11619.1
PLD

Counsel for Plaintiffs:

Thomas F. Kummer
Nevada Bar No. 1200
L. Joe Coppedge
Nevada Bar No. 4954
KUMMER KAEMPFER BONNER & RENSHAW
3800 Howard Hughes Parkway, 7th Floor
Las Vegas, NV 89109
Tel: (702) 792-7000
Fax: (702) 792-7181

Merrill G. Davidoff
Michael Dell'Angelo
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4608

REGINALD H. HOWE
49 Tyler Road
Belmont, MA 02478
Tel/Fax: (617) 484-0029

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' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT III** **ORAL ARGUMENT REQUESTED**

Introduction

Plaintiffs filed their Cross-Motion for Summary Judgment on Count III, together with a supporting memorandum ("Plaintiffs' Memo"), on January 26, 2005. This reply brief is submitted in response to Defendants' Corrected and Amended Memorandum in Opposition to Plaintiffs' Cross-Motion for Summary Judgment on Count III (Best Price Rule) ("Defendants' Memo") filed on March 2, 2005 (docket no. 99), to replace their original memorandum filed[1] on February 28 (docket no. 96), together with three supporting affidavits and attached documents: Declaration of Shelley M. Riley, corporate secretary of Kinross (Exhibit A) ("Riley Aff."); Declaration of John W. Ivany, executive vice-president of Kinross and a director of Kinross USA (Exhibit B) ("Ivany Aff."); and Declaration of Andre Boivin, a Canadian lawyer (Exhibit C) ("Boivin Aff.").

Although noting that they have denied some of the allegations of the amended complaint in their answer and complaining that the plaintiffs have failed to provide references in support of others,[2] defendants do not specifically challenge any of the relevant material facts relied upon by

---

[1] Although defendants did not seek leave of court or plaintiffs' consent to the filing of the Corrected and Amended Memorandum, plaintiffs do not oppose the filing on that basis. However, plaintiffs note that in filing the Corrected and Amended Memorandum, defendants failed to provide any information or guidance as to what changes were made to the prior memorandum.

[2] The only examples of the latter specifically identified in the Plaintiffs' Memo are: (1) p. 5, lines 10-13; (2) p. 6, lines 4-6; (3) p. 6, fn. 2; (4) p. 8, lines 2-4; and (5) p. 9, lines 8-10. Defendants' Memo, p. 3. Of these, (1) and (4) relating to intercompany debt are not material to count III; (3) and (5) relate to the share prices for Kinross common, which were not misstated and are now confirmed for the record by Exhibit A to the Second Affidavit of Michael Dell'Angelo; and (2) relates to the undisputed fact that neither the Franklin nor follow-on transactions were registered under § 13(e) of the Exchange Act. Therefore, there is no genuine issue of material fact in dispute that would preclude this Court from entering summary judgment in favor of plaintiffs on Count III.

the plaintiffs in their argument for summary judgment on count III. Defendants' Memo, p. 3. The defendants do, however, provide a statement of additional facts, which is based on documents attached to the three affidavits. Defendants' Memo, pp. 4-7. As discussed below, these documents do not undercut but rather lend additional support to the factual basis for plaintiffs' cross-motion. Indeed, several of them are the very same documents on which the plaintiffs principally rely, including Kinross's press releases about the Franklin and follow-on transactions and relevant excerpts from the Amended Offer Document.

Argument

I. PROPERLY ANALYZED, THE DOCUMENTS SUBMITTED BY DEFENDANTS WITH THEIR MEMO DEMONSTRATE THAT THE FRANKLIN AND TWO FOLLOW-ON TRANSACTIONS WERE A TENDER OFFER UNDER THE *WELLMAN* TEST.

The documents submitted with the Defendants' Memo confirm that under the eight-factor *Wellman* test, the Franklin and follow-on transactions constituted a tender offer. *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) discussed in Plaintiffs' Memo, pp. 15-18. It is only the defendants' descriptions, characterizations and analysis of these documents that is flawed.

Premium over Prevailing Market Price. As defendants correctly observe (Defendants' Memo, p. 16), "the undisputed facts" show that the Franklin Transaction did not involve an agreement on a dollar price per share of Preferred but rather "an exchange of Preferred shares for Kinross Canada common stock." What they fail to address is the convertibility feature of the

Preferred itself, which provides both a direct measure of the premium paid to Franklin and a method for calculating a cash equivalent value depending on the market price of Kinross at any given time.

As noted in Plaintiffs' Memo, p. 22, under the express terms of the Preferred, each share was convertible into 4.85 shares of Kinross common. However, Franklin was allowed to convert each share of Preferred held by it into 26.875 shares of Kinross common, a rate more than 5.54 times as favorable, which also violated the express terms of the Preferred. *Id.*

On a cash equivalent basis, this preferential rate resulted in payment of a substantial premium over market to Franklin for its shares of the Preferred. Unable to deny this obvious fact, defendants try to minimize the size of the premium by suggesting that it should be calculated at the significantly lower prices for Kinross common that prevailed prior to the latter part of May 2001 (Defendants. Memo, p. 17):

> ***When the transaction actually closed, Kinross Canada stock was trading at nearly twice what it was when Franklin proposed the exchange ratio,*** and Canadian Generally Accepted Accounting Principles required that the value be recorded at $25.80 per share. [Emphasis supplied.]

In fact, the material taken from the Amended Offer Document by the defendants themselves (Ivany Aff., Ex. B1) shows that from the time Franklin agreed "to take Kinross common shares in exchange for the Kinam preferred stock," it remained firm in its "demand" for "21,500,000 shares of Kinross common in exchange for its 800,000 shares of Kinam preferred, an exchange ratio of 26.875 to 1." Kinross was "unwilling to accept" this demand, and Franklin indicated that "if an agreement were not reached by the end of May, 2001, they would pursue litigation." With time running out, Kinross caved: "Ultimately, ***we agreed to the exchange ratio***

proposed by the Franklin Funds in a phone call on May 29, 2001." [Emphasis supplied.]

Franklin's demand was an offer to sell shares, not an offer to buy shares of which it was the issuer, and therefore was not within the scope of § 13(e) of the Exchange Act. While Kinross had indicated an interest in acquiring Franklin's shares of the Preferred and had tried to negotiate a lower price than Franklin's demand, nothing in the documents suggests that Kinross made any firm offer to buy, let alone at a specific exchange ratio, prior to the May 29 phone call. The exchange ratio was not set at some earlier date when Kinross common was trading at lower prices; it was set on May 29, 2001, well after the share price increases that accompanied rising gold prices earlier in the month.

Kinross common closed at $0.94 on May 25, 2001, the Friday before the long Memorial Day weekend. On Tuesday, May 29, the next trading day, it opened at $0.90, traded as low as $0.84, and closed at $0.85. Whatever the precise hour of the phone call in which Kinross and Franklin first came to agreement on and set the exchange ratio, they did so at a time when it represented a dollar amount of not less than $22.575 ($0.84 x 26.875) per share of Preferred, or a premium of approximately 181% over its average closing price of $8.025 on the NYSE in the five trading days preceding public announcement of the Franklin Transaction on June 12, 2001. This amount was 87.5% of the price at which Kinross booked the transaction for accounting purposes, for which it used the closing price of Kinross common ($0.96) on June 12, 2001, the date of closing the formal agreement on the transaction as well as its public announcement.

Another indication of the premium paid to Franklin was its effect on the price of the Preferred. On June 12, prior to the public announcement of the Franklin Transaction, the Preferred closed on the NYSE at $8.50 on a volume of 700 shares. Second Dell'Angelo Aff., Ex.

A. On the following day, the Preferred opened at $12.20 and closed at the same price on a volume of 20,800 shares, an increase of 43.5%. *Id.*

The two follow-on transactions with The Tell Fund ("Tell") and Capital Pro International ("Capital Pro") were announced on June 18, six days and four trading days later, during which period the daily closes on Kinross common ran between $0.98 and $1.04, with a close of $0.99 on June 18. The exchange ratio governing these transactions was approximately 18.48, a rate more than 3.8 times as favorable as the conversion ratio applicable to other holders under the express terms of the Preferred. With Kinross common at $0.99, this ratio equated to $18.29 per share of Preferred, or a cash equivalent premium of approximately 131% over the five-day average price of the Preferred immediately preceding announcement of the Franklin Transaction. Nothing in the documents suggests that either Tell or Capital Pro threatened litigation over the Preferred (nor do defendants so argue), and this fact -- not marginal increases in the price of Kinross common from May 29 to June 18 -- explains their less favorable exchange ratio compared to Franklin.

Active and Widespread Solicitation of Public Shareholders. The defendants contend that as a matter of law their June 12, 2001, press release announcing the Franklin Transaction cannot be considered a solicitation because it was required under Canadian securities law. However, the defendants' conduct as it relates to this case is governed by the laws of the United States. Defendants cite no authority for the proposition that compliance with the laws of Canada somehow serves as a proxy to violate the laws of the United States. Defendants' Memo, pp. 10-11; Boivin Aff., Ex. C1. Whatever merit this argument may have with respect to the first paragraph of the release detailing the terms of the transaction, it holds none with respect to the

second paragraph, which stated (Riley Aff., Ex. A1):

> Bob Buchan, Chairman and CEO of Kinross, stated that "***this transaction is another example of Kinross improving our balance sheet*** even as gold prices continue to languish near 22-year lows." Earlier in 2001 Kinross made a voluntary prepayment of $22 million on the Fort Knox Industrial Revenue Bonds of its 100% owned subsidiary, Fairbanks Gold Mining Inc. Bob Buchan also stated that "***Kinross remains focussed on enhancing shareholder value through appropriate transactions that further strengthen our balance sheet.***" [Emphasis supplied.]

At best, this statement is a half-truth since it contained no mention of the threatened litigation or Kinross's last minute capitulation to an exchange ratio that it considered and still argues was too high. More to the point, however, no legal requirement mandated defendant Buchan's editorial comment describing the transaction as "another example of Kinross improving our balance sheet," let alone his further statement declaring that Kinross remained open to considering additional similar transactions "that further strengthen our balance sheet." Given the size of the premium conferred on Franklin, this statement must be read as an invitation to other holders to request similar favorable treatment. What is more, facing the prospect of having six dividend payments in arrears as of November 15, 2001, Kinross had a strong incentive to acquire more than 50% of the Preferred in order to control any separate class vote for two additional directors. Plaintiffs' Memo, pp. 5-7.

Under these circumstances, Tell and Capital Pro must be deemed to have approached Kinross pursuant to its own solicitation and design. Indeed, the Offer Document itself states (at p. 29): "After the announcement of the transaction with the Franklin Funds, we were approached by Capital Pro International, Inc. and the Tell Fund to purchase an aggregate of 145,500 preferred shares in consideration of the issuance of an aggregate of 2,686,492 common shares of Kinam." Further, in this connection, a comparison of the second paragraph of the June 12 press release

quoted above with that of the June 18, 2001, press release announcing the follow-on transactions is instructive. It stated (Riley Aff., Ex. A2):

> 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***." [Emphasis supplied.]

In short, with 51.4% of the Preferred and the ability to control any separate class vote, Kinross suddenly lost interest in the further balance sheet improvements touted in its in June 12 press release and which had led to the approaches by Tell and Capital Pro.

The defendants also argue that even if the June 12 press release constitutes a solicitation, it was not "active and widespread." Defendants' Memo, pp. 11-12. This argument suffers from two critical infirmities.

First, the Internet provides immediate and widespread distribution of corporate press releases, which when they trigger or are associated with large moves in share prices, generally arouse considerable interest and comment, especially among holders of the affected shares. As previously noted, public announcement of the Franklin Transaction caused an immediate 43.5% jump in the price of the Preferred. Further, Kinross posted the press release at its internet web site, where the release remains available as of the filing of this memorandum, at http://www.kinross.com/news/archive-2001.aspx. *See Fuqua Homes, Inc. v. Beattie*, 388 F.3d 618 (CA8 2004) (publication of material via the Internet is akin to publication by aggregate communication); *Van Buskirk v. N.Y Times Co.*, 99 Civ. 4265, 2000 U.S. Dist. LEXIS 12150 (S.D.N.Y. Aug. 23, 2000) (observing "that Internet publishing has been added to the 'modern methods' of widespread publication); *Smith v. Doe*, 538 U.S. 84 (2003) (stating that publication of Megan's law information on the Internet affords "[w]idespread public access").

Second, defendants have thus far failed to produce any documents in response to Plaintiffs' First Set of Requests for the Production of Documents filed November 8, 2002, which included in numbered paragraph 27 a request covering inquiries from other holders regarding sale of their shares on the same or similar terms as Franklin. As a result, despite their due diligence, the plaintiffs have been unable to discover how many other holders of the Preferred may have approached Kinross in the same manner as Tell and Capital Pro. Whatever the precise number, apparently it was sufficient to warrant inclusion of the disclaimer of further interest contained in the second paragraph of the June 18 press release.

Offer Open for a Limited Period of Time. Defendants argue that if the Franklin Transaction initiated a tender offer, it began in November 2000 when they opened their negotiations with Franklin. Defendants' Memo, pp. 13-14. However, if these negotiations had failed to produce an offer from Kinross acceptable to Franklin, no transaction amounting to an actionable tender offer under § 13(e) of the Exchange Act would have resulted. Nor would other holders of the Preferred have had any reason to complain. These negotiations did not produce an actionable transaction or tender offer affecting other holders of the Preferred until Kinross made an offer in the phone call on May 29, 2001, that Franklin was willing to accept.

Whether that tender offer is dated from May 29 or the formal agreement and public announcement on June 12 is irrelevant because it brought in Tell and Capital Pro by June 18, a relatively short period in either event.

Solicitation for a Substantial Percentage of Issuers' Stock. Defendants argue that purchase of more than 51% of the Preferred does not by itself indicate a tender offer, but they wholly ignore the context in which the shares were acquired. Defendants' Memo, p. 16.

Kinam faced the virtually certain prospect of being six dividend payments in arrears as of November 15, 2001, and thus being required to hold a separate class vote of the Preferred for two additional directors. Indeed, defendant Buchan expressly acknowledged this prospect in a May 17, 2001, letter to Franklin (Dell'Angelo Aff., Ex. E) stating in part:

> If as appears likely, we have to manage Kinam in a more arms length manner, we feel it would be appropriate to invite a representative of Franklin onto Kinam's board now. This will allow you to participate in and understand the changes we now have to make in how we manage the company.

Under these circumstances, Kinross had an obvious interest in acquiring more than 50% of the issue. With absolute control of any future separate class vote, Kinross could avoid making any changes toward a "more arms length manner" of managing Kinam.

Public Announcements of a Purchasing Program. Following the June 12, 2001, press release announcing not only the details of the Franklin Transaction but also Kinross's interest in pursuing additional similar transactions, Tell, Capital Pro and an as yet undisclosed number of additional holders of the Preferred approached Kinross to express an interest in selling their shares on the same or similar terms to those received by Franklin. As it turned out, Kinross was able to quickly secure over 50% of the Preferred through just two additional transactions, at which point it publicly announced that it had no present interest in acquiring any further shares.

Whatever their arguments to the contrary (Defendants' Memo, pp. 15-16), defendants engaged in a "purchasing program"through "public announcements" within the ordinary meaning of those words. Public announcements marked both the start and finish of the program, and were directly instrumental in enabling Kinross to acquire over 50% of the Preferred.

Targeting a Fixed Number of Shares. The Franklin Transaction gave Kinross only

43.5%, making the acquisition of just over another 6.5% critical to securing complete control. Although Kinross did not publicly express an intent to acquire just over 50% of the Preferred (but no more) at premium prices if necessary, to do so was plainly in its interest and was in fact what Kinross did. Discovery may well show that Kinross adopted this plan of action at or around the date that it finally acquiesced to the exchange ratio demanded by Franklin. Contrary to defendants' suggestion (Defendants' Memo, pp. 12-13), plaintiffs do not concede but rather await further discovery on this factor. As previously noted, relevant documents have been sought, but defendants have failed to make any production. However, if documents supporting defendants' position did exist, they almost certainly would have been produced.

II. RATHER THAN COMPRISING INDEPENDENT, STAND ALONE PARTS OF A SINGLE PLAN OF ACQUISITION, THE CASH TENDER OFFER AND FRANKLIN AND FOLLOW-ON TRANSACTIONS WERE INTEGRALLY CONNECTED BY CONTRACT AND BREACH OF FIDUCIARY DUTY.

Describing the functional test applied in *Epstein v. MCA, Inc.*, 50 F.3d 644, 656 (CA9 1995), *rev'd on other grounds, Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), the defendants state (Defendants' Memo, p. 20; emphasis by defendants): "Under that test, the private transactions are considered functionally a part of a public tender offer only when they are ***contractually conditioned on*** the success of the tender offer." In *Epstein*, the contractual condition referred to by the defendants was one of "two facts" that caused the Ninth Circuit to integrate the private purchase with the public tender offer. The other fact, as described by the court, was that "the redemption value of Wasserman's preferred stock incorporated the tender offer price by reference." *Id.*

As set forth in *Epstein,* the functional test itself is far broader than the facts of any specific case, let alone the defendants' formulation of it. The Ninth Circuit cited with approval language from *Field v. Trump*, 850 F.2d 938, 943-944 (CA2 1988) (*Epstein* at 656):

> Courts faced with the question of whether purchases of a corporation's shares are privately negotiated or are part of a tender offer have applied a functional test that scrutinizes such purchases in the context of ***various salient characteristics of tender offers and the purposes of the Williams Act.*** [Emphasis supplied.]

Then it provided its own gloss before proceeding to a detailed analysis of the facts of the case before it (*id.*):

> 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.]

In the present case, the material terms of the Franklin and follow-on transactions cannot stand independent of, but rather by contract and law are inextricably linked to, the cash tender offer through: (1) the express terms of the Preferred relating to dividends, conversion and redemption; (2) the acquisition of just enough shares to control any separate class vote of the Preferred; (3) the indemnity and third-party litigation provisions in the June 12, 2001, letter agreement governing the Franklin Transaction; and (4) breaches of fiduciary duty committed jointly by Kinross and Franklin in connection with the Franklin Transaction.

Express Terms of the Preferred. As set forth in the Plaintiffs' Memo, pp. 18-22, the Franklin transaction violated the express provisions of the Preferred requiring: (1) equal, *pro rata* payments to all shareholders whenever less than the full amount of accumulated and unpaid dividends are distributed; (2) that redemptions or repurchases of less than all outstanding shares

be made *pro rata* or by lot; and (3) approval by a two-thirds affirmative in a separate class vote for any change adversely affecting the relative rights of holders of the Preferred, including changes in the conversion ratio.

Defendants neither address nor deny these violations, but argue instead that the federal securities laws must be applied without reference to basic principles of contract law drawn from the common law or as supplemented by state statutory law. Defendants' Memo, pp. 22-23. Were this preposterous contention correct, the Ninth Circuit could not have decided *Epstein, supra*, which turned on a close reading of the contracts governing the private transactions at issue.

Agreement with Franklin. The defendants do not address at all the letter "agreement" dated June 12, 2001, between Kinross and Franklin governing the Franklin Transaction itself. Dell'Angelo Aff., Ex. H. As set forth in the Plaintiffs' Memo, p. 24, that agreement expressly contemplated the possibility of legal attack by other holders of the Preferred. It provided for indemnification of Franklin by Kinross in case of third-party claims against the former (¶¶ 17-19), and Franklin has in fact given notice under this provision with respect to the present litigation. Dell'Angelo Aff., Ex. F.

It also provided that if 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). Thus while the Franklin Transaction was not conditioned upon the success of any subsequent offer to the remaining holders, the parties expressly contemplated that it might be undone through legal action by one or more of those holders.

Breach of Fiduciary Duty. The defendants argue that breach of fiduciary duty has no relevance to an action to enforce § 13(e) of the Exchange Act. Defendants' Memo, pp. 23-24. However, the Supreme Court has held that "a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide" is actionable under § 10(b) of the Exchange Act since the breaches occurred "in connection with the the purchase or sale of securities." *SEC v. Zanford*, 535 U.S. 813, 825 (2002). Likewise, where the same or related breaches of fiduciary duty infect both a private purchase of securities and a subsequent public tender offer for shares of the same issue, those breaches should be among the salient factors considered in the functional analysis required by *Epstein*, *supra*, under § 13(e).

They are particularly relevant where, as in this case, the breaches are instrumental in structuring an inadequate or coercive public tender offer and contribute to unfair pressure on securities holders to tender their shares. *See* Plaintiffs' Memo, pp. 26-31. What is more, in this case the breaches infected not only both the public tender offer and the related private transaction, but also both sides of that private transaction. As Franklin's own outside counsel has recognized, it is a potential defendant in this action, especially on count II alleging breach of fiduciary. Dell'Angelo Affidavit, Ex. K.

III. FAILURE TO INTEGRATE THE CASH TENDER OFFER AND FRANKLIN AND FOLLOW-ON TRANSACTIONS INTO A SINGLE TENDER OFFER WOULD THWART THE PURPOSE AND INTENT OF SECTION 13(e) OF THE EXCHANGE ACT.

To implement the purpose and intent of § 13(e) and Rule 13e-4, both the *Wellman* test and the functional analysis prescribed by *Epstein* employ flexibility and substantial judicial discretion and to distinguish private repurchase programs "undertaken for any number of legitimate

purposes" (*SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 949 (CA9 1985)) from clever and ingenious schemes to evade or circumvent the requirements of the Williams Act. *Epstein, supra*, 50 F.3d at 654. Outside the Ninth Circuit, the *Wellman* test itself has on occasion been found less than fully adequate to this difficult task. 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 but not determinative).

The plaintiffs have not found, and the defendants do not cite, any case closely analogous on its facts to this one. So far as plaintiffs can determine, no issuer of convertible preferred shares, let alone a preferred with accumulated unpaid dividends, has ever tried to eliminate the issue through private transactions enabling a few large institutional holders to convert to common at preferential rates followed by a coercive cash tender offer to the remaining small investors. In one respect, however, the defendants are correct: Franklin, Tell and Capital Pro International were not subject to unfair pressure by Kinross and these favored investors had little need for the protection of § 13(e) and Rule 13e-4. Defendants' Memo, pp. 14-15.

The investors who did need that protection were the disfavored small holders left behind. They needed the protection of all three key provisions in Rule 13e-4: the all holders requirement (Rule 13e-4(f)(8)(i)); the best price rule (Rule 13e-4(f)(8)(ii)); and the equal right to elect among each type of consideration offered at the highest rate paid to any other holder receiving the same type (Rule 13e-4(f)(10)). See Plaintiffs' Memo, pp.13-14. Absent that protection, they were left to face an extraordinarily coercive cash tender offer that gave them two choices short of litigation: tender to the unfairly low price offered or be left with an illiquid, unlisted and unmarginable

security. That cannot be the result Congress intended when it enacted § 13(e).

Conclusion

For the foregoing reasons, the Court should enter judgment for the plaintiffs on liability under count III.

Dated: March 11, 2005

KUMMER KAEMPFER BONNER & RENSHAW

By: _____

Thomas F. Kummer, Esq.
Nevada Bar No. 1200
L. Joe Coppedge, Esq.
Nevada Bar No. 4954
Seventh Floor
3800 Howard Hughes Parkway, 7th Floor
Las Vegas, NV 89109
Tel: (702) 792-7000
Fax: (702) 792-7181

Merrill G. Davidoff, Esq.
Michael Dell'Angelo, Esq.
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4604

Reginald H. Howe, Esq.
49 Tyler Road
Belmont, MA 02478-2022
Tel./Fax: (617) 484-0029
Attorneys for Plaintiffs

392107_00.wpd

11614.1
PLD

THOMAS F. KUMMER
Nevada Bar No. 1200
L. JOE COPPEDGE
Nevada Bar No. 4954
KUMMER KAEMPFER BONNER & RENSHAW
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89109
Tel: (702) 792-7000
Fax: (702) 796-7181

MERRILL G. DAVIDOFF
MICHAEL DELL'ANGELO
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4608

REGINALD H. HOWE
49 Tyler Road
Belmont, MA 02478-2022
Tel/Fax: (617) 484-0029

Attorneys for Plaintiffs

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	**SECOND AFFIDAVIT OF MICHAEL DELL'ANGELO TO DOCUMENTS IN SUPPORT OF PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT**

STATE OF PENNSYLVANIA)
)
COUNTY OF PHILADELPHIA)

MICHAEL C. DELL'ANGELO, being first duly sworn, states:

1. I am an attorney for plaintiffs Robert A. Brown, Glenbrook Capital LP, George P. Drake, CN&L Investment Corp. and Andrew Kaufman in this matter.

2. I make this affidavit in support of plaintiffs' Cross-Motion for Summary Judgment.

3. Annexed hereto are true and correct copies of the following documents:

a) Exhibit A: A chart setting forth the high, low and closing price, as well as the trading volume, for Kinross Gold Corporation Stock (symbol KCG) on the New York Stock Exchange, as reported by Bloomberg L.P., during the period from May 1, 2001 through and including April 29, 2001;

b) Exhibit B: A chart setting forth the high, low and closing price, as well as the trading volume, for the $3.75 Series B Convertible Preferred Stock of Kinam Gold Inc. (symbol KGC PrB) on the New York Stock Exchange, as reported by Merrill Lynch & Co., during the period from May 1, 2001 through and including April 29, 2001;

4. I certify that under the law of the State of Pennsylvania that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

MICHAEL C. DELL'ANGELO

SUBSCRIBED AND SWORN BEFORE ME this

11th day of March, 2005.

NOTARY PUBLIC in and for said County and State

My Commission Expires: _____

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
SUSAN D. PROTAS, Notary Public
City of Philadelphia, Phila. County
My Commission Expires December 31, 2008

KUMMER KAEMPFER BONNER & RENSHAW
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89109

Exhibit A

Kinross Gold Corporation (KGC)

Date	Price High	Price Low	Price at Close	Volume
5/1/2001	$1.77	$1.62	$1.77	81,967
5/2/2001	$1.83	$1.77	$1.80	70,633
5/3/2001	$1.80	$1.68	$1.68	64,900
5/4/2001	$1.71	$1.62	$1.62	66,500
5/7/2001	$1.68	$1.59	$1.68	128,467
5/8/2001	$1.65	$1.59	$1.59	22,600
5/9/2001	$1.95	$1.68	$1.83	725,600
5/10/2001	$1.95	$1.74	$1.86	206,300
5/11/2001	$1.92	$1.80	$1.83	211,533
5/14/2001	$1.92	$1.77	$1.89	175,467
5/15/2001	$1.89	$1.80	$1.80	206,500
5/16/2001	$2.31	$1.89	$2.25	628,200
5/17/2001	$2.70	$2.31	$2.55	637,833
5/18/2001	$3.06	$2.40	$2.85	850,700
5/21/2001	$3.60	$3.06	$3.30	1,108,733
5/22/2001	$3.15	$2.55	$2.76	929,733
5/23/2001	$2.70	$2.58	$2.70	468,633
5/24/2001	$2.91	$2.43	$2.52	494,967
5/25/2001	$2.82	$2.46	$2.82	388,900
5/29/2001	$2.70	$2.52	$2.55	280,200
5/30/2001	$2.55	$2.25	$2.28	389,467
5/31/2001	$2.43	$2.25	$2.34	291,267
6/1/2001	$2.58	$2.34	$2.52	129,367
6/4/2001	$2.64	$2.49	$2.61	136,967
6/5/2001	$2.70	$2.55	$2.67	92,200
6/6/2001	$2.67	$2.52	$2.58	212,267
6/7/2001	$2.58	$2.43	$2.43	98,633
6/8/2001	$2.85	$2.49	$2.76	260,500
6/11/2001	$2.70	$2.55	$2.67	177,500
6/12/2001	$2.94	$2.73	$2.88	218,500
6/13/2001	$3.03	$2.82	$2.94	234,400
6/14/2001	$3.21	$2.70	$3.12	389,933
6/15/2001	$3.15	$2.94	$3.09	219,400
6/18/2001	$3.12	$2.82	$2.97	249,900
6/19/2001	$2.97	$2.70	$2.73	152,667
6/20/2001	$2.70	$2.43	$2.46	194,933
6/21/2001	$2.52	$2.25	$2.40	363,133
6/22/2001	$2.58	$2.43	$2.52	122,300
6/25/2001	$2.70	$2.40	$2.64	199,700
6/26/2001	$2.91	$2.64	$2.85	270,967
6/27/2001	$2.82	$2.49	$2.49	250,333
6/28/2001	$2.52	$2.40	$2.49	267,867
6/29/2001	$2.52	$2.37	$2.37	213,500

Exhibit B

$3.75 Series B Convertible Preferred Stock of Kinam Gold Inc.

Date	Price High	Price Low	Price at Close	Volume
5/1/2001	$5.83	$5.76	$5.83	1,100
5/2/2001	$6.12	$5.95	$6.05	6,400
5/3/2001	$6.04	$5.97	$6.00	15,200
5/4/2001	$6.30	$6.10	$6.30	10,800
5/7/2001	$6.60	$6.35	$6.60	7,000
5/8/2001	$6.80	$6.75	$6.75	2,400
5/9/2001	$7.34	$6.90	$7.15	11,000
5/10/2001	$7.01	$7.01	$7.01	300
5/11/2001	$7.15	$7.03	$7.03	6,000
5/14/2001	$7.39	$7.05	$7.30	5,900
5/15/2001	$0.00	$0.00	$7.20	0
5/16/2001	$7.60	$7.38	$7.60	5,900
5/17/2001	$8.10	$7.70	$8.00	3,700
5/18/2001	$9.35	$8.10	$9.21	10,600
5/21/2001	$10.30	$9.47	$10.30	8,100
5/22/2001	$10.00	$9.20	$9.70	3,000
5/23/2001	$9.50	$8.89	$9.00	4,600
5/24/2001	$9.00	$9.00	$9.00	1,000
5/25/2001	$9.50	$9.25	$9.50	400
5/29/2001	$9.50	$9.50	$9.50	1,300
5/30/2001	$9.10	$9.00	$9.00	2,600
5/31/2001	$8.50	$8.50	$8.50	600
6/1/2001	$8.70	$8.50	$8.70	1,600
6/4/2001	$8.50	$8.10	$8.10	900
6/5/2001	$7.75	$7.75	$7.75	1,000
6/6/2001	$0.00	$0.00	$7.75	0
6/7/2001	$8.20	$7.80	$7.80	1,300
6/8/2001	$8.50	$8.00	$8.50	1,800
6/11/2001	$8.50	$8.10	$8.10	800
6/12/2001	$8.50	$8.40	$8.50	700
6/13/2001	$12.20	$9.30	$12.20	20,800
6/14/2001	$12.20	$11.00	$11.55	11,100
6/15/2001	$12.10	$10.61	$12.10	2,000
6/18/2001	$12.25	$10.75	$70.75	9,800
6/19/2001	$10.99	$10.50	$10.50	3,900
6/20/2001	$10.20	$9.75	$10.00	2,000
6/21/2001	$10.00	$10.00	$10.00	5,000
6/22/2001	$10.20	$9.60	$10.20	1,100
6/25/2001	$10.75	$10.00	$10.00	1,900
6/26/2001	$10.20	$10.00	$10.00	500
6/27/2001	$9.70	$9.70	$9.70	200
6/28/2001	$10.20	$9.55	$10.20	1,100
6/29/2001	$10.25	$10.25	$10.25	1,200

11614.1
PLD

THOMAS F. KUMMER
Nevada Bar No. 1200
L. JOE COPPEDGE
Nevada Bar No. 4954
KUMMER KAEMPFER BONNER & RENSHAW
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89109
Tel: (702) 792-7000
Fax: (702) 796-7181

MERRILL G. DAVIDOFF
JACOB A. GOLDBERG
DOUGLAS M. RISEN
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4608

REGINALD H. HOWE
49 Tyler Road
Belmont, MA 02478-2022
Tel/Fax: (617) 484-0029

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

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

1. Plaintiffs' Reply Memorandum of Law in Support of Their CrossMotion for Summary Judgment on Count III;
2. Second Affidavit of Michael Dell'Angelo to Documents in Support of Plaintiffs' Cross Motion for Summary Judgment

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

Clark Waddoups
Robert S. Clark
Gregory M. Hess
Parr Waddoups Brown Gee & Loveless
185 S. State St., Suite 1300
Salt Lake City, UT 84111
Attorneys for Defendants

DATED: March 11, 2005

Valerie Larsen
An Employee of Kummer Kaempfer Bonner & Renshaw

KUMMER KAEMPFER BONNER & RENSHAW
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89109

RECEIPT OF COPY

Receipt of the following document is hereby acknowledged this 11th day of March 2005.

1. Plaintiffs' Reply Memorandum of Law in Support of Their CrossMotion for Summary Judgment on Count III;
2. Second Affidavit of Michael Dell'Angelo to Documents in Support of Plaintiffs' Cross Motion for Summary Judgment

Jones Vargas

By: Kirk Lenhard /pk/
Kirk B. Lenhard
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, NV 89109
Attorneys for Defendants