goldman and everyone knows could be out there for the component parts, all of those people are essentially put on hold because they say, Wow, these guys are going to spin. I never really thought I could buy just the pipes or buy just the E&P business.

But when the defendants have said in their briefs that the announcement of the spin somehow put the company into play, it's just the opposite. They were not in play because people say, I should wait for the spin to happen, and then if I'm interested in E&P business, I can go bid for that. If I'm interested in the pipes, I can go bid for that. So that's the brilliance of Rich Kinder's strategy.

THE COURT: The brilliance is that Rich Kinder wants what was going to be the subject of the spin; right?

MR. LEBOVITCH: He wants the other part of the business.

Let me step back, Your Honor. A year earlier he proposed a transaction -- this is September 2010 -- he proposed a transaction in which he essentially asked El Paso to first spin off the E&P business that he doesn't want.

THE COURT: Right.

MR. LEBOVITCH: Doug Foshee testifies, I understood all along. That's not his business. He's not interested in that. Rich Kinder's proposal was, Spin off the E&P business. I'll buy the balance. For various reasons, that wasn't going to work out

back then.

Over the next few months, Rich Kinder fixed his problem by going public. And I'm not saying that's the intent. I'm saying that's the effect, is that he fixed the problem. And Doug Foshee went ahead and did this spin. Now, Rich Kinder sees this and says, Okay. I could wait for the spin to happen. That's kind of a cleaner transaction. But then when I bid for the pipes, I will have competition, a lot of competition.

I think Your Honor is aware, you know, companies like Williams is out there obviously on the acquisition trail. They could go bid for the pipes. This is a great asset that -- Doug Foshee said, We have a tremendous growth opportunity. Rich Kinder says, You know what? I'll bear the execution risk, but the whole game is if I can get a deal done before anyone is ready to bid because they're waiting on the spin, I can have no competition. That was the move here, essentially.

As far as neutralizing the conflict, we do think, Your Honor, if there is ever a conflict that can't be neutralized, this would be it. I think that the problem really goes beyond just the mere fact

of a conflict here because they didn't isolate things the right way.

The Chinese Wall Your Honor referenced, as I said, people know what has to be said, what has to be done. No one has to say it.

Also, just a reality of the way this case was litigated, your Honor will remember, we were constantly told that the proxy is coming out in two weeks, in three weeks. We did do the discovery here in two-week intervals. That's not the defendant's fault. They may have really believed the proxy was coming out. But what happened is you make compromises, so I can't even draw an inference based on a very truncated document production.

But more importantly, the Chinese Wall came a year too late. I just mentioned the September 2010 offer. Exhibit 56 is something we found after our initial brief. We sent in the reply. I don't know if Your Honor has seen it. I have a binder with just --

THE COURT: I probably would have more of a recollection of it if you describe it.

MR. LEBOVITCH: I will describe it to Your Honor.

THE COURT: The numbers, they eventually lose emotional significance to me.

MR. LEBOVITCH: What I can do, Your Honor is, I have a binder with just isolated exhibits.

THE COURT: This an e-mail?

MR. LEBOVITCH: This is an e-mail.

THE COURT: From -- exchange --

MR. LEBOVITCH: This is within Kinder Morgan talking about exchanges with Goldman here.

THE COURT: Okay. I have all kinds of things like this.

MR. LEBOVITCH: Your Honor, it might be easier -- I have 12 exhibits here that I might reference. I might not reference all of them. Can I approach?

THE COURT: Yes. Thank you.

MR. LEBOVITCH: Your Honor, take a look at Exhibit 56. This is an exchange within Kinder Morgan and Greenhill & Co., who had been earlier on advising Kinder Morgan. And you can look at the second and third e-mail on the page. There is an earlier discussion about contacting Goldman Sachs to get some feedback. Goldman Sachs here, of course, is the same Goldman Sachs that owns 20 percent of KMI.

Back then, they were advising El Paso's management on how to respond to Kinder's offer.

So you see Aaron Hoover asks Park Shaper on November 8th, "Have you received any feedback from Howard (GS)?" All right?

And then Park responds, "Howard and I finally connected today. I'll pass on his feedback when we catch up."

So he didn't put anything in an e-mail, but there was no wall. People were talking.

Now, your Honor touched on the fact that --

THE COURT: This is a year before; right?

MR. LEBOVITCH: That's just my point about the Chinese Wall. I don't think the Chinese Wall matters. I kind of picture Steve Daniel sitting on that wall, knowing what his business wants, what his partners want, knowing his own investment at KMI. It's like he's sitting on top of the wall and doesn't know which way to go.

But even if you're going to credit a wall of having some relevance, they didn't credit it back then when they made an offer. I don't know why

the Chinese Wall now would be so great if they didn't think to do it back then.

THE COURT: What you're saying is when Kinder Morgan first comes around, Goldman Sachs, Daniel -- Steve Daniel is the long-time financial advisor for El Paso. Goldman obviously should know that. And they don't take any internal steps to deal with the conflict.

What your friends might say is that, Look, El Paso rebuffed that overture, which shows that, you know, that they weren't just in the pocket.

MR. LEBOVITCH: I think from the El Paso perspective, proposing a deal involves essentially a corporate breakup, a spin, and then accepting the partnership units of a private entity. That might not pass the straight-face test. I think that was a very real problem. So I don't know if you give them many points for the management team saying no to KMI's offer back then.

The point is that's when the discussions started. That's when the seeds get planted for, Oh, Rich Kinder doesn't want the E&P business. He's proposing to spin it. That's when Doug Foshee and Brent Smoluk, who runs the E&P

business, may start thinking, How could this really play out? And they say, Well, let's do our own spin. They do their spin. There is an IPO and, lo and behold, Rich Kinder comes in with a new proposal. If he didn't do it in August, he would have done after the spin. He just had the strategy that everyone seemed to go along with.

Now, Goldman's refusal to allow an unbiased opinion from Morgan Stanley is significant because no one asked them to give up any fees on the spin. The request -- sorry. The first request was Goldman saying, Pay me on the deal. Let me be part of the deal. So actually, the board, the CEO, had leverage. It just didn't use it. They just didn't use it. They passed along a request by Morgan Stanley, not from El Paso or its board.

Morgan Stanley said, Can you let us be a co-advisor on the spin? And that makes sense. And John Sult, the CFO, when I deposed him, he understood that the idea was you would give advice on both sides, the binary decision.

But as Steve Daniel testified -- this is at Page 195 of his deposition -- he says, Yeah, there was a request. He says, It was more like -- I

think it was J.R. -- J.R. Sult -- more like they had asked. So he was asking, but he was going to be okay with whatever we went with. Okay? This wasn't using leverage.

Now, Goldman says no. Okay. Why? If we decide to be cynical about what people did here, we would say if you can cabin Morgan Stanley so that it can only advise on the deal -- and there is no tail, because you're going to do the spin. It's just breaking up the entity. You can make sure that they're going to know kind of where to come out on this.

They worked together --

THE COURT: So if they had rejected -- if when Morgan actually gave the advice to reject the Kinder Morgan deal and to continue with the spin, then Morgan Stanley would have just gotten a $5 million flat fee?

MR. LEBOVITCH: I don't think Morgan Stanley got anything. They got a hundred --

THE COURT: They wouldn't get anything in that context?

MR. LEBOVITCH: Nothing. They had 100 percent contingency.

THE COURT: And so they were there to benchmark the deals. They would only get a fee for the Kinder Morgan option. And then -- but Goldman Sachs, which was supposedly only advising on the spin, and insisted that Morgan Stanley not get any fees if the spin happened, successfully secured for itself a success fee for a deal with Kinder Morgan, which was the deal that they were supposed to be Chinese Walled from advising on?

MR. LEBOVITCH: And they got a fee if the spin went forward, so they had hedged themselves pretty nicely here.

Now, the bankers, they weren't walled off early on. And I want to highlight kind of why that's so important. They describe themselves as co-advisors. I think actually both Jonathan Cox from Morgan Stanley and -- I think he used the words, "We were collaborating," and Steve Daniel said, "We were co-advisors."

And does information affect -- clearly, Goldman Sachs helped get Morgan Stanley up to speed, as if that was needed, but they were in the board presentations together, Your Honor. So if Morgan Stanley is looking to reach a certain goal,

maybe this explains some of the, you know, what I think is almost stunning assumptions that are made in Morgan Stanley's analysis. They were in there when Goldman presented its initial analysis on September 5th; September 15th I believe also.

So they at least understood where Goldman was approaching it, where they were targeting the valuations. As things evolved, you know, you can make an inference of where you end up. You just have to maybe make different assumptions of how to get there. I think that's what you can see with the slight differences between Goldman and Morgan Stanley. They made weird assumptions on different aspects of where they can kind of play with things.

So I think, Your Honor, you know, that in the Toys-R-Us case, I think people kind of misread that to say in that case, then-Vice Chancellor Strine approved staple financing. Actually, no. When you read the facts of the case, you highlight that the banker in that case early on asked the board to work both sides of the deal.

What Your Honor said is the board promptly nixed that idea. That was important to you. That's at Page 1005 of the opinion. In fact, the

board only approved the staple financing two months after the merger agreement was signed. So all Your Honor permitted there was essentially the creation of a conflict after the deal was already done when, presumably, the bankers advising the company had the right --

THE COURT: I permitted that?

MR. LEBOVITCH: Well, I mean, you looked at it actually with a critical eye.

THE COURT: I think that's one of the world's most distorted opinions on all sides.

MR. LEBOVITCH: That is my point, Your Honor.

THE COURT: What I said was there was no benefit to the company. What I actually pointed out is that an upfront staple might be of a benefit to the company if it was controlled by the special committee and everybody understood the incentives.

Of course, we all know about staple financing. They're available in financing markets where you don't need staple financing and they're unavailable in markets in which it would be useful.

MR. LEBOVITCH: Right.

THE COURT: And that's what we've now

have learned from experience. And it did fuel for some reason this idea that you get a second bank to stamp "fair" on something, and the first banker that's conflicted does all the cool stuff, which is a distortion. The opinion never suggests that either.

MR. LEBOVITCH: Absolutely.

THE COURT: But, again, the text is what it is. And, you know, we all learn from theoreticians that just because it says something on paper doesn't mean that it says what it says.

MR. LEBOVITCH: Your Honor --

THE COURT: There are a lot of deconstruction-oriented scholars who work for investment banks.

MR. LEBOVITCH: Yes, Your Honor. And I'm just telling you, the way I read it, based on my understanding of where Your Honor comes from, is had the board not nixed the idea in the first place, Your Honor may well have had a real problem with it. And what we have here --

THE COURT: But isn't the issue here -- actually, Morgan Stanley, in the kind of high-testosterone environment that it is in, there's nothing Morgan Stanley would have liked more than to

come in, show the board the way to a transaction that did not involve Kinder Morgan, and they would have ended up with a big fee.

But the reality is, they did the numbers too, and they couldn't get there. And the best option was to take Kinder Morgan and get as much as you could for that. And, you know, they had every incentive to, frankly, be creative and to find another way, and it just isn't there.

MR. LEBOVITCH: Well, I don't know if they had -- if Morgan Stanley had incentives to find another way, if they are not going to be paid on the spin, and the focus --

THE COURT: When was the compensation arrangement struck?

MR. LEBOVITCH: The compensation arrangement was struck, it was negotiated near the end of September, I think in the last few days of September. The engagement letters are dated October 6th.

THE COURT: When was it first kind of talked about?

MR. LEBOVITCH: I think on that, Your Honor, the record is a little bit vague. All I

can say is when I asked the CFO, John Sult, late September is what he said.

THE COURT: By the end of September, where exactly were they in the deal dance with Kinder Morgan in terms of how committed they were?

MR. LEBOVITCH: They had struck the deal at 27.55. There was the bust --

THE COURT: And then Kinder Morgan said, Oh, my gosh.

MR. LEBOVITCH: Kinder Morgan at that point --

THE COURT: We have overshot the mark.

MR. LEBOVITCH: Right. Kinder Morgan in its model relied on the most bullish analyst on the street, they said. Kind of a little bit -- you can have a little skepticism about that. I think the people at El Paso did. But in any event, what happened is at the time that the fees were expressly discussed -- so this is all after Morgan Stanley had said, Hey, the spin is more attractive than 25.50, significantly more attractive, and don't be afraid of a hostile bid, you now have Kinder Morgan is still below the 26.50 floor that the board set, and that the board a few days later reiterated. I guess it was

September 30, they reiterated. But then after the compensation has become clear, you end up with a deal at 25.90 of cash and stock.

THE COURT: Compensation to whom?

MR. LEBOVITCH: To Morgan Stanley. In other words, I don't know when the negotiations started other than late September. It's clearly set by, I believe, September 30th. I believe that's when it was clear that there is an e-mail saying Goldman didn't agree to open up the exclusivity. I think from there on, you have the board tries one more time to say, Look, 26.50 is the floor on cash and stock. We're not putting value on these warrants. We want 26.50 as the floor. They reiterated.

The minutes, I mean, there shouldn't be a debate about what those minutes say. They're very clear. I can point to that, Your Honor. And all of a sudden, they get a deal that's below the 26.50. It's 25.90 of --

THE COURT: So that's 25.90 of stock and cash. And it has a warrant on top of it?

MR. LEBOVITCH: It has a warrant that the parties in the proxy describe that they agreed that the value for tax purposes is 96 cents. I think

Morgan Stanley, they didn't make any assumption about how likely it is that you'll get the $40 in five years, but they said something like the value could be somewhere close to zero to $2.

But all they're telling the shareholders in their public filing is, We agreed on the value. I imagine if they agreed the value was $4, then they would really be pounding the table about the premium this deal offers.

But it's just an agreed value. They're not even representing that's an actual, you know, likely value that anyone in the market would have valued it that way.

THE COURT: What is the registration on -- I mean, are these things going to be listed?

MR. LEBOVITCH: I believe they will be listed.

THE COURT: And rated?

MR. LEBOVITCH: I believe they will, yes.

THE COURT: El Paso warrants?

MR. LEBOVITCH: Because I guess once they -- what's that, Your Honor?

THE COURT: They'll be listed as --

MR. LEBOVITCH: Kinder. Kinder warrants. They're tied to Kinder stock. So in other words, if the deal, which may have already driven up Kinder stock, right, if the deal is so attractive to Kinder and Goldman Sachs in the long term that it's a windfall for them, well, then El Paso shareholders will get a few more shekels.

I want to highlight that KMI is not really innocent here. They kind of stayed out of this, but --

THE COURT: Does that mean they're traded on an Israeli exchange?

MR. LEBOVITCH: Yes, Your Honor.

THE COURT: I was trying to figure out the relevance of shekels.

MR. LEBOVITCH: They'll get a few dollars. They'll get a few dollars.

The defendants highlight that the Goldman Sachs directors recused themselves from the Kinder Morgan process. Now, that fact actually helps the plaintiffs in numerous ways, Your Honor. First of all, when the Goldman Sachs directors say they're recusing themselves, what does Rich Kinder think is

going on? Did he say, Wait a second? He obviously understood, you're recusing yourself from my end so you can go advise Goldman.

There is no indication that he said, Hey guys, I want to run a really clean process here. Don't mess this up for me. No, he understood what was going on. He didn't have to say any more.

And also, recusing for Goldman -- and picture anyone in a conflict. There are some basic rules about how you decide a recusal. You look at your preexisting bigger interest, financial, emotional, whatever it is, and then there is something new that comes along. If the something new is smaller, you don't take it on. It doesn't make any sense to say, I'm going to recuse myself from a $4 billion investment to go work on a $20 million fee.

THE COURT: Well, I mean, it does. Sure it does, in this circumstance. I mean, it makes sense from Goldman Sachs' perspective, which is if they believed that Rich Kinder and his management team have full incentive to get the best deal for Kinder Morgan, and they believe Kinder Morgan has adequate financial advisors, you know, why get involved? There is going to be no fee on their side. They're not

going to be hired as the advisor on that side. Whereas on this side, they've got a longstanding client and the potential for, you know, a very nice banker fee.

MR. LEBOVITCH: That's exactly right, Your Honor. The other -- another reason why the recusal is a red herring, factually, there were no board meetings to recuse themselves from until October 16th, when the KMI board approved the deal. We asked for the minutes, and then we realized recently, the proxy is pretty cute about this. It talks about board discussions. It doesn't talk about board meetings.

THE COURT: That's what I was going to ask you, and I'm going to ask the defendants. What factor -- what weight, if anything, did the board of El Paso give to the nature of Kinder Morgan in terms of -- there is a lot of talk on the defendants' side which I want to hear more from them about, about the execution risk of the stand-alone option, which involved some of the -- but a lot of the same execution risks still are inherent in the deal that's being done now, as I understand it.

I see quizzical looks, but if you're

selling a deal as a strategy and you're selling that you're getting a substantial part of your currency in the stock of the acquiring corporation, and the acquiring corporation needs to market the asset, that's an execution risk. If the acquiring corporation has actually had its own difficulties operationally, and if part of the upside is the value of the continuing cash flows, then they're going to have the execution risk of putting together these assets.

So there is a lot of execution risk. Still, I'm not saying it's as high, or whatever, as the stand-alone strategy, I suppose, because you're getting half your asset out in cash or something like that. But I'm talking about the nature of Kinder Morgan and the fact that the El Paso stockholders will now be stockholders in a controlled corporation with rather unusual governance features.

MR. LEBOVITCH: Your Honor, I think I do understand the question. First, I guess the first question is, before you get to the governance features, is just how much assessment did the board have of KMI I guess as a company? We know that when the offer was first made at 25.50, the offer that

defendants now say was a serious offer, that's why it's okay we didn't get a whole lot more, we had an instant reaction.

I guess it's Exhibit 23 in this binder. And one of the directors, he says, I want to be really clear. Right? Before they even have their phone call, he says, I want to be really clear. The price is inadequate. And he says, I would not take KMI stock in payment for a box of stale saltines, let alone a real value like El Paso.

Now, Doug Foshee's response to this e-mail I found a little troubling. I don't know if we highlighted this in our brief. His response is not to say, Well, let's talk about this. That makes sense. That's a concern of mine too. He says, "I think it best from here on out for us to have conversations about valuation issues via the telephone." He shut his director up, Your Honor. Okay? Don't send in e-mails like that, was the message.

There are other reasons to think that the board had a fair degree of skepticism. The board minutes talk about -- I believe September 5th and September 15th -- talk about KMI's, I guess, difficult growth profile. KMI, because of its limited

partnership structure, the master limited partnership structure, it has multiples, as it said, so deep into the splits between general partner and limited partner that it would make it difficult to grow.

Doug Foshee testified that acquiring El Paso improves KMI's growth profile. Now, it may be that it's a nice thing. You're improving the growth profile, and now we'll be shareholders of KMI, and so we'll get some of the benefit of that. But the question is, I mean, what made you go from saying, It's inadequate, it's a box of saltines, to saying, We're going to do a deal? And I think it goes back to that Netsmart -- the soft pressures where all the advisors are united, to say, Look, here's the deal. If the spin didn't look as good --

THE COURT: Or could it be they also had an awful lot of financial information, and when you start looking at the upside of the current options on the table in comparison to where Kinder might possibly get, you start looking at a situation where your stockholders can get in hand something in the top ranges of your strategic options. But frankly, if they get it in Kinder stock and they get it in the thing, they can, frankly, monetize -- I mean,

obviously, the cash part is monetized. It's not in shekels yet, perhaps, but it could be, I assume, soon. And the stock could be sold and immediately monetized, as opposed to the other options which will involve continuing --

MR. LEBOVITCH: Yes, Your Honor, and you're not going to hear me say that doing a deal with KMI and hoping for that long-term growth or the near-term monetization is irrational, but like Your Honor said, that's the difference between a Revlon case and a business judgment case. We're not looking at rationality. We're looking at reasonableness.

If the facts surrounding this deal create enough suspicion, we can all say, Yeah, there could be a reasonable explanation for the deal, but it's hard to justify that with a board that was so opposed they said, We're not even going to respond to 25.50. And then they turn around.

I guess I'll briefly talk about Morgan Stanley --

THE COURT: At the time they signed the deal up, they get 25.94 in cash and stock.

MR. LEBOVITCH: 91, I think.

THE COURT: 25.91. And then they get -- plus the warrant.

MR. LEBOVITCH: Plus the warrant, the 96 cents. So whatever that is.

THE COURT: What's El Paso trading at now?

MR. LEBOVITCH: I don't know that, Your Honor.

MR. ROWE: Your Honor, it's in excess of 27.

THE COURT: Thank you, Mr. Rowe.

MR. LEBOVITCH: Morgan Stanley's work product -- we've already discussed their incentives. We submitted the expert report of David Clarke, who is -- the question we asked him and the question he answered is not, you know, What's my own value for El Paso? He says, Are there errors here that a reasonably attentive director would pick up?

The defendants keep talking about how sophisticated their board is, and so if there is conflicts --

THE COURT: You plan to pick it up on exit multiples and the perpetual growth rate that is implied?

MR. LEBOVITCH: Your Honor, where is it that bankers can play games?

THE COURT: I think that's a different question. Where bankers can play games is throughout their analysis. There are many opportunities for them to play games if they know that they're playing games. There are many opportunities for the ones who, again, wear the better suits to also forget about all of the tales they learned in business school and leave them to lower people. And that's why you get analyses that are internally inconsistent.

I've had companies where -- I've had cases where the company's cost of debt was different in the same book for two different analyses. And so I guess one could say a director should pick up on that.

MR. LEBOVITCH: Well, first of all, we do have that here. We have the cost of equity for KMI being different. They used a lower of cost of equity when they were valuing the consideration of KMI's shares. But when they actually used KMI as a comparable for the E&P business, they used a much higher, I think it was 11.8 percent, cost of equity.

Now, Your Honor, I'm prepared to walk you through the board books. I can show you that one,

and you can see that, but the perpetual growth rate, we've all seen the little grid that is the DCF analysis, discount rates, the terminal multiples, and then you see the perpetual growth rate. It's right there in front of the board. We're using a 0.7 percent perpetual growth rate in El Paso.

THE COURT: Why don't you show it to me.

MR. LEBOVITCH: I will. It's in the small binder. If you turn to the last document -- we realized afterwards -- it's the "Project Sirius," Morgan Stanley 9/26/11 book. This is referenced in David Clarke's report, but I'm not sure this document has been submitted in the record yet, Your Honor. If there is no objection, perhaps we can look at it.

The .7 appears on Page 42 of Morgan Stanley's Pipe's DCF analysis.

THE COURT: Which tab?

MR. LEBOVITCH: This is the last tab.

THE COURT: Oh, Morgan Stanley.

MR. LEBOVITCH: Yes. This is the last tab. Your Honor, I'm really not that sophisticated about finance, but I know when I look at a DCF analysis --

THE COURT: So I should discount your briefs?

MR. LEBOVITCH: No, Your Honor. We have experts. I'm saying, I even know, to look at the grid -- look at where this spread is. It's like the first thing you know when you learn about a DCF. The middle number is 0.7 percent. That's the perpetual growth rate.

THE COURT: You're assuming a director knows what that middle thing means.

MR. LEBOVITCH: It says --

THE COURT: I mean, these banker things, half of the bankers don't know what's in them. I really think it's something the industry could do a lot better, because they set up all these complex matrices, they use them in their pitch books, and then they run them through to the end, and they've got every possible analysis in the world rather than the ones most relevant.

You're saying -- where on the chart, for example -- the implied perpetuity growth rate sensitivity is what you're saying is the growth rate implied by the combination of a discount rate of 5.75 and exit multiple of 10 is .7?

MR. LEBOVITCH: That's what the banker said, yes. That's what we were using. Now, I just want to touch on, should a director know this? Everything turns on the facts of the case, but the defendants can't have it both way. They can't poo-poo the risk that management and the bankers gave that advice by saying, Well, this board is not only independent, they're so sophisticated, and then say, You can't expect them to know the core, literally the heart of the DCF analysis.

Now why is .7 -- a little ridiculous; right? First of all, Foshee talked about the tremendous growth opportunity that El Paso had. Clarke, in his report --

THE COURT: Yeah, and what you're saying is this is obviously -- not only it doesn't even keep up with inflation, it's substantially short of expected --

MR. LEBOVITCH: Well less. That's my next point. Clarke points out that inflation is 2 percent. That's what's being projected. Some people think it's going to be more, but you can't really go lower than that. You're starting at 2 percent. Is there going to be any growth? Clarke

makes a point --

THE COURT: In their model, they actually use an exit multiple; right?

MR. LEBOVITCH: Mm-hmm.

THE COURT: I mean, they back into this -- they don't actually do what you're supposed to do with a Gordon Growth Model, which is to actually estimate a growth factor. They just use an exit multiple.

MR. LEBOVITCH: They essentially -- that's exactly right, Your Honor.

THE COURT: Then they somehow back into --

MR. LEBOVITCH: A terminal value.

THE COURT: Right.

MR. LEBOVITCH: That's right. And that's something that --

THE COURT: But what they're saying is the Gordon Growth -- what you then do is if you use an exit multiple of 10, you're suggesting that the perpetuity growth rate of this company is .7?

MR. LEBOVITCH: And part of Clarke's point is even if you should start with the Gordon Growth Model, which is his opinion, even if you're

going to go and start with the exit multiple and back in, when you see the .7, that tells you there is a problem here. The only reason it doesn't tell you there's a problem, Your Honor, is if what you're really doing is backing into a result.

The perpetuity growth rate doesn't make sense because the fact that there is going to be growth, the fact that El Paso --

THE COURT: If they just simply used inflation, how would that have affected their range?

MR. LEBOVITCH: Clarke calculates it with a 2.9 where he assumes less than 1 percent growth. I don't know the numbers with the 2, although I'm going to ask Mr. Schocket if he can find it in the report because he may have put it in a footnote somewhere.

THE COURT: We have the 1.8, although that's with the higher discount rate. That's up at 16 bucks; right?

MR. LEBOVITCH: That's presented as the less likely, but again, the highest growth rate that's in Morgan Stanley's book is lower than inflation. So how does a banker come to term with that? You either think this company is shrinking --

THE COURT: But that's why you're getting your great deal because Rich Kinder and Goldman are really stupid, because they're buying a company with a perpetuity growth rate that's less than half of the inflation rate. So this is an awesome sell-side deal.

MR. LEBOVITCH: If you believe this is an awesome sell-side deal -- notably, I don't believe this number appears anywhere -- it's not being advertised. I don't believe this is disclosed, but either way, someone has to look -- obviously, the bankers take the board through the book. So even if they're not laying out, Here's our key assumptions, they take the board through the book.

I think a director should know that the DCF is the most important valuation technique. Your Honor has -- this Court has said so many times.

THE COURT: I don't want to say I've said that many times. I mean, I think there are many different ways to look at -- frankly, you could have a situation where comparables are the most important if it's a commoditized kind of industry, and it's -- the best evidence is, frankly, things sell at X times cash flow or X times net asset value. It's not always the

case, but it obviously is an important indicator.

I also think one of the things that's illustrated here, again, is one would think that people would be matching similar -- would be applying corporate finance principles in a like manner to everybody involved, all the constituent players, and not being selective about how they do it.

MR. LEBOVITCH: Right.

THE COURT: I'm not saying anybody did that selectively here, but we see an awful lot of inconsistency in books like this where --

MR. LEBOVITCH: Well, Your Honor, Your Honor will decide if you want to say they're being selective. I am saying they're being selective, and I want to explain.

THE COURT: We don't have any other backup on how they came to this, do we? When they got their 9.25 to 10.75, that's from a range of comparable transactions?

MR. LEBOVITCH: That is --

THE COURT: Or is that a range of comparable company trade prices?

MR. LEBOVITCH: It's an exit multiple. I believe it's --

THE COURT: What I'm saying is --

MR. LEBOVITCH: It's too low, Your Honor, the exit multiple they used. It's objectively --

THE COURT: I understand. I assume you'll think it's too low. There are ways to do exit multiples because there is, for example, a philosophical debate you could have about if you use a current trading multiple of comparable companies, does that arguably embed a minority discount if you use this as an exit multiple.

On the other hand, if you think the growth rate of companies over time tends to normalize to the market perhaps using the current trading multiples, adjust for that. And, whereas, if you use comparable transactions, which are sales of whole companies, then you'd be overstating the future exit multiple.

You know, so there is that philosophical debate that men and women of valuation science and the academy never solved these problems. And they don't really think about them much, but judges like us who have to do appraisals do.

What did they, in fact, use? Did they

use a current sample of so-called comparable companies? Did they use comparable transactions?

MR. LEBOVITCH: Your Honor, they used what they considered to be comparable companies. And actually, I believe what Mr. Clarke pointed out in his report -- and hopefully, I can get the paragraph or the page -- is that El Paso has been trading above that 10 range. I want to say the number might have been 12-1/2 or 13.

THE COURT: You're saying it's comparable companies --

MR. LEBOVITCH: It was not a transaction figure.

THE COURT: -- not a transaction multiple.

MR. LEBOVITCH: So they used comparable companies, but I believe Mr. Clarke found that this number is actually lower than the objective data would support. This was something that he tussled with the defendants' second expert.

THE COURT: What was the median of their --

MR. LEBOVITCH: Their median was 10. And what he said is the 10 is objectively too low.

I'm trying to remember how they got there, Your Honor. I'll look it up. His report deals with it. It says the actual trading range of El Paso and of the industry was higher than the 10, so how can you think that's the right number? It's just a matter of finding exactly where he says it --

THE COURT: I'm talking about whether they used the median -- look, I'm not saying the bankers did it here, but it is often the case that bankers will come up with eight comparable companies. That will generate a median. And use something that turns out to be the multiple of one of the companies, and they don't use the median of their selected companies.

Was this based on -- I'm trying to figure out where they got the exit multiples from. Maybe Mr. Rowe will be able to help us.

MR. LEBOVITCH: I believe they did it based on comparable companies where they were trading. I mean, I'm sure Mr. Rowe will correct me if I'm wrong, but I believe that's what they did. There is no premium in it, but I don't want to make any more representations about it and be wrong, Your Honor. That's what I believe.

By the way, there is a basic reason why you couldn't ever think this company -- forget that it's not growing. It's a regulated entity. It's pretty much assured of increasing its rates with inflation. So you start out at 2 percent.

There is another big red flag, though, for the board, if they're paying any attention. Like you said, at least be consistent. If you are going to think that there is kind of a slow growth, at least be consistent. It is established, I believe, that El Paso did expect to grow faster than KMI. So didn't the board members think it odd that a few pages earlier, on Page 35, Slide 35, you have the blue discounted cash flow analysis, and the number you see there is 2.9 percent?

Now, again, the board doesn't understand how a DCF works or what's being described. They have to ask questions. Otherwise they might have a care violation. Here, you see the 2.9 --

THE COURT: Here, it's a little bit different. They don't use --

MR. LEBOVITCH: They use an exit yield. You're still getting the implied perpetuity growth rate. You get an exit yield --

THE COURT: Sounds like a traffic term.

MR. LEBOVITCH: Yes. It's a dividend yield. Because of the way KMI essentially makes its money, it's all dividend-based, Your Honor. So you're still solving for the perpetuity growth rate, 2.9, but for KMI, they do it based on a dividend model. This is something that we can see from the documents going back to Goldman talking to El Paso. These directors understand why the dividend growth model is a way to value these companies, for KMI particularly.

THE COURT: Don't your friends say, though, if you use the 2.9 percent perpetuity growth rate for El Paso it produces absurd results?

MR. LEBOVITCH: Here's the thing. They say it's absurd because they say that their deal is this blowout great deal.

THE COURT: I think what they say is even Mr. Clarke would not stand behind that as a reasonable number when he saw it.

MR. LEBOVITCH: You know, Your Honor, we know better than to put up Clarke to give a valuation at an injunction stage. He just didn't to that analysis. He made that clear.

THE COURT: What is the number that resulted in 2.9?

MR. LEBOVITCH: That results in the 2.9, is the range that's in his report, which is 35, maybe 30 -- I have to get that answer, Your Honor.

THE COURT: 35 for the whole company?

MR. LEBOVITCH: I believe it was maybe 33 to 41, something like that. That's not really what we're solving for at this injunction phase. The point is there is a mistake here that doesn't make sense. But the argument that that's just an absurd result, I mean, we've seen a lot of deals at 100 percent and, recently, 170 percent premium. This happens, particularly in a company that, as Morgan Stanley's witness testified, is very difficult for the market to understand.

You have growth capex that's never been reported, so the market doesn't even know about the expected future growth of El Paso. They have lower estimates on the growth capex. So what you have is you have the perpetuity growth rate of 2.9. A director should say, Wait a second. Now we're thinking that KMI is going to grow at a multiple of what El Paso is going to grow at? That's inconsistent

with everything that we thought before. We're not worse than a box of stale saltines.

Your Honor, the answer to your question I believe is the total equity value for El Paso share, if you fix the errors, is a range of 33.57 to 43.81. That's on Page 15 of Mr. Clarke's report. And again, to be fair, he was clear. He was asked to identify errors and simply say if the board says, If you fix this, where do you end up? We have not asked him to say, what are the other adjustments that you would make?

In other words, if you just accept all of Morgan's or Goldman Sachs' other assumptions and just correct the things that a reasonably attentive director should say, that makes no sense.

THE COURT: How do you deal with their response that if you correct those things you come up with something that seems to be strained, to say the least?

MR. LEBOVITCH: Well, when KMI --

THE COURT: If there was an insight -- I mean, if this thing was really worth that range, someone would have a big incentive to come in and bust up this deal.

MR. LEBOVITCH: If they knew the facts, in other words, if they knew how this model was built and the growth capex and all of that, and also --

THE COURT: But do you need to do that? You could run your own future for the pipeline company; right?

MR. LEBOVITCH: If you don't know about El Paso's growth capex, you could make assumptions, but you don't know where it's at. You don't know where it's at. And Morgan Stanley, in one of their slides, shows the street expectations for the growth capex, and you can see that the street is envisioning, I guess, a more severe decline whereas El Paso is not.

And CFO Doug Foshee testified about his expectations of significant growth capex in the next three years, and then it will slow down a bit because they don't really know what they're going to spend it on. They just haven't decided.

But I don't accept that they can now say that's ridiculous. When KMI made its offer at 25.50, Your Honor, they said, This is a blow-out offer. We're 75 percent higher than your market

price. But we know the board's reaction. We know everyone's reaction to that.

So they obviously thought it was worth a lot more. They thought that the market was undervaluing the company. So they ended up topping their negotiations at the 28, and they found a price below that.

But I don't know how ridiculous it is to say that a company that has great growth prospects, whose stock price has been shooting up as the market better appreciates its value, to say it could have been in a range of 33 to 43, I don't know how -- why is that so crazy? Premium doesn't really do it, especially when there is information that you may not have.

THE COURT: We're a fair piece in. I want to make sure that you get to any points you need, but then we also take a bit of a break and come back with Mr. Rowe. So why don't you pick which to hit. And also, we need to focus on what relief you're seeking, because I'm not sure I understand it.

MR. LEBOVITCH: Okay. I will explain that, Your Honor. Let me quickly go through the main points.

The management conflict, I think from the defendants' brief, they're saying this is just a hypothetical. It's not. Not only do we have Exhibit 41, which is in your binder, which is the "bogey" e-mail, I mean, if that was a serious conversation, when John Sult asked, Hey, have you thought about this? the answer was, Yeah. Doug and I talked about it. He doesn't want to talk about it for now.

When I deposed him, I said, You remember this? He said, Yeah. I said, Have you had a conversation? Because you said you were going to save the conversation for later. And, Your Honor --

THE COURT: Is there evidence that he talked about it at all with Kinder?

MR. LEBOVITCH: Yes, multiple conversations, Your Honor. And this is in Exhibit 12 of my book, Pages 271 and then 277. And I've handed this to you. I would probably highlight 277. 271, he talks about the first conversation. It was casual. He basically says, Yeah, there could be some interest, Rich. Keep that in mind. So it's a short conversation.

I said to him, Was that it? He said there was another conversation. He went back, and it

looks like starting at the bottom of Page 277, there was more detailed conversation.

I actually want to be cautious. I appreciate that KMI has had a lot of sensitivity about this, so I don't know if I should read it into the record or maybe ask Your Honor to look at the -- just what Doug Foshee proposed to do.

MR. ALLERHAND: May I be heard for a second, Your Honor?

THE COURT: Mm-hmm. You may.

MR. ALLERHAND: Thank you. Joseph Allerhand for Kinder Morgan.

I think, Your Honor, rather than start reading into the record, we've supplied the plaintiffs and the Court with an interrogatory response which we took quite seriously, with our local counsel helping us, which provides exactly the record as to whether there were any conversations or anything occurring with respect to a management MBO.

And I would suggest that if we want to tether the facts to the record, that makes it quite clear that apart from the snippet of a deposition, that, in fact, there was a written -- excuse me -- an agreement that there would be no such bid. No such

bid has occurred.

And if we have an opportunity, in an appropriate way, perhaps at a sidebar, we could update the Court as we did yesterday with our friends from the plaintiffs with respect to what exactly is happening on the sale of E&P assets. And there is no participation, Your Honor, I can flatly say, from any member of management.

MR. LEBOVITCH: Your Honor --

MR. ALLERHAND: I'd like to hand up the interrogatory.

MR. LEBOVITCH: Respectfully, Your Honor, I was trying to be courteous and not upset anybody. They're sensitive. I simply wanted to know, can I read into the record about 8 lines of Doug Foshee's testimony about his conversation? I don't even see sensitivity in it, but that was my request.

MR. ALLERHAND: That's fine, if we can hand up to the Court the interrogatory response that puts that into context so Your Honor has it. Is that okay?

THE COURT: I don't care when you do it but, typically, you would do that during your turn.

MR. ALLERHAND: Fine.

THE COURT: I appreciate passion, but I'm not quite getting it here.

And I also think there are two different questions. One is whether they're doing something now, and whether at the time when the deal terms were being struck, someone was interested in doing something. Those are related but distinct issues.

So why don't you read the deposition.

MR. LEBOVITCH: Thank you, Your Honor.

THE COURT: I've read a lot of the depositions. I'm not sure what we're talking about here that is going to affect world stability or the price of the euro.

MR. LEBOVITCH: I think Your Honor has picked up on the fact that the conversations within management about possibly making a bid happened before there was a deal here, before -- so it's critical, their mindset at the time was, we have an opportunity, and so maybe we want to lock this deal in.

THE COURT: When were the conversations, though, with Kinder?

MR. LEBOVITCH: These conversations, he testified, happened a few weeks after the deal was

struck. All right. So that doesn't go to their mindset, but it goes to what his plan was.

He says -- I said, "Have you had any further conversations ... with Rich or Park?" meaning Rich Kinder or Park Shaper.

"Rich or Park, I think we had a very brief subsequent conversation that it probably didn't make any sense for the management team to do that up front, because from Kinder Morgan's standpoint, they really needed to get price discovery on the assets. But that if they got to a point in that price discovery where they weren't liking what they were seeing or wanted an alternative, that then if they were interested, there would be interest on the part of management."

So, you know, if you've got bidders and you know there is going to be bidders, strategics may or may not want to compete with management. We all know private equity bidders would like to partner with management. And the management says, Wow, we've got an opportunity here. And they were thinking this.

The fact that he told Kinder, according to his own testimony -- I guess KMI is calling him a liar, but according to his testimony, he

told Kinder. That doesn't mean that wasn't his plan. We see an e-mail that says, Oh, Doug has thought about it. He wants to wait until later. He thought this through.

He says, Well, if we walk away from this deal because the board says, 26.50 of cash or stock or we walk away, you don't get the ability to make a purchase of one of your own assets without any fiduciary duties. Right? They don't want to make an MBO offer for just the E&P business while it's a public company. But if you can get rid of your fiduciary duties, sell the company to someone else, your shareholders are off into the sunset. You go make a bid. It's a pretty good deal, pretty good opportunity. So it's a real conflict here.

And, Your Honor, they did disclose to the board Mills versus Macmillan. The Supreme Court said that management, given their duty of disclosure --

THE COURT: What is your argument about how it influenced the process?

MR. LEBOVITCH: Okay. Well, the numbers they get from the board, you know, we challenge that. I discussed some of that. The

CEO/chairman sets the tone --

THE COURT: Is the argument here -- the CEO says the only negotiator here was Foshee; right?

MR. LEBOVITCH: Yes, to our knowledge.

THE COURT: What's your concern about what he did as a negotiator?

MR. LEBOVITCH: What he did as a negotiator is, according to the testimony, when he went to go reject the 25.50 and not make a counter at 25.50 because it was so far off the mark, he went to Rich Kinder's house. They had a half-hour conversation. I got about 30 seconds of that conversation: I told them why this company is valuable --

THE COURT: Do they live in the same town?

MR. LEBOVITCH: Yes. They both live in Houston. He went to his house to do it. It was a one-on-one conversation. It was a half-hour. It had happened a few months earlier, but he didn't remember anything besides countering.

Again, I get it. We don't have the record on it, but this is the reality of litigation.

THE COURT: What did he say -- what do you mean, "countering"?

MR. LEBOVITCH: He said that he went and he says, El Paso has a great growth opportunity, great company. 25.50 is not going to do it. Rich Kinder says, Are you going to counter? And he says, I'm not going to counter. Okay? That's his testimony, I think, in a nutshell. But I mean, he basically -- that's the gist of it.

THE COURT: They eventually counter at 28; right?

MR. LEBOVITCH: That's one of the key points I wanted to highlight. 25.50 wasn't good enough to engage. Kinder has another phone call with Foshee a few days later where he says -- he didn't raise his bid. He says, I think this is a really good offer. You should really think about it. And by the way, if you don't, there is -- he makes an allusion to going public with it. And he writes a letter that suggests --

THE COURT: The little teddy bear hug letter.

MR. LEBOVITCH: Yeah. It was a teddy bear hug. It was not a full-on, We're going. No one

was scared about it.

Morgan Stanley says, Look we can do the spin, and maybe shareholders will be upset at us, but we really have a great embedded defense to a hostile bid. And Doug Foshee said, That didn't weigh on me. But what happens at the next meeting --

THE COURT: But isn't there even evidence in the record that they somehow thought that if they pushed Kinder into a hostile, that they would get a lower price?

MR. LEBOVITCH: I think they didn't believe pushing him into a hostile would get a higher price because Steve Munger at Morgan Stanley said, There are no other bidders. You're not going to get competition because no one wants both assets. And there are very few people with the financial capacity to buy the whole company. Okay? So the only way to create competition is to express a willingness to take bids for the --

THE COURT: I'm still not really understanding their logic because even without the competition, hostiles often generate pressure on bidders. And if the bidder goes hostile, then you're obviously in a situation where you can also -- you

don't have to sit around and not explore the potential for selling the parts.

MR. LEBOVITCH: That's right, Your Honor. And in fact, the testimony is no one believed 25.50 was the best and final. They understood when that offer was made -- obviously, in negotiations, Rich Kinder left himself some room. I think that the board minutes reflect that they just didn't think there would be a higher bidder coming from someone else -- I mean a higher bidder coming from somewhere else. Obviously, you can negotiate.

Then what happened a few days later, after these conversations is they come back at 28. And Your Honor, again, in the normal course, I wouldn't be here saying we should micromanage where you counter at in a negotiation, but if you just said 25.50 isn't even not worth talking about, not worth engaging on, do you really come back at less than 10 percent with your counter? That is really your way of saying, Let's just do this deal.

THE COURT: Or it's your way of saying it's not even worth -- you're trying to set a tone; right? I mean, there is a fair amount of value between 28 and 25.50; right?

MR. LEBOVITCH: Well, it's somewhat less than a 10 percent increase on the value of the deal.

THE COURT: Which is how much in dollars?

MR. LEBOVITCH: It's a lot. It's over a billion dollars. It's an increase. But, I mean, I don't think that scale really can matter. You understand when the board says --

THE COURT: Well, the scale can matter to some extent. One of Kinder's attractive attributes to investors, because they seem to like this kind of thing, is its incredible amount of leverage; right?

MR. LEBOVITCH: Leverage in the company?

THE COURT: Yeah. Won't it be very highly levered after this deal?

MR. LEBOVITCH: I don't know how far --

THE COURT: It has a lot of debt, doesn't it?

MR. LEBOVITCH: There is a lot of debt. I mean, this is a leveraged deal. I don't know if it will be off the charts. I don't know if

this is like an LBO.

THE COURT: No, but it's going to be a public -- I think it's going to -- maybe I'm wrong.

MR. LEBOVITCH: I think that's right, Your Honor.

THE COURT: I thought it was north of 25 billion in debt that it was going to be.

MR. LEBOVITCH: That may be the result. I think it's 17 billion --

THE COURT: I'm talking about the resulting shebang.

MR. LEBOVITCH: Right, right. The result may be at that level. That may be. But my point is, again, you know, in context, you might ask, why did Foshee come back and say, a few weeks after they said, We're not going to engage at 25.50, and you're not allowed to counter, he did say, Hey, I think we should come back at 28.

Okay. If you don't want to question the method, I do think coming back within 10 percent of the offer that you rejected when you know the bidder or you expect the bidder is prepared to increase, that is your way of sending a message: Okay. Let's get a deal done here.

Now, if you at least believe that 28 made it highly likely the deal would happen, Goldman Sachs was in the room up until then. They walled them off afterwards. But at that point, if you think it's possible Goldman Sachs had a goal here that was not just doing the advice for El Paso, they achieved it. There is a counter that's been arranged that Kinder Morgan can deal with, can counter to.

So, you know, do I know how Foshee -- I'm not saying they manipulated the board directly. The numbers led them to it. We've challenged the numbers. And the board said 26.50, and now they're doing a deal that's not like that.

I don't know. Maybe the reality of a boardroom is if your CEO wants to fight, you have a tendency to support him, unless you think he's entrenching himself. If the CEO turns around and says, Let's do the deal, I think this is the way to go, not many board members say, No, we should fight more; I disagree. Unless they know that the CEO may have some other interests. That's when you say, We can't let you negotiate this yourself, Doug. But they did let him negotiate it. Whether that was responsible or not, they clearly didn't know about his

potential competing interests.

I am going to turn to the irreparable harm and the relief.

THE COURT: One of the things about the current era of Revlon cases -- I mean, this is not like Revlon in the sense that -- what you're saying is they were overly receptive. In the Revlon era, the idea was you were fending off someone.

MR. LEBOVITCH: Yes.

THE COURT: And denying stockholders the ability to take advantage for themselves of the takeover bid.

MR. LEBOVITCH: Mm-hmm.

THE COURT: Here, we're now in a different kind of era. I admit, this is a different kind of case than Dollar Thrifty. Dollar Thrifty is the kind of case where you can actually -- I think, back in the day, someone would have argued for, frankly, just business judgment rule for Dollar Thrifty, because there wasn't any motive on the part of the target board. No conflicts of interest.

They had actually invited -- the bidder who never came in to litigate, they invited them like three times in the previous two years,

Please buy us. I think they're still saying, Can we bring back Professor Orita to help you get over your issue?

Apparently, the world's most insuperable antitrust problem is really in rent-a-cars. No one would have thunk it, but it is apparently a knotty issue.

But then you get to a situation like this where it's not about entrenchment in the sense that they're trying to fend off a bid. And the stockholders can turn this down; right?

MR. LEBOVITCH: They have a vote. They can turn it down, yes.

THE COURT: Well, why do I take it out of their hands? And if I do, what are the consequences? I can't -- I'm just saying, you know, our state does its best to give people like me a decent living, but I really don't have the wallet to indemnify anybody or have it on my conscience.

MR. LEBOVITCH: I think there's maybe a couple of comments, questions, there. The modern world of Revlon, I think Your Honor said -- I know former Chancellor Allen and former Vice Chancellor Lamb publicly said Revlon is really a soft loyalty

case. That's really what animates it. The facts of that case created a soft loyalty problem. And that's why I started with Dollar Thrifty.

THE COURT: Revlon --

MR. LEBOVITCH: That's it. There are conflicts.

THE COURT: It wasn't about -- the loyalty thing that was identified in Revlon was the most --

MR. LEBOVITCH: It was soft.

THE COURT: It's ridiculous, actually, which is that people who had been your stockholders six weeks ago until you told them to take debt from the company that you promised would be protected by the independent directors that, considering the value of the debt you just gave them in their role as stockholders, was a breach of the duty of loyalty.

The way I always looked at it was the effete, snobbish, French executive, no way in heck was he going to sell to the upstart Jew from Philadelphia. And that whatever they were going to do, it wasn't going to be to sell to Ron Perelman. That's the loyalty story in Revlon. But there is a resistance there; right? Here --

MR. LEBOVITCH: It's still a loyalty issue. It's just not in the form of resistance.

THE COURT: Anybody who knocked at the door -- frankly, Kinder Morgan knocked at the door. The board was able to deal with them willingly. They've given the stockholders now the opportunity to decide for themselves whether to take advantage of this. Why should I take it out of their hands? And why wouldn't a damages remedy be appropriate?

MR. LEBOVITCH: Okay. Should I maybe deal with the balance of the equities first and then the irreparable harm?

THE COURT: Deal with it all. I want to know. But I also want to understand -- I don't share -- I'm a kind of -- in my own, perhaps, untraditional way, I'm pretty traditional when it comes down to the essence of my decisions. And my understanding of preliminarily enjoining a deal is I preliminarily enjoin the deal, which is, you can't have this deal. And it's not that I enjoin it -- I don't know what it means to enjoin it with an egg timer. That doesn't do anything because it doesn't change anything about the deal. It just simply creates an additional period of time.

We don't do the blue pencil in this area. So I have to essentially enjoin the deal, which would put pressure, obviously, on Kinder Morgan to go back and offer more. It opens the opportunity for the company to explore its options, but it also opens up the opportunity for Kinder Morgan to do less, or to do nothing at all.

And the question that comes into play at that point is if the stockholders can vote this down, and even if they don't vote it down, there is the possibility for a damages award later on, why should the Court throw the injunction flag? Because what's absent here are a couple of things that -- Revlon's justification of why it could throw an injunction flag had nothing to do -- there is a mismatch in the analysis.

The idea is that Revlon -- MacAndrews & Forbes as a bidder had standing because they were a stockholder, and they could bring fiduciary duty claims, and it's in a line of stockholders. But when you actually read Revlon and you get to the irreparable harm, the irreparable harm is to MacAndrews & Forbes as a bidder because they have a unique opportunity to buy an asset.

You also have the lessened concern for the Court because you actually have an active bidding contest and you think you're going to chill things. So you actually have this situation, you may never know how that comes out. And the stockholders ought to have the ability to have an untainted thing.

Here, you have a situation where you could have a Van Gorkom kind of case. Actually not a Van Gorkom case, a loyalty case, where you argue that, frankly, Bush -- Foshee and Goldman Sachs actually are conflicted, tainted the negotiation process. And then if you can prove that, frankly, that faithful negotiators, given the value, should have caused Kinder Morgan to pay more, that they be responsible on damages.

MR. LEBOVITCH: Your Honor, I think you just hit on the exact distinction that will dictate the irreparable harm issue. You get to irreparable harm if you find there is a likelihood of success. Okay? But to find a judgment without a remedy is inconsistent with a court of equity.

And what I mean by that, specifically, is Your Honor has observed the risk of doing money damages in a case like this, its speculative nature.

You wrote about it in Netsmart. In del Monte, Vice Chancellor Laster talked about it. The remedy for shareholders' harm by breach of duty has to be clearly available. Okay?

So I think the defendants, when they argue irreparable harm, are being a bit cute, because what they're saying is here's money damages, money damages, but they're at the same time saying, but any breach is just a care breach. You would be exculpated.

THE COURT: I think they would say that, but the problem that they have here -- and it may be true, of course, for several of the independent directors. With regard to the CEO, it wouldn't be so easy. I don't know what you do with Goldman. That's an odd thing. But they're conflicted. And so you have loyalty factors that come into play here that are not the same.

Again, Van Gorkom, the big issue with Van Gorkom is, you know, why weren't these people put on a float and celebrated, as opposed to punished? Except that they weren't good enough readers of The Business Lawyer, and reading that fresh article by Marty Lipton six months out that they were -- they

hadn't done that yet, and realized how influential it would be. And some other people had a half decade to observe the learning and then put it into the A.2d. But this is one where you had loyalty issues.

And what you're asking me, though, is -- I'm going to take the sale out of the hands of the stockholders. And I understand that it creates frustration for folks like you. I could well find that there is a reasonable probability of success on the merits, but then I have to figure out the equitable calculus.

And when the stockholders have -- because the value of the consideration in some ways has gone up; right? Because Kinder Morgan stock has gone up.

MR. LEBOVITCH: Yes, Your Honor.

THE COURT: I don't know how the stockholders turned -- I don't know why -- I know it seems to be constitutionally asking too much of institutional investors to ever vote no. They should be able to vote yes on everything and then complain about it later, which is like certain people I know in my personal life. And so, you know, maybe I love them too. But I chose it; it stinks; so it's now on you.

But, I mean, it really is a serious thing, because what do I do if Kinder Morgan just goes away and then the stock price goes down to 22?

MR. LEBOVITCH: First, if the Court finds an absence of irreparable harm, I suggest that that has to rest on a finding of a likelihood of success that the plaintiffs will show non-exculpated claims. Why is this -- the harm to shareholders from the deal going through is severe because the other opportunity is this breakup that can never happen. Now, the harm to KMI and even the harm to shareholders of a preliminary injunction is nominal. The deal can't close yet, Your Honor. It won't close for a while.

I believe in a disclosure yesterday, KMI reported that they had received a second request from the antitrust regulators. I don't know how long that second request will take, but this deal is not closing too soon. There's --

THE COURT: Again, the deal is not closing too soon. What kind of relief are you asking for? If I grant a preliminary injunction, am I supposed to have a trial? Is the idea that we're then going to have a trial? And if it's like the last day

before the deal and nothing has happened, you guys are going to tank and withdraw your motion for a mandatory injunction? I'm trying to figure this out.

MR. LEBOVITCH: I understand Your Honor's concern about --

THE COURT: Am I creating my own go-shop window where I say for a period of time, you can come in and bid on part of the assets with no thing? That, to me, is a mandatory injunction.

MR. LEBOVITCH: I don't think it is, Your Honor, because all you have to do --

THE COURT: Yeah, it is --

MR. LEBOVITCH: If you simply enjoin the deal protection's operativeness for some period of time, they don't have to go get a new banker. They don't have to go do a new go-shop. If Your Honor says, Your reliance on the advisors here appears not to have been reasonable, not to have been in good faith, you're not going to get Rule 141(e) protection, I bet they'll go get an advisor, but not because it's mandatory. Because the way the law works is you say there is a consequence to your actions.

THE COURT: Let me explain something. Kinder Morgan doesn't have to close on a deal

different than they signed up.

MR. LEBOVITCH: They don't have to close, but they're not in position to close and --

THE COURT: But what I mean is, if I do something like that, they have an option to walk away simply because I did something like that.

MR. LEBOVITCH: Your Honor, you're not -- you are not giving final relief. It will not trigger the right to walk away. The deal lasts until June 30th. And by the way, as Your Honor did in the Ace case, you have the right to look at it and say, Okay. Should their rights step aside because of fiduciary issues? You can preliminarily enjoin the deal protections so that people can make bids.

THE COURT: You're saying if I create some window where anyone in the world could supposedly come in without paying them a break fee or anything and buy some or all of assets --

MR. LEBOVITCH: That's right, Your Honor.

THE COURT: -- and then at the end of that 60 days, nobody does it, they're still bound?

MR. LEBOVITCH: They will still be bound --

THE COURT: Bound by what?

MR. LEBOVITCH: -- and if someone makes a bid in the 60 days, Your Honor --

THE COURT: They'll still be bound under what principle?

MR. LEBOVITCH: When they engage in a contract with these fiduciaries, with everything they knew about with Goldman Sachs and everything, they bear some risk that there could be a preliminary injunction. I'm not saying you wouldn't need to make a final determination to let the competing bid succeed.

In other words, if somebody says, I want to buy the pipes, I'm not saying that if the market goes that way, that you won't have to make a final determination that says this was in fact invalid. But if you have a likelihood of success, you can say, We're going to have the market shut.

THE COURT: They would have to go get my preliminary -- the reason why a preliminary injunction doesn't make a deal go away is that -- is that you can also get it appealed. I think most of the preliminary injunctions say if somebody like me does something, you don't have to go away, but if the

Supreme Court gives a preliminary injunction, you go away.

I think it's also the case that if you were the person on the other side of the contract and the bargain changes, you can walk away because the bargain changed.

MR. LEBOVITCH: And the negotiation --

THE COURT: The idea is that I have created a world that is inconsistent in material ways with the bargain that's struck, the other party can say, I'm not getting my bargain, I'm not closing.

MR. LEBOVITCH: What I'm saying, Your Honor, is when they negotiated this, I believe they negotiated for the right to walk on a permanent injunction. They could have negotiated on a preliminary. We would say that the fiduciaries have a problem agreeing to that because they cannot strip Your Honor of your equitable authority to make a preliminary injunction. And then, if it comes to pass, you grant the final relief.

THE COURT: It also depends what the closing conditions are and whether the deal protections and compliance with the deal protections, to the extent that they're covenants or reps and

warranties, are closing conditions.

And if what you're saying is Strine creates his own go-shop period during which things happen which would be a violation of the covenants and reps and warranties in the agreement and, therefore, when Kinder Morgan goes to close, it can look and say, Well, it says that there has to be material compliance with this covenant, this rep or warranty, all of which has been gutted by Strine's go-shop period, I don't understand why they wouldn't have a walk right.

Now, if they haven't actually made any of that a closing condition, maybe it's bad on them, and I have a kind of free option and I can do whatever I want, but it seems kind of unlikely.

MR. LEBOVITCH: Your Honor --

THE COURT: And I do believe -- I really don't understand how it's not a mandatory injunction. If what you're saying is I'm going to tell somebody that they may not close the deal -- I understand that maintaining the status quo, you cannot close the deal. Okay? That maintains the status quo. If what you're saying is you may not close the deal, and during the next 60 days, thus and so will happen, that strikes me as a mandatory injunction.

MR. LEBOVITCH: You're simply enjoining the operation of the termination, of the deal protections, to see what's going to happen.

Now, the incentive that's created, Your Honor, there are two points.

THE COURT: To see what's going to happen. But the way you enjoin the transaction is you enjoin the transaction. Now, what you do say, typically, is you say the reasons why one enjoins the transaction are thus and so. And therefore, to the extent that these things are corrected, the Court, you know -- there is no, necessarily, injunction against a different deal.

What I'm struck by, too, is whether your primary argument is about the deal protections or about the price of negotiations, whether this particular array of deal protections could have been acceptable if you had unconflicted advice and the negotiating process had led to a price, you know, higher in the range.

Or even if the board had said, when Kinder came back with their really cute -- again, this is my phrase of the week, so I apologize -- cute in a non-Reese Witherspoon way, Oh, you know, we just sent

you a bear hug letter, and we're really tough Houston oil types but, you know, our model is just 300 million too aggressive. If the board had simply said, Well, take your drilling equipment and, you know, do your -- aren't you -- Rich, you're a man of a certain age. Your next proctology exam is coming up. You've got plenty of drilling equipment. Do your own proctology exam with your model and your offer. If they had done something like that and actually gotten the 27.55 in cash and stock, would you be as concerned?

MR. LEBOVITCH: I think I'm answering the question. Our showing in this case on the success on the merits is based on the process and the negotiations and the conflicts. Our cure that we propose --

THE COURT: That's what I'm saying.

MR. LEBOVITCH: Yes --

THE COURT: Your cure is really about something -- if they had gotten to the right price and used the leverage that they had, this is a set of deal protections that isn't on its face -- you know, I know that from your perspective, you would like to have no deal protections or something -- it's not that unusual; right?

MR. LEBOVITCH: Right. The board in this context where they knew there were only going to be bidders for the parts, should have kept that option open, but --

THE COURT: So you're saying on the termination fee, the reality is if what you're trying to benchmark here is the spin and all these other kinds of options, that they should have been negotiating part for the flexibility to entertain --

MR. LEBOVITCH: They could have said, This price is below the floor we set. We'll lock this in, but we're not going to give you the benefit of bidding advantages. You're going to have to face some risk here. Now, we propose as a cure suspending temporarily the deal protections.

If Your Honor is going to say, I have no ability under any set of facts to blue pencil on a preliminary basis a contract, then the incentive you're creating is for a buyer and a seller that want to hug, they want to get together, to just go nuts with those deal protections. Because the more coercive and preclusive you can be, the less likely it is you'll have any competition.

And if your goal is get this deal

closed and we'll deal with the money damages later, because you know what? Chancellor Strine and everyone else has recognized how hard it is to prove money damages in this court and other courts. It's a deficient breach. Let's do a 50-percent termination fee. Let's say you can't even respond. You don't even have a fiduciary out. How can this Court invalidate a fiduciary out if you can't blue pencil?

THE COURT: But you're not asking -- you're not willing to actually ask me for a flat-out injunction, traditional flat-out injunction.

MR. LEBOVITCH: What I'm going to say, Your Honor, is just like -- see, I thought the argument for affirmative relief was we were trying to force them to get bankers. We are not. If Your Honor says, Here's the law. You go do what you want. Your reliance on advisors wasn't good enough; go hire a banker -- if Your Honor suspends the transaction, suspends the transaction, and if you cite that this was a bad process, that they should be looking into the deal protections that are a problem, maybe they will find a way to fix that.

We are asking for you to suspend preliminarily the deal protections because I think

that's what opens up bidding, independent bidding. But if Your Honor suspends the transaction because the way it was put together does not comply with fiduciary duties, I think, then, you know -- I don't want to bid against myself, but maybe they will get the message depending on what message you send.

THE COURT: The pivotal thing -- and this is where I think this Court has traditionally done a good job of not ducking the consequences of the way we go about things, which is why -- you know, honestly, our approach to things -- I'll just mention Omnicare. I think Vice Chancellor Lamb's approach to Omnicare reflects the way Chancery does things. You have to do them in realtime and you have to recognize what the realities are of the world. You can't always say that there is a free option.

Because the thing that was never considered in Omnicare, I think, adequately was -- you know, when you take the bird in the hand and you say, We're not going to deal with you, you go back to the bank to want to pick the bones in bankruptcy. And, frankly, their legal advisor was at a conference and admitted that the only time they saw equity value, the first time they recognized there was equity value in

the company, was when somebody else signed a binding contract to pay equity value. And it was one of their competitors, even though they had been looking at the company.

And if the other party that convinced them there was equity value went away, they would come back saying, No, it's bankruptcy value. And then the board would have gotten sued in that case because they were big equity holders and they had held out for their own equity at the expense of the creditors.

It's good to have free lunches. And somebody comes back four months after the fact, and now they finally have a fully financed deal ripe before the Court and, you know, it all seems like it's free money. Let's give out -- you know, of course the highest bidder should win. Shouldn't the stockholders get the highest bid? It's all beautiful.

And in this context, you're trying to ask -- convince me that there is some sort of moment like that where I can do something that isn't consequential, that only has an upside. And that's where I'm not getting it.

The traditional way would be I would grant a preliminary injunction against this deal

because there is possibility of irreparable harm and the balance of the hardships outweighs the risk. That means this deal could not go forward on these terms unless and until, frankly, my ruling was either overturned -- was either overturned in some way --

MR. LEBOVITCH: Or they, on final record, convinced you otherwise.

THE COURT: On final record. But the expiration date on the contract, the closing-out date is June --

MR. LEBOVITCH: June 30th. It can be extended by the parties. June 30th.

THE COURT: Traditionally, if you would have a preliminary injunction against a deal and it would be -- and I would do that in early March or something like that, late February, say they can fight it on appeal and it stands up, you know, you're not going to have a trial before the end of June. And they're just -- they can walk away if they want.

Now, it may be that things happen the way that you want, which is that you get -- Kinder Morgan raises its price, the company gets sold in parts. But it could also be kindergarten -- Kinder Morgan -- kindergarten, I was about to say -- walks

away, you know, and you're down to value options which in the short run don't add up to what was available to the stockholders.

And that would mean -- to me, that's traditionally the consequence of doing this kind of ruling.

MR. LEBOVITCH: Your Honor, I think if the deal is suspended because Your Honor finds a likelihood of success of breach of fiduciary duty, there is a practical reason why KMI won't walk away. If they leave when you enjoin the deal, there is a money damage claim. The stock drops to wherever it goes to. There is a claim against El Paso's directors and officers, against Goldman. If you find that KMI didn't have the cleanest hands, against them too. It might keep them in the deal, Your Honor.

THE COURT: There is a money damage claim against Kinder Morgan for what?

MR. LEBOVITCH: It would be traditional aiding and abetting. If they came in and if they knew Goldman was going over to the other side, and if they don't have the cleanest of hands, then they leave this deal bearing some risk that they're going to get hit with the damages.

THE COURT: Yes, they do, but, I mean, let's be -- you know --

MR. LEBOVITCH: I understand, Your Honor.

THE COURT: I'm not sure that we've put --

MR. LEBOVITCH: If there is no injunction, then the money damages claim has to be real. In other words, if Your Honor says, I can't enjoin this, there has to be a real, clear, realistic --

THE COURT: That's what the balance of the harms is about. Which is if the money damages part is clear, is viable, that actually traditionally cuts against the injunction.

MR. LEBOVITCH: And the Court's findings are important on that front. If you say there is no irreparable harm because there is money damages --

THE COURT: I'm not bargaining with you about my opinion.

MR. LEBOVITCH: No, I don't mean to --

THE COURT: That's just not -- when I say people are really bad people, I will read the

record and I will write it up the way that my team and I think is most faithful to what went down, realizing that human beings who are involved in events and have no motivation to distort those events cannot accurately recount them after the fact, and that human beings who have to listen to a bunch of other people tell about events in which they do have an interest and have to make a determination about what happened, that's a highly dangerous thing to do anyway. And anybody who confuses it with ultimate truth I think has never actually written up fact findings themselves. But I'll do the best I can.

I'm still trying to get at what is the irreparable harm if the stockholders can vote themselves -- they can prevent the harm, if one of the layers against harm is that stockholders of El Paso can simply say, Stinky, shady deal; not going to do it. Right?

MR. LEBOVITCH: Yes. I mean, in the current status, state of the world, they don't know the facts about how the deal came together but, okay, they could theoretically -- shareholders could theoretically say --

THE COURT: This is a pretty full

courtroom. There are members of the media in here. I think we're actually on the E! Channel, or something else, I think.

MR. LEBOVITCH: Your Honor --

THE COURT: A rerun of Chelsea Handler is coming on soon.

MR. LEBOVITCH: I think that, yes, in theory, the shareholders can hear they have a deal. They have a board and CEO that have decided, We're going to go forward with this deal. We want to sell off the whole company. We don't want to keep managing it. And in theory, the shareholders can say, No, you have to keep doing that.

The shareholders did that with Dynegy. That's the only example I can think of. That didn't work out that well. So I'm not going to comment on why shareholders vote certain ways, but, yes, in theory, they can vote down a deal if they think the process was no good.

THE COURT: And they should vote it down if they think the price is no good; right?

MR. LEBOVITCH: If a board is told that someone is making a bid to break you up and they don't even explore doing the breakup for their own

shareholders, it's very hard for the shareholders to say, You know what? That's really awful. Now what am I going to do? Vote down the deal and tell them to go do the breakup themselves? It's very difficult --

THE COURT: Really, I don't think it's asking too much of investors once in a while, since they make buy and sell decisions all the time, to analyze the price at which a deal was done and to make a decision for themselves about whether it seems sensible, given what they know about it.

If they actually can't do that, I would suggest they should probably have a more passive investment strategy and stop running up so much cost on behalf of their investors. Because you're doing that every day, you realize. Once they increase their portfolio, they're making a decision about the value of El Paso. They buy the same thing with Kinder Morgan. This is probably a more information-rich environment than in which they usually make investment decisions. And --

MR. LEBOVITCH: The inherent nature of the shareholder vote process means that the decision you're making is not just the merits of the deal versus the alternative universe that you would like to

see. You have a board that said, We're done. We're selling. The CEO says, Let's just sell. So, you know, to say, Oh, you could vote it down, there is an inherent risk that they're taking on in voting down that deal. It's a new fact that changes the calculus.

THE COURT: Risk-free capitalism seems to be in vogue among people who freely buy and sell stocks on behalf of others all the time.

MR. LEBOVITCH: I'm not saying risk-free. I'm saying if the breach contributes to the problem --

THE COURT: Get real. I mean, you either get the deal or you don't. The next day, what are they going to do? Everybody in the company is going to go, like, take axes to the pipelines and try to sabotage it? And Mr. Foshee, who has got, like, all kinds of wealth tied up in this, he's going to just nihilistically -- you know, he knows there is a good oil patch. We're not going to explore that now.

MR. LEBOVITCH: There are circumstance in which --

THE COURT: Fidelity and Vanguard and CalPERS voted no, so we're just going to -- and of course, Fidelity, Vanguard and CalPERS, it could not

be that -- because of the inherently coercive pressures of being able to book a gain in the portfolio for the quarter just make it --

MR. LEBOVITCH: I'm not saying that's the version that the Court should --

THE COURT: I'm asking questions because this is a very serious thing, because what is the bond?

We've got this very unusual case that involves a parcel in Westover Hills which probably hasn't necessarily -- you know, this case maybe hasn't sunk into the psyche of our national corporate bar. But it's a case about somebody who wanted to buy the lot next to them and turn it into a little playground for their family, and the aesthetic concerns of Westover Hills. And now we're supposed to set a bond in all these things.

And the last bond I knew of was in the Gimbel case, which was the case that turned the phrase "substantially all," converted it into the math of "approaching half." And I think there was an injunction given, but the bond was, like, as big as the deal. And somehow, the plaintiffs didn't want to -- I forget what the bond was, but it was

ginormous --

MR. LEBOVITCH: I think $25 million.

THE COURT: -- in the 1970s.

What kind of bond would you be posting here?

MR. LEBOVITCH: Your Honor, we know there is the more recent precedent in Del Monte. And, again, I would highlight, from our calculus, this is a deal that can't close. This is a deal that contractually -- I'm not sure it's right that KMI can just walk on a preliminary injunction against the deal or even against deal protections. I'm not sure they can walk -- they have a second request. So there is no delay in their ability to close the deal.

And the harm to shareholders, again, dictated by how realistic their remedy is, I mean, that's what dictates the level of irreparable harm. And so the harm to shareholders can be very severe. And so we don't think that there is a need for a very significant bond. If you're looking at the harm to the shareholders on the other side, it is nil, and the harm to KMI and whatnot is pretty close to nil, because the deal can't close.

And I don't know that KMI can walk

because of the injunction. And again, if they do, there is a damage claim.

THE COURT: You don't know.

MR. LEBOVITCH: There is a damage claim if they walk, I think, if I am understanding what Your Honor is saying.

THE COURT: To me, you were telling me that -- the most obvious damage claim in the situation against somebody who walks would be that they didn't contractually have the right to walk.

MR. LEBOVITCH: Or the deal was enjoined because of breaches of duty. When you went in, you bore -- you're bearing the risk that there is going to be breaches of duty. You should avoid that. If you do a deal that has breaches of duty in it and you then decide to walk, you know what? You're going to be liable for the harm that comes from when you walk.

THE COURT: I don't think QVC went that far where they said -- QVC, I think, went to the point where the Restatement that a lot of people don't read, that a lot of people find shocking -- M&A practitioners find shocking things that are said in judicial opinions when they have an origin in the

Restatement of Contracts because that's something that deal lawyers wouldn't tend to look at.

I believe what QVC stands for is the proposition that if you're overly aggressive in asking for deal protection measures, and the other side of the transaction, when you're dealing with a fiduciary, they're found to have breached their fiduciary duties, then your contractual protections are as good as what you got.

And there is a provision of the Restatement that says that a contract -- a provision in a contract that tends to induce or to be the manifestation of a breach of fiduciary duty is invalid, which leaves you without the protection of that part of the contract.

It doesn't mean -- I don't think it's like a Bankruptcy Court lease kind of thing where the debtor gets to keep the leases it wants and shirk the leases it doesn't, such that what it means is the things are invalid, but you're bound to do the deal such that you have an option where you don't have the protection of the deal but you still have an obligation to pay.

MR. LEBOVITCH: You look to see the

severability of the contract. Your Honor, I'm going to read this. Section 7.1 of the merger agreement deals with termination. It says here that there is a termination right "... if any restraint having the effect set forth in Section 6.1(c) shall be in effect and shall have become final and nonappealable ...." That is the trigger for the termination right.

So I understand, Your Honor may say, Well, is it unfair to KMI that they solicit a breach of duty and then have to live with the consequence?

THE COURT: Go over that again.

MR. LEBOVITCH: One of their termination rights is if any restraint shall be "... having the effect set forth in Section 6.1(c), shall be in effect and shall have become final and nonappealable ..." then they have the right to terminate.

It says, "This Agreement may be terminated and the Transactions abandoned at any time prior to the Second Effective Time ... if any restraint shall have become final and nonappealable."

So, Your Honor, I think at a certain point, we're concerned about KMI's rights that they should have negotiated, perhaps not the rights they

did negotiate. Putting aside that what QVC says and I think what Your Honor said in Ace is this Court does have the power to say when you negotiate with a fiduciary, you bear a risk that provisions will be struck, contracts are, in fact, severable, and there is consequences to walking from a contract because it turned out to have been unlawful to ask for it and get the provision.

THE COURT: You're saying that a preliminary injunction opinion that enjoins this and is not lifted, and then the expiration date on the deal is done, somehow, they would have a duty to do the deal? Or am I just supposed to --

MR. LEBOVITCH: If we get to June 30th, I mean, I think then there is a separate right to terminate, if the deal hasn't closed by June 30th.

THE COURT: What you're trying to say is --

MR. LEBOVITCH: I think what I'm trying to say, Your Honor, is you have a choice. You cure the problems now or you deal with them later. There has to be a remedy -- thank you, Mr. Grant.

He just pointed out that Section

6.1(c), which I referred to when I just read --

THE COURT: Let's focus, and then I really do -- we've gone --

MR. LEBOVITCH: I appreciate that, Your Honor.

THE COURT: The reporter has done a heroic shift.

If I enjoin this until June 29th --

MR. LEBOVITCH: If you enjoin this until June 29th, yes.

THE COURT: Right. So there could be like an old-fashioned June 30th like I used to experience -- we used to enjoy June 30th because we usually got most of the stuff that we needed done and then we could just concentrate on making sure bad stuff didn't get done and mischief. But if you get to June 29th and it's an injunction -- you imagine something else besides an injunction, though.

You imagine where I've somehow licensed El Paso during the injunction period to engage in activity which is not authorized by the contract. And again, I haven't read -- and I would expect that the parties would have, though. Typically closing conditions involve things like compliance with

covenants, compliance with reps and warranties that relate to covenants, like, We have not done certain things, blah, blah, blah. And if those are closing conditions, irrespective of the fact that I lift the injunctive order on June 29th, Kinder Morgan will say, boom, boom, Closing conditions are not met. You went and did a go-shop, and we go at it again.

Now, you're going to come back to me and say, That's QVC, that's whatever. No, that's why you put in place a preliminary injunction against this deal, which is this deal can close.

Now, the consequence of your position that you're taking on behalf of your clients is this deal can't close. And that means if this deal can't close, it can't close. Not this deal can't close but Kinder Morgan still has to do it if we want them to.

That's what I call -- that's where -- again, I don't know this kind of idea of free lunches for -- not for kids who are economically distressed, but for stockholders. It just doesn't work that way.

MR. LEBOVITCH: I think that what we're going back and forth on is whether an injunction would actually enjoin deal protections while keeping the deal in place, or enjoin the closing of the deal,

which, according to this contract, if it's final, nonappealable on June 30th, they have a right to walk.

THE COURT: There is a structure to a merger agreement.

MR. LEBOVITCH: Yes.

THE COURT: And there is something called a bring-down clause. And there are three -- and I teach this in law school. There is too little taught in law schools. That's why plenty of lawyers who have argued cases, they have no idea what a covenant is and they're talk about a breach of covenant. Or I love the one, breach of condition.

I've had Harvard students who actually said: Why is a bring-down clause important? Because if you breach the bring-down clause, it brings down the merger. Which in some ways is actually true, but it's not really what it means; right?

There are a bunch of things in the contract called reps and warranties and covenants, and they're made at the time of signing. And then you have closing, and you bring them forward. And you talk about how true they still have to be. How compliant with them, in the case of covenants, do you have to be. And the extent to which those things, in

terms of compliance with the reps and warranties, compliance with the covenants, are a condition to either party's duty to actually consummate the transaction.

And what you're trying to suggest is you're looking at one of the conditions, which is the absence of an injunction. But if what you're trying to achieve during that time is to authorize and mandate El Paso to take actions which are in derogation of the covenants that it has made to Kinder Morgan, and are in derogation of the reps and warranties it has made to Kinder Morgan, and to the extent that the bring-down clause and the merger agreement makes compliance with those covenants and representations and warranties closing conditions, then it does not matter that my injunction goes away because there will be independent contractual reasons why Kinder Morgan does not have to close the transaction on June 30th. There would therefore be risks to the stockholders. And that's the equitable calculus that I have to make and what I can't play pretend about.

MR. LEBOVITCH: I think Your Honor's calculus may prove too much because I think the end

result, Your Honor, is this Court cannot use injunctive relief to correct breaches -- cure breaches of fiduciary duty that manifest themselves in a merger agreement. That's fine. The Court can say the only way we can deal with this is money damages, but I don't know what fact pattern would lead to a different --

THE COURT: I think the cure is obvious. Traditionally, people who think a deal is stinky in the non-French cheese kind of way don't wish to eat it. So they get an injunction where they prevent the stink from being dumped on their doorstep.

What you're trying to have me do is a thing where I enjoin the stink, but only until June 30th. And then if you want the stink, you have a right to still get it. That's the unusual thing here. That's the -- we want the option for the stink in the end because, in our world, frankly, if nothing good happens better than the stink, our institutional investors are going to take it, because they're not going to read the Clarke affidavit and the other things and conclude that this company's stand-alone options are better.

Because they actually -- really, they

are like any American in front of a bowl of Frito's. No matter how much you don't want to eat it, and you know it's not good for you, if it's sitting in front of you for a half-hour, you're going to eat the Frito's. You may even eat a Dorito, which is a decidedly lower caliber junk food. And you walk around not only with the intestinal, digestive, longstanding waistline problems, but with this powdery substance of a color not existing in nature on your fingers just displaying your lack of willpower and courage.

MR. LEBOVITCH: I think what Your Honor is saying would be a rule that says in the absence of another bidder, there can't be a Revlon injunction.

THE COURT: No.

MR. LEBOVITCH: We would brief it, Your Honor --

THE COURT: I don't think it is. No. You're trying to tell me -- you're trying to give me a free-lunch opportunity, and you're trying for that for yourself. What I'm asking you is what you want, which is, are you asking me or are you not asking me for a traditional injunction?

MR. LEBOVITCH: Yes.

THE COURT: If all things --

MR. LEBOVITCH: Yes.

THE COURT: So if all things are equal, I just issue a preliminary injunction. It doesn't have some time limit in it. It's just an injunction. And you can't close this deal.

MR. LEBOVITCH: Your Honor, I think that's right. We would propose a time limit, but that's because we thought this dealt with deal protections, but yes, if Your Honor would grant an injunction --

THE COURT: But the time limit -- but you understand that the time limit -- I want you to be clear that I don't feel -- and you're not showing me a way where I issue an order that basically says: Kinder Morgan, give up the rights that you negotiated under your deal protections, but then at the end of a period, the Court mandates you close.

What you typically would do is, you can't close. That does put pressure on them to maybe offer up to fix the deal protections if they wish to close, to negotiate a higher price and keep the deal protections, or to do something else. But it also,

frankly, traditionally gives them at the end of the period the time to just say, Enjoy the other side of Houston, or whatever you're on. You know?

MR. LEBOVITCH: Your Honor, we understand.

THE COURT: We are at ten of noon. Go get yourself a snack at Dunkin' Donuts. Why don't we come back at five after. Our staff should gird themselves with -- get your Frito's out, your nachos, your power bar, like one of those bars that you feel good about eating because it's so grotesque afterwards that you know you ate something that had to be healthy because it was the worst thing you ever tasted. But whatever that is, we'll do it at five after.

I think for our staff, we're going to have to move back something in some other takeover case this afternoon by an hour, so get that done if we can.

(A recess was taken.)

MR. ROWE: Your Honor, may I proceed?

THE COURT: You may.

MR. ROWE: Thank you, Your Honor. Paul Rowe here for the individual El Paso defendants.

Before I get to a somewhat more

structured review of the facts and the issues, at some point during the colloquy with Mr. Lebovitch, Your Honor mentioned 27.55. And I wanted to mention, because I think it's useful to point out, two numbers that we did not discuss this morning. One of them is $29.04, which is the current value on a blended basis of the consideration, and the other is 7.6 billion. 7.6 billion is the gross approximate amount of premium. Second --

THE COURT: What would -- it's 29 what?

MR. ROWE: $29.04. It's the blended value. There are these options --

THE COURT: That's the blended value of the stock, cash, and warrant?

MR. ROWE: Yes, Your Honor.

THE COURT: What would it be if the deal had been done at 27.55 in cash and stock?

MR. ROWE: I wouldn't be able to calculate that standing here.

THE COURT: It would be higher even than that; right?

MR. ROWE: It would depend whether the stock component was higher in that deal because it's

the stock component that has resulted in the increase.

THE COURT: Right. The cash is the cash; right?

MR. ROWE: Right. We can figure this out, Your Honor.

THE COURT: It's the run-up. What I'm saying is it's not as much stock as was originally promised.

MR. ROWE: I don't know if that's true, Your Honor. We would have to go back to --

THE COURT: Really? I think it's pretty clear that it is. It was originally, We'll do --

MR. ROWE: You mean the gross amount of the stock went from an offer of 40 percent to 37 percent, or are you referring to the exchange ratio?

THE COURT: I thought there was going to be at one point a combination. Mr. Kinder had promised a combination of $27.55, a combination of cash and stock. That's when the bold men and women of Kinder and their advisors, after having done a soft bear hug and indicating that it would go hostile, and your folks engaged with them and reached agreement on

economic terms, when they said, Oh, no, we had $300 million or something. We had this error in our model. We were just far too bullish, and we have to pull money back off the table. Right?

MR. ROWE: Yes, Your Honor.

THE COURT: Yeah. So they pulled money back off the table. They're not -- at the time they signed this deal up, they didn't give $27.55 in combination with Kinder Morgan stock. And what I'm saying is they were going to give a certain value in Kinder Morgan stock as of that time. And if they had done so, we don't know what the value would be now. Is that what you're saying?

MR. ROWE: I don't know that it can't be calculated. The fractions here go out to three places, and I'd have to go back and look in the proxy statement exactly what they are. I can have one of my colleagues do that while I'm speaking, if that is acceptable.

THE COURT: Yeah, that's fine.

MR. ROWE: If I may move on. There's been a lot of emphasis in this morning's presentation and in the briefing on the idea that there are a multitude of options, some or all of which in the

plaintiffs' view are or could be superior to the KMI deal on the table. And I want to address that because the one word we did not hear from the plaintiffs this morning was "tax." And --

THE COURT: Right.

MR. ROWE: -- the record of both Mr. Sult at Page 43 of his transcript, Mr. Foshee at 248 of his transcript, and items in the minutes, are pretty clear that when you sell off a low basis asset, such as both pieces of the El Paso business are, you're going to have a tax hit. And you can pay those taxes either with NOLs, which are like money, or you can pay them with money, which is like money, but you're going to have to pay them.

And if you then, for example, declare a special dividend and give the money to the shareholders, they're going to pay taxes as well because we have a system of double-taxation on corporate profits and dividends.

So we looked at sales and we concluded in connection with looking at the spin that there was no circumstance under which a sale of the separate businesses for cash would exceed the value of a tax-free spin-off.

So in our minds, we determined that the separate sale alternative was always going to be --

THE COURT: Did you take into account in that the tax-free -- a large portion of the transaction is not tax-free; right?

MR. ROWE: Of this transaction?

THE COURT: The transaction that's subject to the injunction motion is not tax-free.

MR. ROWE: I believe that's right, Your Honor.

THE COURT: In order for a Kinder -- I mean an El Paso stockholder receiving this consideration, for that then to be tax-free means they have to remain as a Kinder Morgan investor.

MR. ROWE: I believe -- I'm not sure, frankly, Your Honor. We have a tax section --

THE COURT: Well, if they sell their Kinder Morgan shares they're receiving, that's a taxable event.

MR. ROWE: Yes, Your Honor.

THE COURT: If they hold it, and Kinder Morgan does what it says and it sells the business that it's going to sell, is that going to be

a tax-free transaction for Kinder Morgan?

MR. ROWE: No. They're going to have to pay taxes, Your Honor. That's my understanding.

THE COURT: And the value to the El Paso investors who bought -- who kept their Kinder Morgan shares, the value that comes to Kinder Morgan from that sale will be net of the taxes?

MR. ROWE: Yes, Your Honor. The point I'm trying to make --

THE COURT: All I'm trying to get at is there are some -- you know, look, we have more tax leakage in this country than anything else because what we're much better at than anything else is tax leakage. I mean, it really is something. It's an American marvel, you know? The difficulty is there is nothing to leak out once you stop being able to make anything, but you know, we'll deal with that later.

How much were those factors taken into account? For example, when you say there is a present value of $29, well, that is, but that's a tax -- that's a -- $14 of that is subject to the mighty 15 percent. I mean, let's not exaggerate, anyway, capital gains taxes. You know, it's not like they actually get taxed like you have to work for an hour.

You get 15 percent if you held it for a year, and it's just on the gain part. But you might have to pay -- you're going to pay that on the cash; right?

MR. ROWE: Yes, Your Honor.

THE COURT: And then if you actually want to turn it into the $29 now with the Kinder Morgan, you also have to pay the part on the Kinder Morgan share.

MR. ROWE: On the cash portion.

THE COURT: If you want to turn --

MR. ROWE: Yes, Your Honor. I see what you're saying.

THE COURT: If you want to treat it like it's a $29 deal --

MR. ROWE: Yes. If you monetize it, yes, sir.

THE COURT: -- then you have to pay taxes on everything; right?

MR. ROWE: Yes.

THE COURT: Did the board do that kind of adjustment?

MR. ROWE: No, because we don't know -- I've never seen it done, because you don't know the tax position of every individual. Some of

them may have offsetting tax losses, which means they're not paying taxes on their short-term or long-term capital gains. We don't know that.

THE COURT: Right.

MR. ROWE: My point, Your Honor, is that the board looked at these things. They made a judgment. They liked the spin-off. They liked the spin-off. The market didn't like the spin-off quite so much. This is an unusual board.

The idea that, as I think they're being charged with, that they were not proactive in seeking shareholder value, I think that's an unusual as well as unjustified charge to bring against a board that, number one, when KMI came around in September of 2010 with a $16, apparently, offer, the board said they weren't interested.

THE COURT: Right.

MR. ROWE: Then the board proactively studies for several months a complicated transaction. And the spin was an extremely complicated transaction, both to understand it and to get it done. Spins are unusual. You had to have a new company, a new E&P company, which has very different capital raising needs from an established pipeline company previously.

They were together. They were helping each other out, or the pipeline company was helping out the E&P company. This was a difficult decision. And this board, unlike a lot of boards, adopted it. They went public with it. They committed themselves to it. And where did the stock go?

THE COURT: And so who was going to run it, so I have the playing field from your perspective?

MR. ROWE: I believe the current head of the E&P division was going to be either the CEO or -- I think the CEO of the pipeline, the independent pipeline company. And I believe Mr. Foshee was going to stay with the -- I'm sorry -- of the E&P company. And Mr. Foshee was going to stay with the pipeline company. He may also have been going to be chairman of the board of the other company. He was definitely going to be affiliated with both companies.

THE COURT: So you're going to spin the exploration company; correct?

MR. ROWE: Correct.

THE COURT: And who was going to run that? Who was the head of that?

MR. ROWE: Mr. Smolik.

THE COURT: Mr. Smolik would run that as the CEO. You then have this stand-alone pipeline company. And I know there is this, where do you match some of these middle assets; right? But that's going to be with the pipeline. Mr. Foshee will remain as the CEO of that, which will be its own public company.

But because you can never let your children be adults until you actually die yourself, and even when you die, if you get a good trust and estates lawyer, then you don't let them be adults even after your dead, he would remain as chairman to make sure that Smolik continued to progress in a Foshee-like basis as an executive.

MR. ROWE: Your Honor, if I may, Mr. Foshee had a very good reputation with investors.

THE COURT: I'm sure he does.

MR. ROWE: Okay. Let me step back a moment, if I may.

THE COURT: I'm just trying to understand the thing. And so that was put out to the marketplace.

MR. ROWE: Yes.

THE COURT: And that was put out to the marketplace when, exactly?

MR. ROWE: May 24th. The stock was around 19. It went up briefly. And three months later, August 30th, when KMI makes its bid, the stock is right where it was.

There was no -- for whatever reason, and people can, you know, debate this, but the fact of the matter was that if you would have hoped that three months into and 50 percent along the way to when you said you were going to complete it, that the market was going to give you credit for the spin, the answer is the market was -- I don't know exactly what adjective to use -- skeptical, tepid. The response was not, Oh, this is fantastic, and we're going to -- you've unlocked value and we're going to recognize it. And Mr. Vagt, the independent director who was deposed, mentioned that.

And it was the fact that when this board got the letter on August 30th, it was not in the position that most boards are in where it hadn't looked at the company's alternatives or had advice about its fundamental value or considered proactive alternatives to raise the company's return on investment or returns to shareholders. This company had tried it. It had done that.

And somehow, I sort of feel like no good turn goes unpunished. But having done that and gone out with that, and having not told KMI when they made their bid to go pound sand, we're now being criticized for doing things which, frankly, if we had done the opposite, I know we would have been criticized for.

THE COURT: Well, you know that's the environment.

MR. ROWE: I do, Your Honor.

THE COURT: I mean, there is no way in which a deal like this is not going to be subject to a suit.

MR. ROWE: However --

THE COURT: But --

MR. ROWE: I'm sorry.

THE COURT: -- there are ways to do things that perhaps make days like today a little less piquing.

Actually, one of our principal worries -- off the record. I say that with the press, who will not put it in the transcript -- Actually, let's put it in the transcript. I know we were all worried about whether Mr. Grant would get lunch. And

Ms. MacIntyre, it's good to know -- we all feel better knowing that Stuart is having a good lunch. And I know he may argue that he's working, but we've all known him too long to know that he's not going to skip lunch, because he wasn't really going to listen very closely to what Mr. Rowe said anyway. He would rebut it, assuming he knew what Mr. Rowe would say. But I think -- but I just think it is noticeable that we feel his absence, and I feel an emotional void. I know that I speak for everyone on the defense side as well.

MR. ROWE: We miss him, Your Honor.

At the risk of trying the Court's patience --

THE COURT: We actually have a room full of food. And if Stuart is like me, he shares a propensity, if there's a room full of food and the potential to exploit it singularly while everyone else can't, it may be too much to turn down.

MR. ROWE: As Your Honor mentioned, the shareholders have the opportunity to vote this transaction down. As the plaintiffs did not mention, they are not bringing disclosure claims. This is a fairly unusual in my experience PI application in an

M&A case.

THE COURT: That's actually, yeah, it's refreshingly unusual.

MR. ROWE: It may be refreshing but it also tells us that the plaintiffs have to be admitting, at least for purpose of the hearing today -- for purposes of the hearing today -- that the shareholders have the information they need to vote.

THE COURT: Yeah. I don't know that that's what I would -- it's not the inference I would draw.

For example, was it disclosed to the stockholders that Mr. Foshee and other members of top management had in their mind the idea of buying the E&P business?

MR. ROWE: Let me address that, Your Honor.

THE COURT: As you address it, can you address whether it's been disclosed?

MR. ROWE: No, Your Honor. And it's not disclosed because while there is a bit of testimony, and there were a couple of conversations, the level of interest and the amount of actual consideration given to this possibility was so light

that we don't believe it was material. What happened was after --

THE COURT: How would you know that it was light?

MR. ROWE: For the following reasons, I think: What happened was that after there was an understanding as to where the eventual deal would be, this is after -- well, it's before the 15th. It's on the 11th of October. There are a couple of e-mails which, as I read them, on their face, indicate people talking. They are talking about a possibility. They are not -- they are essentially speculating about whether an opportunity might be available.

There was never any attempt to put together a bid. There was never any attempt to talk to financing sources. There were no documents that were done to look at how they could possibly pay for an asset in the multibillion-dollar class.

And then the next thing that happens is that after the deal closes, there is an informal conversation with Mr. Kinder in which he politely listens. And then, according to Interrogatory No. 5, which you'll recall Mr. Allerhand was so enthusiastic about showing you --

THE COURT: It's actually -- some people get deal cubes. He's getting an interrogatory cube.

MR. ROWE: Because the thing about Interrogatory No. 5 is that --

THE COURT: I actually think he's actually going to try to get a holiday season -- FAO Schwartz to actually put his interrogatory cube on display and have some associates, you know, like the people on the floor who show you how to use the toy, they'll have associates show how it was crafted.

MR. ROWE: Well, Interrogatory No. 5 has a statement under oath by Kinder Morgan saying that when this topic was raised, after saying, We'll get back to you, when they got back to Mr. Foshee, it was to shut it down, any thought of it, and say --

THE COURT: Sure, but the cake was baked.

MR. ROWE: The cake was baked. There was no, Your Honor --

THE COURT: At the time of that conversation, the cake was baked from the perspective of El Paso stockholders; correct?

MR. ROWE: Yes, Your Honor.

THE COURT: Here's the problem. Okay? Who was the principal negotiator for El Paso?

MR. ROWE: Mr. Foshee. But the board -- I say that, but the board was active in telling --

THE COURT: What's active? Negotiation is -- you know, it does have some qualities -- I mean, it's artistic. It involves reading human beings. It involves leverage. It involves steel. It involves the opposite of steel. It involves what people had for lunch that day. The board wasn't involved in any of that; right?

MR. ROWE: No, I think the board was involved in face-to-face meetings and conversations --

THE COURT: In reading back and reporting back on -- you know, remember, this is a dynamic that went from somebody on the outside acting like they're making a bid, and a board saying no, and rather than them having to kick their way in, having the receiver of the offer be more in a pretty-please mood, Please stay.

MR. ROWE: With all respect, Your Honor, that's not right.

THE COURT: Okay. Well, I mean, there

are a few objective moves in the process that are odd. I mean, really. The Kinder Morgan move away from 27.55, you know, may be an audaciously Texas move. And the response to it is something that somebody from Texas would then pin on some other state.

Mister Tough Guy walked in here. You were going to make a public bid for my company doing 27.55. Now you just lost your model. Really? You made a deal? Because you're the controlling stockholder of an oil business and Evercore has to tell you what to bid? Really? You're from Texas? Do they even let you in the border? Does your mom cut your brisket?

MR. ROWE: May I respond?

THE COURT: Well, what I'm saying is, there is that move. The person who is the principal person making all the moves counter to Kinder Morgan is Foshee. It's not the Morgan Stanley banker. It's not any member of the board other than Foshee. The fact that Kinder Morgan after the deal is baked is smart enough to say, in the face of a lawsuit, We really don't need another conflict in this deal, we really don't need one of the principal assets at play in the deal to have to be bid on by the person on the

other side, because the person on the other side was supposed to be getting the highest price for all the assets, and if that person actually had an interest in keeping our acquisition costs down, because that meant that he would have a chance, both he and his management confreres, of bidding on the part they know we're going to dispose of at a more affordable price, that could be seen as the kind of thing, in the context of negotiations, which can move in a lot of different directions, is the kind of thing that can leave money on the table.

MR. ROWE: Your Honor, can I address 27.55?

THE COURT: Sure. Address the whole thing. But this is disturbing. And to say, for example, then -- again, it does raise all kinds of epistemological, psychological problems about people and their conflicts; right?

What is Mr. Foshee going to say now? He's going to, of course, say this was a passing concern. Of course it didn't distort my fiduciary duties. Well, I mean, that may -- that's certainly possibility true. It's also, though, who would know other than him?

Am I supposed to assume -- we always have people come in who are people who spend their life not deworming children in the developing world, not as an art teacher in an inner city school, not as just a regular firefighter or cop. There are people who count nickels and dimes every day, who are walking net worth calculators. They spend their time in commerce.

Then they come in all the time, and there is something in which they have a powerful self-interest, and they've expressed a self-interest; and then it's always immaterial, as if what they are is some sort of frivolous, trust fund great-grandchild, party girl or guy, who just has a whim of the moment about something like a multibillion-dollar MBO possibility. Is that really just a lark?

MR. ROWE: Your Honor, if they had -- and we have had cases like that. We have had Lear, where the CEO, if I remember, spoke to Icahn for a week directly about joining the Icahn team, and he wound up being in charge of the company afterwards, if I remember it correctly. He was part of an MBO negotiation, and he wound up as part of the MBO team.

And even in that case, while Your Honor required there had to be disclosure about his interest in having his retirement monies prefunded by the company, but even in that case, there was no Revlon violation by virtue of his involvement both as a negotiator and on the MBO side. Here --

THE COURT: I thought he had disclosed some of his interest to the board, too.

MR. ROWE: Well, after a week of talking to Mr. Icahn and being part of --

THE COURT: Here, there was never any disclosure. Your guy says, Yeah, there's e-mail. Yeah, I thought about it. Come on. It just crossed my mind.

MR. ROWE: They never --

THE COURT: This is the sort of thing that just crosses people's minds. Like, you know, like, they're Russell Brand.

MR. ROWE: Your Honor, if there were documents here showing they sat down and figured it out, could they afford this --

THE COURT: He doesn't have to do that.

MR. ROWE: Well, does he know how much

he's going to have to pay one of these private equity firms to put together a bid?

THE COURT: How many times has Mr. Foshee dined with bankers, do we suppose, over the last decade?

MR. ROWE: I --

THE COURT: You know, my sense is, I could -- I don't have to cut, you know, tender Texas biscuits or even a brisket with Foshee. I could cut, you know, a really horrible piece of meat, like London broil or something like that. I could easily cut it with Foshee's mind. This is a sharp knife. He ain't somebody who isn't familiar with the metrics of doing LBOs. He's not just sort of positing that it's a possibility that I might do this. You know, the point is, if he might do it, why didn't he tell his bosses?

MR. ROWE: I believe the answer to that is simply that there is a big difference between, I might do something with a 75 percent probability and with a, You know, I'm thinking about going to --

THE COURT: If I'm thinking about something which gives me an economic interest adverse to the interest I'm duty-bound to represent, and I've already got conflicted financial advisors all over the

scene, and I'm going to be the sole negotiator, I don't have any duty to bring that forward and discuss it with somebody?

MR. ROWE: Your Honor, I believe that if there had been some concept of overt steps, if they had --

THE COURT: It's not a question of -- that's the problem. All it has to be is -- why would he have not -- there is a clear reason why he wouldn't do overt steps at that stage.

MR. ROWE: Well --

THE COURT: Right?

MR. ROWE: I think it would be --

THE COURT: Well, I mean, if he had done -- let's assume -- I'm actually giving him credit for being an incredibly sharp steak knife, and to realize that he has on the scene lawyers who are in their own domain very sharp. He goes up and bakes up, begins to bake up an offer. What does he do for himself?

Then your firm and people get wind of it, and he's out of the process. He doesn't get to go forward with it. He is certainly not the lead negotiator anymore with the Kinder Morgan thing.

Whereas, you know, I'm the kind of guy, just like I brought in Morgan Stanley -- I mean, I brought in Goldman Sachs. I'm the kind of guy who believes in the old-fashioned approach to divorces, when a wise person could represent both sides. I'm really an objective balancer of interests.

I would never leave money on the table simply so that I could buy the assets at a lower price than I'm thinking about buying. I'm able to separate all these things out. And so I'm going to proceed to negotiate, leave the option for myself, beginning exploring it, because, frankly, it doesn't take that long.

I know that all I have to do is say, I've got a table at the Four Seasons. Whichever buyout firm, you know, gets there first, plus a big investment bank, will get to do the deal with me and my management team and make the offer. I know that I probably won't be at an empty table long. I can do that down the line, and that's just far less icky and more elegant.

So I'm going to do it the way I do it, which is I'll be the negotiator. I won't tell the board. I'll then go to see Rich Kinder and see if we

can make a win-win all around.

MR. ROWE: Well, for a sharp knife, it didn't happen.

THE COURT: Well, it didn't happen. It didn't happen, but who knows what the future brings. But the deal -- he got the deal that he did. He shaped the deal that he did. It didn't happen in part because probably the Kinder Morgan people, their advisor probably said, This is nuts. All we're doing is increasing deal risks for ourselves. What do you mean? The guy who negotiated the deal with you now wants to buy the asset?

MR. ROWE: May I suggest a different reason?

THE COURT: Yeah.

MR. ROWE: Kinder Morgan knew how it was going to handle the sale of the E&P assets. It knew what it was going to do was have a public auction. It was going to send out 65 information packets. It was going to talk to everyone in the world. They needed the management group at KMI to participate -- I'm sorry -- at El Paso to participate in this like a fish needs a bicycle. That wasn't how they were going to do it.

And we're positing some, to my way of thinking, some, I guess, either a misunderstanding, a disconnect, but it was never in the cards that it was going to happen this way.

THE COURT: But see, it doesn't -- there is a misunderstanding or disconnect. Again, it doesn't -- this is one where, you know, Kinder Morgan doesn't have to be involved in any wrongdoing at all on this one for it to still raise substantial concerns.

Because if Mr. Foshee -- you know, I'm sorry, but if you get to the point -- I didn't know that public companies of other public companies -- public companies of one public company go to another public company's CEOs lightly and just kick around multibillion-dollar bids for assets.

I assume that this was just not canape talk; that Mr. Foshee thought there was a basis to think that this would be a welcome overture.

MR. ROWE: Well, he knew there was going to be a sale of the assets.

THE COURT: Right. And he knew -- and in his mind, one of the possible bidders on those assets was himself and other key members of his

management team.

MR. ROWE: But how likely was it --

THE COURT: How likely -- the point is -- so it was, again, the kind of lark where a very sharp knife, experienced person, has a conversation with another public company CEO. Again, that's not in the proxy statement, is it?

MR. ROWE: No, Your Honor.

THE COURT: That he spoke to Rich Kinder about this?

MR. ROWE: That's right, Your Honor.

THE COURT: Did he speak to his board and get "authoritay," in the Eric Cartman sense, to speak to Rich Kinder about this?

MR. ROWE: I don't know, Your Honor, but I can't represent to you that he did.

THE COURT: Is there any indication that he felt that he would have a requirement to do that?

MR. ROWE: I don't know one way or the other, Your Honor.

Can I address the 27.55 point that Your Honor raised as a concern as well?

THE COURT: Yeah, but what you're

saying is I can infer from the record that consistent with him never telling the board that he had discussed with management and thought to himself that he might be a bidder for these assets, that he also never got permission from the board in advance to speak to the CEO of the company with which -- the CEO of the other company with which the company was doing a merger transaction?

MR. ROWE: I don't have any evidence to give Your Honor to rebut that.

THE COURT: It would be pretty odd for him to have a conversation about this where he disclosed only that he wanted to have this conversation and didn't disclose his interest; right?

MR. ROWE: I --

THE COURT: It's a sort of unusual thing. Can't I infer one from the other?

MR. ROWE: I guess that's -- Your Honor, you'll draw the inferences you --

THE COURT: No. I want to be fair. And what I'm saying is if you have some reason to believe that Mr. Foshee sought permission of the board to engage in this discussion with Mr. Kinder, I'm giving you an opportunity, and maybe come back after

Mr. Lebovitch to talk about that.

And then there is a follow-up question that would come after that. What did the board do with that information in terms of assessing whether the economic motivation that Mr. Foshee had when he was negotiating the deal was not one of concern and should lead the board to reassess whether it left money on the table?

MR. ROWE: I don't have any information to suggest that there was that conversation with the board, but I don't know that I would know if there had been.

Well, Your Honor, from my perspective what I would like to suggest is that the Court should focus or can focus as well on -- in one of your decisions, you pointed out that the Court doesn't sit to police conflicts in the abstract but also looks at --

THE COURT: No, I agree with that. But in the particulars, I think to some extent, we do. And I really -- you know, we need to deal with the case as we take it. This is not any -- if we're now turning to Goldman -- I don't believe --

MR. ROWE: I don't want to turn to

Goldman yet.

THE COURT: Let's focus on Foshee. If you think I think that this is an abstract conflict --

MR. ROWE: No.

THE COURT: -- I don't think it's abstract at all.

MR. ROWE: I was making a causation point, Your Honor, that I think we need to look at the objective record of what this deal offered to the shareholders, what the board that consists of 11 independent directors decided, looking at it, and what -- the objective view as to whether Mr. Foshee left anything on the table.

THE COURT: But why is it -- I mean, what do we have to do -- this is like the first wave of when the cappuccino wave of deals came in the very unusual financing markets where private equity bidders could outbid strategics, because as it turns out, people were financing deals in a crazy way.

There were plenty of deals that got done at a substantial premium to market, but where one is left with the firm kind of sense that the stockholders got less than they should have. And that the reason that they got less than they should have is

boards did things like not have any policies about when the CEO does what fundamentally changes the strategy of the company and decides that it should be sold, despite having told the board that we're not for sale. Tell everybody we're not for sale as a business strategy we stand behind.

The CEO then goes up, signs up a deal, and gets -- frankly uses nonpublic information, takes subordinates and has them sign voting agreements, and they promise to hold their nose and not work for anybody else in the world. And they come to the board and say, We have an offer on the table. It's fully financed, frankly, by our traditional financial advisors, one of our partners.

Sometimes, regrettably, even members of our profession turned coat and worked on a management buyout team despite being counsel to the company, and turned around and said, We got this great deal. It goes away in 30 days if you don't do this thing that has a 30-percent premium to market. But we'll give you a go-shop. And management has 18 percent of the voting power, and has pledged not to work for anyone else. And you can shop this the 30 days to some other private equity shops, but take it

or leave it.

And people took it, primarily. And you know, stockholders got a lot of money. But there is also the sense that they might have gotten even more had it been done the right way and there had actually been a competitive process, and you hadn't tainted it from the very beginning.

MR. ROWE: Let me address two points in that, if I may. First of all, in this situation, we happen to have -- and I was going to leave this to Mr. Allerhand, but I think it's a direct response to what Your Honor is asking. We happen to have contemporaneous notes and e-mails from Rich Kinder and inside the Rich Kinder -- inside Rich Kinder's board.

And what he says from time to time is, This deal is over. I'm going to an Italian restaurant because it's all over. You can stand down. What he says is, We're at an impasse. I'm not paying a cent more. Roger Altman, I think, from Evercore, advises him to pay more, and he says, I'm not going to do it. And these are contemporaneous.

Unless you believe that these notes, handwritten notes and e-mails that were sent to board members, were all fabricated with the, you know --

THE COURT: Things -- people say stuff all the time.

MR. ROWE: Well, but these are --

THE COURT: Mr. Kinder said he was going to go -- you know, he could potentially go hostile. Mr. Kinder had been at 16 the year before; right?

MR. ROWE: Well, 16 in an interesting currency, but yes.

THE COURT: Right, which might not have been even 16.

MR. ROWE: Right. Our stock at the beginning --

THE COURT: That also shows a certain flightiness, or maybe not even flightiness, maybe, I'm a business guy. I use what leverage I have.

MR. ROWE: That's right. Business people make offers, but they're disciplined. We have realtime evidence here that because of Kinder Morgan's issues with how it's traded and whether this would be accretive or not, that there was a hard stop on how much Kinder Morgan was willing to pay. And we have indications that they were willing to stop the transaction negotiation when we were close to hitting

that or had hit it.

Now, the plaintiffs have this theory and this mantra that when 25.50 was put on the table, somehow, it was such a terrible offer that our initial reaction was to say, This isn't even good enough to start negotiating, and then suddenly, oddly, we start negotiating. That's not what the record says.

If you read the minutes of the September 5th meeting, which was the meeting at which the board decided how to respond to that initial bid, what they say is, This is clearly a good enough bid to start a discussion.

THE COURT: They were pointing to an e-mail from one of the directors who obviously thought it was not.

MR. ROWE: The "saltines" e-mail.

THE COURT: Yes.

MR. ROWE: Yes. He was in Maine and he --

THE COURT: That's where the island was? I was wondering.

MR. ROWE: Yes. He was in Maine, and he didn't -- as he testified at his deposition -- if Your Honor wants to see whether Mr. Vagt supports this

transaction, all I can say is, I would recommend reading Mr. Vagt's transcript. Mr. Vagt loves this transaction.

Mr. Vagt says, in his colorful phrase, that after he learned more about KMI and the value of its stock and what Mr. Kinder had done to grow a small company into this huge $20 billion enterprise, that he was convinced. That's what's supposed to happen on a board. An independent director comes in skeptical. Nothing wrong with that. And over the course of time, he decides, you know, This currency really is pretty good.

In any event, 25.50 comes over the transom, and we look at it, and we say, 25.50, that's about a 37-percent premium. That's about a $5 billion premium, Your Honor. This is real money. And 37 percent is a healthy premium.

And why did Mr. Kinder come -- why did the bidding go like this? One thing I would suggest is that Rich Kinder knew from the previous year that if he was going to come in and get this board's attention, he couldn't come in with a lowball offer. He had to come in with a very serious offer.

So he comes in with a 37-percent

premium offer. Of course we pay attention. And of course it was reasonable for us to come back with, a good negotiator would, a hard statement of our position. Our position was this -- you're going to have to pay us a lot more. That's exactly what you would want to hear from us.

And to then be told that, having said that you're going to have to pay us a lot more, that, somehow, that means that we could never come to a deal with them at a higher price, and it's something between what was then a 5, $6 billion premium and is now $7.6 billion, I just -- I mean, my mind boggles at the idea that this is anything like the prototype of the Revlon case where a board does something which objectively allows a Court, admittedly, under the reasonableness standard, but objectively allows a Court to say there was money left on the table.

THE COURT: But again, life is nice when you can ignore -- if you can ignore the parts of it that are most inconvenient for you.

Like I'm just going to imagine it's 1981. I still have bangs and long hair. It's all good. I can eat whatever I want, don't gain any weight. It's all cool. We haven't even gotten that

blast yet of really bad Australian imported music, so it's still, you know -- London Calling is still pretty fresh, still pretty good. The economy stinks, but, you know, but I don't know that because I don't know anything that's bad.

Well, you're not dealing with the problem. The problem is you've got a negotiator with a conflict, and he makes it worse. Why does he make it worse? Because he's not honest about it. And then he tells you after the fact. I mean, maybe he was -- I don't know. That's the point. Again, he was serious enough about it that he spoke to Rich Kinder. Serious enough about it that he replied to an e-mail saying he had been thinking about it already, already kind of in the works.

But then I'm supposed to put that aside and say it just wasn't serious enough when, of course, what he could have done is go up front and tell the board and let the board structure a process.

And I know -- I don't even need to ask you. I know what your firm would have done in terms of his ability to participate alone in negotiations and things like that. That would have been a very serious discussion if management was going to buy an

asset that was going to be disposed of by Kinder Morgan.

You have the Goldman thing you're not even talking about yet and you do need to talk about. Goldman is here. They will disclaim all their liability. They signed it all away. They'll be here as an aider or abettor, but I'm sure they'll basically say, We don't have any liability to anybody. If we get sued, all the independent directors owe us money and everything. That would be the typical banker thing, with some sort of English rule -- one-way English rule thing for fees and stuff.

Even Goldman Sachs, you guys say they're out. What the heck were they doing involved in Morgan Stanley's compensation?

MR. ROWE: Your Honor, I think they're -- Goldman Sachs had a contract, and they were asked to waive a contract right, and they said, No, we're not interested in waiving that contract right, but let's look at the effect --

THE COURT: But then -- they had a contract right. Not only did they deny Morgan Stanley any upside if the company remained independent and did the existing business strategy. Goldman Sachs then

said, We want a piece of the Kinder deal.

MR. ROWE: Your Honor --

THE COURT: And your clients gave it to them.

MR. ROWE: Your Honor --

THE COURT: Frankly, your clients gave 20 million bucks that could have been thrown into the deal for the stockholders.

MR. ROWE: Mr. Cox, who is the, I suppose, the chief Morgan Stanley partner on the deal, Mr. Cox testified at Page 191 of his transcript, when he was asked about this topic, that he understood from management that if the company did pursue the spin -- well, Your Honor --

THE COURT: Wait a minute. So again, here's where we are. If the management did pursue the spin, what we said, in fact, we were not going to do in term of paying you, we would, because we love bankers and we know that the world is long, we would in fact pay you?

MR. ROWE: No. What he said he understood was that if the company wound up spinning itself into two companies, that there would be two public companies, and he would expect from management

and had been led to believe that they would have future assignments. That's what bankers do. They look for future assignments from public companies.

THE COURT: And again, what people do, then, in this Court is they come in -- like Goldman. What the -- again, Goldman -- it's immaterial to Goldman, but they wouldn't waive the contract right.

MR. ROWE: I don't know whether it was immaterial or not.

THE COURT: So it wasn't immaterial; right? And it wasn't immaterial to Morgan Stanley to actually get a fee. They would have actually found that material. It would be satisfying.

MR. ROWE: Morgan Stanley --

THE COURT: Especially in this time where bankers' bonuses are down, things like that; right?

MR. ROWE: Well, I'll make a general observation, which is that if we're going to essentially --

THE COURT: No. Let's not make a general observation. Let's start focusing with what your clients did, the way they managed the conflict, a serious conflict. You would admit, this is not the

ordinary banker conflict where Goldman Sachs just did work for Kinder Morgan in the past.

MR. ROWE: Unusual but not unprecedented.

THE COURT: It's a serious leap. It is a serious conflict. I love the little script involving the CEO of Goldman saying, We want to manage the appearance of conflict. Okay? How about, do you want to manage an actual conflict?

MR. ROWE: We treated it as a conflict, not as a --

THE COURT: It's a conflict at two levels. Billions of dollars of ownership interest, 20 percent. They are part of a control group of Kinder Morgan. They have fiduciaries on -- they have directors on the board of Kinder Morgan. It's not an appearance of conflict.

And frankly, it doesn't make you think better when you're a judge when you read stuff, it doesn't make you think better of people's motives when they trivialize what is clearly an actual conflict of interest by calling it an "appearance." Because if that's an appearance -- right -- if they treat actual conflicts as appearances, I'm assuming they treat the

appearances of conflict as being invisible.

MR. ROWE: But El Paso --

THE COURT: No. So let's deal with -- so the board is coming in and they're going to manage this. And the way they're going to manage this is Goldman is still going to give advice about the principal strategic alternative to a sale of Kinder Morgan. But Morgan Stanley is going to hold everybody honest by doing their own review of that alternative.

But then the reason why you're paying, right -- and Goldman Sachs did pay for Morgan Stanley; right?

MR. ROWE: No.

THE COURT: And no one negotiated with Goldman Sachs to say, You pay for Morgan Stanley; right?

MR. ROWE: Correct.

THE COURT: And the reason why you're paying a second banker is because of someone else's conflict of interest; right? You're paying a second banker because your first banker has a conflict of interest.

MR. ROWE: Okay.

THE COURT: Right?

MR. ROWE: Yes.

THE COURT: So your stockholders and your investors are paying for the conflict of interest rather than the party with the conflict of interest; right?

MR. ROWE: We did think we were getting something of value.

THE COURT: I'm sure. People love their bankers. And they feel, despite the fact that they paid them over the years on a retainer basis, they always feel they need them. I mean, and they feel comforted by the banker.

So in order to constrain the conflict, as I understand it, Morgan Stanley is going to do all elements of it, including look at all the strategic alternatives, including the one that was on the table. But if the one that's on the table is done instead of the Kinder Morgan transaction -- the one, remember, that Goldman Sachs has a financial interest in, a really big financial interest in making sure that Kinder Morgan doesn't pay too much, the only way that Morgan Stanley for sure gets banker compensation that they can look in at the banker club and they can hold their heads high is if they do the deal with Kinder

Morgan.

So the only way they get paid is to represent -- is to actually bring forward and consummate the deal that Goldman Sachs has an interest in seeing done at a price level that is not optimal for El Paso. And that's called managing the conflict.

I don't really get it because the -- how -- again, what I'm supposed to assume now is that you have very top-tier bankers at Morgan Stanley, like the top-tier bankers at Goldman Sachs and like Mr. Foshee. These are people who are better than ordinary people. They can, despite being in professions that are all about pursuing financial advantages, despite living their lives always sensitive to incentives, when they, themselves, face conflicting economic incentives, they are above temptation. And they can act on a neutral, unbiased basis in the face of powerful financial conflicts of interest. And we just are lucky because we have got the bulge bracket kind of people. We have got the top-tier people, the type of people who get beyond conflicts of interest; right?

MR. ROWE: No, I wouldn't say that anyone thought they were beyond conflicts of interest.

THE COURT: Really? So if -- again, Goldman Sachs is Chinese Walled off except to interfere with the ability of the company to provide compensation to Morgan Stanley in the event that the company does the strategic alternative to the Kinder Morgan transaction.

MR. ROWE: We obviously were always free to compensate Morgan Stanley as we saw fit. But if you --

THE COURT: And why, pray tell, did Goldman Sachs get paid a success fee for work that you tell me it did not do?

MR. ROWE: Because as the people who testified about this said, they were being paid in part for work they had done in the past and never been paid for. Investment bankers often work on the come. They were being paid for the fact that they continued to advise the board. And if the issue is whether $20 million is too much, maybe that's the meat for a derivative case somewhere. But --

THE COURT: The point is why do you do it? Again, it's $20 million you could have gotten out of Kinder Morgan.

MR. ROWE: This board valued Goldman's

advice.

THE COURT: It's clear. If there is one undisputed fact, it's that the board wanted Goldman close to it.

MR. ROWE: Well, there is a reason for that.

THE COURT: But then you're telling me in your briefs that Goldman only did certain things, but yet, Goldman was a powerful player in shaping the incentive systems for the bank that came in to supposedly address its own conflict of interest. And then the board went and rewarded Goldman for the deal that Goldman was supposedly not advising on.

MR. ROWE: That's not the set of incentives we believe we had in front of them.

THE COURT: Really? You paid them -- your clients paid them, you admit.

MR. ROWE: Yes.

THE COURT: For doing something that you tell me they were not supposed to be involved in.

MR. ROWE: They were paid for what their role was, which was to stay on top of --

THE COURT: So your clients paid them for a transaction that wasn't done in the guise of a

transaction that was?

MR. ROWE: The spin-off had to be kept going, and Goldman was who we looked to to keep the spin-off going.

THE COURT: So Morgan Stanley actually wasn't a benchmark or wasn't actually looking at the spin-off.

MR. ROWE: No, they were looking at it as a banker looks at it, but Goldman was working on it, as I understand it, 14, 18 hours a day. They were working to get it done. It needed a lot of work to be done by the end of the year.

And one of our points was we may never come to a deal with Mr. Kinder for all kinds of reasons. He may turn out to be too tough a negotiator. Something could happen over at his company. It may never happen; and we need to be able to do the spin.

There is no motive here, Your Honor, for the board, whether it's Mr. Foshee or, more importantly, I think, 11 independent directors, to want to use Goldman for some bad purpose. There just -- what -- maybe they paid too much money, but where is the bad purpose in wanting to use Goldman?

Goldman has no hold over us. Goldman doesn't decide --

THE COURT: I actually think in these weird ways, what it shows is that these folks get -- you wouldn't give bonuses to ordinary employees this way. You wouldn't give other service providers free money. You already had to increase your advisor costs because of Goldman; right?

MR. ROWE: We had to hire an additional advisor.

THE COURT: Why is Goldman giving advice about the Kinder Morgan thing after they're supposedly being cauterized? Why is their presentation to the board still addressing the Kinder Morgan offer?

MR. ROWE: You mean on September 15th?

THE COURT: Yeah.

MR. ROWE: Here's what happened. There was a -- when Mr. Kinder sent a letter saying, We may go public, there was a discussion about whether, A, going public was a good thing or a bad thing; and two, should we do what Mr. Kinder was asking us to do, which was to give him due diligence before there was a deal on price.

Now, as it turned out, as Your Honor observed, we did a deal on price prior to giving him due diligence, and as a result, he was able to come back and say, Now that I've seen your books, I've got some issues about the price.

THE COURT: Yeah. He was able -- again, I don't know why someone who puts themselves in the bucket that Mr. Kinder puts himself in was treated -- I mean, really, I do find the board's response: I hope to play a lot of sports against you.

MR. ROWE: The response to what Mr. Kinder came back with?

THE COURT: Yes. I absolutely would have enjoyed responding to that, because he was a tough guy; right? He made a hostile move. See, the point is this turned into -- your client turned into -- went from being asked -- being the prettiest or most handsome person in high school being asked to the prom by someone who didn't seem to be that attractive, to salivating to be going to the prom with the person asking, really quickly.

MR. ROWE: It would surprise me, as a matter of Delaware law, if a board which thought that a $22 billion deal --

THE COURT: If you want -- if a board gets from somebody who is such a tough guy, threatens a hostile bid, a reneging on a price based on some idea that their own banker modeled something after an analyst, and immediately plays puppy dog --

MR. ROWE: We didn't play puppy dog.

THE COURT: You did.

MR. ROWE: Your Honor --

THE COURT: Who won the point?

MR. ROWE: Well, the point --

THE COURT: Let's go down to the 26.50, where the board said it was going to get a minimum of 26.50, which is another, as I read it, a dollar 5 short of what Mr. Kinder promised. So the board erected its own mental Maginot Line, and then did they get 26.50 in Kinder Morgan cash and stock?

MR. ROWE: What did we get? 25.91, we got.

THE COURT: Right. So you got 69 cents per share less than your second line after having had a guy who threatened to go public back up on his own number because his -- he based his number on an analyst and on Evercore. And so he was able to, frankly, renege on his own tough guy offer because he

was now in a situation where, apparently, he didn't have to be a tough guy. Apparently, you all couldn't lose him.

And then you try to recover from there, and you try to say, Minimum of 26.50 in actual Kinder -- which Kinder is hardly a longstanding public company stock yet -- and cash, and you don't even get that. And what you're trying to tell me -- see, this is the problem, Mr. Rowe. There might be explanations for all this. But, see, one would have a lot more confidence if things like Goldman wasn't so omnipresent despite their Chinese Wall.

And I do believe, frankly, fundamentally screwing up and distorting the financial incentives of the other bank is a fairly sizeable role to play. And if people want to roll their eyes and tell me that 25 million bucks or something doesn't matter, they can, but I think there is a reason why people negotiate for those kinds of things.

And then when it turns out that the guy doing the price negotiations is thinking seriously enough about bidding for part of the assets himself that he's willing to go to Rich Kinder after the deal is baked and talk to him about it, never tells anybody

during that process that he's doing that, there is another thing about Goldman and it being so valued that's important that comes to my mind. And you might guess.

Well, who really wants Goldman around, Mr. Rowe?

MR. ROWE: Well, I suspect Your Honor might not give the same answer I would. The board wanted Goldman around --

THE COURT: Who was telling --

MR. ROWE: -- and management wanted Goldman around.

THE COURT: Who was the one who e-mailed Daniel and said, We just want you for the meeting.

MR. ROWE: Well, Your Honor, that didn't mean we don't want -- what that meant was, We don't want you to bring a whole team.

THE COURT: I get that, but who did that?

MR. ROWE: Someone from management.

THE COURT: Was it Foshee?

MR. ROWE: It was either him or their CFO. I don't know.

THE COURT: Who is the guy who really had the relationship all the time with Daniel, probably?

MR. ROWE: I think -- he had been a banker for eight years for this company, Your Honor. He knew everyone.

THE COURT: Right; but who really wants him around?

MR. ROWE: Your Honor, I don't know how to answer that question.

THE COURT: I mean, one of the things we don't know, we don't know, but human nature would suggest that the person who really wants him around in a high-stakes deal situation like this, and who is used to talking to him all the time, and views him as his only real peer, would be Foshee himself.

And that when you're talking about moves like, How do we react to Rich Kinder about this? Do we do things without due diligence? How do we react to Rich Kinder, frankly, threatening to go hostile one week, making a deal with us 45 cents short of what we asked for, and then reneging based on some -- I mean, I do find it one of the more amusing things. What you're telling me is they built their

model on an analyst, and then it turns out that analyst's projections don't match the company's internal projections.

And by the way, did your bankers, your client's bankers, ever actually verify this, you know, model change?

MR. ROWE: Our bankers came to the conclusion that, as I recall, that it was plausible, but they couldn't absolutely verify it.

THE COURT: Which is another way of saying, you know, it's ridiculous.

MR. ROWE: Two things, because there are so many things I wanted to respond to. But number one, I think when I gave you an answer before as to the amount of the consideration, the amount of the consideration with the warrant -- and the warrant has value. And, indeed, today, it's worth -- it's going to be worth considerably more, based on where KMI stock is trading. But as of --

THE COURT: The stock is -- where is the stock trading?

MR. ROWE: Around 32 bucks.

THE COURT: It has to get to 40 before it's --

MR. ROWE: No. It has value way before it gets to 40. That's the way the warrants work.

THE COURT: Some sort of -- the warrant itself is basically profitably exercised at above 40?

MR. ROWE: It will be traded and have value. And indeed -- but in any event --

THE COURT: When is the warrant exercisable?

MR. ROWE: When the stock reaches 40.

THE COURT: Okay. So yeah, it has value now based on certain probabilities.

MR. ROWE: It's monetizable. And indeed -- so this is what I was going to say. I think we said 25.91 before, but bear in mind, the value of the deal when it was approved was calculated as 26.87.

THE COURT: Look, I get it. You don't think that the warrant has dollar-for-dollar value with a share of Kinder Morgan stock, do you?

MR. ROWE: I don't think it's worth less than 96 cents, for example. In other words, we're not saying it's worth $32.

THE COURT: There was a reason why

your clients wanted 26.50 in stock and cash, and they didn't place as much value on the warrants. And there is a reason why they want to give you warrants instead of their stock.

MR. ROWE: And just because we had a merger part of the group --

THE COURT: All I'm saying is you may be right. What do I do with the situation where everybody -- where the first principal negotiator has a conflict of interest he doesn't discuss, where your Chinese Wall is -- you know, I'm mentioning things that I think -- I don't know whether the Chinese wall has worked. It's very hard to come from China. But the Maginot Line obviously didn't work. But their own Maginot Line, they just get a kick through.

And that's what I'm saying. This is a very unusual pattern of negotiations to begin with. Again, I don't see any serious discussion. I don't want to play banker or lawyer. I really -- the idea, for example, that in a hostile dynamic, Kinder Morgan would pay less, that's just not immediately sensible to me.

MR. ROWE: What we were advised and what we believed was that if they went public, they

were not going to bid against themselves, whereas if we were negotiating with them privately, we could extract additional value.

Now, what I seem to hear here is the notion that because the board loved a deal, which took the value of this company in the hands of the shareholders from, say, $15 billion to 21, that because in the course of trying to finalize that deal, maybe we only got 20 or 20.3, that we should have told them to go away. That, to me, is crazy.

THE COURT: I mean, again, that's -- I mean, if you want to put it in those terms, those are terms that are unrecognizable to me. I think the terms would be like, the board has a situation that it was probably duty-bound to explore. There was a powerful conflict of interest on the scene from the financial advisor of the company, knowing the principal advisor that the board is relying on, and wanting to keep Goldman Sachs around, are people who have an undisclosed conflict of interest.

There is then a negotiation process that's a bit unusual in that the tough guy Texas potential hostile bidder reneges on the deal. The board, frankly, doesn't react in a very Texas-like

way. Then the board tries to "Texas up" again. Sets a minimum price. Doesn't get near it. Its principal negotiator the whole time is the one with the undisclosed conflict of interest.

And then the Court is left with -- you're trying to say that this is just some ordinary situation where there is no rationally explicable economic conflict of interest, and that people just got outnegotiated, or might have gotten outnegotiated, or might not have.

Well, in that situation where people don't have any conflict of interest, you can say, Look, you know, you elected these people. They tried their best. There is not the potential for a breach of fiduciary duty. If they try their best and they maybe don't score as many touchdowns as you would like, but they still put out a respectable performance, it's not a breach of fiduciary duty.

Here, we're talking about something different where there are objectively -- objective points in this discussion which are odd, where you might expect a bit more vigor, where it doesn't happen, and where you're telling me to trust something. And I'm supposed to ignore the conflicts

of interest because your argument ignores them entirely.

MR. ROWE: No, Your Honor. I'm asking that before the Court comes to any of these conclusions, that we explore what evidence there is for a causal link between the conflicts that Your Honor finds or may find to have existed and anything that harmed the shareholders.

THE COURT: What could harm them is this. If someone actually -- if we know that our negotiator might actually prefer Kinder Morgan not to have emptied its pockets, that we would actually want Kinder Morgan to have a bit of a cushion, there is the potential, then, to know that somebody who may have actually not had a conflict would have actually emptied their pockets.

And you might approach -- I'll use this Aspen Institute word, "inflection points," you know, vomitous kind of words -- it's good we didn't have lunch; right? -- inflection points differently. You know, having someone -- is it usual -- how do we deal with the fact that this guy played tough guy on us and now he's reneged on his price? How do we deal with that?

And then have that the two -- because Daniel is still around at that time. Very influential. And he's also influential -- and this is the thing. I draw the inference that the people who really wanted him on the scene were management. And management is the one doing the negotiation with Kinder Morgan.

Wasn't there also a time in this when Foshee went back and made an overture that really wasn't within the parameters given to him?

MR. ROWE: No. I don't think that's the case, Your Honor. At every stage of the process -- and Steve Daniel was out of the picture for all intents and purposes after the meeting at which management rejected his advice, which was around September 9th, 10th, in that time period. He did appear at the September 15th meeting, and there are Goldman valuations in that book.

THE COURT: He was having no conversations with management?

MR. ROWE: No, I can't say he was having no conversations with management. There is nothing in the record to suggest he was having any particular conversations with management. Plaintiffs

didn't make a record as to that.

But here's my point. At each stage, there was a board. These are 11 independent directors. They're entitled, I think, to some weight under Delaware law.

THE COURT: Of course they're entitled to weight, but none of them -- they didn't have a special committee. They didn't negotiate.

MR. ROWE: They directed their negotiator how to negotiate, and he reported back instantly. Mr. Baker sent an e-mail after every meeting and discussion saying, This is what Mr. Foshee said. This is how Mr. Kinder reacted. Mr. Foshee testified he talked with the lead independent director, Mr. Talbert. And whenever a letter was sent, it was virtually instantly sent to the board members.

The board members decided how to respond, whether in Texas style or some other state's style, to Kinder Morgan's telling us that they were going to reduce their price. It was the board that decided that. The board could have said, We're so angry at Mr. Kinder. We think he's no good. You shouldn't talk to him anymore.

THE COURT: This is the -- CEOs are influential.

MR. ROWE: Under our law, I don't think there is a presumption that the --

THE COURT: No. We pay them all this money and we pay the bankers all this money to be influential, except when it really matters, they're just another body in the room.

MR. ROWE: No, but I think all the Delaware cases tell us that where an independent board is involved and informed --

THE COURT: The independent board had no face on the negotiations with Kinder Morgan; right?

MR. ROWE: That's right. Well --

THE COURT: So the whole dynamic in terms of reading the dynamic about Kinder Morgan, where it's going to go, even the whole thing about -- one of the things about the CEOs, one of the reasons why -- one of the difficult things for companies now is getting sitting CEOs to stay on your board because they have M&A experience. They're familiar with the way the world works. And when you get independent directors, they don't quite dance. You're telling me Goldman was so important, we had to have them on the

scene. They're our long-term financial advisor. We've got our CEO here. But they're not really -- and they're the ones who actually know the other side and have contact with them. But, you know, we're principally -- it's principally the independent directors kind of using their horse sense about how to go back to Kinder, what the dynamic is, whether you can actually get to the 26.50 rather than the 25.91. It's the independent directors?

MR. ROWE: On this --

THE COURT: Was there one who was like the --

MR. ROWE: Yes.

THE COURT: Is there one, when I read his deposition, I will find is the thought leader and negotiation strategist for this?

MR. ROWE: I'm sorry, Your Honor?

THE COURT: Was there one in particular?

MR. ROWE: There is a lead independent director, Mr. Talbert.

THE COURT: And was he -- you know, did they think about awarding him a bonus afterwards too?

MR. ROWE: I don't believe that came up. Your Honor, these independent directors have a status under Delaware law.

THE COURT: I understand what status they have.

MR. ROWE: And there is no suggestion that they would have any reason to do any favors for Goldman.

THE COURT: And --

MR. ROWE: We let CEOs who are going to be joint CEOs of the new merged company negotiate merger terms. We don't say, as far as I know, that just because the CEO is going to go on the board or is going to have a role as CEO or COO in the new company, that he can't be the board's negotiator. A board is allowed to rely, as I always understood it, on objectively what comes back to it.

THE COURT: There is something different about that situation that is pretty obvious, isn't there?

MR. ROWE: If you believe that the CEO would be motivated by his interest in continuing to be employed, which is Mr. Foshee is not. He is not going to be --

THE COURT: No. What I'm saying is about the other situation, which is if a board of directors, in negotiating a stock-for-stock merger agreement where it's contemplated that the CEO will stay on, knows that. They know about the conflict up front, and they're letting the CEO do that, presumably.

MR. ROWE: It's not always clear, Your Honor.

THE COURT: And again, don't imply from anything I'm saying that I'm applauding what you're suggesting as a model. And I think the stock-for-stock situation, we've often seen situations where, in stock-for-stock merger agreements, there was probably money for the stockholders and other constituencies of the company that was diverted to having twice as much top management precisely because of negotiation processes like that. Where you've got like -- it's like some sort of gentry where you have CEOs- and CFOs-in-waiting and shadow governments and 20-year succession plans like the Lenin with an I.

But what we're talking about here is, you know, what was cool about this is the board was really, in many ways, they're pristine, because

they're pristine also of any knowledge that Mr. Foshee had the conflict he, in fact, did, because he didn't burden them with information which would have caused them to think about it. So in that way, the board actually is able to give the very pure judgment and just objectively sift through the information that he's providing them.

MR. ROWE: But objectively, at the end of the day, this is, number one, a very fair and attractive price. And there is no indication, indeed, it's exactly the opposite, looking at Mr. Kinder's own contemporaneous notes, that he wouldn't have paid more.

And the projections for this company have been public since November 10th. That's when we first filed our first draft documents with the SEC. There is a $650 million breakup fee in what is now a $23 billion transaction. If there is so much -- if this board --

THE COURT: But your own advisors suggested that if you were going to -- that the way you would get -- you're not going to have a competitive process for the whole.

MR. ROWE: We didn't think it was

likely, but it wasn't that we affirmatively stopped it through deal protections.

THE COURT: Why did the board not consider exploring the market?

MR. ROWE: Because we didn't think that there was -- given our size and the fact that the number of companies that would want to own both a regulated pipeline and --

THE COURT: That's what I mean. You had a potential -- nothing prevented the company from being sold -- you can -- Mr. Lebovitch pointed to the 1980s. You can sell all of El Paso in a contemporaneous time period where all El Paso doesn't go to the same universe of buyers.

MR. ROWE: We didn't know whether, if we put both pieces up for sale, we would be able to get an attractive price for one, both, or neither.

THE COURT: No, you never know. But what's interesting --

MR. ROWE: It was risky.

THE COURT: But see, you've talked about -- there's execution risk; right? That's one of the things you're pushing upon me. There is a lot of execution risk in the structure that's being proposed;

right?

MR. ROWE: No. We have a hell or high water deal with them.

THE COURT: No. Wait a minute. The value of every element of this deal, except for the cash, is subject to execution risk.

MR. ROWE: Well, it's subject to market risk as to the price of the stock.

THE COURT: You can't have it both ways. It's either an all-cash deal -- if you want to look at it as a deal -- that's where the tax issue comes in, because if you want to look at this as if it's all monetizable now -- right? -- then a good deal of the consideration, depending upon the tax status of people, but a good deal of it is going to be taxable. And even, frankly, if you have to offset it against other kinds of losses, you're using those losses, and you won't be able to use them in another context; right?

MR. ROWE: I think there is a difference between execution risk and market risk. On the day this deal closes, whatever the price is of Kinder Morgan stock, you can sell it for. When I say execution risk, I mean things like maybe the people

who want to buy our assets have antitrust risks. Maybe they can't raise the money.

THE COURT: No, that is absolutely true, but also, you were talking about the execution risk on the business side of things; and there is that. So what you're saying is whatever the price is now, you can exit out, sell all this stuff. So you just treat it as all monetizable, which means there is going to be a discount to it; right?

MR. ROWE: You mean if everybody sells on the same day, because of --

THE COURT: Yeah, because of taxes and other things. The warrants, who knows. The warrant will sell at whatever it is at.

MR. ROWE: I mean, normally, I think we look at these deals, even if they include a stock portion, as being whatever they appear to be on their face at any given time, with the market. That's normally, I think, how we do it.

THE COURT: Okay. And so what you're saying is the board just -- the board concluded that even testing the market on the other things was too risky?

MR. ROWE: No. We felt we had already

tested the market by announcing the spin. And we got a very non-enthusiastic reaction. We felt we -- we've gone so much further than most boards in looking at alternatives --

THE COURT: The spin --

MR. ROWE: -- announced --

THE COURT: What you're saying is if somebody had wanted to buy the E&P business, the perfect time to buy it is when it's being spun?

MR. ROWE: No, Your Honor. We believed -- and this is in the minutes, and Mr. Vagt said so -- we believed that once we announced the spin, we were putting ourselves in play. And we were putting ourselves in play as two separate companies or as one. And if there was someone out there who wanted to buy pipelines, who wanted to buy E&P, after May 24, 2011, when our board indicated we were willing to spin them off, of course they could. It was an invitation to come forward. No one came forward.

THE COURT: So it's not an invitation -- people wouldn't read it as, We actually want to keep the pipeline business, but you can buy E&P?

MR. ROWE: Either way. We were

splitting up -- this board was open. It was trying to, as the phrase goes, maximize shareholder value. And, obviously, they could have made an offer to buy either one. No one came forward. We didn't get a letter. We didn't get an inquiry. There is no issue about that. We were exposed. We exposed ourselves. This is the opposite of an entrenched board, and it's the opposite of entrenched management.

THE COURT: How do you deal with this growth rate, to sort of segue to something? It is kind of silly on its face.

MR. ROWE: The growth rate?

THE COURT: Yeah.

MR. ROWE: You mean the .7 percent?

THE COURT: Yeah.

MR. ROWE: No, Your Honor. There is nothing inherently --

THE COURT: If you did a Gordon Growth Model with that as your perpetuity growth rate for this business, wouldn't you think that would be pretty dumb?

MR. ROWE: Look, I'm not a Ph.D. in this area. Mr. Lehn is, and he didn't think it was inherently suspect.

THE COURT: So did he do his own Gordon Growth Model, and he came up with a perpetuity value calculated as of 2015 for El Paso's pipeline business of .7 percent, which is lower than inflation?

MR. ROWE: What he did say is that in his --

THE COURT: He did not; right?

MR. ROWE: Correct.

THE COURT: He reverse-engineered this thing. What is the sample for the 10 exit multiple? Is it a comparable company sample?

MR. ROWE: Yeah. There are about six companies on a page. I have it. But, Your Honor --

THE COURT: And what's the median?

MR. ROWE: What's the median?

THE COURT: Did they use the median?

MR. ROWE: I tore the page out of Mr. DiPrima's book. Let me try to find it.

What Mr. Lehn points out is that he takes the 2.9, but he doesn't take the discount rate. He just cherrypicks. He says, You should compare it to KMI's 2.9 but not use the discount rate for KMI. He's just picking and choosing. On top of that, if you use --

THE COURT: I'm not talking about using someone else's.

I think what Mr. Clarke said, fundamentally, about KMI is if you look at the objective economic information in this record about KMI versus El Paso in the pipeline area, a big reason why KMI was buying El Paso was because of the attractiveness of its pipeline business; that if, really, what you're assuming is that the future prospects of that pipeline business as recently as 2015 will translate into a perpetuity growth number of about a third of the historical inflation rate, then Kinder Morgan would not be doing this deal. The whole premise of the deal is stupid. That El Paso is dead. And yeah, I mean, this would be a great deal $10 per share less or something like this.

I mean, to get to a perpetuity growth rate of .7 takes some doing because what you have, obviously, is you're going to have growth. You look at periods. And there might be a period between 2015 to 2025 where El Paso is still growing higher than the market.

Then you're talking normalizing. Usually, you have to normalize through when they grow

at the rate of the overall economy, then to where they kind of keep and they're sort of the same share. This assumes that they're relatively rapidly becoming less valuable as a proportion of the economy; in fact, not keeping up with inflation; in fact, not even keeping up with half of inflation; and it's just a really odd thing.

Having to do something -- I'm below your market cap, so I actually have to be in appraisals. Usually, you guys, you know, get out of appraisals and leave them to -- we don't even see Wolfe much in appraisals. He just passes that on, you know. Mr. DiCamillo, a little bit, but he's phasing out of that and giving it to the more junior types.

But those of us stuck with appraisals kind of know a little bit about this. And it's a really unusual perpetuity growth number for the story that's being told about this company and this merger. And why shouldn't that be concerning?

MR. ROWE: Mr. Lehn explains better than I could about seven different reasons why .7 is not -- this is a regulated company --

THE COURT: It's a regulated --

MR. ROWE: Mr. Clarke disclaims any

expertise in the pipeline industry. And if you use his growth rate --

THE COURT: Where is Professor Lehn's perpetuity growth number that he comes up with?

MR. DiPRIMA: I can address that.

MR. ROWE: Let Mr. DiPrima, who worked with Mr. Lehn, address that.

THE COURT: Especially because Mr. Lehn is so special and so much more special than your original expert, we should explore this so that value is added by him.

MR. DiPRIMA: Good afternoon, Your Honor. I'm Steve DiPrima.

To address the perpetuity growth rate, what Mr. Lehn explains is that you can't look at that rate in isolation. You have to look at it relative to the net investment that's being put into the company in the perpetuity period.

In Mr. Clarke's model and in the Morgan Stanley model, there is no projected growth in invested capital. So if you use a 2.9 percent growth rate, you are essentially assuming that your earnings are going to grow into infinity but your capital base is basically staying the same, which is crazy.

THE COURT: Well, I think it's --

MR. DiPRIMA: In other words, if you look at Mr. Clarke's model, he's saying D&A in 2015 and beyond is exactly equal to capex. So in other words, year over year over year, your investment capital is staying exactly the same, but he's projecting a growth at 2.9 percent. And that just fundamentally can't be.

What Mr. Lehn also says is that if you look at --

THE COURT: Then it also sounds like management's projections are kind of messed up, then.

MR. DiPRIMA: Well, no. Morgan Stanley used the multiple approach.

THE COURT: No. I understand people use a multiple approach, but this idea that they were not going to make any capital investments in the future, that's not built -- one --

MR. DiPRIMA: There are capital investments, but when you go into this steady state period, if you fix capex --

THE COURT: You're not in a steady state in 2015.

MR. DiPRIMA: 2016. It's a terminal

period.

THE COURT: Mr. Allerhand, you guys might want to get out of this deal now.

Mr. DiPrima, this is just --

MR. DiPRIMA: No, wait.

THE COURT: No. This is fundamentally stupid.

MR. DiPRIMA: It's not.

THE COURT: No, it is. Because is he saying that going into -- how did he build his model, Professor Lehn? There's got to be a period in which they're still growing relatively rapidly. They're also out making capital investments before 2015 that are going to produce things. You're making an assumption, too, that you're matching depreciation exactly with real economic --

MR. ROWE: That's Mr. Clarke's assumption.

THE COURT: I think -- again, okay. Good thing. Kinder Morgan is buying a company with a perpetuity growth rate of .7 percent.

MR. DiPRIMA: Well, what --

THE COURT: I got it. It's fine.

MR. DiPRIMA: Well --

THE COURT: No, I don't need to hear more. It really, objectively, it makes a lot of sense.

MR. DiPRIMA: I'd like to explain one more thing, if I could. What Mr. Lehn explains is that if you're doing a comparison between the El Paso DCF and the Kinder Morgan DCF, which is what the plaintiffs point to -- and they focus on the disparity between the perpetuity growth rates; they don't focus on the difference between the WACCs -- that if you look at it, the perpetuity rate is a calculation. It's just solved. In other words, they're using an EBITDA multiple --

THE COURT: I understand that part of what both sides -- these experts are doing is they're not actually doing a Gordon Growth Model.

MR. DiPRIMA: Correct. But they're using --

THE COURT: So they're backing into their exit.

MR. DiPRIMA: So if you use the same discount rate in both models, you get a perpetuity growth rate for El Paso of something like 2.7 percent and a value very close to the value that Morgan

Stanley got.

THE COURT: I hadn't known that the way you're supposed to do this, though, is to just sort of create some -- you know, I'll have to go back and dust off my DCF chops. I actually hadn't known that you come up with your perpetuity growth model by monkeying with your discount rate and vice versa.

MR. DiPRIMA: It's purely a format. It is correct. In other words, the .7 is solved, and it's a function of the 5.75 percent discount rate that Morgan Stanley uses for El Paso. In other words, if you use the discount rate that is calculated for KMI, if you use that --

THE COURT: All I'm saying is I did not know and I will have to brush up and memorize for myself and relearn for myself the idea that if I know a company's discount rate, I can determine its perpetuity growth rate.

I don't actually -- I think that there are plenty of companies, for example, with whacky high discount rates and all kinds of things that would not translate into a higher perpetuity growth rate.

MR. DiPRIMA: You need to know the terminal value, too, to do the calculation. So in

other words, if you use Morgan Stanley's terminal value and you use the discount rate from the KMI model, which they like -- they say that the prospects are the same, so, okay, use the same discount rate for both companies. If you solve for the perpetuity growth rate on the El Paso side, you get something in excess of 2 percent. And you get a value that's not exactly the same, but close to being the same.

THE COURT: So two companies with -- if you know the companies have equal discount rates, they must have equal perpetuity growth rates?

MR. DiPRIMA: If you know -- I'm not sure that that's correct.

THE COURT: Exactly. I didn't know that that was either. And you're welcome to -- I don't want to take any more time. You guys are welcome to send me some corporate finance tomorrow in which I now know that all I need to know about a company to establish its perpetuity growth rate when I do an appraisal is that it has a discounted -- it has a discount rate done properly, 11 percent.

MR. DiPRIMA: I think that's not correct.

THE COURT: Well, then if it's not

correct, there is an awful lot about Professor Lehn's report that requires illumination that I think we're probably not able to get into.

If it is as I always thought was the case, that you had to independently calculate your growth rate -- and that's a very difficult thing, and it's one of the reasons why the terminal value in these, you've got to be careful. Like in companies that don't have any actual earnings it's always a problem because the last -- your terminal multiple and all that kind of stuff, your value, it's like 187 percent of the value because the earlier horizon period where you actually have things that you know about, it has a negative value. And you've always got to be careful about that.

Here, you have real cash flows. But to get down to a terminal -- to a perpetuity growth rate of .7 percent in this business as of 2016, I do think is rather strikingly odd. And the explanation that if you simply just act like it has the same discount rate, it may just show that you've got a model that's just a fungible model, and it basically isn't a growth model at all.

And what you're telling me is that the

exit multiples are comparable companies.

MR. DiPRIMA: Right.

THE COURT: Not comparable transactions.

MR. DiPRIMA: They looked at comparable companies. And they're both in Professor Lehn's report and in the Morgan Stanley deck from --

THE COURT: Are they comparable transactions, or are they comparable companies in the sense of ordinary everyday trading data, or is it transactions for the sale of comparable companies?

MR. DiPRIMA: I think it's trading data. And they did look at a median for the current period and used a slightly lower multiple for the terminal period. And that's calculated in the book, Morgan Stanley's --

THE COURT: So they used a lower period for the -- they used a minority, a current minority trading multiple, and then they reduced it to use it as an exit multiple for an entire company?

MR. DiPRIMA: The multiple they used is I believe slightly below the median.

THE COURT: Of the current minority

trading multiples?

MR. DiPRIMA: Correct. And I think part of the idea of that is that when you're out to 2016, you're in a slower growth period.

THE COURT: Well, if that's the idea of it, and that may be part of why I talked about before decelerating the multiple by using a current minority trading multiple, but what you're saying is they decelerated it even more. They took the minority --

MR. DiPRIMA: I don't know the exact difference. Professor Lehn shows in his report that if you look at where the comparables have traded historically, a 10 times multiple is right where you would expect it to be. So I think it's --

THE COURT: Again, an exit multiple, though, is -- a minority -- where companies trade at on a daily basis is not really the economic question.

MR. DiPRIMA: Well, it's the methodology that Morgan Stanley used.

THE COURT: That is -- yeah. Okay. That doesn't necessarily mean --

MR. DiPRIMA: True.

I would make, just if you will indulge

me, two small points.

The comparison of the KMI that we were talking earlier about, what the director should have picked up on and realized, first, the September 26th deck, as I understand it, wasn't a deck reviewed with the board.

Putting that aside, the chart they're looking at or comparing when they say, You should realize that your numbers for El Paso are so different for KMI, the KMI income stream was a levered income stream. In other words, they're discounting dividends. On the El Paso side, it's not. So Clarke doesn't address it. At his deposition, we got into it a little bit.

But the idea that the El Paso directors were supposed to have some lightbulb moment where they realized that there was some --

THE COURT: No. I understand that. But it's also the power of advisors, because what results from things like this is advisors are given ranges, and advisors are told -- not advisors. The directors are given ranges, and they're told things.

MR. DiPRIMA: Right.

THE COURT: And there is room in these

things for mistakes to have influence, or, frankly, for things not to be mistaken but to rationalize a result.

MR. DiPRIMA: Right.

THE COURT: Having had a case, frankly, where a very large bank changed the historical -- the way it made a deal look more fair was to have its view of the historical equity risk premium change by nearly 2 percent within a period of two months. Which is a remarkable intellectual achievement, given that the historical risk premium is calculated -- there is a debate about whether it goes back to the Ibbotson data or whether it goes back to the 19th century.

And then when I asked them whether they had done it at their committee, this is something they had decided for all representations, no. They were on the buy side. I said, Would you ever use this on the sell side? And the guy actually was real candid, and said something like, Heavens no. You know, and --

MR. DiPRIMA: But, Your Honor, the DCF that the board was shown, the one on September 15th, calculates I think the bid point perpetuity growth

rate is 1.3. If we're just talking about --

THE COURT: I don't know -- I think most of the valuation literature will tell you the following: If you have a pretty healthy, solvent company in an industry that you think people -- is going to be around for a while, using a perpetuity growth rate lower than inflation, that there ought to be an explanation.

MR. DiPRIMA: Right. And my understanding --

THE COURT: And when you use one that's a third of the inflation rate --

MR. DiPRIMA: My understanding is the explanation is tied to what you're assuming about net investment. And here, in his original report, Mr. Clarke assumes no net investment. And that is one of the things that explains a perpetuity growth rate that looks to, Your Honor's eyes, low.

THE COURT: Maybe that's -- you know, I would -- apparently, it's good news for people with low perpetuity growth rates, that there are people at Kinder Morgan out there looking for them and want to buy their debt.

So thank you, Mr. DiPrima.

Mr. Rowe, is there something else you want to talk about, like balance of the harms, all that kind of good stuff.

MR. ROWE: Sure.

THE COURT: Whether there is some risk-free option here?

MR. ROWE: Frankly, I listened to Your Honor's colloquy with Mr. Lebovitch this morning, and I don't know that I have much to add to it.

THE COURT: What are the closing conditions for Kinder Morgan? If I were to just put this thing on ice and enjoin you and let you go-shop or something like that, you know --

MR. ROWE: I'm sure from my conversations with Mr. Allerhand that they would take the position that the conditions -- I don't want to make the mistake that your Harvard students made or something, but --

THE COURT: What I hunger for is someone who has actually read the merger agreement to talk to me about the provisions.

MR. ROWE: The problem is, Your Honor, I don't want to take a position at this point about --

THE COURT: I understand, but what I'm

saying is, do they have a plausible walk right. Are there conditions in there --

MR. ROWE: Yes.

THE COURT: -- that actually relate --

MR. ROWE: Yes.

THE COURT: -- to the deal protections?

MR. ROWE: Yes. And I believe that would be their position. But yes, they would certainly have a position that we would have to take seriously. What, ultimately, our position would be about it --

THE COURT: Right. You'd try to hold them into the deal, but what you're saying is they wouldn't be relying on the preliminary injunction provision. They would be relying on other closing conditions tied to covenants.

MR. ROWE: They might rely on the preliminary injunction provision as well.

THE COURT: They might rely on that as well, but what I'm saying is there are other things in there, including material compliance with covenants, that are closing conditions.

MR. ROWE: Yes.

THE COURT: Such that if, for example, when you have a no-shop deal, you actually went and shopped.

MR. ROWE: Shopped.

THE COURT: Where they could have a plausible -- they could point to that, and they wouldn't have to say "Strine's injunction." They would just point to the fact that you shopped the deal.

MR. ROWE: Absolutely.

THE COURT: Okay.

MR. ROWE: Yes.

THE COURT: Anything else?

MR. ROWE: No, Your Honor, unless you have any --

THE COURT: What about the balance of the harms here? What do I do if I come away convinced of this: That the plaintiffs have a reasonable likelihood of success that there were breach of fiduciary duty committed; that there were powerful unchecked conflicts of interest that it's not possible to say for sure affected a deal dynamic because you weren't there; but that the reason that you don't know about this is because people weren't up front about

it; that there is enough in the record, frankly, to have some deep concern about whether El Paso stockholders are getting what they should have, had people behaved properly and all the incentives been dealt with in the right way? What do I do with that?

MR. ROWE: Well, I think the traditional way to deal with it, as Your Honor said this morning, is to say whatever you would say in the section of your opinion about chances of success on the merits, and then when you balance the harms and perform the equitable analysis that this Court is always going to perform, conclude that the best interest of the shareholders lies in allowing this deal to close and the plaintiffs to pursue whatever post-closing remedies they may have in this Court.

THE COURT: How does, in your view, the exculpatory charter provision play into this? I'm assuming you take the position that the independent directors, you know, you can't get a remedy from them; right?

MR. ROWE: You can't get dollars from them.

THE COURT: What other remedy do you want?

MR. ROWE: No. I --

THE COURT: I'm not into shaming. I know there are some people in the shaming school. I don't wish to shame anyone.

MR. ROWE: Yes, Your Honor. As to the breaches covered by 102(b)(7), there would be no direct remedy.

THE COURT: So the only possible sources of a remedy would be -- and I understand -- when I ask you to answer this, obviously, I accept that you reject the premise that Foshee might be an interested party. He's the only management director?

MR. ROWE: Yes, Your Honor.

THE COURT: And then you've got Goldman Sachs.

MR. ROWE: Yes.

THE COURT: Who is going to have their own defense that, We weren't a fiduciary. We're just an advisor; right?

MR. ROWE: I assume they'll assert whatever defenses they believe they have.

THE COURT: Which that would be one of them; right? And they're not a controlling stockholder. Heck, we were mostly a stockholder of

the other ones, not you guys. So if we had any control, it was over there. And we told you about it. You didn't have to hire us. You did.

And so the remedy would just be going after Mr. Foshee; right?

MR. ROWE: The plaintiffs can go after whoever they want. Whether they'll be successful in establishing a potential aiding and abetting case on a full record, you know, that would be up to the Court. And some of these issues, I think, may not be -- what happens in a situation like this, like Your Honor describes, has not, I think, come up very often.

THE COURT: What I'm getting at is that we're in this -- and this goes back to what I call the frappuccino market kind of cases, where, again, I'm not saying how I come out. I want to absorb all your excellent arguments. Everybody go back over the record.

But if you come out of this feeling that there's a reasonable probability of success on it, on the merits; that you never know how things would have come out if it was done right, but it wasn't done right -- and there are some presumptions about uncertainty when you don't do things right

because of undisclosed conflicts of interest.

But the realities of the litigation process are if you, frankly, don't -- if you enjoin the deal now, there is the risk that the plaintiffs -- the risk that the stockholders will be harmed more. But if you let it go forward, as a practical matter, you keep having situations where you're concerned.

And yeah, I'm not talking about missed pricing by 25 percent. I mean, that doesn't happen. You know, I'm willing to concede, I mean, that's why I don't think Clarke stood behind that this thing is worth 40. But as we've been talking about, things are real money. A dollar per share is real money. $1.50 per share is real money. And that's where, frankly, there is the potential for diversion.

I wasn't entirely joking when I said that the board, if they had $20 million to put into Goldman Sachs' pocket for the success of this deal, that's $20 million they could have gotten out of Kinder Morgan. That's true.

MR. ROWE: Your Honor, when this Court speaks, if it speaks clearly and establishes rules, the community of M&A practitioners listens. And I don't think you have to take away -- usually, the

statements are so nuanced --

THE COURT: I don't think that there is anything nuanced about the idea that if you have a conflict of interest, you're supposed to tell the board as a whole. I don't know what lack of nuance there has been about that. I don't really know the nuance about that if you're the first bank and you're supposed to stay out of something because of your conflict, that you don't get involved in distorting the economic incentives of the second bank. Again, I don't really know -- I don't know the nuance of that.

MR. ROWE: Right. But I thought Your Honor was asking --

THE COURT: What I'm talking about is how do you deal with the -- and it's a hard problem. I haven't figured it out for myself, in the sense that I don't have another bidder on the scene. There is the risk that the market has changed and all that kind of good stuff, and you just don't know what Kinder Morgan will do. So you do an injunction and the deal goes away and the stockholders are harmed. Okay? So you don't do the injunction. And time after time, you don't do the injunction.

And so kind of the marginal potential

for corruption and diversion just grows into being part of the M&A process, because the remedial tools of later on trying to deal with monetary damages is just not a very precise one. No one wants to go back to the Van Gorkom era.

I suppose there was a former head of enforcement at the SEC who said, Every year, you ought to take two people out and shoot them because that's the best deterrent. We haven't done that Tudor-style -- that hasn't been Delaware's approach so much.

So I'm asking you a serious question because that's the real thing, because what you're going to say to me is there is no other bidder on the scene. The plaintiffs will say, Yeah, there is a reason for that, which is you actually didn't do a pre-signing market check. Now, you're going to tell me that you did, and I'll explore that, and I get the premise of it.

But you had somebody come forward. You could have tested the separate sale. You didn't. You did the deal you did. And you knew that for the entire company, there wasn't a range of bidders; that Kinder Morgan wanted this pipeline business enough

that they were going to buy the whole business and spin off the other.

And that's what the plaintiffs say. How do you know what you could have gotten because you can't go back and recreate this? And if you're always in this point that you'll have the balance of the harms will dictate no injunction, do you have an under-enforcement problem?

MR. ROWE: I think those are two separate questions. I don't think it has ever been the law or the policy, and I don't think it would work, to require every sale of a company to involve testing not only the --

THE COURT: I agree with that. What I'm talking about is a situation where, if we get recurrent situations where there is concern that conflicts of interest resulted in -- let's just say here, that an appropriately Texas El Paso board could have held Kinder Morgan to their 27.55, but their Texas point people had conflicts that led them to be happy at a lower level.

And then we get a pattern of deals like that, like the frappuccino deals I talked about, where the CEOs got ahead of their board, and instead

of creating competition in a low-cost way among private equity buyers, they basically foreclosed that. And we're not talking about missing by $10 per share, but we're talking about real money that potentially could have gone to the investors if it was done right that was essentially diverted in other ways because of conflicts of interest.

How do I deal with that? Because it is a concern that we have. Because we do see this.

MR. ROWE: Well, if Your Honor feels that that is the message that needs to be sent, I think --

THE COURT: I'm not into --

MR. ROWE: When I say "message," I don't mean --

THE COURT: In the remedial calculus of the balance of the harms -- because what you're telling me is sort of similar to what my sense is, which is the plaintiff's idea, which is that, somehow, you keep an option out there for the stockholders in this kind of situation, where you take someone like Kinder Morgan and you somehow hold them in and make them buy while they sit around and endure a free market check.

Now, I suppose that one could do that. I would think the way you would have to do this, you'd have to have a trial. You'd have to conclude that, somehow, Kinder Morgan itself acted with some culpability such that they could actually be subject to affirmative relief of that kind, and that you create a structure. That's a pretty difficult thing to gear up and do, too.

And often, in these cases, there is a line between the -- there is a big difference between the QVC thing of saying to someone, You bargained for a contract. You're at risk if they breach the fiduciary duties. You lose your contract rights.

That's a lot different than saying, Not only do you lose your contract rights, you actually have to have formed the contract at the option of the other party. The first, you can do under the Restatement of Contracts, and it means the contract goes away. And then not only do they not get their contract, they don't get any of the rights of the contract, I think.

But are you just telling me in cases like this, I've just got to basically say, Monetary damages are adequate?

MR. ROWE: No. I think the Court has the traditional tools available to a court of equity, which is if you find the requirements are met, you can enjoin the transaction with whatever risks that poses to shareholders. Or you can balance the equities differently, permit the shareholders to get their $7 billion, and if there is a -- we've just seen one of the largest damage awards in history in this Court, and it's had its impact.

THE COURT: I hadn't heard about that one.

MR. ROWE: And I'm sure it will have its impact. The idea that, somehow, by writing and by telling people what standard of conduct is expected and by permitting plaintiffs to put on their best case at a trial, those are the tools in the toolbox.

THE COURT: Thank you.

MR. ROWE: Thank you, Your Honor.

THE COURT: Anyone, briefly, from the defense side? Because I also do want to give our reporter a stretch-your-legs break before Mr. Lebovitch comes back.

MR. LEBOVITCH: Can I request just a minute break? I'm feeling a little under the weather.

THE COURT: Can Ms. MacIntyre handle it while you're gone?

MR. LEBOVITCH: No problem.

MR. ALLERHAND: May it please the Court, Joseph Allerhand from Weil Gotshal on behalf of the Kinder Morgan defendants. Your Honor, I know we've been going a long time. Let me hopefully clean up some of the questions.

Let me start with the merger agreement. Your Honor asked if anyone had read it and could speak to it. I have read it and I think I can speak to it somewhat intelligently. And let me at least point Your Honor to the provisions that we believe would be implicated by the kind of injunction that the plaintiffs have sought.

And I think Your Honor has put your finger on it. Let me just give you the citations. 5.2(a) prohibits any sale out of the ordinary course of assets over 75 million. If you look at Page 51 and 52 of their reply brief, what they want is to open up the sales process so that the two components of the business in fact can be marketed and sold. So that's one.

THE COURT: Right. But that says you

can't sell.

MR. ALLERHAND: Right. There's another one, Your Honor, that's unique to this deal, which is 5.16. We would not have signed this agreement -- that is the provision that says they will actively assist us in selling and marketing the exploration and production business so that if we're successful, that business can be sold the moment before the merger closes. So that covenant would clearly be breached if, as opposed to assisting --

THE COURT: So what you're saying is not only does this deal contemplate that you get the E&P business, but the deal contemplates that if you can be successful in your own effort to sell this E&P business, that you can take advantage of the upside -- if you get a really good deal on the E&P business, Kinder Morgan will profit from that, but at the very least, you're paying for your acquisition costs of the rest of the business by doing this. And if they somehow go out -- how can you run that process while they're selling the E&P?

MR. ALLERHAND: Your Honor, what we hope to do -- correct. What we had hoped to do was report to you perhaps at a sidebar and update the

Court, and we did it with the plaintiffs yesterday, as to what's happening with that process. Because we don't have to speculate as to what would have happened. We actually know what's happening in the marketplace.

The E&P business is particularly sensitive, Your Honor, to commodities prices. Natural gas prices are down almost 30 percent since we signed the deal. And we're currently marketing.

I can say for sure that if the Court issued an injunction which said that not only will the deal protections be eviscerated, but there will be a new banker who is going to market it, no one is going to deal with us. And that was one of the important deal rights that we obtained, which was we had no interest in owning this business, what was to be able to market and sell it.

Now, we took the risks, Your Honor, and it looks like the risks are playing out in a way that's favorable to El Paso's shareholders and to their board in the decision they made, and perhaps not so favorable to us, because we know what's happened. The business has been marketed to over 60 financial and strategic players.

So when we hear -- and we started many hours ago -- Your Honor said in response to something Mr. Lebovitch said that you can't have an argument that's untethered to the record. Some of the stuff I've heard here is not only untethered to the record, Your Honor, it's untethered to the actual marketplace reality that makes this deal somewhat unusual.

Plenty of buyers come in and say, We're going to finance our acquisition by selling pieces of the business we don't want. We were very up front about it. That was part of the negotiation. But we're in a hell or high water deal where we're locked in. As Mr. Kinder said, our hands are locked on the wheel of getting this deal done.

He said one of the biggest risks here was executing on the sale of the exploration and production business, and that risk has turned out to be exactly what he thought it was: A very significant risk.

And so if there was some grand conspiracy to somehow -- by Mr. Foshee -- to circle back and buy the exploration and production business, I can't comment on what was going on in his mind or what he told his board. The one thing I can assure

the Court is that on the Kinder Morgan side, we truly are an innocent buyer.

We're not happy about everything that's occurred here. We had no discussions with Goldman, Your Honor, with the Goldman guys on our board. We had no discussion with Goldman investment bankers. There was no information that was provided to us by anyone from Goldman.

So when Your Honor does the calculus of the balance of the hardship, and where the provisions that we bargained for in good faith and were up front about, and said, We want to sell this business -- Your Honor, you made a comment a while ago, and maybe the plaintiffs said we're overleveraged and that, somehow, we can't grow without the deal. That's utter nonsense.

THE COURT: I don't think I said you're overleveraged. I said there is a lot of leverage in your business.

MR. ALLERHAND: Your Honor, I've heard Mr. Kinder lecture on this point. He says, What will kill the golden goose of Kinder Morgan is if the master limited partnership, K&P, which is where all the money is spent, if he loses the investment grade

rating. That's one of the reasons, Your Honor, we want to sell --

THE COURT: I thought one of the risks -- I don't know. I read the proxy. I thought it talked about leverage.

MR. ALLERHAND: Well, Your Honor, as you know, the risks are always there, but --

THE COURT: Just yet another thing I'm supposed to ignore that people say.

MR. ALLERHAND: No.

THE COURT: I said I thought it was in the proxy statement about the risk, the leverage of Kinder Morgan. I also thought one of the reasons why Kinder Morgan has to do things like warrants was -- I thought it said that there were limits to the cash it could pay. Am I wrong about that?

MR. ALLERHAND: Yes. The reason we had to go to warrants is we were not going to pay over the range that Rich Kinder and the Kinder board had set at the very outset of the negotiation of 24 to 27. And we were trying to find a way to revive a deal that was dead on September 30th.

Your Honor, by the way, the other provisions in the merger agreement, you're absolutely

right, there is a bring-down provision as a condition, which is at 6.2 -- 6.2(b) says that there has to be a bring-down that the company, El Paso, has performed in all material respects, Your Honor, its obligations under the agreement.

And then there is a termination right which, of course, keys into that which says we could terminate if the covenants are not performed or there's been a material breach of the rep and warranty.

So again, I don't think we should sit here and speculate what would happen, but certainly, an injunction, which would strip away --

THE COURT: If they did conduct that was in breach of their covenants to you and representations and warranties to you, that is something that there's -- that flows through in some way that you and Mr. Rowe would potentially argue about in the future. But you would have -- you wouldn't be pointing to my injunction alone that -- the point of the injunction is to authorize them to do things that are otherwise violations of the agreement. It's not -- how they got to do it, the fact would have been they violated provisions in the agreement,

compliance with which are a requirement to your closing obligation, and that would give you an option to walk away -- your client an option to walk away if it didn't want to close on June 30th.

MR. ALLERHAND: We'd be in a very serious dispute as to whether we were obligated or not to close, and we would probably be arguing about what boilerplate severability clauses mean, and how would it play out here, when a material part of the deal we bargained for -- for example, Your Honor, instead of having I think it's roughly 7 billion in financing, we'd have to pull down 15 billion because it wouldn't have been able to sell the E&P assets. Nobody is going to deal with us on that sale. So the transaction would become a heck of a lot more expensive for us.

And if Your Honor is searching for it, there is a severability provision. I did check with the corporate lawyers beforehand to find out, because I thought we might get to it, as to whether or not he remembered any actual negotiation back and forth on it, and nobody -- he did not. It's boilerplate. And it says that if Your Honor in words or substance strikes something, that the parties then negotiate in

good faith to try to get back to where they were, whatever that means, within the spirit of the agreement.

I don't know how that would work because were Your Honor to strike the provision which says that El Paso is obligated to help us sell the E&P assets, I don't know how we would ever get back to that provision, if they go ahead and shop the two components of this business.

By the way, Your Honor, the other point I perhaps didn't make clearly enough, the plaintiff says they want an unconflicted advisor so that the board can consider shopping these businesses. We are shopping the E&P business. We have every interest to get the highest price possible.

THE COURT: I understand that, but what they would obviously say is they would like 100 cents on the dollar of what comes out of that, not, you know, what flows from the deal.

MR. ALLERHAND: But what if we know, Your Honor, today -- and I don't want to get into the numbers, and we can do it at sidebar --

THE COURT: I don't wish to have oral communications to me about --

MR. ALLERHAND: Fine.

THE COURT: -- you know, sensitive stuff.

MR. ALLERHAND: Fine.

THE COURT: Because it's already a burden, all the national security secrets that I have.

MR. ALLERHAND: Your Honor, it's in the redacted brief that we supplied to the Court so you will have it.

THE COURT: That's good.

MR. ALLERHAND: But even as of the time we submitted the brief, Your Honor, I think you will see when you go back and read the section on the E&P process, I believe you'll be able to draw conclusions as to who has the upside or the downsides and how that has played out.

THE COURT: But for purposes of today, what you're saying is that in your view, you know, if the Court were to enjoin the deal and, like, say you can't -- preliminary injunction, you can't enjoin this deal until -- you can't close on this deal until June 30th, and the children of El Paso may run free on the range of capital markets and explore that alternatives until that, but then on June 29th, the

injunction expires, that if they go run free in the ways that Mr. Lebovitch posits, your client is going to have about 15 reasons in its mind why it doesn't have any obligation to close.

MR. ALLERHAND: Exactly, Your Honor. And I think even beyond the real-world implications, in the Ace decision which Your Honor wrote many years ago, Your Honor struggled with the issue of how do you balance if you believe there's been a breach of fiduciary duty with the party who is innocent, a bidder, losing its bargained-for rights under the contract? And you laid out four factors.

And in the many hours we have had here, there really is no evidence to suggest that my client knowingly participated in any breach of fiduciary duty. Item 4 is the buyer's interest in enforcing the challenged transaction. This is not Del Monte. In Del Monte, the aider and abettor, KKR, was teamed up with another bidder. The conflicted banker made that happen. The conflicted banker brought them financing.

We have had no knowledge of any breach of fiduciary duty but, certainly, we didn't exploit a situation of conflict. All we knew from our side,

Your Honor, was that the two golden guys who sat on our board were out of the picture. They had no input into anything we decided to do. And the only people we ever dealt with in this deal on negotiations or back and forths were Morgan Stanley people. And there is not a shred of evidence that any information ever flowed from Goldman Sachs to anyone at Kinder Morgan with respect to this transaction.

And the Park Shaper e-mail is such an outrageous distortion of the record. Go back and read it, Your Honor. What it actually says when you go back and read the whole train, it was trying to find out from our side -- excuse me. Greenhill was the banker then for Kinder Morgan. And like all bankers, as Mr. Kinder said, they've never seen a deal they don't like.

And he was trying to find out, Why is this deal dead? Why was it rejected? And he was pushing to find out and having lunch with people at El Paso. And ultimately, he says in his e-mail, It was easy for El Paso to kill the deal because Goldman provided the analysis which allowed them at the executive operation level to readily dismiss it, and it apparently never got to the board level. That's

where -- read the e-mail chain. It doesn't support any grand conspiracy.

THE COURT: Thank you.

MR. ALLERHAND: So, Your Honor, let me just quickly --

THE COURT: I think we need to be --

MR. ALLERHAND: Let me see if there is anything else I need to add, and I will yield my time.

Just Your Honor's point about how do you know what happened and what if you have a conflicted fiduciary? I think here, again, if you buy into the Foshee notion --

THE COURT: Part of why you have the entire fairness standard --

MR. ALLERHAND: I understand.

THE COURT: And actually, this is where I actually tend to agree with Mr. Rowe's inclination to keep all the standards separate. I'm not sure that that's the way our law entirely is. And I think you can actually be in a situation in Revlon that turns into something like entire fairness. I think some of us would say, No, if there is a breach of fiduciary duty, it's not entirely fair. The question become the remedial calculus.

But I think Technicolor, which is a decision that you'll find that I usually try not to cite for any proposition, may suggest that situations like this actually do get you at some point to an entire fairness.

MR. ALLERHAND: Just quickly, Your Honor, two points. The record is undisputed whether we valued the company correctly or not, we paid at the very top of our range. So whether Mr. Foshee had a conflict, which I believe is not proven on the record, but I'll leave that for others, we did pay at the top of our range.

Whether or not we had a crappy model or we didn't do due diligence, the reason this deal died on September 30th -- and Mr. Kinder sent a letter to his director: You can consider this process at an end, because we were not prepared to pay over the top end of the range. So it doesn't mean -- it's the fair price, I understand, but it does show that the negotiations extracted, at least from us, the last pennies that we were prepared to pay.

The next point, most importantly, Rich Kinder is from Missouri, Your Honor. He's not from Texas. So I know there's been a lot of talk about --

THE COURT: Apparently, he's a lot tougher than the Texans.

MR. ALLERHAND: You know, he's not that tough a guy. It's just that he says and he believes, and he's been successful this way, it's better not to do a deal than do a stupid deal.

THE COURT: It's also -- honestly, there is also a technique out there that his 27.55 illustrates --

MR. ALLERHAND: Again, I think --

THE COURT: -- which is you get the seller on the hook, and then you back away.

MR. ALLERHAND: Paul and I have talked about that. And obviously, there were people on both sides --

THE COURT: And the way the bankers leak -- I'm not saying that Kinder Morgan's bankers leaked themselves, but whoever makes Depends would have a good business alone simply because of bankers.

MR. ALLERHAND: Well --

THE COURT: Because -- and so -- you know, people even -- people realize when they speak to their own financial advisors that they're potentially not just speaking with their financial advisors. You

act like this is some -- like Mother Teresa was your confessor, was like Mr. Kinder's confessor, and he sent an e-mail about his true -- it's only between you, Mother Teresa, me, and God, that I have gotten the last penny that I will give. And you've got to understand, I just went -- we went to Mass, and then we went to the Italian restaurant, and I told my wife, We cannot pay another penny more, Mother Teresa.

It's a very different setting than telling your banker, who you know is oscillating wildly to try to get the deal done, I'm trying to tell you really seriously, I'm not going to do much more.

There are ways -- there is emanations that occur from the one that doesn't involve Mother Teresa that can actually produce a dynamic where you actually don't have to do something which, in your own mind, you might be prepared to do.

MR. ALLERHAND: I hear you, Your Honor. And all I can say is that here on August 26th, when Mr. Kinder brought to the board the opportunity and the letter proposal --

THE COURT: Because there is another tactic in terms of -- remember the hostile dance?

MR. ALLERHAND: Yes.

THE COURT: What's going to happen if you make them go hostile? I mean, one of the things that people can never do in the hostile setting if they really want to be serious about something, it is very difficult to set a price and then dial back from it.

So all I'm saying -- and I don't want to get into -- I understand your client is entitled to play the game. You know, frankly, Goldman Sachs, I'm not sure from your client's perspective, it shouldn't have been, Get Goldman off the playing field, simply because of the risk to itself of this.

And certainly, there is no evidence in the record of you knowing about Foshee until after the deal is baked. On the other hand, Mr. Foshee had a discussion with your client's top dog, and that ain't in the proxy statement.

MR. ALLERHAND: Well, Your Honor, you, you know, you mentioned that, and we can --

THE COURT: I'm not asking anybody to correct it. I'm just saying, observationally, you know, two titans, titan-to-titan -- now we know one is a Mizzou guy. Is that the "Show Me State"?

MR. ALLERHAND: Yeah.

THE COURT: The "Show Me State." I don't know where Mr. Foshee is from.

MR. ALLERHAND: All I can say --

THE COURT: All I'm saying is that's not in there.

MR. ALLERHAND: Your Honor, from our perspective, all we can say is we took that comment as an offhand comment and quickly got back to them. I'm just saying that's what we --

THE COURT: It's just another multibillion-dollar throw-around --

MR. ALLERHAND: I would suggest, Your Honor, that if we could actually get the management team, Mr. Foshee, to bid up the process here, given what we're dealing with in the marketplace, I'm not sure --

THE COURT: I understand that, but again, part of what you do in commerce is you have moments. And part of what you do when you're a motivated seller and you know you've got a motivated buyer is you use the moment to get what you can. And the fact that you're in a different moment doesn't mean that you couldn't have done better in the moment if you had acted right. I get that. That's part of

what trading certainties are about.

MR. ALLERHAND: All I can say is that conversation occurred, as you say, after the cake was baked. And from our perspective, we thought -- we thought -- Your Honor will make a decision and look at the record -- we thought the negotiations were very hard-fought, and we ended up paying at the top of the range, a range we set before the negotiation started.

So maybe you can say we're clairvoyant and we knew we'd be in court and so, therefore, we didn't tell the board --

THE COURT: Actually, they couldn't have been paid at the top of the range.

MR. ALLERHAND: Actually, if you add the warrants to what was agreed to --

THE COURT: No, because if you're paying less than 27.55, and then -- you either started out paying more than the top of the range or you lowered your range.

MR. ALLERHAND: Well, what Mr. Kinder testified to is when the NOLs came up and they were more than publicly disclosed, he felt there was a little bit of room to go over the $27 range, which was the top of the range. That's the testimony,

Your Honor. Thank you very much, Your Honor.

THE COURT: Okay.

MR. HARDIMAN: Your Honor, John Hardiman for Goldman Sachs. I know the time and I know you've got a lot --

THE COURT: Why don't we do this? Come back at 5 of. 10 minutes for Goldman. Is that good?

MR. HARDIMAN: Sure.

THE COURT: And hard stop at 3:30 for the plaintiffs.

Mr. Seitz?

MR. SEITZ: Your Honor, I'm supposed to argue at 3:30, just to let you know. So hopefully, I'll have time to --

THE COURT: We'll all have time. Obviously, I won't start without you.

MR. SEITZ: Okay.

THE COURT: I'm in the same predicament. So I'll know where you've been. Now, Mr. Grant, I really don't know.

(A recess was taken.)

MR. HARDIMAN: Your Honor.

THE COURT: Good afternoon,

Mr. Hardiman.

MR. HARDIMAN: Your Honor, we hear loud and clear your process concerns regarding the conflict. I wanted to focus in my brief time on causation and whether or not there is anything in the record that the Goldman Sachs advisors did something or theoretically could have done something that affected what was the ultimate outcome here and pushed things towards KMI. And believe me, I will address the point about the Morgan Stanley engagement.

But just to start to set the tone, this is somebody that Goldman Sachs had advised for eight years. They had worked a considerable amount of time on the spin. By a fortuity, a bid was made by somebody who Goldman Sachs -- funds managed by Goldman Sachs owned a large interest. From the point that --

THE COURT: Well, but fortuity -- Goldman Sachs is a big entity, but Goldman Sachs was aware when Kinder Morgan made its overture in 2011. It was aware before the board of El Paso was aware; right?

MR. HARDIMAN: Right. What I meant by that, Your Honor, is unlike the Del Monte situation --

THE COURT: No. What I'm saying is

that Goldman Sachs' representatives on the Kinder Morgan board --

MR. HARDIMAN: Right.

THE COURT: -- recused from the situation after it had become a situation.

MR. HARDIMAN: When they were apprised on October 20 -- pardon me -- August 26th that KMI was considering making a bid for El Paso, they recused themselves.

THE COURT: So they immediately --

MR. HARDIMAN: Yes. They didn't go to the first meeting.

THE COURT: When Mr. Kinder says, We're thinking of doing this, they vacate the board.

MR. HARDIMAN: Exactly. They didn't go to the first meeting. Goldman was asked to advise El Paso -- Goldman wanted to get in on the deal. I'm not denying that. It proposed ways it could be done to El Paso, including bringing in another banker.

THE COURT: They certainly did.

MR. HARDIMAN: Now, Daniel's advice, and this is undisputed, was consistent with trying to strategize a way to get KMI to pay a higher price. He worked with them on rejecting the first bid. When the

hostile tone --

THE COURT: Of course, you rejected the first version --

MR. HARDIMAN: When the hostile-toned letter --

THE COURT: -- of the first bid.

MR. HARDIMAN: When the hostile-toned letter came in, he continued to advise at that point. At that point, however, that advice resulted in management, the people who you focused on beforehand that he had a long relationship with, decided to further cabin Goldman Sachs.

THE COURT: Right, because there were elements of management that were -- I guess because Mr. Daniel suggested sharing information with Kinder Morgan.

MR. HARDIMAN: The idea was to share information with Kinder Morgan, give them due diligence before negotiating a price with them.

Now, that particular advice -- and again, Goldman wasn't involved later on. And I'm not suggesting plaintiffs focus on that advice and say it was inexplicable, but plaintiffs also say that Kinder Morgan used the due diligence process as a pretext to

lower the bid. I'm certainly not agreeing with that.

But Daniel's advice wasn't crazy, because at least under plaintiffs' theory of what later happened, Daniel's advice would have made it harder for him to use the pretext.

Now, Goldman Sachs did go to the September 15th board meeting, did make a presentation beyond just the spin-off.

THE COURT: Yes.

MR. HARDIMAN: Unbeknownst to Goldman Sachs, before they did that, the board had been told by management that it had concerns and Goldman Sachs was going to be cabined. More or less, they were told, Don't pay attention to them.

After September 15th --

THE COURT: So they weren't told that the board was going to limit their role until after they had already made their first --

MR. HARDIMAN: Goldman had been given an indication that their role would be limited but they should still come to the meeting because work had been done up to that point already on the KMI offer and they delivered it. However, before they presented, management told the board that they

believed Goldman's role should be further limited and the board agreed to do it.

Goldman then came in and made its presentation and left. That was the last advice Goldman gave to the board or anybody else regarding the KMI transaction. The only other time they appeared before the board is October 6th, when they discussed the spin.

One thing about the to September 15th advice, going back to my theme that Goldman didn't do anything to move things to KMI, and this is pointed out in the El Paso brief, if you look at the Goldman valuations for El Paso, they're actually at a larger range, higher range in some respects, than the Morgan Stanley valuations.

Now, with respect to the issue with respect to the Morgan Stanley engagement, and I know Your Honor has talked about Goldman involving itself with Morgan Stanley's fee, I mean, what the record shows is that there was a question posed to Steve Daniel whether he would be agreeable to amending the preexisting two-month-old Goldman engagement letter on the spin.

THE COURT: Which gave them the

exclusive advisor role.

MR. HARDIMAN: Right, it gives them the exclusive right, but the question was being asked, Will you allow Morgan Stanley as an exclusive --

THE COURT: And they said no.

MR. HARDIMAN: They said no.

THE COURT: And they know what that means.

MR. HARDIMAN: Although, Your Honor --

THE COURT: They were not decontextualized here; right?

MR. HARDIMAN: Your Honor, this is what --

THE COURT: Who else did they think was going to be given a role? Didn't Mr. Daniel basically testify, We smacked that bug?

MR. HARDIMAN: What he testified was in the world of investment bankers, he was asked, Will you give up the exclusivity on this deal that you have worked on for six months to Morgan Stanley? And he answered no to that.

THE COURT: I understand that. Again, he was a tough dude. A tough dude of commerce. I'm asked to give up a concession. Again, this is another

situation where tough dude of commerce; right? I'm asked to give a concession. What are you going to give me for this concession? My first answer is going to be no. Then when it comes later, when people want to actually draw an inference from that that your economic motivations matter, Oh, no.

MR. HARDIMAN: That's where I do differ with the plaintiffs. If I could, Your Honor, respectfully --

THE COURT: The reality is when they said no to this, they knew why the company was asking; right?

MR. HARDIMAN: Actually, what they had been told -- this was in the course of the fee discussions with respect to what Goldman would get under its engagement letter. And I don't think there is any record evidence that this was done because there was some concern at the Morgan Stanley end about its independence.

This was part of the negotiations of the engagement, and Morgan Stanley asked the company to ask that question.

THE COURT: So what Goldman Sachs says is, Heck no. We've been working on this spin forever.

If you do the spin, we are the sole advisor. You pay us and you pay only us. Right? Correct?

MR. HARDIMAN: Correct.

THE COURT: Okay. Now, I understand that they're selectively smart; right? This is the thing where people are selectively smart. I've kind of got to look at the whole thing. I think they're probably really smart. And it might have occurred to them that the company was going to do something very expensive because, as you just said, Mr. Daniel wanted in on the deal.

One might actually think for a client, you know -- and I wouldn't have to be here today, you wouldn't have to be here today, if someone had said, I would love to work for you. I would love to do this. I've busted my butt for this company at what we consider below-market rate. You know, it's like, you know, we're getting paid like a member of a court gets paid to give you advice on an annual basis. And we get to give advice to like 20 other people on the same basis so, you know, that's way underpaid. And we've given advice, so we'd like our big cash cow day.

But, you know, honestly we kind of owe you a duty as a client. We kind of told you

everything. We've been working on the spin for a long time. We own like 20 percent of this other company. Two of our big dogs are on the board. It's icky for you. It's icky for us. We're out.

But no, what you're telling me is they know that. In their world, it only rises to the appearance of conflict. It's not an actual conflict.

MR. HARDIMAN: It's a conflict.

THE COURT: No, not to the script to Mr. Blankfein. It's just an appearance of conflict. We're very sensitive to the appearance of conflict. That's in the script for the call that Mr. Blankfein is making to Mr. Daniel to talk about, Let's all be lovey-dovey. We want to get the business. We know, frankly, this is not just an ordinary banking conflict, nothing like that. We want it so much, we do it.

We know that another bulge bracket bank has to be brought in. And it's designed to provide integrity and to make sure that the board is given an unbiased view about two options and, frankly, other options, but to get an unbiased view. Because if you do one option, it's an option in which Goldman Sachs has a huge conflict of interest.

So then when Goldman Sachs gets asked an obvious question which is, We have a contract for you about the spin that was forged at a time when the company that you owned 20 percent of wasn't a rival to the spin. It allows you exclusive rights to advise and to get paid on that. Will you waive your contract right in order for us to do something fairly obvious, which is to allow Morgan Stanley to advise on and receive substantial compensation if we go down that route?

Your guy in his deposition says, I had a contract right. I exercised my right. I said no. Okay? He can do that, and he did. And he just substantially undermined any integrity -- Goldman Sachs apparently likes appearances. He substantially undermined the integrity, the perceived integrity-enhancing value of bringing in Morgan Stanley by doing that. Right?

MR. HARDIMAN: Well, Your Honor, by that time, Morgan Stanley had been advising for three weeks or so.

THE COURT: For three weeks.

MR. HARDIMAN: Alone, without Goldman Sachs. Goldman Sachs had been out for three weeks.

And I just have to say again on the record, and I -- in retrospect, there are a lot of things that you look at in the process, and you say, Okay. We wouldn't be here today if we had done some things differently.

THE COURT: The objective reality, though, is that when Morgan Stanley was doing its work --

MR. HARDIMAN: The objective reality --

THE COURT: The objective reality is when Morgan Stanley was doing its work, it knew it was going to get a contract, it would get a huge payment for a deal with Kinder Morgan, and if the spin was done, it wasn't entitled to anything.

MR. HARDIMAN: That's correct, Your Honor. That is how the agreement worked. But that is --

THE COURT: And that was, in large measure, because Goldman Sachs came out from behind -- they had to be asked from behind the Chinese Wall to waive a contract right, and they wouldn't do it.

MR. HARDIMAN: But Your Honor, first of all, what Morgan Stanley --

THE COURT: Tell me. Do I have an

affidavit from Mr. Daniel saying that he did not know that if he waived the contract right, the implication of that would be that Morgan Stanley would get paid in the event of a spin as if it was a substantial advisor on the spin?

MR. HARDIMAN: No, I wasn't --

THE COURT: So he knew that; right.

MR. HARDIMAN: Your Honor, I don't believe the record shows that he -- I'm not going to say as an experienced banker, he doesn't know --

THE COURT: I don't want to have to bring Mr. Daniel in for an hour and have him tell me and us that he wasn't trying to preserve for Goldman Sachs sole credit and sole financial lucre on the banking side for the consummation of the spin.

MR. HARDIMAN: I have no quarrel with that, Your Honor. Actually, the point I'm going to make, Your Honor, was --

THE COURT: That's where -- if that's the point you're trying to make, then what you have is the banker who comes in to address the conflict is then put in the situation where it can get -- what is it getting? 25 million?

MR. HARDIMAN: Morgan Stanley, I

think, it's 35 million.

THE COURT: 35 million or bupkis.

MR. HARDIMAN: Your Honor --

THE COURT: 35 million or bupkis. You know, the other thing about Morgan Stanley that it knows about the clients that it's dealing with, it knows that they love Steve Daniel. They love him. I mean, they love him so much that $4 billion worth of conflict and the cost of spending -- you know, with this kind of thing here, or frankly, having the investor pay for another banker, they love him that much.

So the idea of that Morgan Stanley banker saying, We're going to take business with Foshee over Steve Daniel, that's just not going to happen. That is really a relationship that will not be put asunder.

MR. HARDIMAN: But, Your Honor --

THE COURT: Even the Supreme Court panel in QVC could not put that one asunder.

MR. HARDIMAN: Your Honor, the point I was trying to get to -- and we certainly accept what the consequences were from the commercial standpoint of what the answer was. But the argument being made

by plaintiffs is this was being done as a strategy to put Morgan Stanley and the company in a position where they would be driven into the arms of KMI. And I don't think there is anything to support that.

In fact, I think the much more straightforward interpretation is what you just said, which is that Goldman, Mr. Daniel, did not want to give up its exclusivity with respect to the spin because the spin may still happen.

THE COURT: Yeah, but -- right, but you're also putting the other advisor -- I mean, this is sort of a testimony by a very sophisticated lawyer for Goldman Sachs to its high esteem for the integrity of Morgan Stanley, that even though Goldman itself would put itself in the very awkward situation that it is in today, where you told me from the get-go they knew this was weird -- again, in their world it's just an appearance of conflict. But they went for this business. They went for it hard.

They knew their client would have to get another banker. And when their client got another banker, and the banker is supposed to provide the undistorted advice that they're not able to give, Goldman then prevents the client by an exercise of

contractual rights from -- and frankly, it knows that, frankly, it's got such a relationship with the people on the inside of the company that when Goldman says no, there is like no evidence of push-back.

That's another situation where I've got to tell you, it seems to me a moment where you would think about kicking somebody's booty out the door.

MR. HARDIMAN: Except, Your Honor, there is no record that this is being done because somebody is concerned that Morgan Stanley --

THE COURT: Wait a minute.

MR. HARDIMAN: Okay.

THE COURT: They know why Morgan is on the scene.

MR. HARDIMAN: Right.

THE COURT: And they're creating bupkis versus 35 million. They seem to have escaped from the Chinese Wall. They're creating -- they're playing a material role in the incentives of Morgan Stanley. And frankly, they're doing it in a conversation with -- who was the conversation with, somebody at management?

MR. HARDIMAN: I think it was

Mr. Sult.

THE COURT: Mr. Sult, who is involved in some other inconvenient things that you know about; right?

MR. HARDIMAN: If you are talking about the management situation, yes. But Goldman Sachs doesn't know about that at the time.

THE COURT: Well, I don't know that. Because, again, you know, there is the marital privilege and there is all those kinds of thing. I don't know, when there's this much love going on, I don't know what's whispered. And that's not the stuff that plaintiffs can easily dig up. All I know is it's kind of strange.

Again, then you've got a situation that you're managing a conflict. Someone who has an undisclosed conflict is dealing with the compensation arrangements.

MR. HARDIMAN: Well, Your Honor, I will sum up by --

THE COURT: What exactly are we summing up?

MR. HARDIMAN: Your Honor, listen, I can only put forward -- I think the record does

establish --

THE COURT: It establishes what?

MR. HARDIMAN: That the law of Delaware was not that Goldman Sachs, when presented with this, or El Paso, when presented with the situation, needed to immediately say Goldman Sachs couldn't be involved. And Goldman Sachs --

THE COURT: And if you notice, what I'm mostly focusing on is that the explanation that's given for why it's okay to have balance is, Let's keep Steve Daniel's historic expertise on the scene.

MR. HARDIMAN: And the spin-off expertise. And the spin-off expertise.

THE COURT: Again, people have done documents. I still haven't heard the magic for what Goldman was going to do with the spin at that point that was any different. You know, it's just they had been working on it since the first books.

I understand. Again, somebody who moved to Houston for business who is a middle manager, moved his family, the promise of a bonus, promise of a promotion, and when things go wrong and you don't get it, that's just life in the American economy.

A banker, you've got to -- you know,

because it's sort of your buddy and your friend, years of accumulated -- this was time -- the $150,000 a year for Steve Daniel to, on a very part-time part of his job, to give us advice, you know, we've got to have him have the big payoff.

Or we trust him so much that we've got to make every M&A move with him around, even if he's conflicted, which is another thing in this.

But then what you're telling me is they can still be involved and we're going to do this. But the way we're going to do this, the cure is we're going to have Morgan Stanley come in, and it's going to be an unbiased advisor. And this is where it all breaks down. Okay?

Let's give him $35 million worth of reasons to go with the deal that will advantage Goldman Sachs as an owner of Kinder Morgan, and let's give them zero financial incentive to go with the other strategic option. That's where your clients -- no. They're not off the scene, Mr. Hardiman. They're very much on the scene. And the idea that they couldn't connect those --

MR. HARDIMAN: Listen, Your Honor --

THE COURT: If they can't connect

those incentives, then they're not equipped to advise on the spin.

MR. HARDIMAN: Your Honor, Morgan Stanley's engagement letter was a fairly standard engagement letter under these circumstances.

THE COURT: This is not a standard --

MR. HARDIMAN: I understand that, Your Honor.

THE COURT: That is one of the problems. One of the biggest distortions of Toys-R-Us is this idea of the second banker coming in to play Shemp, where you get all four stooges. You get Shemp and Curly. So the idea is that we get another stooge on the scene so the first stooge can stay around and get its fee.

This Court has never suggested that. That was a made-up thing by the banking industry. And the amazing thing is that the first banker doesn't have to eat the cost of the second banker. The whole idea, if you've got the conflict, why aren't you paying for the conflict?

What your client did, then, was your client said to itself, Hey, if we do this spin, we want all the payment for ourselves. You can get a fee

if you do the deal where we own $4 billion on the other side of the transaction. And by the way, your client didn't stop there, did it?

MR. HARDIMAN: What are you getting at?

THE COURT: Well, your client asked for a fee.

MR. HARDIMAN: For the --

THE COURT: For the Kinder deal.

Can I do this? Can we have an undisputed fact, and then maybe move toward a settlement, that if your client would stipulate on the record that it didn't do any work on that transaction, that it shouldn't get paid for that?

MR. HARDIMAN: We never argued that, Your Honor.

THE COURT: But the defendants did.

MR. HARDIMAN: I don't think so, Your Honor.

THE COURT: The defendants argued, frankly, that after a certain point, your clients didn't work on that transaction. They actually never really worked on the Kinder response. But your clients went in and asked for a piece of the deal.

And it wasn't as high as you would expect. I'm sure Goldman people would expect if Morgan Stanley was going to get 35 on the deal, we would get 40. You got what, 20?

MR. HARDIMAN: Yes.

THE COURT: Right. You're even pushing for credit in the press releases, your clients. Right?

MR. HARDIMAN: Yes.

THE COURT: Again, you didn't do anything on it.

MR. HARDIMAN: I didn't say we didn't do anything, Your Honor, but we would walk away with nothing after all the work on -- the spin work. And, Your Honor, with respect to the injunction --

THE COURT: Again --

MR. HARDIMAN: The question --

THE COURT: -- there is a price to even the appearance of conflict.

MR. HARDIMAN: I understand that, Your Honor.

THE COURT: And there might be a price to the actualities of conflict.

MR. HARDIMAN: Your Honor, the price

here was that --

THE COURT: Well, there wasn't any price here.

MR. HARDIMAN: Your Honor, Daniel, who had worked on this -- for this company for a long time on a lot of matters, on the come, in a lot of circumstances, advised, and his advice was then subjected --

THE COURT: They were being paid $150,000 a year plus expenses. Was this the sole -- how many matters a year did Mr. Daniel work on for other companies other than --

MR. HARDIMAN: I don't know the answer to that, Your Honor. I don't know the answer to that.

THE COURT: 20?

MR. HARDIMAN: I don't know. I really don't know. But I understand your point. He worked on other things and got other compensation. And your point is he could have stepped aside on this one, but I don't think the law required that. And I don't think he did anything to affect what the determinations were by the board. And I don't think there is any grounds for a further injunction. Even if he gets $20 million, which you think was too much,

it's not a reason for an injunction.

THE COURT: I'm not saying it's too much. I'm just saying I've got briefs on your side of the room that tell me how little they did and how they were carved off, and they got 20 million. It's a pretty good day's work.

MR. HARDIMAN: But that's the only issue with respect to --

THE COURT: And that's to be on the come for the spin; right?

MR. HARDIMAN: Mm-hmm. Yes.

THE COURT: Your client says that it wanted compensation for the spin work in the context of the Kinder deal; right?

MR. HARDIMAN: Right. He had a contract --

THE COURT: Let's pause on that. By parity of reasoning, if the spin ends up happening, Morgan Stanley was employed in part to make sure there was an honest consideration of alternatives, including the Kinder Morgan deal. It does all that work, and the spin happens. By parity of reasoning, what's the logical implication?

MR. HARDIMAN: Are you asking me?

THE COURT: Yeah. The logical implication is the same reasoning by which Goldman Sachs insisted that it get to put its snout in the trough would support symmetrical treatment for Morgan Stanley in the context of the spin. But that, of course, isn't what Goldman Sachs --

MR. HARDIMAN: No. Goldman Sachs -- sorry.

THE COURT: Goldman Sachs went to its buddy and said, Stick to our contract rights. Morgan Stanley gets bupkis if they do all this work and we end up doing the spin. They can lump it. Right?

MR. HARDIMAN: What they said was that we have a contract --

THE COURT: Mr. Sult didn't say -- no. Mr. Sult didn't say to Goldman Sachs when your clients asked for $20 million, You told us when we wanted to give Morgan Stanley an incentive in the context of the spin, I recall you saying, Steve, no way.

Your logic is impeccable. What you should enjoy out of this conversation is the satisfaction of having come home to you the consequences of your own logic. So go enjoy your --

MR. HARDIMAN: Your Honor --

THE COURT: Right? And so, again -- but again, I'll put that to the side, because what I'm told is in certain situations, people think men and women very high up who have training about money, certain things they're really just thinking. Others, it's just inadvertent. I just don't think it's that pretty a picture, Mr. Hardiman.

Because if you just said -- I followed your logic, your client's own logic. And if you see, the client wouldn't apply that logic when it disadvantaged your client and when it would have created a more even incentive for the bank that was brought in to monitor its own conflicts of interest.

MR. HARDIMAN: Your Honor, the purpose for bringing them in at the outset was for the advice Goldman gave when it was giving advice to be reviewed by a fierce rival as well as the 11-member independent board. And that's what Morgan Stanley was brought in to do. That is why it was almost impossible for Mr. Daniel to do the things that originally we're accused of here, which is trying to skew this deal towards KMI.

He was then taken off of the deal as a result of the scrutiny, and because the board then had

confidence with Morgan Stanley. And the conversation we're talking about occurred three weeks later, not in the context of a concern or a question regarding anybody's independence, but in the context of negotiating the fee.

And I don't think it is enough, Your Honor, with respect, to create a reason for why the transaction should be enjoined. We certainly take your comments with respect to process and with respect to the amount of the fee, but with respect to whether or not the transaction needs to be enjoined, I don't think it shows an infection of the process there.

MR. ROWE: Your Honor, may I just rise for a moment to ask you if I could read something into the record or give Your Honor a transcript cite? 60 seconds, Your Honor.

THE COURT: Yes.

MR. ROWE: On Page 280 to 281 of Mr. Foshee' testimony, towards the bottom of 280, we believe it's pretty clear from this testimony, which Your Honor can read yourself, that he is saying that if there was to be any kind of discussion of a buyout, that it's the senior management of E&P that would do that. Mr. Smolik and his people. And his only role,

if he had any, would be to, quote, participate as a board member.

Now, I'm not saying this -- I'm just saying it's important to bear in mind in terms of what the record is here.

THE COURT: What does he mean to participate as a board --

MR. ROWE: In other words, if there was going to be a company that Mr. Smolik and some group of his who were actually in --

THE COURT: And he would be the chairman; right?

MR. ROWE: Well, he doesn't say that.

THE COURT: Who had the conversation with Kinder?

MR. ROWE: Mr. Foshee did.

THE COURT: Not Smolik?

MR. ROWE: Mr. Foshee is the CEO and Mr. Kinder is a CEO. Sometimes, there is a little bit of politesse about that.

THE COURT: Yeah, sometimes there is.

So Mr. Foshee has been talking about this with Mr. Smolik?

MR. ROWE: Well, the --

THE COURT: Who else has he been talking about -- who do we know he talked about it with?

MR. ROWE: Mr. Sult, who the evidence is -- then the question was asked --

THE COURT: Well, Sult wants in.

MR. ROWE: The answer was --

THE COURT: I understand the answer was that Sult wouldn't be a CFO because they had a CFO of that business already.

MR. ROWE: All I'm saying, Your Honor, is there is an insufficient record here, is the way I would put it, to deduce that Mr. Foshee, who had $90 million in stock, would have had a different reason -- would have sold out the shareholders in negotiating the price for the notion that, somehow, KMI was going to sell him this business where he doesn't have even a plan to be part of a buyout group that's --

THE COURT: He doesn't even have -- again, what's he doing then? Why is he talking --

MR. ROWE: All right. I'll --

THE COURT: Again, it's just canape talk. He just goes around all the time floating names

of people in buyouts, writing back to his CFO. Already thought about that. He just does it. And his role was just going to be as a board member. A board member. You don't think he's going to roll equity?

Think about it. Yes. Does he have an incentive to get a good deal, a really good deal, for El Paso? Yes, he does.

If he can buy a part of El Paso and roll his equity or roll something into it, does that distort him from having the same incentive as somebody who is just a stockholder of El Paso? Yes, it does, in a big way.

Isn't that always a concern when you have the LBO context about whether you're going to take as many dollars from the buyer as you should because you're in the buying pool? Yes.

Did Mr. Foshee tell anyone about his musings? No.

Were his musings substantial enough that he went to the CEO of another public company and talked to him about that? Yes.

Did he go to the board in advance of that? No.

Am I to take from this that he talks

to the heads of businesses and the CFO and CEOs of other companies frivolously? I suppose I am.

MR. ROWE: No, Your Honor. For example, you asked the question about rolling equity. Perfectly good question for a trial. My point is we're here on a record where there is --

THE COURT: That's why -- and I'm going to get to Mr. Lebovitch -- why I asked you a lot about this whole idea of what we're in in these situations where really, really bright people create entirely unnecessary questions about their own motivations by hiding conflicts of interest, or in Goldman Sachs' case in this one, you know, going after business when it knows it's conflicted and then actively involving itself in creating questions about the economic incentives of the bank that comes in.

And what do we do about that when we see that kind of stuff in an injunction contest? Or we just kick it down the road and, frankly, we'll be back at a trial about Mr. Foshee' personal liability and Goldman Sachs and whether they can -- are they a -- what are they? Aider and abettor? Who knows what they are.

MR. ROWE: Thank you, Your Honor.

THE COURT: Right? I mean, you would even concede there is nothing in the record, there is no indication, there is nothing binding, where Morgan Stanley gets paid anything for a spin.

MR. ROWE: There was nothing binding that anyone at Morgan Stanley got paid until after it had done most of its work. It's typical investment banking practice where you don't sign your deal up until you've done most of your work.

THE COURT: No, but what they knew -- they knew relatively early in the process that they weren't going to get anything for a spin; right?

MR. ROWE: As I quoted Mr. Cox on Page 191, he said -- and in the world of investment banking, apparently a lot of stuff is done orally. They get comfortable they're going to get paid at the end of the day. He said he felt if the spin happened, there would be fees and business for Morgan Stanley. That's what he said.

Thank you, Your Honor.

THE COURT: He said that at a time when he knew that that's not the way they went; right?

MR. ROWE: I'm sorry?

THE COURT: He gave his testimony when

the deal that's signed up is the Kinder Morgan deal, which they'll get paid 35 million.

MR. ROWE: Yes. As a timing matter, yes.

Thank you, Your Honor.

THE COURT: So again, part of the whole epistemological thing I have to think about is when people have conflicts of interest at a time when it's on their mind, you know, when they say later on, Don't worry about it, I just have to think, you know, how much to credit that.

MR. ROWE: If I may respond?

THE COURT: No, no. It's the same thing with Foshee, which is that it turns out that he can't bid because Mr. Kinder turned him away. It turns out for Morgan Stanley that they can confidently say, We feel like we would have gotten fair treatment in the context of a spin so we didn't really worry about.

And they can say that from the comfortable position of knowing that if this deal closes, which will be not a spin but a deal with Kinder Morgan, they'll get $35 million for that deal. And so you can say that with a lot more comfort about

the situation you would have been in because you'll never actually be in it.

And when you are in that, though, the more piquant moment of real-time when you knew that, for sure, you were going to get substantial compensation from the Kinder deal but not at all sure that you would get anything from the spin deal, because Goldman Sachs had smashed that like a bug, you know, that's a little different situation in real-time.

MR. ROWE: I understand that on a preliminary injunction motion, sometimes the Court is called upon essentially to make credibility determinations, but I think that on some of these issues, the credibility determinations would be better left for a fuller record.

THE COURT: True. I mean, in some ways, you just have to also decide on this kind of motion whether people who have chosen by profession to be homo economicus actually are homo economicus, or more likely to be homo economicus, or are just, as I said, they loom above us all where they're all about economic incentives usually, but when it comes to their conflicts, they can just put them aside.

MR. ROWE: Thank you, Your Honor.

MR. LEBOVITCH: Thank you, Your Honor. I'll be quite brief.

Getting involved in the KMI deal was so important to Goldman that the king of the Goldman Islands, Lloyd Blankfein, saw fit to call Doug Foshee and thank him for the opportunity.

Getting the deal right on the El Paso side, if it was really important to get the incentives right to the board and to Mr. Foshee and management, they wouldn't have sent Sult to make a half-hearted effort to Steve Daniel with his personal investment in KMI. They would have called up and said, Hey, Lloyd, we're letting you in, but you need to do something here. That's just a reality.

Morgan Stanley's retainer, it's 35 million, a flat 35 million for a deal. Okay? And it's only on a potential sale of the company, which may explain perhaps why Morgan Stanley wasn't pushing for some alternative deal.

THE COURT: You're saying they also didn't have any incentive to do a deal -- a segmented deal.

MR. LEBOVITCH: That is correct,

Your Honor. And that deal was, of course, structured well after the management team that structured Morgan Stanley's engagement letter not only had suspected that KMI was not going to keep the E&P business, but because of the September 19th term sheet, knew for a fact that they were not going to keep the business.

I'm not going to belabor about the experts, but I will simply refer Your Honor, we put in a reply report to Mr. Lehn. I guess he was described as the facile Mr. Lehn. We believe Pages 2 through 7 of Mr. Clarke's rebuttal report -- you know, I know the difference between experts who are fighting. This isn't a fight. This is like objectively decimating his argument about the capital expenditures and the growth.

THE COURT: You really believe it decimates it?

MR. LEBOVITCH: I really do believe that, Your Honor. And actually, I didn't bring up the exit multiple issue.

THE COURT: That would be a Lehn versus Clarke report.

MR. LEBOVITCH: It doesn't make sense. What Lehn says is disproven by the record. There is

growth capital expenditures in the projections. That's the point that Mr. Clarke was making. He wasn't making it up.

THE COURT: What you're saying is there is expenditures for growth in the projections.

MR. LEBOVITCH: Yeah. I mean, Lehn's premise is that you're not going to grow because there is no capex, and Mr. Friedman just repeated it, but that's not responsive to Clarke who says, I'm looking at the projections. They're there.

Now, Your Honor asked about the exit multiple. I had not affirmatively brought it up because it's not clear that the board should have seen as obvious that the 10X multiple is doctored. But if you look at Pages 7 to 12 of the Clarke rebuttal, he actually shows that the numbers supplied by Morgan Stanley and Lehn don't even support the 10X multiple. He says if you just simply look at the numbers, it should be 12. He says --

THE COURT: If you look at the median. Is that the median?

MR. LEBOVITCH: He says -- Well, there's two things that Lehn does. Lehn takes numbers that apply to El Paso as a whole and says that's the

basis --

THE COURT: Applies it to the pipes.

MR. LEBOVITCH: -- to the pipes. But that's what Morgan Stanley did. And what Clarke is saying is you would never do that because the pipes trade at a higher multiple. You're deflating value. That's what Morgan Stanley did.

And he says what they did is they took the 25th and 75th percentile as the edges, and that skewed the numbers. And he says if you fix that, which is normal, you'd end up at 12, which is exactly in line with his opinion.

Mr. Rowe said that on the MBO El Paso management wasn't needed. Really? The September 19th term sheet requires management to support -- we just heard Mr. Allerhand say the merger agreement requires management to support the sale of the E&P business.

THE COURT: In terms of making themselves available to work for a private equity firm.

MR. LEBOVITCH: Yeah. They wanted them involved. That's part of what gave these guys the idea. So it doesn't make sense to say no one wanted them in the process. They're contractually

obligated.

THE COURT: Which managers?

MR. LEBOVITCH: At least the E&P manager, Smolik and his team. I assume Foshee.

THE COURT: They are contractually obligated to participate in the sale efforts for the E&P business.

MR. LEBOVITCH: That was in the September 19th term sheet. And I think we just heard that the merger agreement requires them to support on the E&P sale. But does it matter if KMI even was at its peak? And I think Your Honor hit that on the head.

The question is did Foshee and their advisors who had their own interests lean on the board to take a price below their floor? Foshee did -- he was told 26.50 is the floor. He went back at 26. Your Honor asked that question.

THE COURT: He went back at 26 --

MR. LEBOVITCH: Cash and stock. Sorry.

THE COURT: And you're saying there was no evidence of authority from the board?

MR. LEBOVITCH: I think that -- my

read of the evidence, in fairness, Your Honor, was they found out afterwards, and they took the attitude of, Okay, we trust Doug. I mean, that's really --

THE COURT: That's your point, that he is the guy.

MR. LEBOVITCH: That's why Mr. Vagt said, It's not surprising. We cite that in our brief that his reaction was, It's not surprising that he went with a number below our range. It's a little concerning that a board member would have that attitude, but they were informed afterwards, is the way it reads.

And he says, Look, we were trusting Doug. If he thought 26 was the right number, we gave him leeway. That's not what the board minutes say, but that was Vagt's after-the-fact answer. So it's not like it was hidden from them for a long time. He said it --

THE COURT: What you're saying is the difference here, though, is that makes sense in a dynamic where all you know about Foshee is he's one of the largest stockholder and he's just a seller.

MR. LEBOVITCH: Mm-hmm.

THE COURT: You know, if Doug comes

back to us and he's just a seller, and he says this is the best he can get, he's as good as we've got on the negotiating side. He knows this industry. We trust him.

MR. LEBOVITCH: Yes.

THE COURT: What they don't know is Doug's musing in his own mind about being apparently, now, he's just a director.

MR. LEBOVITCH: Well, with $95 million towards equity as Your Honor observed.

THE COURT: But thinking about, you know, a buy-side opportunity, too.

MR. LEBOVITCH: Right, Your Honor.

On the idea that Goldman didn't do, really, anything besides pick Morgan Stanley, again, the Clarke rebuttal report shows I think definitively at Pages 20 to 22 that the problems they identified with Goldman's numbers, they're real.

And the last thing is, listening to the arguments of Mr. Rowe's and really everyone's arguments, I had a bit of an epiphany. There's been an e-mail that the parties fought over how to interpret. It's Exhibit 42 in the record. This is the e-mail that says over Wachtell's objection, GS got

a letter signed which engaged them as an advisor on the sale of the company.

And the parties disputed this, but actually, what I realized is El Paso's interpretation of the letter takes a sort of cynical view of Wachtell Lipton. Because it says, Well, if Wachtell didn't have a problem -- El Paso's argument is Wachtell didn't have a problem with GS being involved. They just didn't want anyone to publicly disclose it with a letter.

Now, I actually have a higher view of Wachtell Lipton. I think they knew this was a problem. I think they really did object. Okay? And GS's retention may have been over their objection, but they couldn't stop it.

And Mr. Rowe is here doing everything he can to defend his client because that's what he does. He's a very good lawyer. But in the end, it's not up to the lawyer to say, You can't do this, unless the law says so. He says, I object. I don't think you should do this. I think it might upset the judge. But in the end, it's the job of Mr. Rowe to do the best that he can to defend his client. It falls on the Court, if there is going to be lines, to say, This

line has been crossed. And in the future, Mr. Rowe won't be left to object. He'll be able to say, You can't do this.

MR. ALLERHAND: May I just provide a citation to Your Honor?

THE COURT: Sure. I thought you were going to raise your client's bid back up to 27.55 for the honor of Missouri. If you can't depend on someone from Missouri --

MR. ALLERHAND: He's a very dependable guy.

Your Honor, I literally have no idea what Mr. Lebovitch is talking about about this MBO. It doesn't exist. It is a fantasy. Section 5.16 just says the company shall cooperate in our efforts to market the business.

THE COURT: I believe what he said was that there was a term sheet.

MR. ALLERHAND: I have it. It doesn't say anything about Mr. Sult. I can't find anything in there. All it says is, consistent with what got into the M&A agreement -- I'll read it: "Information regarding EP upstream assets. During the period between signing and closing, EP shall cooperate in

good faith with KMI to prepare for the sale of the upstream assets."

Where is it in this record that my client has ever agreed, committed, said, signaled, that we're going to get these people to work with us?

THE COURT: To the extent that Mr. Lebovitch is suggesting that people in the E&P business were -- there are circumstances, as we talked about the cappuccino kind of market --

MR. ALLERHAND: Right, but that's not our problem. We're not going to keep that business, Your Honor.

THE COURT: What I'm saying is where -- no, you're not going to keep it.

MR. ALLERHAND: Right. And we have no deal with them on it.

THE COURT: Right.

MR. ALLERHAND: And they never talked to us about it, except that one conversation where it was mentioned, which we put in -- I'm not going to refer to the interrogatory's name. It cannot be mentioned.

THE COURT: What I'm saying is, it could be, even for somebody in your client's position,

depending on the likely buyers, if selling the E&P business really, frankly, in advance of the old transaction is what's hoped for, and if a likely segment of buyers is private equity, it could even be, from Kinder Morgan's perspective, valuable to have key executives in the E&P business be willing to participate actively, personally, themselves, in a process, and potentially running the business, because that might be something that would actually induce private equity bids.

I'm not saying that that happened. I think that is what Mr. Lebovitch was trying to suggest.

Now, so what I ask is -- I love passion, especially -- we're all decaffeinated or it's waning. Could you just focus on what, in fact, the requirements are? Because I don't --

MR. ALLERHAND: Yes. 5.16, Your Honor. That's it.

THE COURT: And there is nothing in the term sheet that really applies to the kind of people running the business to suggest that they personally --

MR. ALLERHAND: Your Honor, if I

missed it, I missed it. All I'm aware of is 5.16 in the final agreement, which commits -- which commits El Paso to assist us in the marketing of the business.

On the term sheet, at least the copy I had -- if I missed it, I missed it, Your Honor. I apologize -- I see a provision regarding information that they have to cooperate during the period to prepare these assets for sale.

I'm not aware from our side -- and if I'm unaware of it in the record I apologize, Your Honor -- but I'm not aware of anything where we committed any executive or employee of that company to commit themselves to work with the buyer.

We don't even know if it would be a financial buyer or a strategic buyer. Presumably, if it's a financial buyer, Your Honor is absolutely correct. We're going to have to make some deal with the people who run the business, I would think.

THE COURT: Or have a portfolio company that has management or something that you can run.

MR. ALLERHAND: Right. But Your Honor, other than that, I'm not aware.

THE COURT: Is there some part of the

term sheet you're referring to, Mr. Lebovitch, that's --

MR. LEBOVITCH: Yeah, Your Honor. I don't -- I may have been misunderstood. I don't think I said that they're required to stay on with the company. They're required to assist in the marketing.

THE COURT: Right.

MR. LEBOVITCH: I thought that was responsive to the point that no one really wanted them involved.

MR. ALLERHAND: Okay. So it's the provision --

MR. LEBOVITCH: They knew there was going to be going to be a sale of the E&P business.

THE COURT: That's different, though, than knowing -- that's different than believing there is a kind of nascent MBO, there is a nascent -- to get to your LBO or your different elements -- right? You've got your private equity shop, you've got your debt provider, and then you've got your plug-in management. There is nothing in this that signals that they had some plug-in management group that they were going to then, you know, plug into a process where they call up KKR and Blackstone and say, Here's

our little team E&P. Come in, and these guys will work for you.

MR. LEBOVITCH: No, Your Honor. I think that may have been management's idea. The point being they suspected --

THE COURT: From your client's perspective --

MR. LEBOVITCH: This is not a Kinder Morgan --

THE COURT: I think he drew, and, frankly, I drew a little bit more from your statement that Kinder Morgan somehow wanted to kind of create a little E&P management team so it could facilitate private equity bids.

MR. LEBOVITCH: Your Honor, I think that was management's idea.

THE COURT: Yeah. But it matters who it -- from an aiding and abetting standpoint, it would be better for you if it's both, but there doesn't seem to be any inference -- you're not suggesting Kinder Morgan had any -- Kinder Morgan's reaction seemed to have been to Mr. Foshee: Come again? Why do we need this kind of deal? Right?

MR. LEBOVITCH: Your Honor, we're

not --

THE COURT: I mean, none of the evidence --

MR. LEBOVITCH: -- accede on that.

MR. ALLERHAND: I think Your Honor has it exactly. We just want to sell it to whoever will pay the highest price, whether it's a strategic buyer or financial. We had no deals that we precut. What we got a bargain for, and what we hope will remain in the contract, is their obligation, a covenant in 5.16, to help us market and sell this, as opposed to hiring a banker to sell it while we supposedly remain committed on the sideline.

Thank you, Your Honor.

THE COURT: I understand, actually, that Mr. Allerhand has offered to actually give copies of the answer to Interrogatory No. 5, I think it is, along with the warrant.

MR. ALLERHAND: I will be signing them in the back.

THE COURT: I don't know if it's a deal closer or not, if it will close any value gap.

MR. ALLERHAND: I'll be signing them in the back of the courtroom.

THE COURT: I will be back to you -- what do we know about when the vote is?

MR. ALLERHAND: I think the public statements have been within the second quarter of --

MR. ROWE: The vote.

MR. ALLERHAND: The vote. I'm sorry.

MR. ROWE: The vote is March 6th, Your Honor.

THE COURT: Right.

MR. ALLERHAND: Ours is March 2nd, Your Honor. I'm not sure that's important to the Court's decision, but we're voting on March 2nd, the shareholders of KMI.

THE COURT: You know, it has been, in strange ways -- one of the things about the Tyson Foods drama that's interesting is the timing of the vote. The stockholders voted in Tyson, and it was a quick vote, given that one stockholder held 90 percent of the vote.

So March 6th, I will certainly give you an answer by then. And I will digest your fascinating arguments. I appreciate your patience with my questions.

I especially appreciate our good

reporter who has had -- I'm not sure we've kind of got a grasp as a staff on what days like this involve. And so we have one mighty reporter who did the whole darn thing.

So enjoy. I guess it's 50 degrees out there. All the children's hopes for a snow day were raised last night and immediately dashed. I predict that there will be on the East Coast of the United States, if there is not actual snow, there will be some agreement among public school authorities for an inexplicable snow day which will occur simply because we haven't used any of our snow days. They have to be used. So at least some of them have to be used.

And actually, I would also predict that that day will come on a Friday or a Monday or a Tuesday next to a Monday holiday. That's the kind of market guidance that I can actually give. It's not worth really anything at all.

But anyway, have a good day.

And Mr. Seitz, relax. I think we pushed it back a little bit. We'll probably push it back a little bit more, but I promise you, you won't be sanctioned. You wouldn't even be sanctioned if you weren't on the call at all. There's probably less

likely a chance to be sanctioned if you weren't on the call, but you won't be sanctioned for when you call. You might get sanctioned for what you say, but it will be done reluctantly.

I've never actually sanctioned Mr. Seitz or I think anyone in the room, really, which is good. I don't like to do that sort of thing.

MR. SEITZ: I'm really looking forward to this call, Your Honor.

THE COURT: New firm, Mr. Seitz. It's always good to have something to talk about, like a coming out of the box strong sort of thing.

So I will see some of you, or I won't see some of you. I'll hear some of you relatively soon. And I thank you again for the arguments.

(Court adjourned at 3:57 p.m.)

CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 291 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand this 11th day of February, 2012.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
State of Delaware

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