IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWELVE

IN RE KINDER MORGAN, INC.
SHAREHOLDERS LITIGATION

Consol. Case No. 06 C 801

MEMORANDUM DECISION AND ORDER

This action comes before the Court on the Motion to Preclude the Testimony and Strike the Report of John C. Coffee, Jr., filed December 23, 2009, by Defendants Richard Kinder, Park Shaper, Michael Morgan, William Morgan, Fayez Sarofim, Steven Kean, Kimberly Dang, David Kinder, James Street, Joseph Listengart and Knight Holdco, LLC. On the same date, Sponsor Defendants Goldman Sachs Group, Inc., GS Global Infrastructure Partners I, L. P., GS Capital Partners V Institutional, L. P., GS Capital Partners V Fund, L. P., AIG Financial Products Corp., AIG Knight LLC, Carlyle Partners IX, L. P., and Carlyle/Riverstone Global Energy and Power Fund III, L. P., also filed a Motion to Preclude the Testimony and Strike the Report of John C. Coffee, Jr. On January 12, 2010, the Plaintiffs filed a Memorandum of Law in Opposition to Defendants' Motion to Preclude the Testimony and Strike the Report of John C. Coffee, Jr. The Defendants filed replies to the Plaintiffs' Memorandum in Opposition on January 12, 2010. Thus, because the issues presented have been fully briefed and counsel for the parties have advised the Court that no oral arguments are necessary, the Motion to Preclude the Testimony and Strike the Report of John C. Coffee, Jr., is deemed to be submitted for ruling.

I. SUMMARY OF FACTS

This consolidated action arises out of a private offer to purchase the stock held by the public shareholders of Kinder Morgan, Inc. (hereafter "KMI"). KMI is a Kansas corporation headquartered in Houston, Texas. The private offer was initially made by a group led by Richard D. Kinder, the former Chairman and Chief Executive Officer of KMI, on May 28, 2006. In addition to Richard Kinder, the buyout group included William Morgan, a co-founder of KMI; Michael Morgan and Fayez Sarofim, who served as KMI board members; and, several private equity sponsors.

It appears from a review of the record that the possibility of taking the corporation private was first raised by Richard Kinder with the Board of Directors of KMI during a special meeting held May 13, 2006. Another special meeting of the Board of Directors was held by telephone May 28, 2006. It was during this meeting that Mr. Kinder presented a letter to the Board of Directors announcing the offer by the management-led group to take the corporation private at a price of $100 per share.

Following the telephone conference held May 28, 2006, the Board of Directors of KMI appointed a Special Committee of independent directors to investigate the proposed management-led buyout. Stewart Bliss, Edward Austin and Ted Gardner were appointed to serve on the Special Committee. Mr. Bliss was selected to Chair the Special Committee. From a review of the record, it does not appear that any members of the management-led buyout team participated in the Board of Director's appointment of the members of the Special Committee.

Subsequently, the Special Committee retained the Skadden Arps law firm to serve as its legal advisors. In addition, the Special Committee retained both Morgan Stanley and The Blackstone Group to serve as its financial advisors. During the next several months, the Special Committee obtained information and negotiated several agreements with the management-led buyout team, including the termination of certain exclusivity agreements that evidently had been required by Goldman Sachs. It appears from a review of the record that the Special Committee also contacted several other potential purchasers to determine whether they had an interest in acquiring KMI.

On June 1, 2006, shortly after the initial offer was presented by the management-led buyout team to the KMI Board of Directors, the first of seven (7) lawsuits arising out of the proposal to take the corporation private was filed in the District Court of Shawnee County, Kansas. Over the course of the next several days, multiple lawsuits were filed in Kansas and Texas. The cases filed in Shawnee County were consolidated into the present action June 23, 2006. Ultimately, this became the only Kansas action to go forward. However, there was also an ongoing parallel action in the District Court of Harris County, Texas.

On July 17, 2006, the Special Committee advised the management-led buyout group that the offer of $100 per share did not represent a "compelling value" to the shareholders of KMI. It appears from a review of the record that at one point during the relevant time period, representatives of the buyout group asked whether an offer of $103.55 per share would be acceptable. In response, the Special Committee informed them that an offer in that amount would not be approved.

On August 1, 2006, after considering several well-qualified attorneys, this Court appointed Diane A. Nygaard and Pamela S. Tikellis to serve as Interim Lead Counsel for the Plaintiffs in this consolidated action. The Court selected Ms. Nygaard and Ms. Tikellis based on their "unique blend of expertise in Kansas and Delaware law which should be beneficial in protecting the legal rights of the purported class." *In re Kinder Morgan, Inc. Shareholders Litigation*, 2006 WL 2271243 *3 (Kan. Dist. Ct. – August 1, 2006). In the parallel Texas action, the Honorable Martha Hill Jamison appointed Randall Baron to serve as Interim Lead Counsel for the Plaintiffs.

On August 14, 2006, the Special Committee advised the independent members of the Board of Directors of KMI that it was unlikely an agreement could be reached. The Special Committee communicated this information to representatives of the management-led buyout group August 15, 2006. In response, Richard Kinder requested more time to confer with the other members of the buyout group. A few days later, the Special Committee and the buyout group agreed upon a price of $107.50 per share.

On August 24, 2006, Articles of Incorporation were filed with the Kansas Secretary of State for Knight Acquisition Co. On August 28, 2006, it was publically announced that the Board of Directors of KMI had accepted the offer of $107.50 per share. According to the "Agreement and Plan of Merger" executed on that date, Knight Acquisition Co. was to be used as a vehicle to assist in completion of the transactions necessary to take KMI private. Knight Acquisition Co. was ultimately to be merged into KMI, with KMI continuing as a "wholly owned subsidiary" of Knight Holdco LLC, a Delaware limited liability company.

Moreover, the "Agreement and Plan of Merger" provided that the proposed transaction would "become effective at such time as the Certificate of Merger is duly filed with the Secretary of State of the State of Kansas. . . ."

Throughout the summer and fall of 2006, this Court worked closely with the Honorable Martha Hill Jamison to coordinate this action with a parallel action pending in the District Court of Harris County, Texas. To reduce duplication of effort and to eliminate the possibility of inconsistent rulings on pretrial issues, both this Court and Judge Jamison jointly appointed the Honorable Joseph T. Walsh, a retired Justice of the Delaware Supreme Court, to serve as Special Master. Justice Walsh was appointed by this Court on November 21, 2006, and he faithfully served as Special Master until June 22, 2009. During his tenure as Special Master, Justice Walsh made several joint recommendations that were adopted by both this Court and Judge Jamison.

The first issue addressed by Justice Walsh was whether a preliminary injunction should be entered to prevent KMI from holding a special meeting of its shareholders set for December 19, 2006, for the purpose of voting on the proposed management-led buyout. After receiving briefs from the parties addressing this issue, Justice Walsh heard oral arguments in New York City December 14, 2006. He issued a Report and Recommendations of Special Master dated December 18, 2006. In his Report, Justice Walsh concluded that after "balancing the equities," the Plaintiffs were "not entitled to injunctive relief to prevent the holding of the special meeting of KMI shareholders scheduled for December 19, 2006."

Both this Court and Judge Jamison adopted Justice Walsh's recommendations, and a special meeting of the shareholders of KMI went forward as scheduled December 19, 2006. At the special meeting, the proposed management-led buyout was approved by a 73 percent majority of the outstanding shares. On May 30, 2007, the going-private transaction closed. As a result, Knight Acquisition Co. was merged out of existence, and KMI continued as the surviving legal entity.

Meanwhile, the parties continued to litigate in this Court and in the District Court of Harris County, Texas. After completion of significant discovery, the issue of class certification was presented to Justice Walsh. On September 11, 2008, the Special Master heard oral arguments on this issue in New York City. Justice Walsh used this opportunity to encourage the parties to select one jurisdiction in which to go forward. Thereafter, the parties agreed upon Kansas as the venue in which to proceed, and Judge Jamison entered an agreed order staying the Texas action November 4, 2008.

In a Report and Recommendation of Special Master dated January 9, 2009, Justice Walsh found "the remaining viable causes of action [asserted in this action] consist of claims for breaches of the fiduciary duty of loyalty by the Inside Members of the Buyout Group, whose conduct was aided and abetted by the various investment entities who provided funding for, and acquired equity interests in, the merger." According to Justice Walsh, "[u]ltimately, the nub of Plaintiffs' claim is that all remaining Defendants promoted a merger price that was unfair to KMI's shareholders." Thus, after considering the factors set forth in K.S.A. 60-223(a) and Kansas case law, Justice Walsh concluded that "permitting this

litigation to proceed in the form of a class action offers clear advantages to all parties over a fragmented individual approach."

In his Report, Justice Walsh recommended that a class be "certified under K.S.A. 60-223(a) and 60-233(b)(3) with J. Robert Wilson and Douglas Geiger designated as class representatives." On February 20, 2009, this Court entered an Agreed Order in which it certified a class defined as follows:

> "All holders of Kinder Morgan, Inc. common stock, during the period of August 28, 2006, through May 30, 2007, and their transferees, successors and assigns. Excluded from the Class are defendants, members of their immediate families or trusts for the benefit of defendants or their immediate family members, and any majority-owned affiliates of any defendant."

The Agreed Order also appointed Mr. Wilson and Dr. Geiger as class representatives. Furthermore, consistent with Kansas law, the class was certified "without prejudice to Defendants' right to seek decertification of the class or modification of the class definition."

On April 30, 2009, a Status Conference was held by this Court in Topeka, Kansas. One or more attorneys for each party appeared at the conference in person. As reflected in the 85-page Transcript of Status Conference, as well as in the Case Management Order entered June 19, 2009, a number of significant issues were addressed. Of particular relevance to the current motion was the discussion regarding expert witnesses found on pages 17-25 of the Transcript of the Status Conference. As the record reflects, counsel for the Plaintiffs represented to the Court that they anticipated designating an expert on "corporate governance" who would testify regarding "what happens in a boardroom, how directors then

work amongst each other and what kind of considerations that the directors are supposed to put in" when considering a management-led buyout proposal. Transcript of Status Conference, p. 26, lines 17 to 21.

At the Status Conference, the justification given for the Plaintiffs' desire to designate a "corporate governance" expert was that "most of the people on this planet haven't had the opportunity to sit on a public board and understand what directors do . . . I think that's generally the idea of a corporate governance expert, particularly in a jury trial." Transcript of Status Conference, p. 26, line 24 to p. 27, line 4. The Court specifically advised the parties that there would likely be "limitations" placed on any "corporate governance" experts who may be designated "because we don't want to get into having experts telling us what the law is." In response, counsel for the Plaintiffs stated, "I agree." Transcript of Status Conference at p. 27, lines 15-19. The Plaintiffs' counsel also represented to the Court that if a "corporate governance" expert were designated in this action, he or she would "not really [be] there to tell the Court what the law is . . . ultimately the Court is going to have to give the jury the jury instructions . . . if there's [a] presumption, the Court is going to have to do that." Transcript of Status Conference, p. 26, lines 5 to 10.

The Plaintiffs have now designated John C. Coffee, Jr., a well-known law professor at Columbia University Law School, as their "corporate governance" expert. At Columbia Law School, Professor Coffee has taught various courses on corporate and securities law, class actions, complex litigation, criminal law and white collar crime. Professor Coffee is

also the Director of Columbia Law School's Center of Corporate Governance. For many years, Professor Coffee has written and spoken regarding corporate and securities law throughout the United States as well as in several foreign nations. In this action, Professor Coffee has written a 64-page Expert Report dated December 3, 2009.

II. CONTENTIONS OF THE PARTIES

In support of their Motions to Preclude the Testimony and Strike the Report of John C. Coffee, Jr., the Defendants contend that the Report "not only invades this Court's exclusive responsibility to decide the law, it occupies the entire space." The Defendants also contend that, assuming for the purpose of argument this case is triable to a jury, the Report "invades the province of the jury as well." Furthermore, the Defendants contend that "Professor Coffee even goes so far as to pass on the credibility of witnesses. . . ."

The Plaintiffs assert that Professor Coffee has been designated as an expert "to assist the jury in understanding the conduct of KMI corporate fiduciaries" in the management-led buyout and that the discussion of Delaware and Kansas law in his Report is merely intended "to explain how Courts have applied fiduciary duty principles and practices as a rubric to assess the conduct of fiduciaries in specific factual circumstances." The Plaintiffs recognize that "[t]his Court is empowered to strike selectively any portions [of the Report] or preclude testimony as to those portions." However, they request that Professor Coffee "be permitted to testify to all areas other than such limited areas as determined by this Court."

In Reply, the Defendants contend "[t]here is not a single section in the Coffee Report that even purports to describe what directors typically do in the boardroom in response to a takeover proposal." They also argue that "Professor Coffee offers legal conclusion after legal conclusion, based on his analysis of the case law and applicable statutes . . . purporting to decide the critical threshold legal issue, the applicable standard of review: '*i. e.,* whether the business judgment rule applies.'" Thus, the Defendants request that the Court decline the "invitation to parse through the Report to cherry-pick any admissible passages."

III. LEGAL ANALYSIS AND CONCLUSIONS

A. Admissibility of Expert Testimony in Kansas.

"The . . . admissibility of expert testimony are matters within the broad discretion of the trial court. . . ." *Southwind Exploration, LLC v. Street Abstract Company, Inc.,* 42 Kan. App. 2d 122, 129, 209 P.3d 728 (2009). See also *Marshall v. Mayflower Transit, Inc.* 249 Kan. 620, 626, 822 P.2d 591 (1991) ("Obviously, the trial court has considerable discretion in determining whether to permit expert testimony."). Although Kansas courts continue to utilize the *Frye* test, it "does not apply to pure opinion testimony." *Kuhn v. Sandoz Pharmaceuticals Corp.,* 270 Kan. 443, 457, 14 P.3d 1170 (2000). Rather, in cases not involving scientific principles or tests, "[t]he basis for the admission of expert testimony is *necessity*, arising out of the particular circumstances of the case." (Emphasis supplied.) *State v. Cooperwood,* 282 Kan. 572, 578, 147 P.3d 125 (2006) (quoting *Falls v. Scott,* 249 Kan. 54, 63, 815 P.2d 1104 (1991)).

"'Expert opinion testimony is admissible if it will be of special help to the jury on technical subjects [with] which the jury is not familiar or if such testimony [will] assist the jury in arriving at a reasonable factual conclusion from the evidence.'" 282 Kan. at 578, 147 P.3d 125 (2006) (quoting *Sterba v. Jay,* 249 Kan. 270, 282, 816 P.2d 379 (1991)). However, even if the opinion of an expert may be helpful to a jury, "[a] district judge under K.S.A. 60-456(b) controls the admissibility of expert opinion evidence that would unduly prejudice or mislead a jury or confuse the question for resolution." *Kuhn v. Sandoz Pharmaceuticals Corp.,* 270 Kan. 443, 461, 14 P.3d 1170 (2000). Moreover, neither expert nor lay witnesses may "express an opinion on the credibility of another witness; such evidence must be disallowed as a matter of law." *State v. Wells,* ____ Kan. ____, 221 P.3d 561, 564, 2009 WL 4725741 *1, Syl. 7 (Dec. 11, 2009). See also *State v. Elnicki,* 279 Kan. 47, 53-54, 105 P.3d 1222 (2005).

"Testimony in the form of opinions or inferences otherwise admissible is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact." *Falls v. Scott,* 249 Kan. at 63. However, it is not appropriate for an expert to testify regarding legal conclusions in a jury trial. See *Glassman v. Costello,* 267 Kan. 509, 528, 986 P.2d 1050 (1999). "[I]t is the sole province of the court to decide questions of law as distinguished from questions of fact." 267 Kan. at 528 (quoting *Hunter v. Board,* 186 Kan. 415, 419, 350 P.2d 805 (1960)). Permitting witnesses to testify regarding "legal standards to the jury amounts to a usurpation of the court's responsibility to determine the applicable

law and to instruct the jury as to that law." 267 Kan. at 528 (quoting 31A Am. Jur. 2d *Expert and Opinion Evidence*, § 136, pp. 143-44 (1989)).

In Kansas, both the standard of review and the burden of proof are legal questions to be resolved by the Court. See *In re G.M.A.*, 30 Kan. App. 2d 587, 593, 43 P.3d 881 (2002). Certainly, this Court anticipates that it will be receiving legal briefs in the coming months in which counsel for the parties will zealously advocate the respective positions of their clients regarding such issues as the business judgment rule, the fairness/entire fairness standard and disinterested shareholder ratification. Thus, it ultimately will be the Court's responsibility to decide as a matter of law the applicable standard of review as well as which party has the burden of proof at trial.

In support of their position that Professor Coffee should be permitted to testify in this case, the Plaintiffs cite *Fletcher v. Anderson,* 29 Kan. App. 2d 784, 31 P.3d 313 (2001). However, the Court does not find the *Fletcher* decision to be "directly on point" or even particularly relevant to the circumstances presented in this action. As the parties are aware, the *Fletcher* decision involves a post-judgment hearing conducted by a trial judge on the issue of whether an insurance company was entitled to an award of attorney fees in a garnishment action.

In *Fletcher,* a lawyer was permitted to testify at the hearing on the motion for attorney fees because his "testimony was helpful to the court in understanding the facts of the case and in determining what constituted good cause." 30 Kan. App. 2d at 788. Reviewing the

matter under an abuse of discretion standard, the Kansas Court of Appeals concluded that the trial judge "did not abuse [his] discretion in allowing [the attorney's] testimony." 30 Kan. App. 2d at 788. As such, it seems likely that the Kansas Court of Appeals also would have upheld the trial judge had he not allowed the attorney to testify. Regardless, the *Fletcher* decision has little application in the present action since the testimony of an attorney or law professor at a court hearing or trial would be less likely to cause confusion than at a jury trial.

B. <u>Persuasive Authority From Other Jurisdictions</u>.

In *United States v. Bilzerian,* 926 F.2d 1285, 1295 (2d Cir. 1991), a criminal case involving allegations of securities fraud in which Professor Coffee served as an expert for the government, the United States Court of Appeals for the Second Circuit found that "in complex security cases involving the security industry, expert testimony may help a jury understand unfamiliar terms and concepts." However, the *Bilzerian* court warned that the use of expert testimony in such cases "must be carefully circumscribed to assure that the expert does not usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying the law to the facts before it." 926 F.2d at 1295. Furthermore, the Second Circuit found that "[a]s a general rule an expert's testimony on issues of law is inadmissible." 926 F.2d at 1294.

The *Bilzeran* court concluded that "although an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts." 926 F.2d at 1294. It appears that Professor Coffee appropriately restricted

his expert testimony in *Bilzerian* to "general background concerning federal securities regulation" and that he did not testify "as to what the law requires." 926 F.2d at 1294-95. In distinguishing between the type of expert testimony that is and is not admissible, the Second Circuit explained that "[a]lthough testimony concerning the ordinary practices in the securities industry may be received to enable the jury to evaluate a defendant's conduct against the standards of accepted practice [citation omitted], testimony encompassing an ultimate legal conclusion based upon the facts of the case is not admissible, and may not be made as simply because it is presented in terms of industry practice." 926 F.2d at 1295.

"An expert's opinion on the ultimate legal conclusion is neither required nor indeed 'evidence' at all." *Mendenhall v. Cedarapids, Inc.,* 5 F.3d 1557, 1574 (Fed. Cir. 1993) (quoting *Nutrition 21 v. United States,* 930 F.2d 867, 871, n.2 (Fed. Cir. 1991.)) "Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." *Burkhart v. Washington Metro. Area Transit Auth.,* 112 F.3d 1207, 1213 (D.C. Cir. 1997). An expert, no matter how "qualified" on legal issues, "is not qualified to compete with the judge." *Breezy Point Cooperative, Inc.* v. CIGNA Prop. & Cas. Co., 868 F. Supp. 33, 36 (E.D.N.Y. 1994).

Similarly, the United States Court of Appeals for the Tenth Circuit has held that "[i]n no instance can a witness be permitted to define the law of the case." *Specht v. Jensen,* 853 F.2d 805, 810 (10th Cir. 1988). "If one side is allowed the right to call an [expert witness] to define and apply the law, one can reasonably expect the other side to do the same" and "it

can be expected that both legal experts will differ over the principles applicable to the case." 853 F.2d at 809. If this occurs, "[t]he potential is great that jurors will be confused by these differing opinions, and that confusion may be compounded by different instructions given by the court. . . ." 853 F.2d at 809.

The potential for confusion is even greater when an expert witness is an attorney or, as in this action, a law professor. "There is a significant difference between an attorney who states his belief of what law should govern the case and any other expert witness." 853 F.2d at 808. "While other experts may aid a jury by rendering opinions on ultimate issues, our system reserves to the trial judge the role of adjudicating the law for the benefit of the jury." 853 F.2d at 808-09. If an attorney or law professor is allowed to usurp the trial judge's role, "the jury may believe the attorney-witness, who is presented to them imbued with all the mystique inherent in the title 'expert,' is more knowledgeable than the judge in a given area of the law." 853 F.2d at 809.

In *Specht*, the Tenth Circuit also stated:

> "Indeed, one is constrained to ask why it is helpful to the jury to present expert testimony on the law if the witness himself states . . . that anything he says is subject to correction by the judge. Is this not more confusing than helpful? The question is rhetorical and stands as further example why a lawyer's testimony on ultimate issues of law is improper."

853 F.2d at 809, n.4. See also Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. Kan. L. Rev. 325, 337 (1992) ("The judge is the proper party to provide instruction on the law to the jury; and because the jury is instructed to apply the

law as set forth by the judge, the testimony by an expert upon the law by definition cannot be of any assistance to the jury.").

In the present action, Professor Coffee recognizes in his Report "that expert witnesses are not permitted to testify as to legal conclusions to the jury. . . ." Coffee Report, p. 4. Likewise, in a footnote to his Report, Professor Coffee states that "I do not expect to testify as to cases or legal conclusions and will observe any and all restrictions imposed by the Court. My references to case law in this report should be understood as intended to show the basic legal framework within which courts have focused on certain recurring factual issues." Coffee Report at pp. 4-5, n.1. Thus, similar to the *Specht* court, one must ask: "Is this not more confusing than helpful?"

C. <u>The Role of Legal Counsel</u>.

It is the role of counsel, not expert witnesses, to present legal argument to the Court. "They have every professional motivation to research and present the law . . . in the most able, complete, and effective manner possible. . . . [I]f the judge does require assistance in determining the law, the traditional sources . . . have proved to be adequate, and are without doubt superior to expert testimony on the law, with its attendant complications and risks." See Baker, 40 U. Kan. L. Rev. at 363-64. In the present action, the Court has every confidence in the ability of the attorneys to zealously advocate on behalf of their clients.

It is important to recognize that this Court spent a great deal of time and effort at the outset of this case in the selection of the attorneys to be designated as lead counsel for the

Plaintiffs. As indicated above, after considering several respected attorneys from across the United States, the Court appointed Diane A. Nygaard and Pamela S. Tikellis to serve as lead counsel based on their experience and legal abilities. Although this Court "inherited" Mr. Baron after the Texas action was stayed, it is confident that the Honorable Martha Hill Jamison selected him to serve as lead counsel based on similar reasons. Thus, the Court is confident that the attorneys representing the Plaintiffs in this action have the ability to address the legal issues presented without the need for "expert testimony with its attendant complications and risks."

D. Timing of Motions to Preclude.

The Plaintiffs also contend that the Motions to Preclude the Testimony and Strike the Report of John C. Coffee, Jr., are premature. However, as the Court of Chancery of Delaware found in *In re The Walt Disney Company Derivative Litg.*, 2004 WL 550750, *1 (Del. Ch.- March 9, 2004), "early determination" of such issues "promotes judicial efficiency." Of course, as the parties are aware, the present action has been ongoing for more than 3 ½ years. Moreover, the class has been certified, and the deadline for dispositive motions is rapidly approaching. Thus, although it would be premature to decide whether Professor Coffee ultimately will be allowed to testify at trial, the Court finds that it would serve the best interests of judicial efficiency to impose limitations at this point in time regarding the subject matter on which he may render opinions.

E. Application of Legal Authorities to the Coffee Report.

Applying the legal authority set forth above to the circumstances presented in this action, the Court finds that many of the opinions rendered by Professor Coffee in his Report are not appropriate subjects for expert testimony. Specifically, the Court will not permit Professor Coffee to render opinions regarding legal standards, legal analysis and/or legal conclusions. Furthermore, the Court will not permit Professor Coffee to render opinions regarding his interpretation of the evidence nor will it permit him to comment on the testimony of other witnesses.

The Court recognizes that Professor Coffee has a substantial amount of expertise in corporate and securities law. Likewise, the Court recognizes that general background information regarding management-led buyouts may be helpful to the finder of fact. Nevertheless, the Court finds that allowing Professor Coffee to testify regarding his understanding of the law and/or his interpretation of the evidence would severely blur the important distinctions between the roles of judges, juries, and advocates. Thus, the Court concludes that it is reasonable to limit Professor Coffee to rendering opinions in this case regarding the customary roles of corporate officers, directors, members of a Special Committee, equity sponsors, and disinterested shareholders in a management-led buyout.

F. Limitations on Professor Coffee's Testimony.

For the reasons set forth in this Memorandum Decision and Order, the Court strikes the following portions of the Expert Report of John C. Coffee, Jr., and precludes the

testimony of Professor Coffee at trial regarding such matters:

1. Section 1, page 4, starting with the sentence that begins with "Thus, the Delaware courts have also recognized. . . ." up to and including the sentence that begins with "In this light, I first examine briefly several Delaware decisions. . . .";

2. Section III, pp. 8-21, in its entirety;

3. Section IV, pp. 21-57, with the exception of general background information regarding the customary roles of corporate officers, directors, members of a Special Committee, equity sponsors, and disinterested shareholders in a management-led buyout;

4. Section V, pp. 57-61, with the exception of general background information regarding the customary roles of corporate officers, directors, members of a Special Committee, equity sponsors, and disinterested shareholders during a management-led buyout; and,

5. Section VI, pp. 62-64, with the exception of general background information regarding the customary roles of corporate officers, directors, members of a Special Committee, equity sponsors and/or independent shareholders during a management-led buyout process.

CONCLUSION

The Court finds the limitations set forth above to be consistent with the Kansas Rules of Evidence. In addition, the Court finds these limitations to be consistent with the representations made to the Court by counsel for the Plaintiffs at the Status Conference, and in their Memorandum of Law in Opposition to the Defendant's Motion to Preclude, regarding the role of a "corporate governance" expert. At this point in time, however, the Court does not make a final determination regarding whether Professor Coffee will be permitted to testify as an expert witness at trial. Ultimately, this question will be largely dependent upon his deposition testimony.

Therefore, for the reasons set forth in this Memorandum Decision and Order, the Court hereby grants the Motions to Preclude the Testimony and Strike the Report of John C. Coffee, Jr., in part and denies them in part. This Memorandum Decision and Order shall serve as the Order of the Court. No further journal entry is required.

IT IS SO ORDERED.

Dated this 9th day of February, 2010.

David E. Bruns
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was faxed and mailed on this 9th day of February, 2010, to the following:

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