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Transaction ID 36998256
Case No. 6367-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EDWARD F. NORTON, III and KEN POESL, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	C.A. No.
v.	)	
K-SEA TRANSPORTATION PARTNERS L.P., K-SEA GENERAL PARTNER L.P., K-SEA GENERAL PARTNER GP LLC, KA FIRST RESERVE LLC, ANTHONY S. ABBATE, BARRY J. ALPERIN, JAMES C. BAKER, TIMOTHY J. CASEY, JAMES J. DOWLING, BRIAN P. FRIEDMAN, KEVIN S. MCCARTHY, GARY D. REAVES II, and FRANK SALERNO,	)	
Defendants.	)	

VERIFIED CLASS ACTION COMPLAINT

Plaintiffs Edward F. Norton, III and Ken Poesl, by their undersigned attorneys, allege upon information and belief, except for those allegations that pertain to themselves, which are alleged upon personal knowledge, as follows:

NATURE OF THE ACTION

1. This class action challenges the fairness of a proposed merger (the "Proposed Merger") in which K-Sea Transportation Partners L.P. ("K-Sea" or the "Partnership") will be acquired by affiliates of Kirby Corporation ("Kirby"), a strategic buyer, for $8.15 in cash or a similarly-valued combination of cash and Kirby stock.

2. The Proposed Merger was structured to serve the interests of the Partnership's majority unitholders, whose interests conflict with those of Plaintiffs and other public investors. Absent an injunction, consummation of the Proposed Merger is virtually assured, as the conflicted majority unitholders have entered into support agreements that require them to vote in

favor of the Proposed Merger, and there is no provision for a majority-of-the-minority vote by the Partnership's minority public unitholders.

3. The entity controlling the Partnership, K-Sea General Partner GP LLC ("K-Sea GP"), has negotiated a payment from Kirby for its controlled affiliate, K-Sea IDR Holdings LLC ("K-Sea IDR"), of $18 million in cash on account of incentive distribution rights (the "IDRs") held by it. This payment is not shared with the common unitholders, and represents more than one-third of the total payment to be received by K-Sea GP and its affiliates through the Proposed Merger. As discussed below (in paragraphs 40 to 44), assigning *any* value to the IDRs is incompatible with the valuation assigned to the public's common units in the Proposed Merger.

4. In addition, K-Sea's preferred unitholder, KA First Reserve, LLC ("KA First Reserve"), is a private equity venture that invested $100 million in K-Sea in September 2010. The Proposed Merger, scheduled to close less than a year after its investment, would yield it an extraordinary short-term gain – an annualized return of more than 65%. By contrast, public unitholders, who invested in K-Sea before the recent economic downturn, at prices ranging from the mid-$20's to the mid-$40's per unit, are being deprived of the opportunity to retain their investment and are being compelled to sell at a time when the Partnership's units have been trading at prices close to their historical lows. The Proposed Merger is compelling a sale at roughly 1x tangible book value, compared what equity analysts at KeyBanc described as the Partnership's "historical median of 2x and normalized range of 1-4x" tangible book value.

5. Finally, management of K-Sea has been incentivized to support the Proposed Merger by an apparent commitment by Kirby to retain them, and they are further incentivized by change in control payments totaling an estimated $4.4 million.

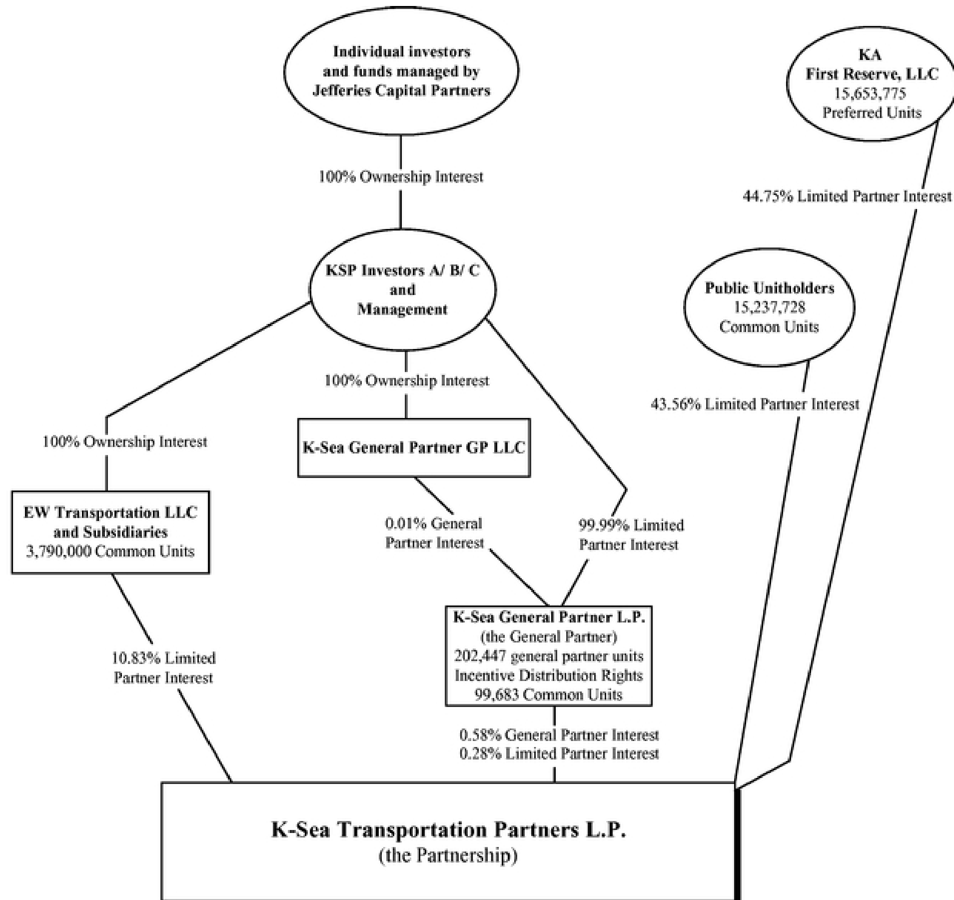
6. Accordingly, both the terms and timing of the Proposed Merger are unfair, breach the Defendants' fiduciary duties and contractual obligations under K-Sea's now-operative Fourth Amended and Restated Agreement of Limited Partnership, dated as of September 10, 2010 (the "LP Agreement"), and should be enjoined.

THE PARTIES

7. Plaintiff Edward F. Norton, III is, and all times relevant hereto was, the owner of Partnership common units. He first acquired such units in K-Sea's January 2004 IPO.

8. Plaintiff Ken Poesl is, and all times relevant hereto was, the owner of Partnership common units.

9. The ownership and control of the Partnership is set forth in the following chart (which reflects unit holdings as of September 2010):



10. The Partnership, Defendant K-Sea, is a Delaware limited partnership with its principal executive office at One Tower Center Boulevard, 17th Floor, East Brunswick, New Jersey 08816. It provides marine transportation, distribution, and logistics services for refined petroleum products in the United States. Its common units trade on the New York Stock Exchange ("NYSE") under the symbol "KSP." At the Proposed Merger price, its publicly-traded units are valued at $156 million.

11. Defendant K-Sea General Partner L.P. ("K-Sea GP LP" or the "General Partner") is a Delaware limited partnership and the general partner of the Partnership. K-Sea GP LP acts as a pass-through entity and is controlled by its general partner, K-Sea GP.

12. Defendant K-Sea GP is a Delaware limited liability company and, as general partner of K-Sea GP LP, manages the operations and activities of the Partnership. K-Sea GP is 90% owned by a group of investment funds and individuals affiliated with Jefferies Capital Partners ("Jefferies"), a private investment firm.

13. Defendant KA First Reserve is a Delaware limited liability company with a principal business address at 717 Texas Avenue, Suite 3100, Houston, Texas 77002. It is a joint venture of Kayne Anderson Capital Advisors ("Kayne Anderson") and First Reserve Corporation ("First Reserve"), two prominent private equity firms active in the energy sector.

14. Defendant Anthony S. Abbate ("Abbate") is a director of K-Sea GP and was appointed in February 2004. Abbate was President, Chief Executive Officer and a director of Interchange Financial Services Corporation, a bank holding company, from 1984 until his retirement in 2007 and President, Chief Executive Officer and a director of its principal subsidiary, Interchange Bank, from 1981 until his retirement in 2007. Abbate is a member of the three-person standing conflicts committee (the "Conflicts Committee") of the K-Sea GP, which

was constituted to review matters that the board of directors of K-Sea GP believes may involve conflicts of interest. The Conflicts Committee reviewed and recommended entry into the Proposed Merger agreement.

15. Defendant Barry J. Alperin ("Alperin") is a director of K-Sea GP and was appointed in February 2004. Alperin is a business consultant who retired from Hasbro Inc. in 1996 after 11 years in various senior executive positions. Alperin is a member of the Conflicts Committee.

16. James C. Baker ("Baker") is a director of K-Sea GP and was appointed on September 10, 2010 as designee of Defendant KA First Reserve. He is a Senior Managing Director of Kayne Anderson and holds other positions with affiliated entities.

17. Timothy J. Casey ("Casey") is K-Sea GP's President, Chief Executive Officer and Director and was appointed in July 2003. He was previously President, Chief Executive Officer and Director of EW Transportation LLC ("EW Transportation"), the predecessor to K-Sea. As further discussed below, EW Transportation also retains an ownership interest in K-Sea.

18. James J. Dowling ("Dowling") is Chairman of the Board of K-Sea GP and was appointed in July 2003. He was previously Chairman of the Board of EW Transportation. Dowling has been a Managing Director of Jefferies since January 2002, and is a director of various private companies in which Jefferies has an interest.

19. Brian P. Friedman ("Friedman") is a director of K-Sea GP and was appointed director in July 2003. Since 1997, Friedman has been President of Jefferies and holds other positions with affiliated entities.

20. Kevin S. McCarthy ("McCarthy") is a director of K-Sea GP and was appointed on September 10, 2010 as designee of Defendant KA First Reserve. He is a Senior Managing Director of Kayne Anderson and holds other positions with affiliated entities.

21. Gary D. Reaves II ("Reaves") is a director of K-Sea GP and was appointed on September 10, 2010 as designee of Defendant KA First Reserve. He is a Vice President of First Reserve, a joint venture partner in KA First Reserve.

22. Frank Salerno ("Salerno") is a director of K-Sea GP and was appointed in February 2004. From mid-1999 until his retirement in February 2004, Salerno was Managing Director and Chief Operating Officer of Merrill Lynch Investment Advisors—Americas Institutional Division, an investment advisory company. Salerno is a member of the Conflicts Committee.

CLASS ACTION ALLEGATIONS

23. Plaintiffs bring this action as a class action pursuant to Chancery Court Rule 23, individually and on behalf of all holders of Partnership common units as of March 14, 2011, together with their successors and assigns, excepting Defendants and their affiliates (the "Class").

24. This action is properly maintainable as a class action because, *inter alia*:

(a) The Class is so numerous that joinder of all members is impracticable. Partnership units are publicly traded on the NYSE and, according to the Partnership's Form 10-K for the fiscal year ended June 30, 2010 ("2010 10-K"), as of September 10, 2010, there were 19,127,411 outstanding common units, which were held by approximately 101 holders of record, representing approximately 12,200 beneficial owners.

(b) There are questions of law and fact which are common to the Class including, *inter alia*: (i) whether Defendants breached their duties to Plaintiffs and the other

members of the Class; and (ii) whether Plaintiffs and the other members of the Class will be irreparably harmed by the wrongs complained of herein.

(c) Plaintiffs are committed to prosecuting this action and have retained competent counsel experienced in litigation of this nature. Plaintiffs' claims are typical of the claims of the other members of the Class, and Plaintiffs have the same interests as the rest of the Class. Accordingly, Plaintiffs are adequate representatives of the Class and will fairly and adequately protect the interests of the Class.

(d) The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendants. In addition, adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests.

(e) Defendants have acted, or refused to act, on grounds generally applicable to, and causing injury to, the Class and, therefore, preliminary and final injunctive relief on behalf of the Class as a whole is appropriate.

SUBSTANTIVE ALLEGATIONS

A. Background Regarding the Partnership and the Events Leading to the Proposed Merger

25. K-Sea conducted its initial public offering in January 2004 at a per-unit price of $23.50.

26. Between January 2004 and September 2009, K-Sea's operations expanded, with the Partnership roughly doubling its fleet barrel-carrying capacity through strategic acquisitions and purchases of newly-constructed vessels.

27. The recent economic downturn, however, significantly impacted K-Sea, resulting in Partnership net income declining from $26.0 million in the fiscal year ended June 30, 2008 to a loss of $87.0 million in the fiscal year ended June 30, 2010.

28. K-Sea responded by shifting its focus from growth to improving liquidity, reducing outstanding debt, and increasing the profitability of existing assets.

29. Among the measures taken by K-Sea GP was to replace outstanding debt with preferred equity – a new class of Partnership units designed "Series A Preferred Units" – which were sold for approximately $100 million to KA First Reserve on September 10, 2010. As of March 15, 2011, KA First Reserve's preferred units represented 49.8% of the Partnership's outstanding ownership units, slightly exceeding the total number of publicly-traded common units outstanding.

30. As a master limited partnership ("MLP"), investors purchase common units of the Partnership principally as a yield-oriented investment – i.e., for the cash distributions they pay. After the Partnership's business performance declined, it ceased paying distributions to unitholders in late 2009.

31. In early 2011, the Partnership's efforts to stabilize its business and the recovery in the economy yielded significantly better performance, as measured by factors such as vessel utilization (81% for July-December 2010 vs. 72% for the prior six months) and average daily rates (up 12% over the same period). Accordingly, KSP units gained 33% from the beginning of 2011 through March 11, the last trading day before the Proposed Merger was announced.

32. The run-down and subsequent recovery of KSP units is reflected in the following stock chart covering the two years prior to March 11, 2011:

B. The Partnership's Capital Structure and Ownership

33. Based on disclosures in the Partnership's 2010 10-K and in recent Form 13D filings, K-Sea's equity was comprised of the following interests as of the date on which the Proposed Merger was announced:

(a) 19,178,120 preferred units, owned entirely by KA First Reserve, representing an approximately 49.9% economic interest in the Partnership;

(b) 99,683 general partner units, owned entirely by K-Sea GP LP, representing an approximately 0.3% economic interest in the Partnership; and

(c) 19,160,394 common units, representing an approximately 49.8% interest in the Partnership.

34. With respect to the common units, approximately 78.5% are owned by the unaffiliated public unitholders comprising the Class. Most of the remaining common units (19.8%) are held directly or indirectly by EW Transportation, the predecessor to the Partnership. EW Transportation is owned by the same group of investors that owns K-Sea GP.

35. In addition, the general partner, K-Sea GP LP, held incentive distribution rights ("IDRs") – which entitled it, as is common among MLPs, to a percentage of distributions, after paying the preferred units their allocable distribution (based on a 13.5% annual interest rate), and making substantial minimum distributions to the common units of $0.55 per quarter.

C. **Summary of The Proposed Merger**

36. On March 13, 2011, K-Sea announced that it had entered into a definitive merger agreement (the "Merger Agreement") in which Kirby would acquire K-Sea for consideration of $8.15 per unit in cash or $4.075 per unit in cash plus .0734 of a share of Kirby's common stock (representing roughly equivalent value). The Proposed Merger price represented a 26% premium to the closing price of the Partnership's common units on March 11, 2011. According to senior of executives of Kirby, closing is anticipated in June or July 2011.

37. Contemporaneous with K-Sea's entry into the Merger Agreement, KA First Reserve and affiliates of the General Partner (EW Transportation and two subsidiaries), entered into support agreements that required them to vote all of their units in favor of the Proposed Merger and against any alternative transaction.

D. **Defendants' Conflicts of Interest**

38. The Proposed Merger was structured to serve the interests of the owners of the Partnership's General Partner and the preferred unitholder, and its timing and terms are unfair to Plaintiffs and the other minority public unitholders.

1. **The General Partner's Conflicts**

39. While Plaintiffs and the other members of the Class would receive only $8.15 per unit in the Proposed Merger, the General Partner and its affiliates would also receive $18 million in cash on account of the IDRs – representing more than one-third of the total payment to be received by them from the Proposed Merger. (The owners of K-Sea GP would receive approximately $33 million on account of the common and general partner units held by the General Partner, and the common units held by EW Transportation and its subsidiaries.)

40. Assigning *any* value to the IDRs, however, is inherently inconsistent with a determination that the Proposed Merger price of $8.15 is a fair price for the common units.

41. As noted above, MLPs like K-Sea are purchased for their cash distributions, and typically trade at a multiple of their anticipated cash distributions to unitholders – expressed as a yield on the unit's purchase price. MLPs typically provide yields of 7% to 8%, ranging up to 12% to 15% for extremely high-yield MLPs.

42. Based on a yield range of 7% to 15%, the Proposed Merger price of $8.15 implies an expectation of future quarterly distributions of 14 to 31 cents per unit.

43. No distribution is payable in respect of the IDRs, however, until the common units have received a quarterly distribution nearly *two* to *four* times higher – 55 cents per unit.

44. The wide disparity between the Proposed Merger price and the valuation assigned to the IDRs is further illustrated by the common unit valuation that would be implied by the assumption of quarterly distributions at the 55 cents-per-unit level. Based on the range of yields noted above, payments of 55 cents per quarter would produce a valuation range of $14.67 to $31.43.

45. Briefly stated, if the IDRs were really worth $18 million, then the common units should be valued at in excess of $14.67, and if the common units are only worth $8.15, then the IDRs have no value at all. Accordingly, the payment on account of the IDRs is entirely unjustified, and benefits insiders at the expense of the Class.

2. <u>The Preferred Unitholder's Conflicts</u>

46. The Proposed Merger also locks in an extraordinary, short-term return for the preferred unitholder, KA First Reserve, while compelling the long-term investors comprising the Class, including Plaintiffs, to sell at a time when the Partnership is trading near its all-time lows. For investors such as Plaintiff Norton, who bought K-Sea in its 2004 IPO at $23.50 per unit, the Proposed Merger price of $8.15 per unit represents a loss of over 65% of the original capital he invested.

47. By contrast with the losses faced by the Partnership's public investors, the Proposed Merger would pay KA First Reserve over $156 million on its private equity investment of $100 million late last year – an annualized return of more than 65%.

48. Reflecting the depressed valuation of the Partnership at the present time, the Proposed Merger is occurring at roughly 1x tangible book value, compared what equity analysts at KeyBanc described as the Partnership's "historical median of 2x and normalized range of 1-4x" tangible book value.

49. The Proposed Merger would thus compel long-term value-oriented public unitholders to liquidate their interests in the Partnership at a time when it is trading at historic lows while allowing insiders to cash out their interests at an unjustified premium and enabling KA First Reserve to exit its short-term investment in the Partnership with a gain of more than 56%.

3. The Management Team's Conflicts

50. Finally, K-Sea's management team would receive substantial change in control payments in connection with the Proposed Merger totaling an estimated $4.4 million, and Kirby has indicated that it will retain K-Sea's management, providing further benefits to insiders that will not be shared with the Partnership's public unitholders.

51. Accordingly, the timing and other terms of the Proposed Merger are unfair to the Class.

E. The LP Agreement, Defendants' Breaches Thereof, and Its Partial Elimination of Fiduciary Duties

52. Section 2.1 of the LP Agreement, in relevant part, provides that the fiduciary and other obligations imposed by Delaware law and the Delaware Revised Uniform Limited

Partnership Act ("DRULPA"), 6 *Del. C.* § 17-101 *et seq.*, are applicable to the Partnership, except as limited by the terms of the LP Agreement:

> Except as expressly provided to the contrary in this Agreement, the rights, duties (including fiduciary duties), liabilities and obligations of the Partners and the administration, dissolution and termination of the Partnership shall be governed by [DRULPA].

53. Conflict transactions such as the Proposed Merger are governed by Section 7.9 of the LP Agreement. Section 7.9(a) provides, in relevant part, that in the event of a conflict between the General Partner, its affiliates, and the Partnership or a unitholder:

> any resolution or course of action by the General Partner or its Affiliates in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement . . . or of any duty stated or implied by law or equity, if the resolution or course of action is, or by operation of this Agreement is deemed to be, fair and reasonable to the Partnership.

54. Section 7.9(a) further provides three mechanisms to determine whether a conflict transaction is "fair and reasonable":

> Any conflict of interest and any resolution of such conflict of interest shall be conclusively deemed fair and reasonable to the Partnership if such conflict of interest or resolution is (i) approved by Special Approval (as long as the material facts known to the General Partner or any of its Affiliates regarding any proposed transaction were disclosed to the Conflicts Committee at the time it gave its approval), (ii) on terms no less favorable to the Partnership than those generally being provided to or available from unrelated third parties or (iii) fair to the Partnership, taking into account the totality of the relationships between the parties involved (including other transactions that may be particularly favorable or advantageous to the Partnership).

55. Section 1.1 of the LP Agreement defines "Special Approval" to mean approval by a majority of the members of the Conflicts Committee.

56. Section 7.9(a) of the LP Agreement further identifies a list of factors that the General Partner, including the Conflicts Committee, are "authorized . . . to consider" in making a determination whether a transaction is "fair and reasonable":

> The General Partner (including the Conflicts Committee in connection with Special Approval) shall be authorized in connection with its determination of what is "fair and reasonable" to the Partnership and in connection with its resolution of any conflict of interest to consider (A) the relative interests of any party to such conflict, agreement, transaction or situation and the benefits and burdens relating to such interest; (B) any customary or accepted industry practices and any customary or historical dealings with a particular Person; (C) any applicable generally accepted accounting practices or principles; and (D) such additional factors as the General Partner (including the Conflicts Committee) determines in its sole discretion to be relevant, reasonable or appropriate under the circumstances. Nothing contained in this Agreement, however, is intended to nor shall it be construed to require the General Partner (including the Conflicts Committee) to consider the interests of any Person other than the Partnership.

57. In addition, Section 7.9(c) of the LP Agreement provides that:

> Whenever a particular transaction, arrangement or resolution of a conflict of interest is required under this Agreement to be "fair and reasonable" to any Person, the fair and reasonable nature of such transaction, arrangement or resolution shall be considered in the context of all similar or related transactions.

58. Finally, Section 7.9(a) expressly eliminates the application of fiduciary duties to the General Partner, but (unlike the preceding sentences of Section 7.9(a)), imposes no restriction on the scope of duties of the Conflicts Committee:

> In the absence of bad faith by the General Partner, the resolution, action or terms so made, taken or provided by the General Partner with respect to such matter shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or, to the extent permitted by law, under the Delaware Act or any other law, rule or regulation.

59. Accordingly, the General Partner is subject to a "bad faith" standard with respect to its decisionmaking; the Conflicts Committee owes the Partnership and the Class the fiduciary

duties generally imposed on partners by Delaware law, subject to the other provisions of Section 7.9.

60. The decision to approve payment to an affiliate of the General Partner of $18 million on account of the IDRs, and the decision to engage in the Proposed Merger at the present time, were not fair and reasonable to the Partnership, were not made in good faith, and constituted a breach of the LP Agreement and the Conflicts Committee's fiduciary duties.

F. Need for Injunctive Relief

61. Absent an injunction, consummation of the Proposed Merger is virtually assured, as the conflicted majority unitholders have entered into support agreements that require them to vote in favor of the Proposed Merger, and no majority-of-the-minority vote has been provided to the Partnership's public unitholders.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Breach of Fiduciary Duty
(Against Abbate, Alperin and Salerno)

62. Plaintiffs repeat and reallege the foregoing paragraphs as if fully set forth herein.

63. As the directors of K-Sea GP comprising the Conflicts Committee, Abbate, Alperin and Salerno, stand in a fiduciary relationship to Plaintiffs and the Class in evaluating conflict transactions such as the Proposed Merger.

64. As set forth above, Abbate, Alperin and Salerno have breached and continue to breach their fiduciary duties to Plaintiffs and the Class by approving a transaction that was not fair and reasonable.

65. As a result of the breaches of duty by Abbate, Alperin and Salerno, Plaintiffs and the Class will suffer irreparable injury through the consummation of the Proposed Merger on unfair terms.

66. Plaintiffs and the Class have no adequate remedy at law.

SECOND CAUSE OF ACTION
Breach of Partnership Agreement
(Against All Defendants Excepting K-Sea)

67. Plaintiffs repeat and reallege the foregoing paragraphs as if fully set forth herein.

68. Defendants, as general partner of K-Sea, general partner of K-Sea's general partner, directors thereof, and controlling unitholders, are bound by the LP Agreement and owe Plaintiffs and the Class the contractual duties set forth therein.

69. As set forth above, Defendants have breached and continue to breach their contractual duties to Plaintiffs and the Class by proposing, approving and otherwise participating in a transaction that was not fair and reasonable and is being undertaken in bad faith.

70. As a result of the breaches of duty by Defendants, Plaintiffs and the Class will suffer irreparable injury through the consummation of the Proposed Merger on unfair terms.

71. Plaintiffs and the Class have no adequate remedy at law.

WHEREFORE, Plaintiffs demand relief in their favor and in favor of the Class, and against Defendants, as follows:

A. Ordering that this action may be maintained as a class action and certifying Plaintiffs as Class representatives and their undersigned counsel as Class counsel;

B. Declaring that Defendants have breached the LP Agreement;

C. Preliminarily enjoining Defendants, and anyone acting in concert with them, from proceeding with the Proposed Merger;

D. Rescinding, to the extent already implemented, the Proposed Merger and any agreement or transaction attendant thereto;

E. Awarding the Class compensatory or rescissory damages;

F. Awarding Plaintiffs the costs of this action, including reasonable attorneys' and experts' fees and costs; and

G. Granting such other and further relief as this Court deems just and proper.

/s/ David L. Finger
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