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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Brown v. Kinross Gold U.S.A., Inc.	CV-S-02-0605-PMP-(RJJ)
This Document Relates To: All actions	**PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION**

Movants Robert A. Brown, Glenbrook Capital LP, Andrew D. Kaufman, George P. Drake, and CN&L Investment Corp., by and through their undersigned counsel, respectfully

move this Court for the entry of an order pursuant to Federal Rule of Civil Procedure 23, certifying that this action may be maintained and proceed as a class action in accordance with Rules 23(a) and 23(b)(3). In support of this motion, plaintiffs rely upon their Memorandum of Law and further state as follows:

1. For all counts of plaintiffs' Amended Class Action Complaint, the proposed class consists of:

> All persons and entities who: (1) tendered shares of the $3.75 Series B Convertible Preferred Stock of Kinam Gold Inc. ("Kinam") to Kinross Gold Corporation ("Kinross") pursuant to the February 20, 2002, cash tender offer (as amended February 22, 2002) made by Kinross; (2) continue to hold shares of the $3.75 Series B Convertible Preferred Stock of Kinam; or (3) did not tender shares of the $3.75 Series B Convertible Preferred Stock of Kinam to the February 20, 2002, cash tender offer (as amended February 22, 2002) made by Kinross but have since sold such shares directly to Kinross, Kinam or Kinross Gold U.S.A. Inc. ("Kinross U.S.A.").[1]

2. Additionally, for all counts of plaintiffs' Amended Class Action Complaint, the proposed Class is comprised of three subclasses consisting of all non-excluded persons who:

> (1) held shares of the Preferred which they tendered to the Offer (the "Tenderor" subclass); (2) continue to hold shares of the Preferred (the "Holder" subclass); or (3) sold shares of the Preferred to Kinross or any of its controlled entities after the closure of the Offer and the delisting of the Preferred (the "Late Tenderor" subclass).

3. The requirements of Fed. R. Civ. P. Rules 23(a) and 23(b)(3) are satisfied.

4. The plaintiff Class is so numerous that joinder of all members is impractical.

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[1] Excluded from the Class are Kinross, Kinam and Kinross U.S.A. (collectively "Defendants"), their officers and directors (including Robert M. Buchan), affiliates, legal representatives, heirs, predecessors, successors and assigns, and any entity in which any Defendant has a controlling interest or of which any Defendant is a parent or subsidiary.

5. There are numerous questions of law and fact common to all members of the Class.

6. The claims of the named plaintiffs are typical of the claims of the members of the Class, and the named plaintiffs will fairly and adequately protect the interests of the members of the Class.

7. Plaintiffs' counsel are eminently qualified to represent the Class.

8. Common questions of law and/or fact predominate over any such questions that may affect members of the Class individually.

9. A class action is superior to all other available methods for the fair and efficient adjudication of this case.

WHEREFORE, plaintiffs respectfully request this Court enter an order pursuant to Rules 23(a) and 23(b)(3), certifying that this case may proceed as a class action, and that the named plaintiffs shall serve as representatives of the Class.

Dated: February 28, 2005

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By: _____

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Brown v. Kinross Gold U.S.A., Inc.	CV-S-02-0605-PMP-(RJJ)
This Document Relates To: All actions	**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION**

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I. PROCEDURAL HISTORY

Pending before this Court are two class action lawsuits for damages, equitable and declaratory relief by holders and certain former holders of the Preferred against Kinross Gold Corporation ("Kinross"), Kinross Gold U.S.A. Inc. ("Kinross USA"), Kinam Gold Inc. ("Kinam") and Robert M. Buchan ("Buchan"), Chairman & Chief Executive Officer of Kinross, (collectively "Defendants"). By Order dated August 7, 2002, this Court appointed Movants to serve as Lead Plaintiffs, pursuant to § 21D(a)(3) of the Securities Exchange Act of 1934 (the "Exchange Act") 15 U.S.C. § 78u-4, and appointed Berger & Montague, P.C., and Reginald H. Howe, Esquire, as Plaintiffs' Co-Lead Counsel and Kummer Kaempfer Bonner & Renshaw as Plaintiffs' Liaison Counsel.[1] Both cases arise out of the same operative facts and allege that defendants breached the terms of the Preferred, breached their fiduciary duties arising out of their status as "control persons" and major shareholders, violated the "best price rule" promulgated under Section 13(e) of the Exchange Act, violated anti-fraud provisions of rules promulgated under Sections 13(e) and 14(c) of the Exchange Act, and violated the anti-racketeering law set forth in N.R.S. Section 207.

The original complaint, filed on April 26, 2002, included counts for breach of contract (count I), breach of fiduciary duty (count II), violation of the "best price rule" under § 13(e) of the Securities Exchange Act of 1934 (the "Exchange Act") (count III), violations of the anti-fraud provisions of §§ 10(b) and 13(e) of the Exchange Act (count IV), violation of Nevada's anti-racketeering law (Nevada Revised Statutes, §§ 207.350-207.520) (count V), and violation of § 20(a) of the Exchange Act (count VI). The defendants answered on June 11, 2002.

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[1] Also pending before the court is *Tsurekidis v. Kinross, Gold, U.S.A., Inc.*, U.S.D.C. Nev., CV-S-02-0726-PMP-(LRL) ("Tsurekidis Action"). The Court's August 7, 2002 Order also consolidated the pending actions. The defendants in the Brown Action and the Tsurekidis Action are identical: Kinross, Kinross USA, Kinam and Buchan.

On October 22, 2002, plaintiffs moved for class certification. On October 28, 2002, defendants moved for judgment on the pleadings on count IV under the Private Securities Litigation Reform Act ("PSLRA"). Pending a decision on defendants' motion for judgment on the pleadings, the Court dismissed plaintiffs' motion for class certification with leave and granted plaintiffs leave to renew. On September 29, 2003, the Court granted this motion with leave to amend. Plaintiffs filed an Amended Complaint on November 21, 2003.

On March 1, 2004, defendants filed a second motion for judgment on the pleadings on the amended federal securities fraud claims contained in counts V (violation of §§ 10(b) and 13(e) of the Exchange Act and Rules 10b-5 and 13e-4(j)), VI (violation of Rules 10b-5(a) and (c) and 13e-4(j)(1)(I) and (iii)), and VII (violation of § 20(a) of the Exchange Act). By an Order entered on November 2, 2004, the Court dismissed these three counts with prejudice, leaving counts I through IV (corresponding to counts I, II, III, and count V of the original complaint) for trial.

On January 6, 2005, defendants filed a "motion for judgment" on counts III (best price rule) and IV (Nevada RICO) of the amended complaint. That motion also sought correction of an error in the Court's Order of November 2. Plaintiffs responded with a cross-motion for summary judgment on count III.

II. STATEMENT OF FACTS

In August 1994, Kinam, then Amax Gold, issued 1.84 million shares of Preferred for net proceeds of $88.3 million. AC, ¶ 24. The issue was listed on the New York Stock Exchange. The Preferred ranked prior to the company's common stock "both as to payment of dividends and as to distribution of assets upon liquidation, dissolution, or winding up of the Corporation, whether voluntary or involuntary." AC, ¶ 27. Any amendment "to affect adversely the relative rights,

preferences, qualifications, limitations, or restrictions" of the Preferred required the separate affirmative vote or consent of at least two-thirds of the shares of Preferred then outstanding. *Id.*

In addition an $8.25 conversion price, equating to 6.061 common shares per Preferred share, the attributes of the Preferred included: a liquidation preference of $50; a cumulative dividend of $3.75 per year, payable quarterly on the 15th of February, May, August and November, as and if declared by the board of directors; and a call or redemption provision at a price ratably declining on an annual basis from $52.625 on August 15, 1997, to $50.00 on August 15, 2004, plus accrued and unpaid dividends. The Preferred carried 1.4 votes per share when voting together with the common, as called for on all matters except in certain instances when a separate class vote was mandated (*e.g.*, election of two additional directors whenever six dividend payments remained unpaid). AC, ¶ 26.

1. The 1998 Merger

Amax Gold and Kinross announced their intention to merge in February 1998, stating, among other things, that: "In the merger transaction, approximately US$335 million of Amax Gold debt will be eliminated." AC, ¶ 30. In the merger, each common share of Amax Gold was exchanged for 0.8004 of a common share of Kinross, resulting in the former shareholders of Amax Gold acquiring an approximate 50% ownership interest in Kinross. AC, ¶ 38. However, the Preferred was not exchanged or retired. Rather, the conversion rate was adjusted *pari passu* with the exchange rate for the common, giving the Preferred a new conversion price of $10.31 equating to 4.8512 shares of Kinross common. AC, ¶ 39. Neither this change nor any other aspect of the 1998 merger was submitted for approval by a separate class vote of Preferred. *Id.*

Rather than eliminate the Amax Gold debt as promised, Kinross advanced $256 million to Kinam to pay off an equal amount of outstanding bank debt, and then left the advance on Kinam's

balance sheet as a non-interest bearing obligation with no fixed terms of repayment. AC, ¶ 42. Nor did Kinross retire debt of $92 million owed by Amax to its former corporate parent, Cyprus Amax Minerals. Rather, Kinross converted the debt into a non-interest bearing demand loan to Kinam from Kinross USA, Kinross's wholly-owned subsidiary, with no fixed terms of repayment. AC, ¶ 44.

All the common shares exchanged by Amax Gold's former shareholders for common shares of Kinross were placed in Kinross USA, thus making Kinam a closely held corporation in which Kinross controlled approximately 97% of the total voting rights and remained a creditor to the tune of $348 million, or an amount in excess of the $335 million of Amax Gold debt that the merger had promised to eliminate. AC, ¶ 40.

In the years immediately following the merger, Kinross also took several non-cash charges to write down the balance sheet value of Kinam's gold mining assets. These writedowns caused Kinam's reported shareholders' equity to fall from $274 million at year-end 1997 to a capital deficiency of $104 million by year-end 2000. AC, ¶ 45.

For approximately the first two years after the merger, dividends continued to be paid on the Preferred. During this period, defendants did not state publicly that the intercompany debt on Kinam's balance sheet could be used in a manner that would disadvantage the Preferred relative to Amax Gold's former common shareholders, who then held a 50% interest in Kinross.

The payment of dividends on the Preferred was suspended with the August 15, 2000, payment as a "cash conservation measure due to the persistence of low gold prices," and with the further statement that the suspension "will be reviewed by the board on a quarterly basis." AC, ¶ 46. No mention was made of Kinam's balance sheet. In May 2001, in connection with moving Kinam's state of incorporation from Delaware to Nevada, Kinross stated that while the move would make it

more difficult for shareholders to apply for the appointment of a receiver (AC, ¶ 48), Nevada law would allow Kinam greater discretion to pay dividends. AC, ¶ 54.

No further dividends have been declared since August 2000. AC, ¶ 47.

2. The Partial Exchange Offer

With six dividend payments in arrears as of November 2001, the Preferred voting as a class became entitled to elect two additional directors to Kinam's board. *Id.* In a series of three transactions in mid-2001, Kinross exchanged 24.2 million of its common shares for 945,000 shares of the Preferred -- approximately 51.4% of the total outstanding -- held by three institutional investors. AC, ¶¶ 56-60. These transactions were not registered under § 13(e) of the Exchange Act, 15 U.S.C. § 78m(e), or Rule 13e-4 relating to issuer tender offers.

In the first and largest of these transactions, Franklin Funds ("Franklin") exchanged 800,000 shares of the Preferred (43.5% of the total outstanding) for 21.5 million shares of Kinross common, equating to a conversion rate of 26.875 shares of Kinross common for each share of Preferred. AC, ¶ 56. At the closing price of Kinross common on the date of the exchange, Franklin received a consideration of $25.80 for each share of Preferred, or a premium of approximately 221% over its average closing price of $8.025 on the NYSE in the five trading days preceding announcement of the transaction with Franklin.[2] *Id.*

In two similar follow-on transactions Kinross obtained an additional 145,000 shares of the Preferred. AC, ¶ 57. As a result of the Franklin Transaction and the follow-on transactions Kinross

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[2] In June 2002 Kinross common traded above $2.50, at which time Franklin's 26.875 common shares per share of Preferred would have been worth over $67. Similarly, since its 3:1 reverse share split in early 2003, Kinross common has traded generally in the $6 to $8 range, equivalent to a value of $53.75 to $71.67 for each share of Preferred exchanged by Franklin.

obtained control of approximately 51.4% of the total issue. AC, ¶ 58.

Kinross refused all other requests to convert shares of the Preferred into Kinross common at the same or similar rates as Franklin and two other institutional holders. AC, ¶ 59. The Preferred shares acquired in the Franklin and follow-on transactions were not redeemed by Kinam but instead held by Kinross USA as outstanding shares, thus giving Kinross effective control of any required separate class vote of the Preferred. AC, ¶ 60.

3. The Cash Tender Offer

By the end of 2001, the Preferred was trading again near $8.00 on the American Stock Exchange, to which its listing had been transferred. AC, ¶ 61. In early February 2002, Kinross announced that it was considering a cash tender offer of $16.00 per share for the remaining 894,600 publicly held shares of the Preferred. On February 20, Kinross made a formal "Offer" in that amount by mailing a tender offer document (the "Offer Document") to all holders of the Preferred in the United States and filing a Schedule TO with the Securities and Exchange Commission as required under § 13(e) of the Exchange Act. AC, ¶ 63. The Offer was scheduled to close on March 20. On March 21, Kinross extended the Offer for one week by mailing an "Amended Offer Document" to holders of the Preferred. AC, ¶¶ 67-71.

The terms of the Preferred expressly prohibited any distributions to common shareholders prior to payment of all accrued and unpaid dividends on the Preferred. However, the Offer Document disclosed (at p. 7) that Kinross had withdrawn cash from Kinam in an amount exceeding the cumulated dividend arrearages, claiming that these withdrawals were repayments of its "advances" or "loans." AC, ¶ 52.

The Offer Document also disclosed that the negotiations between Kinross and Franklin had

been "extended and acrimonious" and that Franklin had threatened litigation, the nature of which was not stated. AC, ¶ 66. In fact, as the documents attached to the Dell'Angelo Affidavit show (Exs. A, B, C and F, esp. pp. 13-15 of draft complaint), Franklin's threats included derivative claims challenging the validity and enforceability of Kinam's intercompany debt on substantially the same grounds as the plaintiffs in this action. The Offer Document revealed to the remaining holders of the Preferred for the first time that the intercompany debt in fact represented a Trojan horse which Kinross now intended to deploy against the Preferred.

First, Kinross relied on the intercompany debt to justify continued nonpayment of dividends on the Preferred for the indefinite future. Noting that Nevada law prohibited Kinam "from paying dividends on the preferred stock if its total assets are less than its total liabilities," the Offer Document stated (AC, ¶ 52) (emphasis added):

> This determination can, at the election of Kinam, be based on either its financial statements or a fair valuation of its assets and liabilities. ***Kinam has not undertaken and does not propose to undertake a valuation of its assets and liabilities for that purpose.*** ... Even if Kinam were permitted to pay dividends, it is under no obligation to do so and, at current gold prices, Kinam does not expect to resume the payment of dividends for the foreseeable future.

What is more important, the fairness opinion prepared by Raymond James and communicated to holders of the Preferred by Kinross in the Offer Document relied on the intercompany debt to assert without qualification that Kinam was actually insolvent, stating (AC, ¶ 74): "A break up of Kinam through the sale of individual properties would not yield sufficient value to cover the company's liabilities and preferred shares liquidation value." This statement was underscored and expanded in the Amended Offer Document (at pp. 8-9; AC, ¶ 98) (emphasis supplied):

> Neither Raymond James nor the special committee formally analyzed the liquidation value of Kinam, since ***the net asset value analysis indicated that the preferred stock***

> ***had insufficient asset coverage for a liquidation analysis to be meaningful.*** . . . In addition, based on the financial statements of Kinam as of September 30, 2001, which reflect the assets and liabilities of Kinam on a historical cost basis adjusted for amortization, depreciation and depletion, ***the holders of the preferred shares would not be entitled to any payment on liquidation of Kinam since its assets were $81.3 million less than its liabilities.*** Finally, the liquidation of Kinam was not considered as an alternative to the tender offer and there is no obligation or plans to liquidate Kinam. As set forth above, ***based on either the financial statements or the net asset value analysis performed by Raymond James, there would not be sufficient assets to pay any amount to the holders of the Kinam preferred stock on a going concern basis or in a liquidation***.

During the Offer period, Kinross common traded mostly in the $1.00 to $1.25 range, giving one Preferred share the right to receive only $4.85 to $6.06 worth of Kinross common on conversion.

4. Calculating the Fair Value of Kinam

With the conversion feature of the Preferred having little value at the time, the fundamental issue raised by the Offer was the fair value of Kinam's assets and liabilities. In the absence of that basic calculation, no fair value could be determined for the Preferred. On the liabilities side, Kinross sought to charge the Preferred with all the purported intercompany debt. On the assets side, both Kinross and Raymond James refused to make any evaluation of the actual market value of Kinam's proven and probable in-ground gold reserves, or to give any weight to the prices that were being paid for comparable assets in arm's length negotiated transactions between unrelated parties.

In fact, reasonably contemporaneous acquisitions of gold mining properties comparable to Kinam's had been executed at prices per reserve ounce of $176 (acquisition of Getchell Gold Corp. by Placer Dome Inc.), $110 (acquisition of Homestake Mining Co. by Barrick Gold), and $88 (acquisition of Normandy Mining Ltd. by Newmont Mining Corp.). AC, ¶ 76. The subsequent three-way merger among Kinross, Echo Bay Mines Ltd. ("Echo Bay") and TVX Gold Inc. ("TVX") valued Kinam's assets toward the upper end of this range.

Although not completed until 2003, the three-way merger was being negotiated as early as March 21, 2002, the date of the Amended Offer Document, in which Kinross stated (at p. 3): "We do not currently intend to sell our interest in Kinam in the foreseeable future." AC, ¶¶ 68(A), 81-83.

Based on Kinross's year-end 2002 financial reports, approximately 75% of its total annual gold production and a similar percentage of its total attributable proven and probable gold reserves came from assets owned by Kinam, including its Fort Knox gold mine, its 54.7% interest in the Kubaka gold mine in Russia, and its 50% interest in the Refugio gold mine in Chile. AC, ¶ 84. What Kinross proposed to do and in fact did with Kinam's assets was not to sell them but rather to trade them for a majority stake in, and management control of, a "new" and larger Kinross formed by its merger with Echo Bay and TVX.

As of December 31, 2001, Kinam reported total gold reserves of 4,139,000 ounces. AC, ¶ 76. At $120, the low end of the range in the comparable transactions analysis contained in the fairness opinion later provided to Echo Bay's shareholders, the value for Kinam at the time of the Offer would have been approximately $497 million. At $180, the high end of the range in the comparable trading statistics analysis, the value for Kinam would have been just over $745 million. The midpoint of these two indicated values is approximately $621 million.[3] AC, ¶ 96.

Kinam's September 30, 2001, balance sheet as described in the Offer Document showed total liabilities of just under $440 million, including $308.4 million of intercompany debt ("advances" plus "loan") owed to Kinross. A sale of Kinam at a price in the middle of the indicated range would

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[3] The analysis also showed that at the conversion ratio of .52 Echo Bay shares for each share of Kinross, and based on the June 7, 2002, closing prices for Echo Bay and Kinross ($2.57), Echo Bay standing alone had a value of $164 per reserve ounce and the "new" Kinross, with Kinam's gold reserves at its core, an indicated value of $184 per reserve ounce, *i.e.*, a premium valuation in relation to the comparable companies and transactions analyses.

have been far more than sufficient to pay all claims on Kinam, including not just the intercompany debt but also the liquidation preference of $50 per share on the Preferred and all accrued and unpaid dividends thereon. AC, ¶ 97.

5. Closing the Offer; Delisting the Preferred

In an effort to coerce holders of the Preferred to tender, the Offer Document stated that following completion of the Offer, Kinam intended to: (1) delist the Preferred from the AMEX, thus making it a highly illiquid security with no readily available market price; (2) terminate registration of the Preferred under the Exchange Act, and to cease to file annual and periodic financial reports thereunder or to provide equivalent information to any remaining unaffiliated holders; (3) pursue whatever strategies might become available to force out, by merger, recapitalization or otherwise, any remaining holders of the Preferred at $16.00 per share or less; and (4) continue for the foreseeable future not to pay dividends on the Preferred. AC, ¶ 65.

On April 1, 2002, Kinross announced that a total of 652,992 shares of the Preferred were tendered to the Offer, and that it would purchase all these shares, giving it ownership of 86.9% of the total original issue and leaving 241,608 shares or 13.1% publicly held. Kinross also announced that it would extend the Offer through 5:00 p.m. on April 4, 2002, to permit additional tenders.

According to its 2003 annual report, an additional 17,730 shares were tendered during the extension. Kinross later purchased 14,700 shares from the plaintiff Glenbrook Capital LP, which reserved all its rights in this action (AC. ¶ 7), and 3,223 shares were converted into Kinross common. Accordingly, the Tenderors (including Glenbrook) now represent approximately 685,422 shares of Preferred and the Holders approximately 207,183 shares (11.26% of the original issue), for a total of 892,605 shares. The Preferred was delisted from the AMEX shortly after the Offer closed, leaving

the remaining Holders with the illiquid (and unmarginable) security threatened.

6. The "New" Kinross.

The merger of Kinross, Echo Bay and TVX into the "new" Kinross was effected in early 2003, and shortly thereafter Kinross engaged in a three-for-one reverse stock split, making three shares in the old Kinross equal to one share in the new. AC, ¶ 105. As a result, the 26.875 shares of Kinross common received by Franklin for each share of Preferred presently equate to 8.958333 Kinross shares. As of February 15, 2005, the redemption price for the Preferred was $50 plus accrued and unpaid dividends of $17.8125, totaling $67.8125.

III. THE PROPOSED CLASS, SUBCLASSES, AND RESPECTIVE REPRESENTATIVE PLAINTIFFS.

Like the original complaint, the Amended Complaint alleges two classes: a Tenderor Class consisting of all persons and entities who tendered their shares of the Preferred pursuant to the Offer; and a Holder Class consisting of all persons and entities who continue to hold shares of the Preferred since the Offer expired.[4] AC, ¶¶ 16-17. The Amended Complaint also alleges that common questions of law and fact exist as to all members of both these classes and predominate over any questions affecting only individual members of either class. AC, ¶ 20.

Because common questions of law and fact affecting liability predominate, and because the principal differences between the classes as originally proposed relate only to damages and equitable relief, plaintiffs now propose that the Court certify this action as a class action composed of a single class with the Tenderors and Holders as subclasses.

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[4] Excluded from the both classes are the defendants, the defendants' officers and directors, affiliates, legal representatives, heirs, predecessors, successors and assigns, and any entity in which any defendant has a controlling interest or of which a defendant is a parent or subsidiary.

Accordingly, the proposed class consists of all non-excluded persons who: (1) held shares of the Preferred which they tendered to the Offer (the "Tenderor" subclass); (2) continue to hold shares of the Preferred (the "Holder" subclass); or (3) sold shares of the Preferred to Kinross or any of its controlled entities after the closure of the Offer and the delisting of the Preferred (the "Late Tenderor" subclass). The proposed Class and Tenderor subclass is represented by plaintiffs Drake, CN&L, and Kauffman.[5] The proposed Class and Holder subclass is represented by plaintiff Brown. Plaintiff Glenbrook represents the proposed Class and Late Tenderor subclass.[6]

More formally, the proposed Class is defined as:

> All persons and entities who: (1) tendered shares of the $3.75 Series B Convertible Preferred Stock of Kinam Gold Inc. ("Kinam") to Kinross Gold Corporation ("Kinross") pursuant to the February 20, 2002, cash tender offer (as amended February 22, 2002) made by Kinross; (2) continue to hold shares of the $3.75 Series B Convertible Preferred Stock of Kinam; or (3) did not tender shares of the $3.75 Series B Convertible Preferred Stock of Kinam to the February 20, 2002, cash tender offer (as amended February 22, 2002) made by Kinross but have since sold such shares directly to Kinross, Kinam or Kinross Gold U.S.A. Inc. ("Kinross U.S.A."). Excluded from the Class are Kinross, Kinam and Kinross U.S.A. (collectively "Defendants"), their officers and directors (including Robert M. Buchan), affiliates, legal representatives, heirs, predecessors, successors and assigns, and any entity in which any Defendant has a controlling interest or of which any Defendant is a parent or subsidiary.

As defined, the proposed Class represents those persons who stand in privity of contract with Kinross or its controlled entities on substantially all of the 894,600 publicly held shares of the Preferred targeted by the Offer, either because they still hold shares of the Preferred or because they tendered or sold shares of the Preferred directly to Kinross or its controlled entities pursuant to the

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[5] At the time of the Offer, Kaufman held 15,300 shares of the Preferred. Kauffman tendered 15,290 shares and held 10 shares, all of which were subsequently transferred to another owner.

[6] Glenbrook withdrew its tender of the Preferred. At the time of the filing of Lead Plaintiffs' original complaint, Glenbrook held 14,700 shares of the Preferred. Thereafter, prior to the filing of the Amended Complaint, Glenbrook sold all of its shares of the Preferred to Kinross, reserving all rights in this action.

Offer or subsequent to its closure. Accordingly, they are the persons with direct claims against the defendants for breaches of the terms of the Preferred relating to payment of dividends, conversion and redemption.[7]

The proposed Class does not include persons who sold or traded shares of the Preferred in the market, whether before, during, or after closure of the Offer. These persons may have potential claims against the defendants arising out the events described in the Amended Complaint, but their claims are of a somewhat different nature than those of the proposed Class because sale of preferred shares in the market transfers to the purchaser all direct contract rights pertaining to ownership of the shares, including those relating to dividends, redemption and conversion.[8]

Certification of the proposed Class, including the three proposed subclasses, is appropriate here because all Class members: (a) are entitled to equal treatment under the terms of the Preferred; (b) stand in the same fiduciary relationship to the defendants; (c) are entitled to the same elevated fiduciary duties from the defendants; (d) are entitled to the safeguards provided under §13(e) of the Exchange Act relating to issuer tender offers; (e) are among those for whose protection the Nevada anti-racketeering law has created a civil remedy; and (f) have each suffered or will suffer like injuries

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[7] "Whatever preferential rights and privileges may thus be granted to a stockholder, the law regards them as contractual." *Strout v. Cross, Austin & Ireland Lumber Co.*, 28 N.E.2d 890, 893 (N.Y. 1940). Traditional rules of contract interpretation apply. *See Dwoskin v. Rollins, Inc.*, 634 F.2d 285, 293-294 (5th Cir. 1981); *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 852-854 (Del. 1998); *In re Sunstates Corp. S'holder Litig.*, 788 A.2d 530, 533 (Del. Ch. 2001).

[8] For example, since there is ordinarily no right to dividends on preferred shares until they are declared, the right to receive cumulated unpaid dividends, if and when declared and paid, transfers with any transfer in the ownership of the shares. *Jermain v. Lake S. & M. S. R. Co.*, 91 N.Y. 483, 492-493 (1883); *Bates v. Androscoggin & K. R. Co.*, 49 Me. 491, 506 (1860). *See also Palmer v. Carling O'Keefe Breweries of Canada Ltd.* (1989), 56 D.L.R. (4th) 128, 67 O.R. (2d) 161, 41 B.L.R. 128 (Div. Ct.) (dates on which preferred shares purchased not relevant to determining contract rights in litigation).

as a result of the unlawful and fraudulent conduct alleged.

As discussed more fully *infra*, common questions of law and fact applicable to all members of the proposed Class include whether defendants: (a) breached the terms of the Preferred; (b) breached their elevated fiduciary duties as control persons and major stockholders to other holders of the Preferred in the closely held Kinam; (c) violated § 13(e) of the Exchange Act as alleged; (d) whether defendants violated Nevada's anti-racketeering law as alleged; and (e) violated New York Stock Exchange Rule 311.03, as alleged.

Regarding damages or other equitable relief, all members of the proposed Class are entitled to the benefits of the best price rule and all holders requirement imposed by § 13(e) and Rule 13e-4. However, the precise relief accorded the different subclasses must account for the cash payments already received by the Tenderor and Late Tenderor subclasses and the practical reality that equitable relief relating to conversion or redemption can more easily be structured and applied with respect to the Holder subclass than the other subclasses.

IV. ARGUMENT

A. This Action Is Appropriate for Class Certification

Courts in this Circuit have long recognized the usefulness and efficacy of class actions in circumstances similar to those presented in this litigation, and have long recognized and adopted a liberal construction of Rule 23 when considering shareholder suits seeking class action certification. *See, e.g., In re DJ Orthopedics, Inc.*, 2003 U.S. Dist. LEXIS 21534, *6, *27 (S.D.Cal. Nov. 16, 2003) ("the trial court has broad discretion in determining whether a class should be certified"); *In re United Energy Corp. Sec. Litig.*, 122 F.R.D. 251, 253 (C.D.Cal. 1988) ("In a securities case, the requirements of Rule 23 should be liberally construed in favor of class actions.") (*citing Blackie v.*

Barrack, 524 F.2d 891, 903 (9th Cir. 1975)). Courts have explicitly recognized that any doubt as to the propriety of certification should be resolved in favor of certifying the Class because denying class certification will almost certainly terminate the action and be detrimental to the members of the proposed Class. *Blackie*, 524 F.2d at 901. In deciding a motion for class certification, courts focus on the limited question of whether the prerequisites of Rules 23(a) and (b) are satisfied. As the Supreme Court emphasized in the seminal case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), an inquiry pursuant to Rule 23 should not extend to the merits of the case. *Id.* at 177 ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); *see also Welling v. Alexy*, 155 F.R.D. 654, 656 (N.D.Cal. 1994) ("In conducting such an analysis, district courts must be careful to avoid reviewing the merits of the underlying action and focus instead on the requirements of Rule 23."). Accordingly, "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action." *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971) (citations omitted).[9] Because class certification is determined at the pleading stage, the allegations in the Amended Complaint are accepted as true for the purposes of the class motion. *Blackie*, 524

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[9] Notwithstanding the pending cross dispositive motions, it is not inappropriate for the court to rule on plaintiffs' motion for class certification prior to the disposition of those motions. *See In re Diamond Multimedia Sys., Inc. Sec. Litig.*, 1997 WL 773733, *2 (N.D.Cal. 1997) (*citing Medhekar v. United States Dist. Ct.*, 99 F.3d 325, 328 (9th Cir. 1996)).

F.2d at 901 n.17; *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *In re Heritage Bond Litig.*, 2004 WL 1638201, *2 (C.D.Cal. July 12, 2004). As discussed in detail *infra*, this case clearly satisfies the requirements of Rule 23 and, therefore, the proposed Class should be granted. Indeed, "all that is required [at the class certification stage] is enough for the court to form a 'reasonable judgment' on each requirement." *See Blackie*, 524 at 901. Where the party seeking class certification has met its burden, the district court has broad discretion to certify a class. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), as amended, 273 F.3d 1266 (9th Cir. 2001); *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977).

B. The Requirements Of Rule 23(a) Are Met

Rule 23(a) establishes four requirements for the maintenance of a class action:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23. *See, e.g.*, *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1339 (9th Cir. 1976). Each of these four requirements -- numerosity, commonality, typicality and adequacy -- are plainly satisfied here.

1. The Proposed Class Is So Numerous That Joinder Of All Members Is Impractical

Class certification requires that the proposed Class is so numerous that joinder of all members is "impracticable." Fed. R. Civ. P. 23(a)(1). Impractical does not mean impossible, but rather refers to the difficulty or inconvenience of joining all members of the class. *Wehner v. Syntex*

Corp., 117 F.R.D. 641, 643 (N.D.Cal. 1987) ("While not impossible, joinder would clearly be impracticable."). There is no fixed number of class members which either compels or precludes the certification of a class. However, as a general rule, classes numbering greater than 41 individuals satisfy the numerosity requirement. *See Santillan v. Ashcroft*, 2004 WL 2297990, *9 (N.D.Cal. Oct. 12, 2004) (*citing* 5 James Wm. Moore *et al.*, *Moore's Federal Practice* § 23.22[1] [b] (3d ed. 2004)).[10] Additionally, the exact size of the class need not be known so long as general knowledge and common sense indicate that the class is large. *See Schwartz v. Harp*, 108 F.R.D. 279, 281-82 (C.D.Cal. 1985) ("failure to state the exact number in the proposed class does not defeat class certification"); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D.Nev. 1991) (*citing Lund v. Affleck*, 388 F. Supp. 137, 139-40 (D.R.I. 1975)) (that the moving party is not sure of the exact number of members proposed class does not bar class certification); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 679 (N.D.Cal. 1986) (plaintiffs need not establish exact number of class members, but merely demonstrate that it is sufficiently numerous). Thus, a court may draw a reasonable inference of the size of the class from the facts before it. *See Sherman*, 775 F. Supp. at 1389 (*citing Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1332 (9th Cir. 1977)); *Schwartz*, 108 F.R.D. at 281-282 (C.D. Cal. 1985) (numerosity met where plaintiffs alleged 1,000,000 shares of publicly traded security affected but failed to state exact size of proposed class; court could make "common sense assumptions"). Courts in this Circuit have assumed that the

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[10] Professor Newberg's survey of court rulings on the numerosity issue concluded that any class consisting of 40 or more members presumptively fulfills the numerosity requirement. *H. Newberg, Class Actions* §3.05 at 3-25 (1992). *Cf. Tietz v. Bowen*, 695 F. Supp. 441, 445-446 (N.D.Cal. 1987) (class of 27 certified); *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319-1320 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982) (classes of 39, 64 and 71 certified); *Perez-Funez v. District Director, INS.*, 611 F. Supp. 990, 995 (C.D.Cal. 1984) (acknowledging class of twenty-five members).

numerosity requirement is satisfied in securities cases involving nationally-traded stocks. *Yamner v. Boich*, Fed. Sec. L. Rep. (CCH) P98427 (N.D.Cal. Sept. 15, 1994).

Adequate numerosity clearly exists in this case. The Amended Complaint alleges that 894,600 shares of the Preferred were outstanding and publicly traded that the time of Kinross's tender offer, the alleged breach of the Preferred. *See e.g.*, AC, ¶¶ 1, 10, 18. As plaintiffs alleged, it is believed that there are hundreds of members of Class which represent the entirety of the 894,600 publicly traded shares of the Preferred. AC, ¶ 18.

Classes of the size extant here are sufficiently numerous so as to make individual joinder extremely impracticable, if not logistically impossible, especially where the members of the Class are located throughout the country. *See In re Seagate Techs. Sec. Litig.*, 115 F.R.D. 264, 267 (N.D. Cal. 1987). Thus, classes of the size presented here are routinely certified by the courts. *See, e.g., In re Genentech, Inc. Sec. Litig.*, Fed. Sec. L. Rep. (CCH) P95347 (N.D.Cal. June 8, 1990) (proposed class likely to include "hundreds" of members based on share trading volume); *In re Diatonic Sec. Litig.*, 599 F. Supp. 447, 451 (N.D.Cal. 1984) (potential class consisting of "hundreds of class members" satisfied numerosity). Therefore, certification of the Class sought here, which is believed to have hundreds, if not thousands, of members is consistent with the practice in this Circuit.

2. Questions Of Law And Fact Common To The Plaintiffs And The Class

Rule 23(a)(2) requires that there exist "questions of law or fact common to the Class." Fed. R. Civ. P. 23(a)(2). The commonality requirement of Rule 23(a)(2) is satisfied when common questions of law or fact are present. *See O'Connor v. Boeing North Am., Inc.*, 184 F.R.D. 311, 330 (C.D.Cal. 1998). Such questions are "substantial questions either of law or fact common to all." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 914 (9th Cir. 1964). However, individual

variation among plaintiffs' questions of law and fact does not defeat the underlying legal commonality because "[t]he existence of shared legal issues with divergent factual predicates is sufficient" to satisfy Rule 23. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998); *Santillan v. Ashcroft*, 2004 WL 2297990, *10 (N.D.Cal. Oct. 12, 2004). Commonality may be found even where divergent facts exist because "plaintiffs may demonstrate commonality by showing that class members have shared legal issues but divergent facts or that they share a common core of facts but base their claims for relief on different legal theories." *Dukes v. Wal-Mart.*, 222 F.R.D. 137, 145 (N.D.Cal. 2004). Thus, where, as here, the proposed Class has been damaged by a common course of conduct, courts regularly find the commonality requirement is satisfied. *See, e.g., Blackie*, 524 F.2d at 902-905; *In re Emulex Corp. Sec. Litig.*, 210 F.R.D. 717, 721 (C.D.Cal. 2002); *Gould v. Marlon*, Fed. Sec. L. Rep. (CCH) P93408, P97125-97 (D.Nev. Aug. 29, 1987).

The Amended Complaint details a common course of unlawful conduct. Common questions of law and fact exist as to all members of the proposed Class and predominate over any questions affecting solely individual members of the Class or the proposed subclasses. Nevertheless, "[t]he fact that there is some factual variation among the class grievances will not defeat at class action . . .. A common nucleus of operative facts is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *In re Heritage Bond Litig.*, 2004 WL 1638201, *3 (C.D.Cal. July 12, 2004) (*quoting Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992)).

Among the questions of law and fact common to the members of the Class are:

(a) whether defendants have breached the terms of the Preferred;
(b) whether defendants have breached their elevated fiduciary duties as control persons and major stockholders to other holders of the Preferred;
(c) whether defendants violated § 13(e) and Rule 13e-4 of the Exchange Act as alleged;
(d) whether defendants violated Nevada's anti-racketeering law as alleged; and

(e) whether defendants violated New York Stock Exchange Rule 311.03 as alleged.

These issues are common to all members of the Class and predominate over any questions affecting solely individual members of the Class or proposed subclasses. Although the precise relief appropriate for each of the proposed subclasses may differ, all members of the Class claim damages or equivalent equitable relief under the best price rule and all holders requirement contained in Rule 13e-4 of § 13(e) of the Exchange Act.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). In the leading decision of *Blackie v. Barrack*, the Ninth Circuit Court of Appeals affirmed the certification of a class of securities purchasers based upon a common course of conduct. The court reasoned that "the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit." 524 F.2d at 902 (citations omitted); *Gould*, ¶ 93,408 at 97,126 (focusing on defendants' course of conduct over time).

Class certification is appropriate here because the claims against defendants "arise out of the same set of operative facts and are based on common legal theories." *Schneider v. Traweek*, Fed. Sec. L. Rep. (CCH) P95419 (C.D.Cal. July 31, 1990); *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig.*, 122 F.R.D. 251, 254 (C.D.Cal. 1988); *Schwartz*, 108 F.R.D. at 282; *In re Unioil Oil Sec. Litig.*, 107 F.R.D. 615, 618-19 (C.D.Cal. 1985). Therefore, the commonality requirement has been met.

3. Plaintiffs' Claims Are Typical Of The Claims Of The Class Members

The typicality requirement of Rule 23(a) is established where, as here, the claims of the Representative Plaintiffs arise from the same event or course of conduct that gives rise to the claims of other Class members and where the claims are based on the same legal theory. *See In re United Energy Corp.*, 122 F.R.D. at 256; *Schlagal v. Learning Tree Int'l*, No. 98-6384, 1999 U.S. Dist. LEXIS 2157, *8-9 (C.D.Cal. Feb. 23, 1999) (*holding* class members' claims typical where representatives' claims "stem from the same event or course of conduct as other class members' claims and are based on the same legal theory as the absent members"); *H. Newberg, Class Actions* § 3.13, at 3-76 (1992) (the typicality requirement is usually met "when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiffs and the class sought to be represented"). All that is required at this stage of litigation is a preliminary showing of typicality and adequacy. *Ferrari v. Gisch*, — F.R.D. —, 2004 WL 2983942, *7 (C.D.Cal. May 21, 2004) (*citing Erikson v. Cornerstone Propane Partners LP*, 2003 WL 22232387, *3 (N.D.Cal. Sept.15, 2003). The heart of the inquiry is thus whether the Representative Plaintiffs' claims and the claims of the Class are interrelated so that class treatment is economical. *In re Heritage Bond Litig.*, 2004 WL 1638201, *4 (C.D.Cal. July 12, 2004) (*citing General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). However, "[t]he named plaintiff need not have suffered an identical wrong. It is sufficient if his allegations are derived from the same remedial and legal theories." *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 235 (C.D.Cal. 2003) (*quoting Murray v. Local 2620, Dist. Council 57, Am. Fed. of State, County & Mun. Emples.*, 192 F.R.D. 629, 635 (N.D.Cal. 2000)). Thus, the typicality requirement is not rigid, as it "may be met 'even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages by

the representative parties and the other members of the class.'" *Id.* (citation omitted). Indeed, factual variations are not fatal to a proposed class when the claims arise out of the same remedial and legal theory. *Wofford v. Safeway Stores*, 78 F.R.D. 460, 488 (N.D. Cal. 1978); *Mendoza v. Zirkle Fruit Co.*, 222 F.R.D. 439, 448 (E.D.Wash. 2004). Accordingly, "the typicality requirement is not demanding." *In re Heritage Bond Litig.*, 2004 WL 1638201, *4 (C.D. Cal. July 12, 2004) (*citing In re Enron Corp. Sec., Derivative and ERISA Litig.*, 2004 WL 405886, *25 (S.D.Tx. Feb. 25, 2004). Thus, even if it is determined that the representatives of the Class, including each proposed subclass, may not have been injured in the identical manner as other Class members, that does not prevent the proposed Class Representatives from acting as such provided the general theory of recovery is typical of the Class and subclass they represent. *See e.g., California Rural Legal Assistance, Inc. v. Legal Services Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990) (Rule 23 "does not require the named plaintiffs to be identically situated with all other class members. It is enough to share a 'common issue of law or fact.'"); *Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D.Wash. 2003) (typicality satisfied where "[t]he claim of at least one of the representatives seems to be typical of the claims of putative class members as described in the class definition").

Typicality does not require that the interests between the Representative Plaintiffs and the members of the Class be identical. *See In re Unioil Oil Sec. Litig.*, 107 F.R.D. 615, 620 (C.D.Cal. 1985) ("'A plaintiff's claim meets the typicality requirement if it arises from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory.'") (*citation omitted*). Indeed, the purpose of the "typicality" requirement is to assure that the named Representative Plaintiffs' interests align with, not duplicate, those of the Class. *See Weinberger v. Thornton*, 114 F.R.D. 599, 603 (S.D.Cal. 1986). Thus, "[t]he test generally is

'whether other members have the same or similar injury, whether the action is based on conduct that is not unique to the named plaintiffs, and whether other class members have been injured by the **same course of conduct**.'" *A & J Deutscher Family Fund v. Bullard*, Fed. Sec. L. Rep. (CCH) P92938, at P94584 (C.D.Cal. Sept. 22, 1986) (emphasis added); *see also Dura-Bilt*, 89 F.R.D. at 99 ("The proper inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct not special or unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.").

In *Weinberger v. Jackson*, 102 F.R.D. 839, 844 (N.D.Cal. 1984), the court stated that "[t]ypicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." (citations omitted). This applies to a Representative Plaintiff's decision to hold, tender to Kinross, or hold and subsequently sell to Kinross the Preferred, thereby placing the member in the Holder, Tenderor, or Late Tenderor subclass. Indeed, a "named plaintiff need not have suffered an identical wrong. It is sufficient if his allegations are derived from the same remedial and legal theories." *Murray v. Local 2620, Dist. Council 57, Am. Fed. of State, County & Mun. Emples.*, 192 F.R.D. 629, 635 (N.D.Cal. 2000); *see generally, Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985) ("[T]ypicality entails an inquiry whether the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.").

Here, the Representatives Plaintiffs equally satisfy the typicality requirement because, like all other Class members, they (1) own shares of the Preferred or formerly owned shares which they tendered to the Offer or sold to Kinross after the Offer closed; and (2) each suffered damages as a

result of, *inter alia*, defendants' breach of the terms of the Preferred. The claims of each Representative Plaintiff are typical of those of other Class members because each of their claims arise directly out of defendants' common course of conduct. Because the proposed Representative Plaintiffs seek to prove that all Class members' claims arise from the same event or course of conduct that gave rise to the claims of the members of the Class, and those claims are based on the same legal theory, the Rule 23(a)(3) typicality requirement is satisfied.

4. The Named Plaintiffs Will Fairly And Adequately Protect The Interests Of The Class

Rule 23(a)(4) requires that plaintiffs will "fairly and adequately protect the interests of the class." *See, e.g., O'Connor*, 184 F.R.D. at 335; *see also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.1978). The standards of Rule 23(a)(4) are met if it appears that the interests of each Representative Plaintiff are not antagonistic to those of other members of the Class they seek to represent and the attorneys they have selected to prosecute this action are qualified, experienced and generally able to conduct the litigation. *See id.*; *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982) (representative is adequate if (1) counsel for the class is qualified and competent; (2) the representatives' interests are not antagonistic to interests of absent class members; and (3) the action is not collusive); *In re Computer Memories Sec. Litig.*, 111 F.R.D. at 681; *In re Victor Technologies Sec. Litig.*, 102 F.R.D. 53, 57 (N.D.Cal. 1984).

Each prong of the "adequacy" test is met here.[11] First, the proposed Class Representatives have selected law firms to represent them that are highly experienced in prosecuting class actions

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[11] The only possible distinction between the Representative Plaintiffs and the proposed Class members relates to the amount of damages each member may receive. However, as discussed, "[d]ifferences in damage awards are inherent to almost any class action and, consequently cannot overcome a class certification motion." *Schlagal*, 1999 U.S. Dist. LEXIS 2157, at *12.

such as this and also possess significant knowledge of the gold mining industry. *See* Exhibits "A" and "B" to the Davidoff Decl. to Movants' Motion for Appointment as Lead Plaintiffs (Docket No. 18). Second, the interests of the proposed Representative Plaintiffs are clearly aligned with the members of the Class and subclass they seek to represent, and there is no evidence of any antagonism between the interests of these individuals and the Class or subclass. As demonstrated *supra*, the proposed Representative Plaintiffs share numerous common questions of law and fact with the members of the Class and their claims are typical of the claims of the other members of the Class. There is no conceivable reason why the action would be collusive and no such inference exists. Thus, the Representative Plaintiffs satisfy the requirements of Rule 23(a)(4).

C. The Conditions Of Rule 23(b)(3) Are Satisfied.

In addition to meeting the prerequisites of Rule 23(a), the proposed Class also satisfies Rule 23(b), which requires that the proposed class action meet any one of three conditions stated by the rule.[12] In this case, common questions of law and fact predominate and a class action is the superior (if not the only) method available to fairly and efficiently litigate this action.

In conducting such an evaluation, this Court should consider, *inter alia*, the interests of members of the Class in prosecuting separate actions and the difficulties likely to be encountered in the management of this class action. *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1216 (S.D.N.Y. 1992). This case meets all the criteria set forth in Rule 23(b)(3).

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[12] "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b).

1. Common Questions Of Law And Fact Predominate.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997).[13] In determining whether common questions predominate, "courts focus on the liability issue, ... and if the liability issue is common to the class, common questions are held to predominate over individual questions." *Genden v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 114 F.R.D. 48, 52 (S.D.N.Y. 1987) (*quoting Dura-Bilt Corp.*, 89 F.R.D. at 93). *See also, In re United Energy Corp.*, 122 F.R.D. at 254. "The mere presence of potential individual issues does not defeat the predominance of common questions." *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 239 (C.D.Cal. 2003) (*quoting McFarland v. Memorex*, 96 F.R.D. 357, 363-64 (N.D.Cal.1982)). Thus, when common questions present a significant aspect of the case and they can be resolved for all members of a Class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.[14] *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (*citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)). The critical issues of fact

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[13] Rule 23 requires, in addition to the requirements of subparagraph (a), plaintiffs must meet the requirements of one subsection of subparagraph (b). Here, plaintiffs move pursuant to and meet the requirements of subsection 23(b)(3).

[14] Differences in various Class members' claims regarding damages will not defeat class certification. *Gould v. Marlon*, P93408 at 97126 ("individual questions with respect to damages do not defeat class certification"); *In re Unioil Oil Sec. Litig.*, 107 F.R.D. 615, 622 (C.D.Cal. 1985) ("any differences between named plaintiffs and class members [at class certification stage] do not preclude class certification"; observing conflicts can be resolved with subclasses or bifurcation); *Newton-Nations v. Rogers*, 221 F.R.D. 509, 511 (D.Ariz. 2004) (speculative conflicts are not actual conflicts sufficient to defeat class certification) (*citing Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) *cert. denied* 539 U.S. 927 (2003) (grant of class certification was not abuse of discretion "without some evidence of an actual conflict")).

and law raised in this action are common to ***all*** members of the Class and will predominate in this case. Once these common questions are resolved, all that should remain is determining the appropriate relief for the members of each subclass. *See Blackie*, 524 F.2d at 905.

Nevertheless, the fact that members of the Class may not be identically situated is not critical. Common issues predominate because, as here, a **common course of conduct has been alleged**. *See, e.g., Harris*, 329 F.2d at 914-15. *See also Blackie*, 524 F.2d at 902 (endorsing the approach previously taken by the Court of Appeals in *Harris*). In sum, because the Amended Complaint alleges a common course of conduct committed by defendants and directed equally against all members of Class, whether Tenderors or Holders, the issues of law and fact which flow from that wrongful activity clearly predominate over any individual issues. In such circumstances, a class action is not only appropriate, it is mandated by Rule 23. *See, e.g., Blackie*, 524 F.2d at 905-08. Therefore, the predominance of common issues is clear.

2. A Class Action Is Superior To Other Methods Of Adjudication.

Rule 23(b)(3) instructs courts to consider:

> (A) [T]he interest of members of the class in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by . . . members of the class; (C) the desirability . . . of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). Here, class certification is both useful and necessary. The class action device offers judicial efficiencies because it permits common claims and issues to be tried only once, with binding effect on all parties. Class certification also facilitates settlement by permitting agreements that potentially bind all claimants. Finally, class representation is the only way to afford relief to those whose claims are too small to permit them to bring individual suits.

Indeed, even a derivative action, such as that threatened by Franklin over the validity and enforceability of Kinam's intercompany debt on substantially the same grounds as the plaintiffs allege here, could not now bring relief to all members of the Class. Having tendered or sold their shares to Kinross, members of the Tenderor and Late Tenderor subclasses no longer have standing to bring a derivative action on behalf of Kinam or to benefit from any relief that might be accorded the company in any such action.

In this litigation, "the interest of members of the class in individually controlling the prosecution . . . of separate actions" will be minimal. The costs and expenses of such individual actions, when weighed against the individual recoveries potentially obtainable, would be prohibitive. The class action device is the only viable vehicle by which persons injured by defendants' wrongful conduct may obtain a remedy. Any notion that such claims could be litigated individually is wholly unrealistic and is contrary to the philosophy of Rule 23. *See Unioil*, 107 F.R.D. at 622. Although some members of the Class may have sustained substantial individual damages, even individual litigation of such claims would be uneconomical, given the complexity of the factual and legal issues involved. Although this case may require different forms of relief or separate damage assessments for the members of each subclass, even individualized damage assessments are not a basis for denying certification of a class. *See Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 168 n.10 (C.D.Cal. 2002) (*citing In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140-41 (2d Cir. 2001)); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 147 (4th Cir. 2001); *Winkler v. DTE, Inc.*, 205 F.R.D. 235, 245 (D.Ariz. 2001). Indeed, "there is no rule, however, that every member of the class must recover identically." *Morelock Enterprises, Inc. v. Weyerhaeuser Co.*, 2004 WL 2997526, *3 (D.Or. 2004). Moreover, the overwhelming majority

of the members of the proposed Class have not brought suit. Thus, with respect to Rule 23(b)(3)(A) and (B), the class action device is a superior method of adjudicating this controversy.

Defendants themselves, through their alleged actions, manifest the desirability of locating all actions in this forum. With respect to paragraph (C) of Rule 23, the Amended Complaint alleges that, without a vote of Preferred shareholders, Kinross moved Kinam's state of incorporation from Delaware to Nevada. AC, ¶ 48. The Amended Complaint goes on to allege that doing so permitted defendants to avail themselves of Nevada law which requires a stakeholder to own at least 10% of the outstanding voting stock to seek appointment of a receiver. *Id.* Therefore, the Amended Complaint alleges, because Kinross had reduced the Kinam voting rights of the Preferred holders to only 3%, Preferred holders were disabled from seeking to appoint a receiver to capitalize on their preference to the assets of Kinam in any liquidation. AC, ¶ 50. By the summer of 2001, therefore, Kinross had purported to quash virtually all of the rights and preferences to which Preferred holders were entitled. Accordingly, not only did several of the key transactions take place in Nevada, defendants attempted to employ Nevada law to effect the common course of illegal conduct at issue.

Finally, regarding paragraph (D), there is no reason to believe that Class counsel will encounter significant or unusual difficulties in the management of this litigation. *See, e.g., Diasonics Sec. Litig.*, 599 F. Supp. 447 (N.D.Cal. 1984). Discussing the issue of potential class action management difficulties, the court in *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971) observed such matters are only significant if they would render the class action a "less a "fair and efficient" method of adjudication"; particularly where defendants can offer no better remedy. *Id.* at 282 (original emphasis); *see also In re Sugar Indus. Antitrust Litig.*, 1977-1 Trade Cas. (CCH) P61373 at P71340 (N.D.Cal. 1976) (possible management problems alone not grounds for denying

class certification); *accord Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972). Clearly, here, the class device is superior to other available methods of adjudication.

V. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court enter an order certifying this action as a class action pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure and certify the Class as defined.

Dated: February 28, 2005

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT A. BROWN, GLENBROOK CAPITAL LP, GEORGE P. DRAKE, AND CN&L INVESTMENT CORP., Plaintiffs, *vs.* KINROSS GOLD U.S.A., INC., KINAM GOLD INC., KINROSS GOLD CORPORATION, AND ROBERT M. BUCHAN, Defendant.	Case No. CV-S-02-0605-KJD (RJJ) **CERTIFICATE OF SERVICE**

Pursuant to Rule 5, I hereby certify that service of the following documents:

1. Plaintiffs' Renewed Motion for Class Certification;
2. Memorandum of Law in Support of Plaintiffs' Renewed Motion for Class Certification; and
3. Order

was made by depositing a true copy of the same for mailing at Las Vegas, Nevada, postage prepaid, addressed to each of the following:

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Brown v. Kinross Gold U.S.A., Inc.	CV-S-02-0605-PMP-(RJJ)
This Document Relates To: All actions	

ORDER

Having considered the Renewed Motion of Robert A. Brown, Glenbrook Capital LP, Andrew D. Kaufman, George P. Drake, and CN&L Investment Corp., for Class Certification it is

hereby **ORDERED AND ADJUDGED** that Plaintiffs have sustained their burden of satisfying the elements required for class certification.

1. Lead Plaintiffs Robert A. Brown, Glenbrook Capital LP, Andrew D. Kaufman, George P. Drake, and CN&L Investment Corp. have met the requirements of Fed. R. Civ. P. 23(a) as follows:

a. Members of the Class and Subclasses, defined below, are so numerous that joinder is impracticable.

b. The claims of the Class and the respective Subclasses are common.

c. The claims of the Lead Plaintiffs are typical as follows:

(1) The claims of Robert A. Brown are typical of those of the "Holder Subclass" defined below; and

(2) The claims of Andrew D. Kaufman, George P. Drake, and CN&L Investment Corp., are typical of those of the "Tenderor Subclass" defined below; and

(3) The claims of Plaintiff Glenbrook are typical of those of the Class and the "Late Tenderor Subclass" defined below.

2. Lead Plaintiffs are adequate representatives of the Class and of their respective Subclasses.

3. Further, Lead Plaintiffs have satisfied the requirements of Fed. R. Civ. P. 23(b)(3) as follows:

a. Common claims predominate over individual claims such that significant aspects of this case can be resolved in a single action; and

b. The class action device is a superior means to adjudicate the claims of the members of the Class and the respective Subclasses.

4. Having satisfied the elements of Fed. R. Civ. P. 23, for certification, therefore, the following Class is certified:

> All persons and entities who: (1) tendered shares of the $3.75 Series B Convertible Preferred Stock of Kinam Gold Inc. ("Kinam") to Kinross Gold Corporation ("Kinross") pursuant to the February 20, 2002, cash tender offer (as amended February 22, 2002) made by Kinross; (2) continue to hold shares of the $3.75 Series B Convertible Preferred Stock of Kinam; or (3) did not tender shares of the $3.75 Series B Convertible Preferred Stock of Kinam to the February 20, 2002, cash tender offer (as amended February 22, 2002) made by Kinross but have since sold such shares directly to Kinross, Kinam or Kinross Gold U.S.A. Inc. ("Kinross U.S.A.").[2]

5. Further, also certified are the following "Subclasses" consisting of all persons who:

a) held shares of the Preferred which they tendered to the Offer (the "Tenderor" subclass);

b) continue to hold shares of the Preferred (the "Holder" subclass);

c) sold shares of the Preferred to Kinross or any of its controlled entities after the closure of the Offer and the delisting of the Preferred (the "Late Tenderor" subclass).

IT IS SO ORDERED

_____

THE HONORABLE PHILIP M. PRO
UNITED STATES DISTRICT JUDGE

DATED: 2005

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[2] Excluded from the Class are Kinross, Kinam and Kinross U.S.A. (collectively "Defendants"), their officers and directors (including Robert M. Buchan), affiliates, legal representatives, heirs, predecessors, successors and assigns, and any entity in which any Defendant has a controlling interest or of which any Defendant is a parent or subsidiary.