EFiled: Nov 18 2015 05:19PM EST
Transaction ID 58184637
Case No. 9318-VCL

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE

IN RE KINDER MORGAN ENERGY PARTNERS, L.P. CAPEX LITIGATION	)))	CONSOLIDATED CASE No. 9318-VCL

LEAD PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT, CLASS CERTIFICATION AND APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Dated: November 18, 2015

Lead Plaintiff Jon Slotoroff ("Lead Plaintiff"), on behalf of himself and the former common unitholders of Kinder Morgan Energy Partners, L.P. ("KMP" or the "Company"), respectfully submits this reply brief in support of: (1) final approval of the proposed $27.5 million Settlement[1] of this consolidated class action (the "Action" or "Litigation") on the terms set forth in the Stipulation; (2) final approval of the proposed plan of allocation of the Settlement proceeds; (3) final approval of the Settlement Class; and (4) an award of $6.875 million in attorneys' fees and $456,468 in expenses to Plaintiff's counsel.

Since Lead Plaintiff filed his opening brief in support of the Settlement on November 6, 2015, two additional objections to the Settlement were filed. On November 9, 2015, the Court received the objection of Corinne Rivituso. On November 16, 2015, the Court received the identical objections of Joseph C. Blanks, Esq. and Patusan Partners, Ltd, a partnership wherein Mr. Blanks is the president of the general partner (collectively referred to herein as "Mr. Blanks").

Before addressing the specific (and misplaced) concerns raised by Mr. Blanks and Ms. Rivituso, Lead Plaintiff notes that a total of ten objections have been made in a case where nearly ***a million notices were mailed out***. Moreover,

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[1] All capitalized terms used herein shall have the meanings set forth in the August 14, 2015 Stipulation and Agreement of Settlement (the "Stipulation"), unless otherwise specified.

those objections, almost all of which seem driven by an ideological aversion to class actions in general rather than case-specific concerns, represent just 1,230 KMP units out of the more than 437 million KMP units.[2] While Co-Lead Counsel take all Class member objections seriously and believe each warrants fair consideration, the very small percentage of investors and units expressing such concerns is itself further proof that the Settlement is adequate and reasonable. *See, e.g.*, *Ryan v. Gifford*, 2009 WL 18143, at *10 (Del. Ch. Jan. 2, 2009) (a low number of objections "lends support to plaintiffs' argument that the Settlement is fair, reasonable, and adequate.").

A. The Court Should Deny The Objection of Mr. Blanks

Regarding the Settlement, Notice, and claims procedures, Mr. Blanks asserts that: (1) the Court-approved Notice allegedly fails to adequately inform Class members about the Settlement and the underlying Action; (2) the Settlement allegedly is injurious to Class members because it depletes KMI's capital; (3) the Claims Form process is allegedly unduly burdensome; and (4) the Notice allegedly provides Class members with too little detail to make an informed decision about

[2] Mr. Blanks owned 250 KMP units, Mr. Gilmarin owned 300 KMP units, Mr. Guritz owned 200 KMP units, Mr. Koster owned 75 KMP units, Patusan Partners owned 400 KMP units, and Ms. Rivituso owned 5 KMP units. Mr. Steele, Mr. Parker, Ms. Kloth, Mr. Malherbe, and Mr. Wilhoit did not provide proof of their holdings.

their likely recovery or the request for attorneys' fees and expenses ("Blanks Obj."). None of these arguments is persuasive or warrants rejecting the $27.5 million Settlement.

First, contrary to Mr. Blanks's suggestion, the Notice here adequately informed Class members about the Settlement and the underlying Action. The Delaware Supreme Court has held that a settlement notice that

> contains a description of the lawsuit, the consideration for the settlement, the location and time of the settlement hearing, and informs class members that additional information can be obtained by contacting class counsel . . . "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings."

In re Philadelphia Stock Exchange, Inc., 945 A.2d 1123 n. 13 (Del. 2008) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005)); *see also In re Activision Blizzard, Inc. S'holder Litig.*, 2015 WL 2438067, at *30 (Del. Ch. May 20, 2015) ("An adequate notice describes the settlement, puts stockholders upon notice as to the general nature of the subject matter, and warns them that their substantial interests are involved. Armed with this information, any party interested in learning more can contact class counsel or easily obtain all the details of the terms by examining the file in the Court of Chancery.") (internal quotations omitted).

Here, the Notice includes all of the information required by Delaware law, including a description of the Action, a description of the Settlement consideration, the location and time of the settlement hearing, and the contact information for Class Counsel. *See* Nov. 6, 2015 Haendler Aff. at Ex. Q ¶¶ 6-30; 38-51; 74-75.[3] Indeed, the Court's instruction to distribute the Notice followed the determination that the Notice is "reasonably calculated" to apprise Class members about the Settlement and their rights, and that it "constitutes due, adequate and sufficient notice[.]"[4]

Paragraph 48 of the Notice alone provides sufficient detail concerning Lead Plaintiff's allegations, the merits of the Settlement, and the putative recovery to Class Members:

> Lead Plaintiff alleges in the Action that Defendants breached the LPA, and the implied covenant of good faith and fair dealing, in connection with quarterly distributions issued by the Partnership during the Class Period ("Quarterly Distributions"). Lead Plaintiff alleges that if Defendants issued Quarterly Distributions exceeding cumulative cash from operations (accumulated over the life of the Partnership) ("Cumulative Cash from Operations"), as is alleged here

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[3] *See, e.g.*, ¶¶ 6 (describing "claims for breach of the Partnership's limited partnership agreement . . . , breach of the implied covenant of good faith and fair dealing, aiding and abetting, and tortious interference"); 12 (Lead Plaintiff alleges that "he brought 'this suit to compel [Parent] to act in accordance with the terms of the Partnership Agreement' and further sought disgorgement of distributions paid to the General Partner").

[4] *See* August 19, 2015 Scheduling Order at ¶ 7.

> due to the purported misallocation of capital expenditures, then any distributions above Cumulative Cash from Operations would be re-characterized as cash from interim capital transactions ("ICT"). Under the terms of the LPA, Lead Plaintiff alleges, any Quarterly Distributions of cash from ICT should have increased the proportion of the given distribution received by the limited partners (and lowered the proportion received by the General Partner). Under Lead Plaintiff's theory of liability, Quarterly Distributions using cash from operations exceeded the Cumulative Cash from Operations – triggering larger required distributions to the limited partners – beginning with the 4th Quarter of 2012. Based on the foregoing, Lead Plaintiff's damages expert has opined that Quarterly Distributions were underpaid from the 4th Quarter of 2012 through and including the 3rd Quarter of 2014. . . .

In other words, the Notice contained more than adequate detail about Lead Plaintiff's allegations and damages analysis. If Mr. Blanks wanted more information, he should have contacted counsel with his remaining questions.[5]

Moreover, promptly upon receiving Ms. Rivituso's and Mr. Blanks's objections, Co-Lead Counsel sent each objector a copy of Lead Plaintiff's brief in support of the Settlement, which contains detailed information about the

[5] Notably, the notice submitted to this Court here was in the "plain English" form that has long been common in federal court practice, but was not common in Delaware state court until Co-Lead Counsel, Grant & Eisenhofer P.A. ("G&E") and Bernstein Litowitz Berger & Grossmann LLP ("BLB&G"), began insisting several years ago that defendants agree to the more accessible, transparent form of notices. Here, the technical nature of the case, defendants' counsel's insistence on drafting the Stipulation and Notice, and the unusually difficult negotiating process in this case made it challenging to achieve the ideal level of clarity in this Notice. Nevertheless, Co-Lead Counsel believe that the Notice is not only adequate, but remains a better example of "plain English" notice than the still-prominent form of notice used in most settlements before this Court.

Settlement and the underlying Action, including setting forth key parts of the discovery record that illustrate both the Action's merits and the reasons why the Settlement benefits Class members. [6]

Mr. Blanks sets forth a list of questions concerning the Settlement and the Action. Blanks Obj. at § 1. Under controlling precedent, none of the topics as to which Mr. Blanks seeks more information bears on the adequacy of the Notice.[7] Copies of Lead Plaintiff's opening brief in support of the Settlement and supporting papers are publicly available on the Claims Administrator's website and Co-Lead Counsel's website,[8] and a copy of the complaint is publicly available on Co-Lead Counsel's website.[9] Those documents answer the specific questions Mr. Blanks raised in his objections.

Second, while Mr. Blanks argues that the Settlement harms Class members because it depletes KMI's capital without improving its governance (Blanks Obj. at § 2), the governance problems at issue in this Action (*i.e.*, misallocation of

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[6] *See* Letters to Corinne Rivituso and Joseph C. Blanks, attached to Transmittal Affidavit of David M. Haendler as Exs. A and B.

[7] For example, Mr. Blanks argues without support that Notice should have included information regarding Defendants' defenses. Blanks Obj. at § 1(d). There is no authority that requires a notice include such information.

[8] http://www.kindermorgancapexlitigationsettlement.com/; http://www.blbglaw.com/cases/00233?viewDocs=1.

[9] http://www.blbglaw.com/cases/00233?viewDocs=1.

capital expenditures to serve KMI's interests) have already been cured and mooted given the Consolidation of KMP into KMI. As discussed in Lead Plaintiff's opening settlement brief ("Op. Br."), the Consolidation addressed and resolved Lead Plaintiff's governance concerns by removing the IDR structure entirely. *See* Op. Br. at 12. Thus, the only issue that remained for judicial cure was compensating investors for prior harm from mischaracterized capital expenditures.

Third, Mr. Blanks does not support his assertion that no claims process is required because KMI has the information necessary to identify all Class members and calculate and pay their claims. *See* Blanks Obj. at § 3. Co-Lead Counsel spent significant time and resources on distributing ***nearly a million notices*** to Class Members based on Defendants' assurances that Forms K-1 enabled an unusually accurate and complete Notice distribution process. Op. Br. at 20 n.9. Because Co-Lead Counsel therefore had comfort that the Notice would reach all Class Members directly, Co-Lead Plaintiff also had comfort that affected Class Members will either submit a claims form and/or contact counsel with any questions. Requiring Class Members to complete the Claims Form for themselves is not unduly burdensome, and it pre-empts any complaints from Class Members that Defendants' records of their holdings are inaccurate. Furthermore, the method of

paying claims and the contents of the Claims Form were already approved as adequate.[10]

Fourth, Mr. Blanks's argument that the Notice provides too little detail to make an informed decision about the likely net recovery per partnership unit or the request for attorneys' fees and expenses (Blanks Obj. at § 4) is misplaced. There is simply no way for the Claims Administrator to determine the net recovery per partnership unit at this stage, since it does not know how many Class Members will complete and return their Claims Forms. As for information about the request for attorneys' fees and expenses, the Notice discusses Co-Lead Counsel's litigation efforts at length,[11] and the publicly available settlement papers provide additional detail regarding the extensive hours spent on this complex Action and the litigation expenses incurred.[12] In sum, Mr. Blanks's objection should be denied.[13]

B. The Court Should Deny The Objection of Ms. Rivituso

Ms. Rivituso objects that the Notice does not provide sufficient information regarding "the rationale specifically for the methods of calculating the class

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[10] *See* Aug. 19, 2015 Scheduling Order at ¶ 7.

[11] *See* Nov. 6, 2015 Haendler Aff. at Ex. Q ¶¶ 6-29.

[12] *See* Op. Br. at 32-38; Nov. 6, 2015 Haendler Aff. at Exs. R-U.

[13] Mr. Blanks's objection that the Class should be certified as an opt-out class action likewise fails, and is addressed in Lead Plaintiff's opening papers. *See* Op. Br. at 23; 28-29.

members' proceeds," the nature of the Action, or the number of persons constituting the Class. Each of these matters, however, is discussed in the Notice, the publicly available Complaint, and/or the publicly available settlement papers.[14] Indeed, while the Notice provides a full explanation for the basis for Class member distributions (*see* Nov. 6, 2015 Haendler Aff. at Ex. Q ¶¶ 47-51), Lead Plaintiff also provided Ms. Rivituso with his brief in support of final approval of the settlement as well as an affidavit from Lead Plaintiff's expert explaining the considerations behind Lead Plaintiff's damages model (which in turn guided the Plan of Allocation). Nov. 6, 2015 Haendler Aff. at Ex. E ¶¶ 5-13. That explanation goes far above and beyond the typical guidance provided to class members.

Ms. Rivituso further objects that she does not believe that the members of the Class have the requisite commonality of facts to justify a class action, since "[t]here may be a wide range of investments, differing in size, and possibly nature and form." This objection misapprehends the nature of the Class, and class actions generally. As set forth in the Notice, there is only one type of security at issue in

[14] *See, e.g.*, Nov. 6, Haendler Aff. at Ex. Q ¶¶ 38-51 (addressing the method for calculating Settlement proceeds); Op. Br. at 4-11; 25-26 (discussing the nature of the Action and the number of persons in the Class).

this action – KMP common units.[15] Although Class members may have invested differing amounts, all of the investments have the same "nature and form" (KMP units), and all were affected in the same way by Defendants' alleged breaches of the Partnership Agreement. *See* Op. Br. at 26-27.

Finally, Ms. Rivituso objects that there is "unfair bargaining power within this class action and settlement process." This appears to be an objection to class action procedures in general rather than this Settlement in particular. The fact that Ms. Rivituso may not find it worthwhile to participate in the claims process does not demonstrate that any higher recovery would have been possible, or that those Class members who have submitted Claims Forms should be denied the ability to participate in the Settlement.

[15] *See* Nov. 6, 2015 Haendler Affidavit at Ex. Q ¶ 37.

CONCLUSION

For the foregoing reasons, and as discussed in Lead Plaintiff's opening brief and supporting papers, the proposed Settlement is fair, reasonable, and adequate and should be approved. In addition, Co-Lead Counsel's request for a Fee and Expense Award of $6,875,000, and expense reimbursement of $456,468, should be granted.

Dated: November 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 18, 2015, I caused the foregoing *Lead Plaintiff's Reply in Support of Motion for Final Approval of the Proposed Settlement, Certification of the Class, and An Award of Attorneys' Fees and Expenses* and supporting *Transmittal Affidavit of David M. Haendler* to be electronically filed and served through File & Serve Xpress on the counsel listed below:

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