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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' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNTS III AND IV AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT III** **ORAL ARGUMENT REQUESTED**

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Statement of the Case

This is a class action for damages, equitable and declaratory relief arising out of a coercive and illegal issuer tender offer for the $3.75 Series B Convertible Preferred Stock (the "Preferred") of Kinam Gold Inc. ("Kinam"). All Kinam's common stock is owned by Kinross Gold U.S.A., Inc. ("Kinross USA"), a wholly-owned subsidiary of Kinross Gold Corporation ("Kinross"). Kinross is a Canadian corporation engaged primarily in gold mining. Kinam and Kinross USA are Nevada corporations.

The original complaint 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).

Discovery and class certification were stayed pending a decision on defendants' motion for judgment on the pleadings on count IV under the Private Securities Litigation Reform Act ("PSLRA"). On September 29, 2003, the Court granted this motion with leave to amend. On November 21, 2003, plaintiffs filed an amended class action complaint (cited herein as "AC" followed by the appropriate paragraph number), which not only amended the prior counts for federal securities fraud but also added a new count for violation of Rules 10b-5(a) and (c) and 13e-4(j)(1)(I) and (iii). The defendants answered on January 9, 2004.

On March 1, 2004, defendants filed a renewed motion for judgment on the pleadings under the PSLRA 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, separately stated, 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 only counts I through IV (corresponding to counts I through III and count V of the original complaint) for trial.

On January 6, 2005, the defendants filed a "motion for judgment" on counts III (best price rule) and IV (Nevada RICO) of the amended complaint. Their motion also requested correction of an error in the Court's Order of November 2. Plaintiffs have countered with a cross-motion for summary judgment in their favor on liability under count III. This brief addresses both the cross-motion and the plaintiffs' opposition to the defendants' motion in its entirety. In addition, the plaintiffs have filed an Affidavit of Michael Dell'Angelo attesting to certain documents received from the Franklin Templeton Variable Insurance Products Trust pursuant to a subpoena duces tecum served on December 20, 2004.

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Statement of Facts[1]

Kinam, then called Amax Gold Inc., issued 1.84 million shares of Preferred in August 1994 for net proceeds of approximately $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 to a conversion price of $8.25 equating to 6.061 common shares per each share of Preferred, 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

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[1] On the defendants' Rule 12(c) motion for judgment on the pleadings on counts III and IV, the facts alleged in the amended complaint must be taken as true and construed in favor of the plaintiffs. However, under the incorporation by reference doctrine (see *infra*, p. 32), the court may also consider the contents of documents referenced in the complaint if no party questions their authenticity. In the following statement of facts, parts 1-3 relate to counts III and IV while parts 4-6 relate to count IV only.

On their cross-motion under Rule 56 for summary judgment on liability under count III, the plaintiffs must show that there is no dispute as to any material fact relevant to this issue. As to this count, the cross-motion is based on the defendants' own documents as well as certain additional documents attached to the Dell'Angelo Affidavit. These undisputed facts and documents are more specifically identified in part I of the argument.

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 .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 eliminating the debt of Amax Gold as promised, Kinross advanced $256 million to Kinam to enable it to pay off an equal amount of outstanding bank debt, and then left this 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 Gold to its former corporate parent, Cyprus Amax Minerals. Rather, Kinross converted this obligation into a non-interest bearing demand loan to Kinam from Kinross USA, a wholly-owned subsidiary of Kinross, also 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 also 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. None of these transactions was registered under § 13(e) of the Exchange Act, 15 U.S.C. § 78m(e), and Rule 13e-4, 17 CFR 240.13e-4, promulgated thereunder, 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 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

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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.

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 another week and mailed to holders of the Preferred an "Amended Offer Document" amending the Offer Document. 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):

> 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. [Emphasis supplied.]

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):

> 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.*** The liquidation of mines and mining equipment is difficult, particularly in a liquidation in which the sale of the assets is made under

distressed circumstances. 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***. [Emphasis supplied.]

During the pendency of the Offer, Kinross common traded mostly in the $1.00 to $1.25 range, giving one share of Preferred 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 under negotiation by as early as March 21, 2002, the date of the Amended Offer Document, which stated (at p. 3): "We [Kinross] 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 indicated 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 indicated value for Kinam would have been just over $745 million. The midpoint of these two indicated values is approximately $621 million.[3] AC, ¶ 96.

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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,

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 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 obvious effort to coerce holders of the Preferred to tender, the Offer Document stated that following completion of the Offer, Kinam intended: (1) to delist the Preferred from the AMEX, thus making it a highly illiquid security with no readily available market price; (2) to 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) to 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) to 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

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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.

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 3223 shares were converted into Kinross common. Accordingly, the Tenderor Class (including Glenbrook) represents approximately 685,422 shares of Preferred and the Holder Class 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 Holder Class with the illiquid (and unmarginable) security that the Offer Document 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 is $50 plus accrued and unpaid dividends in the amount of $17.8125, for a total of $67.8125.

Argument

I. BECAUSE THE PARTIAL EXCHANGE OFFER AND CASH TENDER OFFER VIOLATED SECTION 13(e) AND RULE 13e-4 OF THE EXCHANGE ACT, THE PLAINTIFFS ARE ENTITLED TO RECOVER UNDER THE BEST PRICE RULE.

The Franklin Transaction and the follow-on transactions not only constituted a tender offer in themselves but also were an integral part of the cash tender offer. Either way, the plaintiffs are entitled to recover under the "all holders requirement" and "best price rule" contained in Rule 13e-4, 17 CFR 240.13e-4, promulgated under § 13(e) of the Exchange Act,[4] governing issuer tender offers. Accordingly, not only should the Court deny the defendants' "motion for judgment" on count III asserting this claim, but also the Court should grant summary judgment to the plaintiffs establishing the defendants' liability under this count.[5]

Rule 13e-4 provides in relevant part:

> (f) *Manner of making tender offer.*
>
> (3) If the issuer or affiliate makes a tender offer for less than all of the outstanding equity securities of a class, and if a greater number of securities is

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[4] Section 13(e)(1) provides:

> It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 781 of this title … to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices.

[5] Fed. R. Civ. P. 56 requires entry of summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). *Newton v. Uniwest Financial Corp.*, 802 F. Supp. 346, 352 (D. Nev. 1990).

tendered pursuant thereto than the issuer or affiliate is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata, disregarding fractions, according to the number of securities tendered by each security holder during the period such offer remains open … .

(8) No issuer or affiliate shall make a tender offer unless:

(I) ***The tender offer is open to all security holders of the class of securities subject to the tender offer,*** and

(ii) ***The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.*** [Emphasis supplied.]

(10) Paragraph (f)(8)(ii) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, provided that:

(I) Security holders are afforded equal right to elect among each of the types of consideration offered; and

(ii) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

Section 13(e)(2) defines the term "issuer," making clear that for purposes of the section and the rules thereunder, Kinam, Kinross and Kinross USA are a single issuer:

(2) For the purpose of this subsection, ***a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer***. [Emphasis supplied.]

As the Ninth Circuit noted in *Epstein v. MCA, Inc.*, 50 F.3d 644, 654 (CA9 1995), *rev'd on other grounds, Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996):

But the term "tender offer," as used in the federal securities laws, has never been interpreted to denote a rigid period of time. On the contrary, in order to prevent bidders from circumventing the Williams Act's requirements, Congress, the SEC, and the courts have steadfastly refused to give the term a fixed definition. Instead, we have held that "[t]o serve the purposes of the Williams Act, there is a need for

flexibility in fashioning a definition of a tender offer." *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 950 (9th Cir. 1985).

The related but separate questions of what constitutes a "tender offer" and what transactions should be deemed to occur "during such tender offer" have been addressed in a number of reported cases in addition to the two Ninth Circuit cases cited above.

With respect to determining the existence of a tender offer, the courts, including the Ninth Circuit, frequently apply an eight-factor test first adopted in *Wellman v. Dickinson*, 475 F. Supp. 783, 823-824 (S.D.N.Y. 1979), *aff'd on other grounds*, 682 F.2d 355 (CA2 1982), *cert. denied*, 460 U.S. 1069 (1983). See, *e.g.*, *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 56-57 (CA2 1985) (*Wellman* factors relevant); *Clearfield Bank & Trust Co. v. Omega Financial Corp.*, 65 F. Supp. 2d 325, 338-340 (W.D. Pa. 1999) (*Wellman* factors used as starting point).

On the question of what transactions are subject to the best price rule because they fall within the tender offer period, many courts have adopted substantially the same functional test as the Ninth Circuit did in *Epstein, supra*, 50 F.3d at 656, to determine whether any particular transaction should be deemed "an integral part of the tender offer." See, *e.g., Field v. Trump*, 850 F.2d 938, 943-944 (CA2 1988); *Katt v. Titan Acquistions, Ltd.*, 133 F. Supp. 2d 632, 644 (M.D. Tenn. 2000).

Most of these cases have arisen under § 14(d), 15 U.S.C. § 78n(d), dealing with tender offers by third parties and pursuant to which Rule 14d-10, 17 CFR 240.14d-10, imposes an "all holders requirement" and a "best price rule" expressed in substantially the same language as Rule 13e-4. An exception is *Carter Hawley Hale Stores, Inc.*, *supra*, which involved an issuer tender offer under § 13(e) made without a significant premium to market and in response to a hostile

offer under § 14(d). There the Ninth Circuit held: "The *Wellman* factors seem particularly well suited in determining when an issuer repurchase program ***during a third-party tender offer*** will itself constitute a tender offer." 760 F.2d at 950 (emphasis supplied).

A. The Franklin Transaction Initiated a Continuing Tender Offer.

The present case arises not in the context of anti-takeover evasive action by a target company, but as the result of a parent issuer employing a two-step strategy to try to eliminate a class of preferred equity in a controlled subsidiary. Step one: a partial share exchange offer with three large institutional holders to obtain voting control on all matters requiring a separate class vote of the preferred, and thereby depriving the remaining holders of their right to independent representation on the subsidiary's board when six dividend payments were in arrears. Step two: a coercive and misleading cash tender offer intended to force out the remaining holders. Both steps violated not only § 13(e) and Rule 13e-4 but also the express terms of the Preferred.

"Under the *Wellman* test," as restated by the Ninth Circuit in *Carter Hawley Hale Stores, Inc.*, *supra*, "the existence of a tender offer is determined by examining the following factors" (760 F.2d at 950):

> (1) Active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only for a limited period of time; (7) offeree subjected to pressure to sell his stock; [and (8)] public announcements of purchasing program concerning the target company precede or accompany rapid accumulation of a large amount of target company's securities. [Citation omitted.]
>
> ***Not all factors need to be present to find a tender offer; rather, they provide some guidance as to the traditional indicia of a tender offer.*** [Emphasis supplied; citations omitted.]

Kinross announced the Franklin Transaction in a press release on June 12, 2001, which read in relevant part (dollar amounts in U.S. currency):

> TORONTO, June 12 /PR Newswire/ - Kinross Gold Corporation (TSE-K;NYSE-KGC) and its subsidiary, Kinam Gold Inc. (NYSE-KGC PrB), announced today that an agreement has been reached with the largest holder of the Kinam $3.75 Series B Convertible Preferred Shares to exchange its 800,000 preferred shares ***(plus rights to accrued but unpaid dividends)*** for 21.5 million common shares of Kinross. Based on the closing price of Kinross common shares on the New York Stock Exchange (NYSE) on June 12, 2001 of $0.96 per share, this transaction has a value of $20.6 million. ... Upon the closing of this transaction, expected by June 26, 2001, Kinross will own 43.5% of the 1,840,000 Kinam $3.75 Series B Convertible Preferred Shares outstanding. [Emphasis supplied.]

Six days later, the two follow-on transactions were announced in a press release, which read in relevant part:

> TORONTO, June 18 /PR Newswire/ - Kinross Gold Corporation (TSE-K;NYSE-KGC) and its subsidiary, Kinam Gold Inc. (NYSE-KGC PrB), announced today that two separate agreements have been reached with two holders of the Kinam $3.75 Series B Convertible Preferred Shares to exchange a total of 145,000 preferred shares ***(plus rights to accrued but unpaid dividends)*** for 2,686,492 common shares of Kinross. Based on the closing price of Kinross common shares on the New York Stock Exchange (NYSE) on June 18, 2001 of $0.99 per share, these transactions have a combined value of $2.7 million. ... Upon the closings of these two transactions and the transaction announced on June 12, 2001 Kinross will own 51.4% of the 1,840,000 Kinam $3.75 Series B Convertible Preferred Shares outstanding. [Emphasis supplied.]
>
> Bob Buchan, Chairman and CEO of Kinross stated that "although these two additional transactions further improve Kinross' balance sheet, Kinross has no intention of acquiring more of the preferred shares at this time."

Applying the *Wellman* test to the Franklin Transaction and two follow-on transactions as described in the defendants' own press releases, five factors indicate the existence of a tender offer. First, active and widespread solicitation is evident from the fact that the press release about the Franklin Transaction corralled two additional institutional holders. Second, the

solicitation brought in over 51% of the Preferred, not coincidentally just sufficient to give Kinross control of any separate class vote as long as it held the shares in Kinross USA rather than redeem them. Third, payment of a substantial premium over the market price ran from 131% in the follow-on transactions to 221% for Franklin, the difference being that the more shares held, the higher the premium. Fourth, the Franklin Transaction and two follow-on transactions were effected in a limited time frame of less than one week. And fifth, public announcements preceded or accompanied the rapid accumulation of over 51% of the outstanding Preferred. Of the remaining three Wellman factors, none clearly points in the other direction.

B. To Avoid Violation of the Terms of the Preferred, the Franklin and Follow-On Transactions Should Be Deemed an Issuer Tender Offer.

Section 13(e) and Rule 13e-4 are directed at securing fair and equal treatment of all shareholders when an issuer tenders for its own securities. In the present case, this statutory and regulatory mandate mirrors legal obligations to which the defendants were also subject under the express terms of the Preferred, which called for equal or *pro rata* treatment of all holders with respect to payment of dividends, redemptions by the issuer, and conversion rates.[6] The Franklin Transaction should be regarded as a tender offer because that is the only construction under which Kinross can avoid violating the terms of the Preferred. It is also a result fully consistent with the maxim that equity regards as done that which should have been done. See, *e.g.*, 2 Pomeroy, Equity Jurisprudence (5th ed.), § 364.

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[6] The Preferred was also subject to the provisions of NYSE Rule 311.03 requiring that "all shareholders of a company be given an opportunity to participate on equal terms in any tender offer made which may affect the rights or benefits of such shareholders," and further that a company agree that "it will not select any of its securities listed on the Exchange for redemption otherwise than pro rata or by lot."

The terms of the Preferred are set out in Article 4 of the Kinam's articles of incorporation (the "Charter"), which constitutes a contract between holders of the Preferred and the corporation. "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 (CA5 1981); *Elliott Associates, L.P. v. Avatex Corp.*, 715 A.2d 843, 852-854 (Del. 1998); *In re Sunstates Corp. Shareholder Litigation*, 788 A.2d 530, 533 (Del. Ch. 2001), and cases cited.

1. Under Nevada Law, Kinam, Kinross and Kinross USA Should Be Treated as a Single Entity with respect to the Preferred.

As adopted by the Nevada Supreme Court in *McCleary Cattle Co. v. Sewell*, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957), the alter ego doctrine for piercing the corporate veil and treating its acts as those of its shareholders contains three requirements: (1) the corporation must be influenced and governed by its alter ego; (2) there must be a unity of interest and ownership between the corporation and its alter ego sufficient to make one inseparable from the other; and (3) the facts of the case must be such that adherence to the notion of separate identities would sanction a fraud or promote injustice. See K. P. Bishop. **Nevada Law of Corporations & Business Organizations** (1998 Supp.), s. 6.17[B], and cases discussed.

Use of the alter ego doctrine in Nevada is not limited to Nevada corporations. *McCleary, supra,* applied it to a Washington corporation; in *Plotkin v. National Lead Co.*, 87 Nev. 51, 482 P.2d 323 (1971), the court assumed that it applied to a Wisconsin corporation if the requirements were met. Nor is it limited to vertical relationships, *i.e.*, corporation to controlling shareholder

or subsidiary to parent. Indeed, in *McCleary* the court imposed liability on one corporation for the debts of another where both were under common control.

Any distinction between Kinam, as issuer, and Kinross, its parent company, breaks down in light of the 1998 merger.

As Kinross admitted in the Offer Document (p. 6):

> We currently control the business, management and direction of Kinam. All of the members of the board of directors of Kinam, including the members of the special committee, are directors or officers of Kinross. In addition, all of the executive officers of Kinam are executive officers of Kinross. Kinross pays the salaries of all of the executive officers and does not charge Kinam for the management services provided by our directors and officers.

Indeed, ever since the 1998 merger, Kinam has served as nothing more than a special purpose entity existing at the sufferance and for the convenience of Kinross. Indeed, as discussed more fully in part II.B below (pp. 36-37), the very existence of the Preferred at the subsidiary level results from the unfair and illegal treatment of the Preferred in the 1998 merger. Accordingly, any restriction in the Charter which speaks to the "Corporation" must be read to apply as well to Kinross.

2. The Franklin and Follow-0n Transactions Violated Provisions of the Preferred relating to Dividends, Redemption and Conversion.

Three provisions of the Charter deal directly with the issue of unequal treatment of Preferred shareholders: Article 4 C. (2), relating to payment of dividends; Article 4 C. (4), relating to redemption by the issuer; and Article 4 C. (5), relating to conversion rights.

<u>Dividends:</u> Article 4 C. (2) of the Charter provides in relevant part:

> Dividends paid on shares of Series B Convertible Preferred Stock in an amount less than the total amount of such dividends at the time accumulated and payable

> on such shares shall be allocated pro rata on a share-by-share basis among all such shares at the time outstanding.

This provision was intended to ensure equal treatment of Preferred shareholders in the case of partial distributions. If less than the full dividend amount is to be paid, all Preferred shareholders must share equally in the reduced payments. Small holders are entitled to the same treatment as big institutional holders.

As the emphasized language in the two press releases quoted above shows, all parties to the Franklin and follow-on transactions expressly recognized that part of the consideration involved represented payment on account of cumulated but unpaid dividends. There is generally no right to dividends on preferred shares until they are declared, and 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 Shore & Michigan So. Ry. Co.,* 91 N.Y. 483, 492-493 (1883). *Bates v. The Androscoggin & Kennebec R. R. Co.*, 49 Me. 491, 506 (1860).

Accordingly, the language in these transactions affirming the transfer of rights to cumulated but undeclared and unpaid dividends was both unnecessary and unusual, but nevertheless recognized the reality that part of the premium received by the three institutional investors was on account of unpaid dividends.

Redemption: Article 4 C. (4) (a) of the Charter provides in relevant part:

> In case of the redemption of less than all of the then outstanding Series B Convertible Preferred Stock, the shares of Series B Convertible Preferred Stock to be redeemed shall be redeemed pro rata or by lot or in such other equitable manner as the Board of Directors of the Corporation reasonably may determine. Notwithstanding the foregoing, the Corporation shall not redeem less than all of the Series B Convertible Preferred Stock at any time outstanding until all dividends accrued and in arrears upon all Series B Convertible Preferred Stock … then outstanding shall have been paid for all past dividend periods.

Like the prohibition on unequal distributions, this provision was designed to ensure that small holders are not disadvantaged relative to large holders when limited resources are allocated, in this instance to repurchase outstanding shares. The Franklin and follow-on transactions violated this safeguard and caused exactly the disparate treatment which this provision was intended to prevent.

Conversion: Article 4 C. (5) (a) of the Charter provides in relevant part:

> (a) Right of Conversion. Subject to and upon compliance with the provisions of this Section 5, each share of Series B Convertible Preferred Stock shall, at the option of the holder thereof, be convertible at any time … into that number of fully paid and nonassessable shares of Kinross Stock … obtained by dividing $50.00 by the Conversion Price … in effect at such time and multiplying the result by .8004.

In June 2001, as a result of the 1998 merger, each share of Preferred was convertible into 4.85 shares of Kinross common stock. Yet Franklin was permitted to convert its shares at a substantially better rate: 26.875. Under the formula set forth in the Charter, this change was equivalent to a modification of the Conversion Price to approximately $1.49. Although adversely affecting the relative rights of the shares of Preferred not held by Franklin, this private amendment of the Charter was not authorized by the Preferred voting as a class, as required by Article 4 C. (6) (c) (quoted *infra*, pp. 36-37).

C. The Cash Tender Offer neither Stood Independent of the Partial Exchange Offer nor Cured Any of its Legal Deficiencies.

In support of their motion to dismiss count III, the defendants do not address at all whether the Franklin and follow-on transactions were themselves a tender offer. Rather, improperly characterizing them as merely private transactions in advance of and completely

independent of the Offer, the defendants attempt to bring them within *dictum* from *Epstein, supra,* 50 F.3d at 656:

> To be sure, the fact that a private purchase of stock and a public tender offer are both part of a single plan of acquisition does not, by itself, render the purchase part of a tender offer for the purposes of Rule 14d-10. Rule 14d-10 does not prohibit transactions entered into or effected before, or after, a tender offer -- ***provided that all material terms of the transaction stand independent of the tender offer.*** [Emphasis supplied.]

See Defendants' Memorandum in Support of Motion for Judgment (Docket #86), p.10.

The Offer Document makes clear that the Franklin Transaction was not a one-off private market transaction but just the first step in a plan to acquire all the outstanding Preferred (p. 5):

> We had initially contemplated creating a senior debt instrument to offer in exchange for the Kinam preferred stock and outstanding Kinross convertible debentures. In December 2000, we approached the largest single holder of the Kinam preferred stock, Income Series, a subsidiary of Franklin Custodian Funds Inc., and Franklin Income Securities Fund, a subsidiary of Franklin Templeton Variable Insurance Products Trusts [*sic*] (the "Franklin Funds"), which rejected our proposal to exchange the Kinam preferred stock held by it for a debt instrument. After several months of negotiation, we reached an agreement with the Franklin Funds in June 2001, and shortly thereafter with two other institutional holders, to acquire the shares of Kinam preferred stock held by them in exchange for Kinross common shares. ***As a result of the rejection of the senior debt instrument and the difficulties in structuring an exchange offer or other transaction with the remaining holders of the Kinam preferred stock, we temporarily abandoned our efforts to acquire the remaining Kinam preferred stock***. [Emphasis supplied.]

The documents obtained from Franklin elaborate on the foregoing disclosure in two important respects. First, the proposed offer of a "senior debt instrument" was rejected by Franklin because it declined to give any credence or effect to Kinam's intercompany debt. Dell'Angelo Affidavit, Ex. D. Instead, Franklin offered a counterproposal: an exchange offer to

all holders of the Preferred of a "convertible senior subordinated debenture" with richer terms. *Id.*

Second, in the letter "agreement" dated June 12, 2001, between Kinross and Franklin, the parties expressly recognized that the Franklin Transaction was subject to challenge by other holders of the Preferred. Thus the agreement provided (Dell'Angelo Affidavit, Ex. H): (1) for indemnification of Franklin by Kinross on account of any third party claims (¶¶ 17-19); (2) that notwithstanding its general release of all claims, including derivative claims, Franklin retained the right to seek recourse against Kinross or Kinam "in respect of any claim based upon the holding of the [Preferred] or the transactions contemplated by this Agreement which is brought against [Franklin] by a third party... (¶ 23); and (3) that in the event either Franklin or Kinross "is required by law to return or disgorge" shares of the Preferred or of Kinross common, respectively, the release provided by such party "shall be null and void and shall not apply to preclude the assertion and prosecution of any Released Claims..." (¶¶ 24-25).

Upon receiving notice of the claims asserted in this action as first communicated by letter to Kinross's board, Franklin gave notice to Kinross "of a claim for indemnification" under their agreement. Dell'Angelo Affidavit, Ex. F. Accordingly, far from standing independent of the Franklin Transaction, the Offer quickly brought into play its provisions regarding the assertion by third parties of claims similar to Franklin's with respect to violation of the terms of the Preferred. Indeed, as Franklin's own outside counsel has recognized, not only are the plaintiffs' claims regarding the intercompany debt "the same" as Franklin made, but also Franklin itself is a potential defendant, especially on the breach of fiduciary count. Dell'Angelo Affidavit, Ex. K.

However convenient it may have seemed to Kinross at the time to "temporarily abandon" its efforts to eliminate the Preferred once it had crossed the 51% threshold, Rule 13e-4 does not permit an offeror to act in this manner. Indeed, the rule acts as a direct brake on such self-serving second thoughts. Once an issuer tender offer is commenced, it is subject to the rule, which sets the terms of its completion.

Notwithstanding observance of the procedural formalities required by Rule 13e-4, the Offer cured none of the substantive deficiencies or contractual violations attaching to the Franklin and follow-on transactions. To the contrary, the Offer further violated the uniform consideration requirement by introducing yet another dollar value and by using an unlike type of consideration: cash rather than shares of Kinross common stock.

The defendants' argument that count III should be dismissed as to holders of the Preferred who did not tender to the Offer is without merit. If the Franklin and follow-on transactions constitute a tender offer, the holders are entitled to relief under the "all holders requirement" of Rule 13e-4. If these transactions are integrated into the Offer so as to create a damage remedy under the "best price rule" for holders who tendered, the non-tendering holders are entitled to injunctive relief under the provisions of the Preferred calling for equal treatment of all holders as regards dividends, redemption and conversion.

Finally, citing one unreported district court decision and another pre-dating *Epstein*, the defendants suggest that no right of private action exists under § 13(e) of the Exchange Act. In *Epstein*, 50 F.3d at 649-652, the Ninth Circuit considered this issue at length with respect § 14(d) and concluded, as have both the Second and the Third Circuit, that Congress intended to create a private right of action under that section. The same reasoning applies with equal force to § 13(e).

D. The Cash Tender Offer Was Unfairly Coercive and Breached the Fiduciary Duties Owed by Controlling Shareholders to Minority Shareholders.

In *Foster v. Arata*, 74 Nev. 143, 155, 325 P.2d 759, 765 (1958), the Supreme Court of Nevada held that controlling or dominant stockholders, even if they do not hold a majority of the stock, stand in a fiduciary relationship to the corporation and its other shareholders. While the Nevada court has not had occasion to apply or enlarge upon the decision in *Foster* since, most jurisdictions have been moving toward giving even greater protection to minority shareholders, particularly in closely held corporations.

1. Nevada Would Apply the Developing Law on Shareholder Oppression.

Although at least three separate doctrinal approaches can be identified, in practice they all emphasize concepts of fair dealing and reasonable expectations.

<u>"Compelling Business Purpose."</u> The Ninth Circuit has applied California's "compelling business reason" test to Nevada corporations. See *Shivers v. Amerco*, 670 F.2d 826, 832 & n. (CA9 1982), citing *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93, 108-112, 460 P.2d 464, 471-474 (1969). This test requires management to show "such good faith or compelling business purpose that would render their actions fair under the circumstances" when "either the directors or majority stockholders were engaged in self-dealing, or the actions taken by the directors or majority stockholders had a disproportionate impact on the minority stockholders." *Shivers*, *supra* at 834.

<u>"Entire Fairness."</u> The Delaware Supreme Court in *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710, 711 (Del. 1983), took a different approach:

> When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain.
>
> * * * * *
>
> The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. [Citations omitted.] However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.

In applying the entire fairness doctrine in *Weinberger*, the court found reversible unfairness in two areas: (1) materially false and misleading statements and omissions (457 A.2d at 711-712); and (2) a valuation methodology that failed to include: (a) certain "techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court" (457 A.2d at 713); and (b) the possibility of rescissory damages (457 A.2d at 714).

"Elevated Fiduciary Duties." In *Donahue v. Rodd Electrotype Co. of New England*, 367 Mass. 578, 592-594, 328 N.E.2d 505, 515-516 (1975), the Supreme Judicial Court of Massachusetts held that controlling persons in closely held corporations must meet a standard of "strict good faith" in their dealings with minority holders. The First Circuit has described this standard as one of "elevated fiduciary duties." *A.W. Chesterton Co. v. Chesterton*, 128 F.3d 1, 5-6 (CA1 1997), and cases cited. In *Merola v. Exergen Corp.*, 38 Mass.App.Ct. 462, 469, 648

N.E.2d 1301, 1305 (1995), this Massachusetts standard produced a "reasonable expectations" analysis.[7]

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[7] The reasonable expectations analysis applied in *Merola* is nearly identical to the "reasonable expectations" analysis applied under Canadian law in similar situations. Canadian law protects the "reasonable expectations" of corporate stockholders against conduct that is oppressive, unfairly prejudicial, or unfairly disregards their interests. See D. Peterson, **Shareholder Remedies in Canada** (Issue 50, May 2002), §§ 18.39, 18.40 and 18.101.1; F. H. O'Neal & R. Thompson, **O'Neal's Oppression of Minority Shareholders** (2nd ed.), § 10.13. Similar provisions are now found in the business corporations statutes of many states in the United States, especially with reference to closely held corporations. See F. H. O'Neal & R. Thompson, **O'Neal's Close Corporations** (3rd ed.), §§ 9.27-9.28.

Notably, the court in *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.), applied Canada's reasonable expectations analysis to a case factually similar to the case at bar. There, the wholly-owned Canadian subsidiary of an Australian conglomerate ("Elders") acquired all the common shares of a Canadian brewery company ("Carlings"), but left outstanding two classes of preferred, which carried a fixed dividend and were redeemable at par ($50) upon liquidation or at the option of the company. The merged company first tried to acquire the preferred shares by proposing to amend their terms to require redemption within a short time period at a price above their current market value but below the original redemption value. When this proposal failed to garner the necessary two-thirds vote of the preferred, Elders caused its Australian subsidiary and Carlings to merge in order to make the interest on the acquisition debt tax deductible against the operating profits of the brewery. Holders of the preferred thus became owners of shares in a new Carlings with an additional $400 million of bank debt but no additional assets. Anticipating litigation and to offset the obvious prejudice to the preferred, Elders arranged a "support agreement" under which it guaranteed the merged subsidiary's debt and dividends, and the lending banks agreed to waive recourse against the subsidiary and look only to Elders on the debt. The preferred shareholders then sought relief.

On appeal and reversing the trial judge, the Ontario Divisional Court held (56 D.L.R. (4 th) at 136, 137, 138):

> In the final analysis, the support agreement is only as good as Elders, an Australian company. The preference shareholders did not invest in Elders; they invested in [the new Carlings], or one of its predecessors, which were Canadian brewing companies. . . . The marrying of the debt and the operating revenues was done for the exclusive benefit of Elders, and to the prejudice of the interest of the preference shareholders. . . . But I am satisfied they did something that violated one of the fundamental principles of our company law. They treated [Carlings] as though it was a private company, when it still had other shareholders. They then

2. The Offer Was Wrongfully Coercive and Materially Misleading.

Under Delaware law and consistent with the *Weinberger* rule, tender offers by corporations for their own shares may be held unfairly coercive where: (1) materially false or misleading statements are made to stockholders in connection with the offer; or (2) the terms or circumstances of the offer are wrongfully coercive. *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1056 (Del. Ch. 1987).

In *Eisenberg*, a class action on behalf of preferred shareholders challenging a self-tender offer by the corporation for a preferred issue having terms similar to Kinam's preferred but without an option to convert into common, the court granted a preliminary injunction against the offer, holding that a threat to delist listed shares appears on its face to be wrongfully coercive :

> In this case, however, the defendants have done more than simply acknowledge the possibility of delisting and deregistration; they have told the Preferred stockholders that CMC "*intends to request* delisting of the Shares from the NYSE." It is that disclosure which tips the balance and impels the Court to find that the Offer, even if benignly motivated, operates in an inequitably coercive manner.
>
> CMC's directors are fiduciaries for the Preferred stockholders, whose interests they have a duty to safeguard, consistent with the fiduciary duties owed by those directors to CMC's other shareholders and to CMC itself. Those directors have disclosed that they intend to seek to eliminate a valuable attribute of the Preferred stock, namely, its NYSE listing. That listing is the source of that security's market value, and its elimination will adversely affect the interests of the nontendering Preferred shareholders. On what basis are the defendants, as fiduciaries, entitled to do that?
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> 537 A.2d at 1062 (emphasis in original).

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tried to make amends in a fashion that those other shareholders were not required to accept.

In the present case, not only did the Offer attempt to coerce acceptance with the threat of delisting, but also it materially misrepresented the power of Kinross to effect a squeeze-out of any remaining Preferred shareholders following completion of the Offer. The Offer Document stated in relevant part (pp. 18-19):

> We are seeking to acquire all of the shares of the Kinam preferred stock that we do not currently own through the tender offer. To the extent that not all of such shares are tendered into the offer, we intend to pursue a merger or a recapitalization in which the remaining holders of the Kinam preferred stock would receive $16.00 per share for their shares of Kinam preferred stock. However, we are under no obligation to complete such a merger or recapitalization or to pay $16.00 per share and may decide, subsequent to the completion of the tender offer, not to proceed with the merger or recapitalization or to change the price if we do proceed.
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> * * * * *
>
> If we proceed with a merger subsequent to the tender offer, we will create a newly-formed, wholly-owned subsidiary for the purpose of merging with Kinam. If we obtain sufficient shares of the Kinam preferred stock in the tender offer so that we hold 90% or more of the outstanding preferred stock, we will complete a "short-form" merger under the corporate code of the state of Nevada. This permits us to authorize and complete the merger by action of our board of directors, and the merger would not be subject to, or submitted to, the vote of the shareholders of Kinam.
>
> In the event that we do not hold 90% or more of the Kinam preferred stock, the merger would be required to be approved by the shareholders of Kinam. Approval of the merger would require the affirmative vote of those shares entitled to vote on the proposal. In any such vote, we would hold a majority of the shares entitled to vote on the merger and would vote those shares in favor of the merger. Consequently, the merger would be approved whether or not remaining non-affiliated holders voted for or against the merger.
>
> If we elected to proceed with a recapitalization, we would propose a reverse split of the outstanding preferred stock so that all of the remaining holders of preferred stock, except for us, would be reduced to owning a fraction of a share. We would not issue fractional shares and instead would pay the holders an amount of cash equal to $16.00 per share (on a pre-split basis). Approval of the recapitalization would require the affirmative vote of those shares entitled to vote on the proposal. In any such vote, we would hold a majority of the shares entitled to vote on the

recapitalization and would vote those shares in favor of the recapitalization. Consequently, the recapitalization would be approved whether or not remaining non-affiliated holders voted for or against the recapitalization.

These and similar statements were calculated to coerce acceptance of the Offer. If they did not tender, Preferred shareholders were threatened in the best case with being squeezed out later for $16.00 or less, and in the worst with ownership of an illiquid and worthless security.

These and similar statements were also false and misleading. As already discussed, the Charter provides an explicit mechanism for calling the Preferred: redemption, which must occur at a stated price and in accordance with stated procedures. The Charter does not allow Kinross to choose a cheaper way of compelling redemption, and the alternatives posited by Kinross in the foregoing excerpts would, if attempted, constitute further violations of the Charter and breaches of fiduciary duty.

E. No Factual Dispute Precludes Summary Judgment for the Plaintiffs on Count III.

As the foregoing argument shows, all the material facts necessary to a decision on liability under count III come from the Charter and defendants' own statements, including press releases, documents filed with the SEC, and agreements to which they were parties.[8]

[8] A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. See *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (CA9 1982); *Admiralty Fund v. Jones*, 677 F.2d 1289, 1293 (CA9 1982). The movant must show the absence of a genuine issue of material fact. *Garcia v. Burns*, 787 F. Supp. 948, 949 (D. Nev. 1992). The burden then shifts to the respondent to present evidence that would support a verdict in its favor on every element of its claim. If the respondent's claim appears implausible within the factual context, the respondent must then present more persuasive evidence than would otherwise be necessary to defeat the summary judgment motion. *Garcia*, 787 F.Supp. at 949. Finally, the summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designated to secure the just, speedy and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

As the Court noted in its Order dated November 2, citing *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 986 (CA9 1999), "under the incorporation by reference doctrine, the Court may consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to it." What is more, defendants attached copies of all these documents to their affidavit in support of their original motion for judgment on the pleadings. Accordingly, at least absent some clear identification by the defendants of an incorrect statement of one or more relevant and material facts in the foregoing argument, the Court is in a position to render judgment on liability under count III, leaving the question of damages or appropriate injunctive relief for future determination.

II. EVEN ABSENT PREDICATE ACTS BASED ON VIOLATIONS OF FEDERAL SECURITIES LAW, COUNT IV ADEQUATELY ALLEGES PREDICATE ACTS BASED ON VIOLATIONS OF STATE SECURITIES LAW AND OBTAINING PROPERTY BY FALSE PRETENSES.

Count IV of the amended complaint designates "the multiple violations of the antifraud provisions of the federal securities laws alleged in counts V and VI" as "violations of NRS 90.570 and predicate acts under NRS 207.360." AC, ¶ 137.[9] The predicate acts alleged to

[9] Nevada's anti-racketeering or "baby RICO" statute, NRS 207.350 through 207.520, makes it unlawful "through racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise" or to participate as an employee or otherwise advise or assist in any such activity. NRS 207.400. "Any person who is injured in his business or property by reason of any violation NRS 207.400" may bring a civil action for treble damages and attorney's fees. NRS 207.470. The action "may be commenced at any time within 5 years after the violation occurs or after the injured person sustains the injury, whichever is later." NRS 207.520. The 1998 merger of Kinross and Amax Gold closed on June 1 of that year; this action

1 constitute racketeering activity were related to each other as part of a coordinated scheme,
2 starting in mid-1998 and continuing to the present time, directed at holders of the Preferred,
3 located in Nevada and elsewhere, and designed to compel them ultimately to surrender their
4
5 shares to Kinross at less than fair and full value.

6 In summary, and as discussed in greater detail in parts B through D below (pp. 36-48),
7 the scheme had three main components: (1) Kinross's representation in connection with the 1998
8 merger that "US$335 million of Amax Gold debt will be eliminated" and its subsequent failure
9
10 to deliver on that promise; (2) Kinross's deliberate weakening of Kinam's balance after the
11 merger so as to saddle the Preferred with virtually all of Amax Gold's former debt; and (3)
12 Kinross's misrepresentation of the true value of Kinam in connection with the Offer.

13 Raising a contention that they easily could have included in their prior motions for
14 judgment on the pleadings, defendants now argue that dismissal of counts V and VI for failure to
15
16 meet the PSLRA's heightened pleading requirements carries with it by necessary implication
17 dismissal of the state securities fraud violations alleged as predicate acts in count IV.

18 This Court rejected a similar contention in *In re Stratosphere Corporation Securities*
19 *Litigation*, 1 F. Supp. 2d 1096 (D. Nev. 1998), stating (at 1123):

20
21 > The Underwriters argue that Plaintiffs' claims for violations of Nevada's securities laws, N.R.S. sections 90.570 and 90.660, must be dismissed due to
22 > Plaintiffs' failure to prove a 10(b)-5 claim under the Exchange Act against the Underwriters. In support, the Underwriters cite *Shrivers v. Americo*, 670 F.2d 826
23 > (9th Cir. 1982), which found that Nevada's securities laws are interpreted consistently with Rule 10(b)-5. Id. at 831. ***While this Court agrees that it is***
24 > ***proper to interpret Nevada's securities laws consistently with similar federal law***
25 > ***provisions, this Court cannot conclude that this general rule warrants the***

26

27 was filed on April 26, 2002, less than four years after the merger.
28

> ***imposition of the drastic changes enacted by the PSLRA to Nevada's securities laws.***
>
> * * * * *
>
> However, ***the PSLRA enacted great changes in federal securities laws, both procedurally and substantively. While states are certainly free to adopt similar changes in their own laws, comity weighs against imposition of such changes in the absence of action from state legislatures.*** Therefore, as the basis of this Court's finding that Plaintiffs fail to state a claim under the Exchange Act rests upon the provisions of the PSLRA, particularly the safe harbor provision, this Court does not apply these additional requirements to Plaintiffs' state law claims, and a Motion to Dismiss on this basis is improper. [Emphasis supplied.]

A. Count IV Sufficiently Alleges a Fraudulent Scheme in Violation of both NRS 90.570 (State Securities Fraud) and NRS 205.380 (Obtaining Property by False Pretenses).

Under the Nevada statute, "racketeering activity" is defined as "engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents... ." NRS 207.390. "[T]here is no pattern/continuity requirement as is required under federal law. A state RICO complaint need allege no more than that which is set forth in the Nevada statute." *Siragusa v. Brown*, 114 Nev. 1384, 1399, 971 P.2d 801, 811 (1998).

A "crime related to racketeering" or predicate act includes, *inter alia*, "obtaining possession of money or property valued at $250 or more ... by means of false pretenses" [*i.e.*, violation of NRS 205.380] as well as "[a]ny violation of NRS 90.570" prohibiting fraud, deceit, and materially false or misleading statements or omissions "in connection with the offer to sell, sale, offer to purchase or purchase of a security... ." NRS 207.360. Proof of prior convictions for predicate acts is not a prerequisite to a civil action. *Hale v. Burkhardt*, 104 Nev. 632, 635, 764

P.2d 866, 868 (1988). What is more, the plaintiff "need not allege an injury separate and distinct from the harm caused by the predicate acts themselves." *Id*.

Assuming that the elements of a claim for violation of NRS 90.570 parallel those for a claim under federal Rule10b-5,[10] it is necessary to distinguish between subparagraph (b) of Rule 10b-5 prohibiting misleading statements and omissions, as alleged in count V, and the more general provisions of subparagraphs (a) and (c) prohibiting manipulative schemes or practices which operate as a fraud, as separately alleged in count VI.

A claim brought under Rule 10b-5(b) requires the plaintiff to allege a false statement, but "[t]he first and third subparagraphs are not so restricted." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972). Thus in *SEC v. Zanford*, 535 U.S. 813, 825 (2002), the Court held that where "a complaint describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide, [t]hose breaches were therefore 'in connection with' securities sales within the meaning of § 10(b)."

As recently summarized in *In re Global Crossing, Ltd. Securities Litigation*, 322 F. Supp. 2d 319, 329 (S.D.N.Y. 2004), a claim under Rule 10b-5(a) or (c) must allege: (1) injury; (2) in connection with the purchase or sale of a security; (3) resulting from reliance on a market for securities; (4) controlled or influenced by deceptive or manipulative conduct by the defendant; (5) acting with scienter.

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[10] As in most states that have adopted the Uniform State Securities Code, NRS 90.660 provides a private right of action only to defrauded purchasers of securities, and then only for violations of NRS 90.570(2) relating to material misstatements or omissions. However, whether directed at purchasers or sellers, multiple violations of NRS 90.570, including subparagraphs (1) ("any device, scheme or artifice to defraud") and (3) ("an act, practice or course of business which operates or would operate as a fraud or deceit"), give rise to a private right of action under NRS 207.470.

In addition to securities fraud, count IV also expressly referenced "obtaining possession of money or property ... by false pretenses" as a predicate act. AC, ¶ 134. The offense of obtaining money or property under false pretenses under NRS 205.380 has four elements: (1) a false representation, the concealment of a material fact, or "any other artifice or act calculated to deceive;" (2) made with intent to defraud; (3) to a person who relied thereon in whole or in part; and (4) as a result parted with money or property. *Barron v. State*, 105 Nev. 767, 774, 783 P.2d 444, 449 (1989), and cases cited. *Hale v. Burkhardt*, *supra*, 104 Nev. at 639, 764 P.2d at 869. These elements correspond so closely to those for securities fraud under NRS 90.570 that as a practical matter the same conduct will generally result in violation of both statutes.

Accordingly, count IV should not be dismissed if the facts there alleged or incorporated by reference set forth conduct in violation of NRS 90.570 or NRS 205.380 as predicate acts with sufficient specificity to meet the pleading requirements imposed by state law or federal law prior to passage of the PSLRA, but the heightened pleading requirements of the latter statute are inapplicable.

B. The 1998 Merger Improperly Deprived Amax Gold's Preferred Shareholders of their Seniority relative to its Common Shareholders.

Relying on and misled by Kinross's promise to eliminate Amax Gold's debt, holders of the Preferred did not request the separate class vote on the 1998 merger to which they would have been entitled had an intention to leave all of Amax Gold's debt in Kinam been disclosed, or the possibility of such a development even been suggested.

Article 4 C. (1) of the Charter provides in relevant part:

> All shares of Series B Convertible Preferred Stock shall rank prior, both as to payment of dividends and as to distributions of assets upon liquidation,

> dissolution, or winding up of the Corporation, whether voluntary or involuntary, to all of the Corporation's now or hereafter issued Common Stock.

Article 4 C. (6) (c) of the Charter provides in relevant part:

> Class Voting Rights. So long as the Series B Convertible Preferred Stock is outstanding, the Corporation shall not, without the affirmative vote or consent of the holders of at least 66 2/3 percent of all outstanding shares of Series B Convertible Preferred Stock (unless the vote or consent of a greater percentage is required by applicable law or these Articles of Incorporation, as amended, of the Corporation), voting separately as a class, (I) amend, alter, or repeal (by merger, consolidation, or otherwise) any provision of these Articles of Incorporation, as amended, or the Bylaws of the Corporation, as amended, so as to affect adversely the relative rights, preferences, qualifications, limitations, or restrictions of the Series B Convertible Preferred Stock … .

As a result of the 1998 merger, Amax Gold's common shareholders were elevated to the parent holding company level. However, instead of similarly elevating the Preferred so that its position relative to the common would remain unchanged, the merger left them in place as downstream owners of an equity interest in a debt-laden subsidiary controlled by the parent. Kinross's decision to keep the Amax Gold debt on Kinam's balance sheet rather than to eliminate it resulted in a structural realignment of the rights of the Preferred versus the former common shareholders of Amax Gold, who now as holders of Kinross common became creditors of the Preferred rather than subordinated to it.

Accordingly, the 1998 merger as finally implemented adversely affected the rights of the Preferred relative to the common. However, by failing to hold a class vote of the Preferred shareholders on the merger, Kinross failed to obtain their consent as required under the Charter.

C. By Treating its Investment in Kinam as Debt rather than Equity, Kinross Wrongfully Subordinated the Preferred to its Own Common Shares.

As demonstrated by its subsequent conduct, Kinross's true intention with respect to Amax Gold's debt was to saddle the Preferred with virtually all of it, and thereby grossly to undercapitalize Kinam. The Offer Document described the intercompany indebtedness (p. 7):

> In connection with the 1998 merger, we advanced $255.8 million to Kinam for repayment of Kinam's outstanding third-party bank debt. During the balance of 1998, Kinam repaid $41.6 million of this obligation. In 1999, we advanced an additional $16.6 million to Kinam to permit it to purchase assets related to the True North property in Alaska. An additional $6.7 million was advanced by Kinross in 2000, and approximately $14.9 million in the first nine months of 2001, primarily for True North property development and to repay third-party long term debt obligations of Kinam. Kinam has repaid a portion of the advances, resulting in a balance of $234.8 million owed to us on this obligation as of September, 2001. During the fourth quarter of 2001, this obligation was reduced by an additional $18 million, resulting in a balance of approximately $216.8 million as of December 31, 2000 [*sic*]. ***These advances are non-interest bearing, are due on demand, and have no fixed terms of repayment***. [Emphasis supplied.]

> Pursuant to the 1998 merger, we acquired a demand loan in the principal amount of $92.3 million from Cyprus Amax that was an obligation of Kinam. Again, we have not charged Kinam interest on this loan. Subsequent partial payments reduced this demand loan payable to $73.6 million at December 31, 2000, and it has remained unchanged through December 31, 2001. ***The demand loan is non-interest bearing, due on demand, and does not have any fixed terms of repayment***. [Emphasis supplied.]

The Offer Document failed to disclose that these "advances" constituted the entire investment made by Kinross in Kinam. Of the $255.8 million that Kinross injected into Kinam in connection with the 1998 merger, not one dollar was designated as equity. This decision, in conjunction with a rapid writedown policy, quickly rendered Kinam insolvent. Shareholders' equity declined from $273.8 million at year-end 1997, to $72.1 million at year-end 1998, to a capital deficiency of $47.5 million at year-end 1999, and to a capital deficiency of $104.1 million at year-end 2000.

One purpose behind Kinross's decision to cripple Kinam's balance sheet is revealed in the treatment of cash pulled out of Kinam by Kinross subsequent to August 15, 2000, when it caused Kinam to miss its first dividend payment on the Preferred. In the foregoing excerpts from the Offer Document, Kinross admits to pulling $18 million out of Kinam in the fourth quarter of 2001 alone. This amount would have been more than sufficient to pay all arrearages on the Preferred, which aggregated $10.35 million as of year-end 2001. But by calling it a repayment of an "advance" rather than what it was in economic reality -- a distribution on common equity -- Kinross sought to avoid its legal obligation to pay dividend arrearages on the Preferred before making any distribution on the common, as required by Article 4 C. (2) of the Charter:

> No dividends or other distributions, other than dividends payable solely in shares of Common Stock, shall be paid, or declared and set apart for payment in respect of, and no purchase, redemption, or other acquisition for any consideration shall be made by the Corporation of and no sinking fund or other analogous fund payments shall be made in respect of any shares of Common Stock or other capital stock of the Corporation ranking junior as to dividends or as to liquidation rights to the Series B Convertible Preferred Stock … unless and until all accrued and unpaid dividends on the Series B Convertible Preferred Stock, including the full dividend for the then current dividend period, shall have been paid or declared and set apart for payment and the Corporation is not in default in respect of the optional redemption of any shares of Series B Convertible Preferred Stock.

The Offer Document also disclosed (at p. 13) that the negotiations between Kinross and Franklin had been "extended and acrimonious" and that Franklin had threatened litigation. AC, ¶ 66. It further revealed (at p. 29) that in early March 2001 Kinross "agreed to extend any limitation period within which the Franklin Funds may have been permitted to assert a claim against us, Kinam, or any related parties arising from their ownership of [the Preferred]." Although the Offer Document did not identify or describe the nature of the legal claims or violations of law asserted by Franklin, the documents obtained from Franklin reveal that its

complaints, which included the threat of derivative claims on behalf of Kinam against Kinross, were directed primarily at the intercompany debt which Kinross had used effectively to cripple the Preferred notwithstanding its representation in connection with the 1998 merger that this debt would be eliminated. Dell'Angelo Affidavit, Exs. A, B, C and F, esp. pp. 13-15 of draft complaint.

Nor did the Offer Document provide any details about the terms of the extension of the limitation period or whether it ran to derivative or class claims. However, the Extension of the Kinross Tolling Agreement expressly acknowledged that Franklin has "raised concerns regarding the propriety of the 1998 merger ... and the enforceability of certain debt allegedly due from Kinam to Kinross Canada and Kinross USA (as well as payments thereon by Kinam to Kinross)." Dell'Angelo Affidavit, Ex. G, p. 1. The extension also expressly acknowledged that the Franklin shareholders, "individually and in their representative capacities, have stated they have or may make certain claims (including potential derivative claims by or on behalf of Kinam)" against Kinross and its representatives "arising out of or otherwise related to [these transactions]." *Id*.

In short, what Kinross did in the Franklin Transaction was to buy off Franklin so that it would not assert claims that in fact and law belonged to all holders of the Preferred. The size of the premium paid to Franklin by Kinross demonstrates that it attributed substantial merit to the threatened claims.

Noting that plaintiffs purchased their shares of the Preferred after the 1998 merger and subsequent disclosure of Kinross's decision to leave Amax Gold's debt on Kinam's balance sheet, defendants assert (memo at p. 6) that plaintiffs "could not have suffered any 'concrete loss'

from ... purported misstatements about the debt" and "simply want an unwarranted windfall at Defendants' expense."

This argument misunderstands the contractual nature of preferred shares. Subsequent purchasers of preferred shares succeed to all the contract rights of the original purchasers. The dates on which the subsequent purchasers obtained their shares are not relevant for purposes of determining their contract rights in litigation. *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.).[11] Accordingly, Kinross cannot immunize itself from liability for a breach of the terms of the Preferred merely by disclosing the breach to subsequent purchasers.

D. The Offer Document Knowingly and Materially Misrepresented Kinam's True Value.

Citing the intercompany debt, the fairness opinion in the Offer Document asserted 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

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[11] As that court put it (56 D.L.R. (4 th) at 136-137):

> I am unimpressed with the argument that no relief should be given in respect of shares purchased after the intention to amalgamate became known. The submission was that, in respect of those shares, the purchasers "bought into the oppression". If relief is given to anyone in these proceedings, it will mean that the applicant correctly appreciated the legal rights of the preference shareholders. If the applicant and others could not take advantage of those rights with respect to the shares they were bold enough to purchase while those rights were still in dispute, it would mean that less sanguine owners would be deprived of the advantage of selling their shares during the pending litigation at prices reflecting the purchasers' estimate of the chances of success. Any such rule would place a new and, in my view, unwarranted restriction on the price of shares that are traded on a stock exchange.

company's liabilities and preferred shares liquidation value." This statement was embellished in the Amended Offer Document (at pp. 8-9; AC, ¶ 98):

> 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.*** ... 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***. [Emphasis supplied.]

Being "highly experienced in the valuation of gold mining companies" (AC, ¶ 101), defendants well-knew that these statements were materially false and misleading. The standard valuation methodologies customary in the gold mining industry both in 1998 and today place heavy emphasis on two fundamental metrics: price (or market capitalization) per reserve ounce of gold and price (or market capitalization) per ounce of annual production." AC, ¶ 33. See also AC, ¶ 73.

1. Defendants' Experience and Expertise in Mergers and Acquisitions in the Gold Mining Industry.

Plaintiffs' allegations regarding the defendants' experience and expertise are based on three principal sources: (a) the corporate history of Kinross as described by one of its vice presidents in a March 2000 presentation (posted at its website), which notes that from its inception in 1993 as the merger of three companies, the company's growth over the next seven years included "over a dozen significant transactions," of which the 1998 merger with Amax Gold was by far the most important (AC, ¶ 101); (b) the resume of defendant Buchan, the

company's CEO since its founding, whose qualifications include university level degrees in mining engineering and mineral economics, four years as a mining analyst for a Canadian brokerage firm, and another six years working for an institutional boutique where he specialized in "mining-related research and financing" (AC, ¶ 102); and (c) the actual valuation opinions rendered in connection with the two major mergers that serve as the bookend transactions to the Offer: the 1998 merger of Kinross and Amax Gold and the 2003 merger of Kinross, Echo Bay and TVX.

Indeed, the March 2000 presentation underscores that Kinross's approach to acquisitions employed "relative analysis" to do deals that were "accretive with regard to the relevant measures of the day," and thus the principal focus was the underlying value of the target's gold mining assets: "The most likely candidates [for acquisition] are companies with strong assets and weak balance sheets because weak balance sheets can be fixed but weak assets by definition can't." AC, ¶ 103.

2. Comparables-Based Valuation of Kinam's Assets in the 1998 Kinross/Amax Gold Merger.

The Management Proxy Circular (the "Circular" reproduced as Exhibit 3 to the Supporting Documents to Memorandum in Support of Defendants' [Original] Motion for Judgment on the Pleadings) (Docket #41), contained (at pp. 30-42) detailed summaries of the three separate fairness opinions delivered, respectively, to Kinross by Merrill, Lynch, Pierce, Fenner & Smith Inc. (Circular, Ex. D), to Amax Gold by Salomon Smith Barney (Circular, Ex. E), and to the Special Committee of the Board of Directors of Amax Gold by SBC Warburg Dillon Read Inc. (Circular, Ex. F). AC, ¶ 32. As described by Kinross in the Circular and in accordance with standard valuation methodologies regularly employed in the gold mining

industry, all three of these fairness opinions in valuing Kinam's assets placed heavy emphasis on the two fundamental metrics of price (or market capitalization) per reserve ounce of gold and price (or market capitalization) per ounce of annual gold production. AC, ¶¶ 33, 35-36.

Thus Merrill Lynch compared the price paid for Amax Gold to prices paid in comparable transactions, stating (Circular, p. 32): "The multiples of the stated gold reserves prior to the acquisition ranged from $122 to $351 [per ounce], compared to an implied transaction multiple of $119 for Amax. The multiples of stated gold reserves plus resources prior to the acquisition announcement ranged from $73 to $274, compared to an implied transaction multiple of $60 for Amax." Similarly, both the Salomon and the SBC Warburg opinions also provided figures comparing the consideration in Kinross/Amax Gold merger with prior comparable transactions in the industry based on price per reserve ounce and price per ounce of annual production. See Circular, p. 36 ("Transaction Analysis"), p. 37 ("Analysis of Certain Publicly Traded Companies"); and p. 41 ("Analysis of Selected Publicly Traded Comparable Companies").

3. Comparables-Based Valuation of Kinam's Assets in the Kinross/Echo Bay/TVX Merger.

The three-way merger among Kinross, Echo Bay and TVX completed in 2003 began to take shape in January and February 2002. Negotiations were well under way by March 21, 2002, the date of the Amended Offer Document, which stated (at p. 3): "We [Kinross] do not currently intend to sell our interest in Kinam in the foreseeable future." AC, ¶¶ 68(A), 81-83. In fact, rather than sell Kinam's assets, Kinross was planning 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.

The Management Information Circular dated December 20, 2002, issued by Kinross in connection with the proposed merger (the "Echo Bay/TVX Merger Circular"), Kinross represented (at p. A-10) that it "is the owner of the Fort Knox mine," which not only was the most significant asset of the "old" Kinross but also would be the most significant asset of the "new" Kinross. AC, ¶¶ 85-87. Nowhere did the Echo Bay/TVX Merger Circular reveal that Kinam owns this key asset, or that the Preferred are stakeholders in Kinam in addition to Kinross. AC, ¶ 88. What is more, Kinross's year-end 2002 financial reports showed that 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. AC, ¶ 84.

The Kinross/Echo Bay/TVX merger was submitted to the shareholders of all three companies for approval in December 2002. Kinross, which owned 10.6% of Echo Bay's common shares, and Newmont Mining Corp., which owned 43.3%, had both entered into lock-up agreements requiring them to vote in favor of the merger. AC, ¶ 91. But Echo Bay's public shareholders were free to vote for or against, and Echo Bay issued a proxy statement (the "Echo Bay Proxy Statement") dated December 20, 2002, which included a detailed summary of the fairness opinion (the "Echo Bay Fairness Opinion") prepared by its investment bankers, National Bank Financial. AC, ¶¶ 91-92.

In valuing Kinross, the Echo Bay Fairness Opinion necessarily dealt largely with the assets owned by Kinam, most notably the Fort Knox mine, and National Bank Financial used substantially the same methodologies that Merrill Lynch, Salomon and SBC Warburg had used in rendering their fairness opinions on the Kinross/Amax Gold merger in 1998. AC, ¶ 93.

In its analysis of comparable transactions, the Echo Bay Fairness Opinion gave the enterprise value per reserve ounce for companies in Echo Bay's peer group as a range, with $120 at the low end and $150 at the high end. In the comparable trading statistics analysis, the peer group enterprise value per reserve ounce had a somewhat higher range, with $160 at the low end and $180 at the high end. AC, ¶ 95.

4. Fraudulent Intent as Shown by Absence of Comparables-Based Valuation in connection with the Offer.

Kinross's mergers with both Amax Gold and later with Echo Bay and TVX were transactions negotiated at arm's length that collectively produced four fairness opinions addressing the value of Kinam's gold mining assets. Each opinion placed heavy emphasis on the value of Kinam's in ground gold reserves, measuring the price per ounce being paid for them in the transaction at issue with the prices paid for similar reserves in recent comparable transactions in the gold mining industry.

The fairness opinion issued by Raymond James in connection with the Offer deviated from this accepted methodology. It made no effort whatsoever to put any fair market value on Kinam's gold reserves, let alone provide any comparables. Instead, on the basis of a faulty discounted cash flow analysis using both a higher discount rate and lower gold prices than normally employed for this purpose in the gold mining industry (AC, ¶ 75), Raymond James arrived at the preposterous conclusion that Kinam's assets were insufficient to cover its liabilities.

The Offer, of course, was not an arm's length negotiated transaction. AC, ¶ 64. As admitted in the Offer Document (at pp. 10, 13), Kinross made no effort to negotiate the terms of the Offer, to discuss its fairness with holders of the Preferred, or to arrange for them to obtain an

independent appraisal of the fair market value of Kinam's assets from a qualified investment bank. Instead, Kinross stood (or hid) behind Raymond James (AC, ¶ 70), stating in the Offer Document (at p. 2): "Based on the fairness opinion of Raymond James and the special committee's consideration of a number of other factors, ***the special committee believes that the offer is fair to the non-affiliated holders.***" [Emphasis supplied.]

Thus, at one and the same time, Kinross was attempting: (1) through the Offer to the Preferred, to purchase full control of Kinam's assets based on a fairness opinion assigning a derisory value to them; and (b) through merger negotiations with Echo Bay and TVX, to obtain maximum value for Kinam's assets by vending them into the "new" Kinross at a price per ounce for Kinam's gold reserves consistent with the prices paid in comparable transactions in the gold mining industry.

Plaintiffs do not know what position Kinross took on the value of Kinam's gold reserves in its early negotiations with Echo Bay and TVX. However, common sense and normal business practice dictate that Echo Bay did not offer to pay more for these reserves in the merger than Kinross was asking. Thus there is no reason to believe that the fairness opinion finally received by Echo Bay from National Bank Financial reflected a higher range of values for Kinam's gold reserves than those originally sought by Kinross, and every reason to believe that from the outset of its merger negotiations with Echo Bay and TVX, Kinross valued Kinam's gold reserves at least as highly as National Bank Financial did in its fairness opinion to Echo Bay.

5. Motive for Fraud Arising from Pending Merger with Echo Bay and TVX.

Particularly in light of Kinam's ownership of Kinross's most important gold mining assets, the Preferred constituted an obvious impediment in Kinross's capital structure as it

prepared to negotiate the merger with Echo Bay and TVX. AC, ¶85. What is more, Kinross was under heavy pressure to complete the merger as quickly as possible. AC, ¶ 90. In an interview published in the December 23, 2002, edition of *The Wall Street Transcript*, Defendant Buchan stated (*id.*):

> Their [Echo Bay's and TVX's] recapitalizations occurred in 2001 and early 2002 and that allowed us to be able to look at acquiring those two companies in this merger without taking on a level of financial stress that would have made it untenable. So it could not have occurred before 2002. If you look forward three years and you do in fact see a secular recovery in the [gold] market, you couldn't do it. The market would be more supportive of each of those operations independently because of the leverage that would have existed in the recapitalized company. So as inevitably happened the timing of the merger is a matter of circumstance and opportunity. So I don't believe this transaction could have occurred 12 months ago and I don't think it would be doable 12 months from now.

Accordingly, to try to effect the elimination of the Preferred before the exchange ratio was set and the other details of the merger settled, Kinross resorted to various coercive tactics designed to force acceptance of the Offer, including threatening to delist the Preferred after the Offer closed, to terminate registration of the Preferred under the Exchange Act, and if possible to force out by merger, recapitalization or otherwise any remaining holders of the Preferred at a price at or below the Offer price. AC, ¶¶ 65, 89.

And then, after failing through the Offer to acquire the 90% or more of the Preferred necessary to squeeze out the remaining holders (AC, ¶ 78), Kinross nevertheless represented in the Echo Bay/TVX Merger Circular that it held full ownership of Kinam's assets, including its flagship Fort Knox mine. AC, ¶¶ 86-88.

III. EXCEPT UPON FULL RECONSIDERATION, THE COURT SHOULD NOT REVISIT ITS ORDER ON COUNTS V, VI AND VII.

Defendants have also requested the Court "to correct the basis on which it dismissed Count V as to [the Tenderor Class]." As the defendants point out, the Court's November 2 Order "dismissed Count V of the Amended Complaint as to all Plaintiffs on the basis that they did not tender any shares of the [Preferred] ... ." In fact, of course, the Tenderor Class did tender to the Offer, and the defendants are correct in noting the Court's error.

Ordinarily plaintiffs would have no objection to the correction of an obvious and inadvertent error. However, the mistake about which defendants complain does not appear of this genre. Rather, in the plaintiffs' view, it is but one of several fundamental misconceptions about the case reflected in the Order. Others include: (1) the failure to discuss, or even to mention, the plaintiffs' detailed allegations regarding the lack of comparables and other defects in the fairness opinion by Raymond James, or to consider the defendants' use of Amax Gold's former debt to cripple the Preferred, all as part of a scheme to force out the Preferred shareholders at an unfair price; and (2) the application to count VI brought under Rule 10b-5(a) and (c) of pleadings requirements designed for cases brought under Rule 10b-5(b), such as those set forth in *In re Guess?, Inc. Securities Litigation*, 174 F. Supp. 2d 1067, 1079-80 (C.D. Cal. 2001).

Accordingly, plaintiffs respectfully suggest that selective correction or modification of the Order as requested by defendants is neither appropriate nor likely to insulate it against reversal in any future appeal, and that the Order should not be revised except upon a full reconsideration of the matters that were therein at issue.

Conclusion

For the foregoing reasons, the Court should enter judgment for the plaintiffs on liability under count III, deny the defendants' motion for judgment on count IV, and refrain from correction or modification of its Order dated November 2, 2004, except upon full reconsideration.

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