IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MAZY SEHRGOSHA, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. KINDRED HEALTHCARE, INC., PHYLLIS R. YALE, BENJAMIN A. BREIER, JOEL ACKERMAN, JONATHAN D. BLUM, PAUL J. DIAZ, HEYWARD R. DONIGAN, RICHARD GOODMAN, CHRISTOPHER T. HJELM FRED J. KLEISNER, SHARAD MANSUKANI, M.D., and LYNN SIMON, M.D., Defendants.	Civil Action No. _____ **CLASS ACTION COMPLAINT** **DEMAND FOR JURY TRIAL** **1. VIOLATIONS OF SECTION 14(a) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 14a-9** **2. VIOLATIONS OF SECTION 20(a) OF THE SECURITIES EXCHANGE ACT OF 1934**

Mazy Sehrgosha ("Plaintiff"), on behalf of himself and all others similarly situated, by and through his attorneys, alleges the following upon information and belief, including investigation of counsel and review of publicly-available information, except as to those allegations pertaining to Plaintiff, which are alleged upon personal knowledge:

NATURE OF THE ACTION

1. This is a class action brought by Plaintiff on behalf of himself and the other ordinary shareholders of Kindred Healthcare, Inc. ("Kindred" or the "Company"), except Defendants (defined below) and their affiliates, against Kindred and the members Kindred's board of directors (the "Board" or the "Individual Defendants") for their violations of Section 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15.U.S.C. §§ 78n(a), 78t(a), and SEC Rule 14a-9, 17 C.F.R. 240.14a-9, in connection with the proposed merger (the "Proposed Merger") between Kindred, and affiliates of each of TPG and Welsh, Carson, Anderson & Stowe, and Humana Inc. (collectively, the "The Consortium").

2. On December 19, 2017, the Board caused the Company to enter into an agreement and plan of merger (the "Merger Agreement") with The Consortium, pursuant to which, Kindred shareholders will receive $9.00 in cash for each share of common stock they own (the "Merger Consideration").

3. On, February 5, 2018, the Board authorized the filing of a materially incomplete and misleading preliminary proxy statement (the "Proxy") with the Securities and Exchange Commission ("SEC"), in violation of Sections 14(a) and 20(a) of the Exchange Act.

4. While Defendants are touting the fairness of the Merger Consideration to the Company's stockholders in the Proxy, they have failed to disclose material information that is necessary for stockholders to properly assess the fairness of the Proposed Merger, thereby rendering certain statements in the Proxy incomplete and misleading. Specifically, the Proxy contains materially incomplete and misleading information concerning: (i) the Company's financial projections; and (ii) the valuation analyses performed by the Company's financial advisors, Barclays Capital Inc. ("Barclays") and Guggenheim Securities, LLC ("Guggenheim" and together with Barclays, the "Financial Advisors"), in support of their fairness opinions.

5. The special meeting of Kindred shareholders to vote on the Proposed Merger is forthcoming. It is imperative that the material information omitted from the Proxy is disclosed to the Company's shareholders prior to the forthcoming shareholder vote so that they can properly exercise their corporate suffrage rights.

6. For these reasons as set forth in detail herein, Plaintiff asserts claims against Defendants for violations of Sections 14(a) and 20(a) of the Exchange Act. Plaintiff seeks to enjoin Defendants from holding the shareholder vote on the Proposed Merger and taking any steps to consummate the Proposed Merger unless and until the material information discussed below is

disclosed to Kindred shareholders, or, in the event the Proposed Merger is consummated, to recover damages resulting from the Defendants' violations of the Exchange Act.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331, federal question jurisdiction, as Plaintiff alleges violations of Section 14(a) and 20(a) of the Exchange Act and SEC Rule 14a-9.

8. Personal jurisdiction exists over each Defendant either because the Defendant conducts business in or maintains operations in this District, or is an individual who is either present in this District for jurisdictional purposes or has sufficient minimum contacts with this District as to render the exercise of jurisdiction over defendant by this Court permissible under traditional notions of fair play and substantial justice.

9. Venue is proper in this District under Section 27 of the Exchange Act, 15 U.S.C. § 78aa, as well as under 28 U.S.C. § 1391, because: (i) the conduct at issue took place and had an effect in this District; (ii) Kindred is incorporated in this District; (iii) a substantial portion of the transactions and wrongs complained of herein, occurred in this District; and (iv) Defendants have received substantial compensation in this District by doing business here and engaging in numerous activities that had an effect in this District.

PARTIES

10. Plaintiff is, and has been at all relevant times, the owner of Kindred common stock and held such stock since prior to the wrongs complained of herein.

11. Defendant Kindred is a Delaware Corporation with its principle executive offices located at 680 South Fourth Street, Louisville, Kentucky 40202. Kindred is a is a healthcare services company that, through its subsidiaries, operates a home health, hospice and community

care business, transitional care ("TC") hospitals, inpatient rehabilitation hospitals ("IRFs"), and a contract rehabilitation services business across the United States. Kindred's common stock trades on the NYSE under the symbol "KND."

12. Individual Defendant Phyllis R. Yale is a director of Kindred and is the Chairman of the Board.

13. Individual Defendant Benjamin A. Breier is a director of Kindred and is the President and CEO of the Company.

14. Individual Defendant Joel Ackerman is, and has been at all relevant times, a director of the Company.

15. Individual Defendant Jonathan D. Blum is, and has been at all relevant times, a director of the Company.

16. Individual Defendant Paul J. Diaz is, and has been at all relevant times, a director of the Company.

17. Individual Defendant Heyward R. Donigan is, and has been at all relevant times, a director of the Company.

18. Individual Defendant Richard Goodman is, and has been at all relevant times, a director of the Company.

19. Individual Defendant Christopher T. Hjelm is, and has been at all relevant times, a director of the Company.

20. Individual Defendant Fred J. Kleisner is, and has been at all relevant times, a director of the Company.

21. Individual Defendant Sharad Mansukani, M.D. is, and has been at all relevant times, a director of the Company.

22. Individual Defendant Lynn Simon, M.D. is, and has been at all relevant times, a director of the Company.

23. The defendants identified in paragraphs 11-22 are collectively referred to as the "Defendants".

CLASS ACTION ALLEGATIONS

24. Plaintiff brings this action on his own behalf and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all holders of Kindred common stock who are being and will be harmed by Defendants' actions described below (the "Class"). Excluded from the Class are Defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any of the Defendants.

25. This action is properly maintainable as a class action for the following reasons:

(a) The Class is so numerous that joinder of all members is impracticable. As of February 5, 2018, Kindred had an estimated 91,322,323 shares outstanding.

(b) The holders of these shares are believed to be geographically dispersed through the United States;

(c) There are questions of law and fact which are common to the Class and which predominate over questions affecting individual Class members. The common questions include, *inter alia*, the following:

i. Whether Defendants have violated Section 14(a) of the Exchange act and Rule 14a-9 promulgated thereunder;

ii. Whether the Individual Defendants have violated Section 20(a) of the Exchange Act; and

iii. Whether Plaintiff and the other members of the Class would suffer irreparable injury were they required to vote on the Proposed Merger as presently anticipated.

(d) Plaintiff's claims are typical of the claims of the other members of the Class and Plaintiff does not have any interests adverse to the Class;

(e) The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class; and

(f) Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole.

SUBSTANTIVE ALLEGATIONS

I. Background and the Proposed Merger

26. Kindred, incorporated on March 27, 1998, is a healthcare services company. The Company, through its subsidiaries, operates transitional care (TC) hospitals, a home health, hospice, and community care business, inpatient rehabilitation hospitals (IRFs), a contract rehabilitation services business, nursing centers, and assisted living facilities across the United States. The Company operates through divisions: the Kindred at Home division, the hospital division, the Kindred Rehabilitation Services division, and the nursing center division. These divisions represent six segments: home health services, hospice services, hospitals, Kindred Hospital Rehabilitation Services, RehabCare, and nursing centers. The home health services and

hospice services operating segments are contained within the Kindred at Home division while the Kindred Hospital Rehabilitation Services and RehabCare operating segments are both contained within the Kindred Rehabilitation Services division.

27. The $9.00 Merger Consideration is inadequate in light of Kindred's recent financial performance and outlook. The Merger Consideration represents a 24% *discount* to Kindred's 52-week high trading price of $11.90. Cash-out mergers, such as the Proposed Merger, usually offer significant premiums to a Company's trading price, not discounts.

28. On Nov. 6, 2017, Kindred issued a press release announcing positive results for the third quarter of 2017. The Company beat earnings estimates by $0.09 per share. Benjamin A. Breier stated:

> "We are pleased to report third quarter results ahead of expectations. We made good progress during the quarter on each of our ongoing key initiatives, including our plan to fully exit the skilled nursing facility business and our continuing efforts to mitigate the impact of long-term acute care ("LTAC") patient criteria. The third quarter also presented unexpected challenges for our business, including two major hurricanes that impacted Florida and Houston, Texas. Thanks to the talented and dedicated teammates across our organization, Kindred delivered solid operating results, when adjusted for the one-time impact of Hurricanes Irma and Harvey (the "Hurricanes") and LTAC closure costs incurred during the quarter. The GAAP and Core pretax earnings impact of the Hurricanes for the quarter was $16 million, which primarily affected both Segment adjusted operating income and Core EBITDAR of the Hospital and Kindred at Home Divisions by approximately $10 million and $5 million, respectively."
>
> "The success of our ongoing LTAC patient criteria mitigation strategy resulted in our Hospital Division delivering operating results that were largely in line with expectations. LTAC compliant revenue increased to 89% from 88% in the second quarter. Managed care and commercial volumes increased 5.1% for the third quarter of 2017 on a same-hospital basis as compared to the prior year period."

> "Kindred's Hospital Division continued to execute on its portfolio optimization initiative by closing five LTAC hospitals since the end of last quarter, including one that will be converted to an inpatient rehabilitation facility ("IRF") joint venture. We expect to further optimize our LTAC portfolio with additional closures, consolidations and IRF conversions over the coming quarters."

29. Further, Wall Street equity research analysts placed price targets as high as $11 per share for Kindred. It is important to note that price targets are a predictive valuation of what a stock is worth on its own. They do not account for premiums associated with a merger or takeover. A "take-out price", or the price that analysts predict in the event a merger or takeover, would include those premiums and be significantly higher.

30. On December 19, 2017, Kindred issued a press release announcing the Merger Agreement. The press release stated in relevant part:

> High LOUISVILLE, Ky.--(BUSINESS WIRE)--Dec. 19, 2017--Kindred Healthcare, Inc. ("Kindred" or "the Company") (NYSE:KND) today announced that its Board of Directors has approved a definitive agreement under which it will be acquired by a consortium of three companies: TPG Capital ("TPG"), Welsh, Carson, Anderson & Stowe ("WCAS") and Humana Inc. ("Humana") (NYSE: HUM) (together, the "consortium") for approximately $4.1 billion in cash including the assumption or repayment of net debt.
>
> Under the terms of the agreement, Kindred stockholders will receive $9.00 in cash for each share of Kindred common stock they hold, representing a premium of approximately 27 percent to Kindred's 90-day volume weighted average price ("VWAP") for the period ending December 15, 2017, the last trading day prior to media reports regarding the potential transaction.
>
> Kindred operates home health, hospice and community care businesses, long-term acute care ("LTAC") hospitals, inpatient rehabilitation facilities ("IRF") and a contract rehabilitation services business. Immediately following the acquisition of Kindred, the home health, hospice and community care businesses will be separated from Kindred and operated as a standalone company owned 40 percent by Humana, with the remaining 60 percent owned by TPG and WCAS ("Kindred at Home"). Humana will have a right

to buy the remaining ownership interest in Kindred at Home over time through a put/call arrangement. Kindred's LTAC hospitals, IRFs and contract rehabilitation services businesses will be operated as a separate specialty hospital company owned by TPG and WCAS ("Kindred Healthcare").

Benjamin A. Breier, President and Chief Executive Officer of Kindred, said, "We are pleased to have reached this agreement, which will deliver significant cash value to Kindred's stockholders and concludes a robust strategic review undertaken by the Board and management team over the course of 2017. We believe this agreement maximizes value for stockholders and represents a significant step forward in transforming home healthcare in America by enhancing access to care and reducing costs for people living with chronic conditions. In addition, the specialty hospital company, Kindred Healthcare, will be uniquely positioned to care for the most medically-complex and rehab-intensive populations."

Continued Mr. Breier, "The flexibility and resources gained through the investments by Humana, TPG and WCAS are expected to enhance innovation in both platforms, further our culture of a patient-first approach to high-quality, compassionate care and create new opportunities for Kindred employees."

Bruce D. Broussard, Humana's President and Chief Executive Officer, said, "Humana is focused on enhancing our capabilities for care in the home to prioritize patient wellness while delivering high-quality care in a low-cost setting. This transaction with Kindred underscores the successful and ongoing execution of our strategy by joining with the most geographically diverse home healthcare provider in the country. We are confident that these new capabilities will help Humana continue to modernize home health and meaningfully improve the member and provider experience. We look forward to completing this strategic transaction with TPG and WCAS."

"TPG's healthcare team has a long history of partnering with companies and management teams that hold significant growth potential," said Jeff Rhodes, Partner at TPG. "We believe this transaction will provide Kindred with additional resources and focus to drive significant value for all stakeholders. We look forward to partnering with Humana, WCAS and the management team at Kindred to build on the complementary capabilities this transaction brings together. We are excited to build the new companies and invest behind best in class clinical care."

D. Scott Mackesy, WCAS's Managing Partner, said, "WCAS's healthcare franchise has been built around partnering with excellent management teams and providing incremental resources to drive above market growth. We have a long history of creative dealmaking with corporate partners and look forward to working with Humana, TPG and Kindred's management team to deliver the highest quality, most cost-efficient healthcare to all."

Debra A. Cafaro, Chairman and Chief Executive Officer of Ventas, Inc. ("Ventas") (NYSE: VTR), said, "As the premier capital provider for leading healthcare companies and long-standing partners to Kindred, we are delighted to support Kindred and this transaction. It creates the nation's foremost LTAC, IRF and contract rehabilitation services operator with improved financial strength. The specialty hospital company, Kindred Healthcare, brings together Kindred's outstanding management team as well as experienced private equity partners with strong healthcare backgrounds. We look forward to deepening our partnership with Kindred's sponsors and building on the strong relationship we have developed with Kindred over many years to continue transforming care for the aging population."

Leadership and Shared Services

Upon completing the transaction, Mr. Breier will serve as Chief Executive Officer of the specialty hospital company, Kindred Healthcare. David Causby, currently Executive Vice President and President of Kindred at Home, will serve as Chief Executive Officer of Kindred at Home.

Under a shared services agreement, Kindred Healthcare will continue to provide certain support functions to Kindred at Home for a transitional period.

Timing and Approvals

The agreement is subject to certain conditions to closing, including, without limitation, the approval of the agreement by the stockholders of Kindred, the receipt of certain licensure and regulatory approvals, the expiration of the waiting period under the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended, and other customary closing conditions.

The transaction is expected to close during the summer of 2018.

Advisors

Barclays and Guggenheim Securities, LLC are serving as financial advisors to Kindred and Cleary Gottlieb Steen & Hamilton LLP is serving as legal counsel.

Morgan Stanley & Co. LLC and JPMorgan Chase are acting as lead financial advisors to the consortium. Citi is also acting as financial advisor. Debevoise & Plimpton LLP and Mintz Levin are serving as legal counsel to the consortium. Ropes & Gray LLP is serving as legal counsel to WCAS.

TripleTree, LLC is acting as strategic and financial advisor to Humana. Evercore provided a fairness opinion to the Board of Directors of Humana. Fried, Frank, Harris, Shriver & Jacobson LLP is acting as legal advisor to Humana.

About Kindred

Kindred Healthcare, Inc., a top-105 private employer in the United States, is a FORTUNE 500 healthcare services company based in Louisville, Kentucky with annual revenues of approximately $6.1 billion1. At September 30, 2017, Kindred's continuing operations, through its subsidiaries, had approximately 86,400 employees providing healthcare services in 2,475 locations in 45 states, including 77 LTAC hospitals, 19 inpatient rehabilitation hospitals, 16 sub-acute units, 609 Kindred at Home health, hospice and non-medical home care sites of service, 101 inpatient rehabilitation units (hospital-based) and contract rehabilitation service businesses which served 1,653 non-affiliated sites of service. Ranked as one of Fortune magazine's Most Admired Healthcare Companies for eight years, Kindred's mission is to promote healing, provide hope, preserve dignity and produce value for each patient, resident, family member, customer, employee and shareholder we serve. For more information, go to www.kindredhealthcare.com. You can also follow us on Twitter and Facebook.

About Humana

Humana Inc. is committed to helping our millions of medical and specialty members achieve their best health. Our successful history in care delivery and health plan administration is helping us create a new kind of integrated care with the power to improve health and well-being and lower costs. Our efforts are leading to a better quality of life for people with Medicare, families, individuals, military service personnel, and communities at large.

To accomplish that, we support physicians and other health care professionals as they work to deliver the right care in the right place for their patients, our members. Our range of clinical capabilities, resources and tools – such as in-home care, behavioral health, pharmacy services, data analytics and wellness solutions – combine to produce a simplified experience that makes health care easier to navigate and more effective.

More information regarding Humana is available to investors via the Investor Relations page of the company's website at humana.com, including copies of:

- Annual reports to stockholders;
- Securities and Exchange Commission filings;
- Most recent investor conference presentations;
- Quarterly earnings news releases and conference calls;
- Calendar of events; and
- Corporate Governance information.

About TPG

TPG is a leading global alternative asset firm founded in 1992 with more than $73 billion of assets under management and offices in Austin, Beijing, Boston, Dallas, Fort Worth, Hong Kong, Houston, London, Luxembourg, Melbourne, Moscow, Mumbai, New York, San Francisco, Seoul, and Singapore. TPG's investment platforms are across a wide range of asset classes, including private equity, growth venture, real estate, credit, and public equity. TPG aims to build dynamic products and options for its investors while also instituting discipline and operational excellence across the investment strategy and performance of its portfolio. For more information, visit www.tpg.com.

About WCAS

WCAS focuses its investment activity in two target industries: technology and healthcare. Since its founding in 1979, WCAS has organized 16 limited partnerships with total capital of over $22 billion. The Firm is currently investing an equity fund, Welsh, Carson, Anderson and Stowe XII, L.P., which closed on over $3.3 billion in commitments. WCAS has a current portfolio of approximately twenty companies with 2017 annual revenues totaling over $16 billion. WCAS's strategy is to partner with outstanding management teams and build value for its investors through a combination of operational improvements, internal

> growth initiatives and strategic acquisitions. See www.wcas.com to learn more.

II. The Proxy Is Materially Incomplete and Misleading

31. On February 5, 2018, Kindred filed the Proxy with the SEC in connection with the Proposed Merger. The Proxy solicits the Company's shareholders to vote in favor of the Proposed Merger. Defendants were obligated to carefully review the Proxy before it was filed with the SEC and disseminated to the Company's shareholders to ensure that it did not contain any material misrepresentations or omissions. However, the Proxy misrepresents and/or omits material information that is necessary for the Company's shareholders to cast an informed vote regarding Proposed Merger, in violation of Sections 14(a) and 20(a) of the Exchange Act.

32. The First, the Proxy fails to provide unlevered free cash flow projections[1] for Kindred. Unlevered free cash flows were utilized by both of the Financial Advisors in their valuation calculations, including their discounted cash flow analyses, and are material to the Company's shareholders. Indeed, investors are concerned, perhaps above all else, with the unlevered free cash flows of the companies in which they invest. Under sound corporate finance theory, the market value of a company should be premised on the expected unlevered free cash flows of the corporation. Accordingly, the question that the Company's shareholders need to assess in determining whether to vote in favor of the merger is clear – is the Merger Consideration fair compensation given the expected unlevered free cash flows? Without unlevered free cash flow

[1] Unlevered free cash flows are used to determine a company's enterprise value. The unlevered free cash flow allows investors to ascertain the operating value of a company independent of its capital structure. This provides a greater degree of analytical flexibility and allows for a clearer picture of the value of the company overall. For this reason, unlevered free cash flows are routinely used to value a company, especially in merger contexts.

projections, the Company's shareholders were not able to answer this question and assess the fairness of the Merger Consideration.

33. The projections included in the Proxy disclose EBITDA without including projections for unlevered free cash flows. EBITDA is not a sufficient alternative to unlevered free cash flows—as Warren Buffet and other financial experts have stated: "References to EBITDA make us shudder. Too many investors focus on earnings before interest, taxes, depreciation, and amortization. That makes sense, only if you think capital expenditures are funded by the tooth fairy."[2] Relying on EBITDA to provide a fair summary of a company's financial prospects has numerous pitfalls. EBITDA does not take into account any capital expenditures, working capital requirements, current debt payments, taxes, or other fixed costs that are critical to understand a company's value.[3] As a result of these material differences between EBITDA and unlevered free cash flows, many experts recognize unlevered free cash flows as a much more accurate measure when it comes to analyzing the expected performance of a company. Simply put, the unlevered free cash flow projections are material and merely supplying EBITDA renders the projections included in the Proxy misleading.

34. Additionally, the Proxy fails to provide a complete report of the various sets of projections furnished to the Financial Advisors. The Proxy provides a base set of projections for 2018 – 2022, but fails to disclose: (i) net operating loss ("NOL") projections of Kindred prepared by Kindred's management for the years 2017 through 2022; (ii) certain illustrative adjustments to the Kindred projections made by Kindred's senior management to reflect the potential impact of

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[2] Elizabeth MacDonald, *the Ebitda folly*, FORBES (March 17, 2003), http://www.forbes.com/global/2003/0317/024.html.

[3] Cody Boyte, *Why EBITDA is Not Cash Flow*, AXIAL FORUM (Nov. 19, 2013), http://www.axial.net/forum/ebitda-cash-flow/.

expected U.S. federal tax reform as provided in the Tax Bill; and (iii) certain further illustrative adjustments to the Kindred projections as to the potential negative impact on Medicare reimbursement arising from the Tax Bill. These projections were explicitly relied upon by the Financial Advisors in the derivation of their various analyses and fairness opinions. Furthermore, these sets of projections appear to present the Company as being more valuable than the base projections, making their omission materially misleading to shareholders.

35. The omission of the above-referenced projections renders the financial projections included in the Proxy materially incomplete and misleading. If a Proxy discloses financial projections and valuation information, such projections must be complete and accurate. The question here is not the duty to speak, but liability for not having spoken enough. With regard to future events, uncertain figures, and other so-called soft information, a company may choose silence or speech elaborated by the factual basis as then known—but it may not choose half-truths.

36. With respect to Barclays' *Selected Comparable Company Analysis* the Proxy fails to disclose the individual multiples for each company utilized in the analysis. The omission of these multiples renders the summary of the analysis and the corresponding implied equity value reference range materially misleading. A fair summary of a company's analysis requires the disclosure of the individual multiples for each company; merely providing the high and low values that a banker applied is insufficient, as shareholders are unable to assess whether the banker applied appropriate multiples, or, instead, applied unreasonably low multiples in order to drive down the implied share price range.

37. With respect to the Financial Advisors' *Discounted Cash Flow* Analyses, the Proxy fails to disclose the following key components used in their analysis: (i) the inputs and assumptions underlying Barclays' calculation of the discount rate range of 8.50% to 9.50%; (ii) the inputs and

assumptions underlying Guggenheim's calculation of the discount rate range of 8.00% to 9.25%; (iii) the inputs and assumptions underlying each of the Financial Advisors' selection of the perpetuity growth rates range of 1.75% to 2.25%; and (iv) the actual terminal values each of the Financial Advisors calculated and used.

38. These key inputs are material to Kindred shareholders, and their omission renders the summary of the Financial Advisors' Discounted Cash Flow Analyses incomplete and misleading. As a highly-respected professor explained in one of the most thorough law review articles regarding the fundamental flaws with the valuation analyses bankers perform in support of fairness opinions, in a discounted cash flow analysis a banker takes management's forecasts, and then makes several key choices "each of which can significantly affect the final valuation." Steven M. Davidoff, Fairness Opinions, 55 Am. U.L. Rev. 1557, 1576 (2006). Such choices include "the appropriate discount rate, and the terminal value…" Id. As Professor Davidoff explains:

> There is substantial leeway to determine each of these, and any change can markedly affect the discounted cash flow value. For example, a change in the discount rate by one percent on a stream of cash flows in the billions of dollars can change the discounted cash flow value by tens if not hundreds of millions of dollars….This issue arises not only with a discounted cash flow analysis, but with each of the other valuation techniques. This dazzling variability makes it difficult to rely, compare, or analyze the valuations underlying a fairness opinion unless full disclosure is made of the various inputs in the valuation process, the weight assigned for each, and the rationale underlying these choices. The substantial discretion and lack of guidelines and standards also makes the process vulnerable to manipulation to arrive at the "right" answer for fairness. This raises a further dilemma in light of the conflicted nature of the investment banks who often provide these opinions.

Id. at 1577-78.

39. With respect to Barclays' *Illustrative Future Share Price Analysis* the Proxy fails to disclose: (i) the projected amount of Kindred's net debt and the book value of noncontrolling interests; (ii) the fully diluted number of shares of Kindred common stock based on data and calculations provided by Kindred management; and (iii) the inputs and assumption underlying the 10.0% discount rate. With respect to Barclays' *Sensitivity* Analyses, the Proxy fails to disclose the inputs and assumptions underlying the various discount rates the financial advisor utilized. Similarly, with respect to Guggenheim's *Illustrative Discounted Cash Flow Analyses (Tax Bill Cases)*, the Proxy fails to disclose the inputs and assumptions underlying the discount rate range of 8.25% – 9.50%.

40. As with the *Discounted Cash Flow* Analyses, the above three valuation analyses were performed by the Financial Advisors, heavily relied on by shareholders, and are expected to represent a clear and accurate illustration of Kindred's financial value. Thus, in summarizing the analyses in the Proxy, the Defendants must be completely transparent with the information provided. The failure to include the above valuable information renders the summary of the analyses set forth in the Proxy materially incomplete and misleading.

41. Finally, the Proxy references Wall Street research analyst price targets several times but fails to actually include the values of the price targets. The Financial Advisors each state a different range for the price targets; however, a range is insufficient disclosure. A fair summary of analyst price targets requires the disclosure of the individual targets from each wall street analyst; merely providing the high and low values observed is insufficient as shareholders are unable to ascertain whether the Financial Advisors' disclosed fairly, or instead presented the price target information to look best in light of the insufficient Merger Consideration, i.e. as low as possible.

42. In sum, the omission the of the above-referenced information renders statements in the Proxy materially incomplete and misleading in contravention of the Exchange Act. Absent disclosure of the foregoing material information prior to the special shareholder meeting to vote on the Proposed Merger, Plaintiff and the other members of the Class will be unable to make a

fully-informed decision regarding whether to vote in favor of the Proposed Merger, and they are thus threatened with irreparable harm, warranting the injunctive relief sought herein.

COUNT I

On Behalf of Plaintiff and the Class Against All Defendants for Violations of Section 14(a) of the Exchange Act and Rule 14a-9 Promulgated Thereunder

43. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

44. Section 14(a)(1) of the Exchange Act makes it "unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title." 15 U.S.C. § 78n(a)(1).

45. Rule 14a-9, promulgated by the SEC pursuant to Section 14(a) of the Exchange Act, provides that Proxy communications with shareholders shall not contain "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9.

46. The omission of information from a proxy statement will violate Section 14(a) and Rule 14a-9 if other SEC regulations specifically require disclosure of the omitted information.

47. Defendants have issued the Proxy with the intention of soliciting shareholder support for the Proposed Merger. Each of the Defendants reviewed and authorized the dissemination of the Proxy and the use of their name in the Proxy, which fails to provide critical information regarding: (i) the Company's financial projections; and (ii) the valuation analyses performed by the Financial Advisors in support of their fairness opinions.

48. In so doing, Defendants made untrue statements of fact and/or omitted material facts necessary to make the statements made not misleading. Each of the Individual Defendants, as officers and/or directors, were aware of the omitted information but failed to disclose such information, in violation of Section 14(a). The Individual Defendants were therefore negligent, as they had reasonable grounds to believe material facts existed that were misstated or omitted from the Proxy, but nonetheless failed to obtain and disclose such information to shareholders although they could have done so without extraordinary effort.

49. Defendants knew or were negligent in not knowing that the Proxy is materially misleading and omits material facts that are necessary to render it not misleading. The Individual Defendants undoubtedly reviewed and relied upon most, if not all, of the omitted information identified above in connection with their decision to approve and recommend the Proposed Merger. Indeed, the Proxy states that Defendants were privy to and had knowledge of the financial projections for Kindred and the details surrounding discussions with other interested parties and the Financial Advisors. Defendants knew or were negligent in not knowing that the material information identified above has been omitted from the Proxy, rendering the sections of the Proxy identified above to be materially incomplete and misleading. Indeed, the Individual Defendants were required to review The Financial Advisors' analyses in connection with their receipt of the fairness opinions, question the bankers as to their derivation of fairness, and be particularly attentive to the procedures followed in preparing the Proxy and review it carefully before it was disseminated, to corroborate that there are no material misstatements or omissions.

50. Defendants were, at the very least, negligent in preparing and reviewing the Proxy. The preparation of a proxy statement by corporate insiders containing materially false or misleading statements or omitting a material fact constitutes negligence. Defendants were negligent in choosing to omit material information from the Proxy or failing to notice the material omissions in the Proxy upon reviewing it, which they were required to do carefully. Indeed, Defendants were intricately involved in the process leading up to the signing of the Merger

Agreement, the preparation and review of strategic alternatives, and the review of Kindred's financial projections.

51. Kindred is also deemed negligent as a result of the Individual Defendants negligence in preparing and reviewing the Proxy.

52. The misrepresentations and omissions in the Proxy are material to Plaintiff and the Class, and will deprive them of their right to cast an informed vote if such misrepresentations and omissions are not corrected prior to the shareholder vote on the Proposed Merger. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that Defendants' actions threaten to inflict.

COUNT II

On Behalf of Plaintiff and the Class Against the Individual Defendants for Violations of Section 20(a) of the Exchange Act

53. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

54. The Individual Defendants acted as controlling persons of Kindred within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as directors of Kindred, and participation in and/or awareness of the Kindred's operations and/or intimate knowledge of the incomplete and misleading statements contained in the Proxy filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of Kindred, including the content and dissemination of the statements that Plaintiff contends are materially incomplete and misleading.

55. Each of the Individual Defendants was provided with or had unlimited access to copies of the Proxy and other statements alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

56. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of Kindred, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the Exchange Act violations alleged herein, and exercised the same. The omitted information identified above was reviewed by the Board prior to voting on the Proposed Merger. The Proxy at issue contains the unanimous recommendation of the Board to approve the Proposed Merger. The Individual Defendants were thus directly involved in the making of the Proxy.

57. In addition, as the Proxy sets forth at length, and as described herein, the Individual Defendants were involved in negotiating, reviewing, and approving the Merger Agreement. The Proxy purports to describe the various issues and information that the Individual Defendants reviewed and considered. The Individual Defendants participated in drafting and/or gave their input on the content of those descriptions.

58. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

59. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Section 14(a) and Rule 14a-9, by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Individual Defendants' conduct, Plaintiff and the Class will be irreparably harmed.

60. Plaintiff and the Class have no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff and the Class be fully protected from the immediate and irreparable injury that Defendants' actions threaten to inflict.

RELIEF REQUESTED

WHEREFORE, Plaintiff demands injunctive relief in his favor and in favor of the Class and against the Defendants jointly and severally, as follows:

A. Declaring that this action is properly maintainable as a Class Action and certifying Plaintiff as Class Representative and his counsel as Class Counsel;

B. Preliminarily and permanently enjoining Defendants and their counsel, agents, employees and all persons acting under, in concert with, or for them, from proceeding with, consummating, or closing the Proposed Merger, unless and until Defendants disclose the material information identified above which has been omitted from the Proxy;

C. Rescinding, to the extent already implemented, the Merger Agreement or any of the terms thereof, or granting Plaintiff and the Class rescissory damages;

D. Directing the Defendants to account to Plaintiff and the Class for all damages suffered as a result of their wrongdoing;

E. Awarding Plaintiff the costs and disbursements of this action, including reasonable attorneys' and expert fees and expenses; and

F. Granting such other and further equitable relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

DATED: February 8, 2018

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