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Case No. 2022-1066-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TEXAS PACIFIC LAND CORPORATION, Plaintiff, v. HORIZON KINETICS LLC, HORIZON KINETICS ASSET MANAGEMENT LLC, SOFTVEST ADVISORS, LLC, AND SOFTVEST, L.P., Defendants.	)	C.A. No. 2022-1066-JTL PUBLIC VERSION FILED JUNE 9, 2023

PLAINTIFF'S POST-TRIAL ANSWERING BRIEF

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PRELIMINARY STATEMENT

This Section 225 action concerns the proper interpretation of a contractual voting commitment and its two exceptions. In their answering brief, however, Defendants avoid addressing basic principles of contract interpretation and the relevant extrinsic evidence. Rather than addressing the most salient points about the SA's[1] plain language and structure, Defendants instead focus on how they believe the Company should be managed. Defendants ignore that the SA lacks express language supporting their view—there are no exceptions to Defendants' voting commitment for certificate amendments or share authorizations, nor any language regarding the Company's pre-reorganization history or its "ordinary course." Rather, the SA reflects that the parties knew how to address certificate amendments and used explicit, defined terms when intended—but they did not do so in the carveouts.

Defendants offer varied interpretations of the carveouts that are infirm and would destroy their Voting Commitment. First, in arguing that Proposal 4 is related to an acquisition, Defendants continue to invoke unidentified, hypothetical past and future transactions. But the carveout requires something quite different: a proposal related to "*an* Extraordinary Transaction"—a single, specific identifiable transaction.

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[1] Defined terms mirror those in TPL's Opening Post-Trial Brief.

Second, in arguing that Proposal 4 effects a recapitalization, Defendants ignore both the case law and the SA's structure, focusing instead on their expert's irrelevant and unreliable survey of old newspaper articles.

Third, in arguing that Proposal 4 is related to other matters involving a "corporate transaction," Defendants cite dicta where the phrase was used, but not analyzed. This irrelevant dicta do not support their gloss.

Finally, in arguing that Proposal 4 comes within the ESG carveout, Defendants disregard both the contractual and the commercial context surrounding use of the word "governance." Moreover, if their broad interpretations of "governance" and "related to" are credited, Proposal 4 comes within the Proviso.

Defendants altogether fail to grapple with the extrinsic evidence contradicting their interpretation of the SA. TPL discussed four categories of evidence in its opening brief. Defendants decline to address their pre-litigation, private statements acknowledging that they are bound by their Voting Commitment, and their subsequent conflicting testimony that virtually *all* ballot proposals come within both the Extraordinary Transaction and the ESG Carveouts. Defendants do address evidence of industry usage and drafting history, but only to argue (incorrectly) that it is inadmissible. Defendants ignore other things, including that they put the drafting history at issue by making claims about the parties' negotiations and

intentions. The reason for this willful blindness to key evidence is obvious: it weighs decisively against them.

The evidence also proves Defendants' Standstill breaches. Defendants sheepishly say many of their breaches occurred before Proposal 4 was announced. The evidence proves otherwise. Defendants activated the support network they developed during the 2019 proxy fight to "spread the word" on their behalf—*e.g.*, Oliver's "Do This!" campaign—leaving many communications well beyond discovery in this summary proceeding. Defendants also ignore evidence that Defendants' Standstill breaches tainted the vote on Proposal 4 and their self-proclaimed claim of "influence" over 20% of the vote. Although the extent of Defendants' wrongdoing concerning Proposal 4 is difficult to discern with precision, Defendants should bear the burden of that uncertainty.

Defendants' late or never-pled affirmative defense of unclean hands does not change the outcome. Defendants focus on alleged disclosure issues that had no effect on the Proposal 4 vote, as demonstrated by TPL's prompt clarifying disclosure of the issues that Defendants raised at trial and the lack of impact on the vote tally thereof.

Defendants made an enforceable bargain in the SA. They *chose* to trade away their unfettered right to vote as they pleased, and sway others' voting, for the

certainty of securing a voice in the boardroom. TPL upheld its end of that bargain; Defendants did not uphold theirs. The Court should enforce the SA.

ARGUMENT

I. DEFENDANTS BREACHED THEIR VOTING COMMITMENT

Defendants concede that "[t]he principal issue in this case is whether Proposal Four falls into at least one of" the two carveouts in Section 2(b). Defendants' Post-Trial Answering Brief (hereafter "DPTB") 3. Defendants do not dispute that they bear the burden of proof on those exceptions. Plaintiff's Post-Trial Brief (hereafter "PPTB") 25. Defendants have not carried their burden.

A. Proposal 4 Does Not Come Within the Extraordinary Transaction Carveout

1. Defendants Continue to Try and Avoid the Fact That the Parties Knew How to Refer to Certificate Amendments

In arguing that Proposal 4 falls within the Extraordinary Transaction Carveout, Defendants emphasize that TPL could increase authorized shares only by amending its certificate of incorporation. DPTB 36. Given the SA's structure, this proves TPL's point, not Defendants'. Although the parties included a provision explicitly addressing certificate amendments in the Standstill—using the defined term "Governance Documents"—they made no such provision in the carveouts. PPTB 28; SA § 3(e).

That is dispositive. Delaware courts have repeatedly held that when parties show that they "knew how" to use a term expressly in one contract provision, that term may not be read indirectly into a different provision. PPTB 28-29; *see also, e.g.*, *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1225 (Del. 2012) ("If the drafters of the NDA intended…, they easily could have done that by referring directly to 'Evaluation Material,' as they did repeatedly elsewhere in the NDA.").

Defendants contend instead that they did not need to specify certificate amendments in the Extraordinary Transaction Carveout because certificate amendments are covered by "overlapping" categories of "acquisition" and "other matters involving a corporate transaction." DPTB 30, 37. Defendants argue, for example, that "since the 'other transactions' term encompasses a certificate amendment, Defendants had no need to separately specify that a certificate amendment would be an Extraordinary Transaction." DPTB 37; *see also id.* 29-33; Kesslen Tr. 152:2-10.

This is plainly wrong. The above-cited case law provides that a direct and express reference to certificate amendments precludes the inference that a different term—*e.g.*, "corporate transactions"—captures certificate amendments indirectly and implicitly. The parties knew how to refer to certificate amendments, and they

did so expressly when they intended to address them. With that express provision in place, Defendants *did* have a "need to separately specify" that an Extraordinary Transaction extends to certificate amendments. They failed to do so.[2]

2. Defendants Mischaracterize Proposal 4 and TPL's History

Defendants repeatedly contend that Proposal 4 is related to an Extraordinary Transaction given the "enormous amount of new shares contemplated" and the departure from a "135-year history." *E.g.*, DPTB 31-32. But that "enormous amount," as TPL has shown, is a commonplace doubling of authorized shares. PPTB 20 n.10. TPL committed to a 3:1 stock split, which Stahl and Oliver approve. *Id.* Passage of Proposal 4 and effectuation of the stock split means that TPL's outstanding and authorized but unissued shares will be equal. *Id.*

Defendants now characterize the approved stock split as "sheer conjecture," arguing that the Board reserved its rights "should it 'change its view on the desirability' of doing so." DPTB 20 n.81 (quoting Definitive Proxy). Defendants

[2] Defendants confusingly suggest that, because parties to stockholder agreements may use a "belt and suspenders" approach, the Standstill's express incorporation of certificate amendments has no bearing on whether certificate amendments come within the Extraordinary Transaction Carveout. DPTB 30-31. Defendants nowhere explain why the parties would use this approach in the Standstill but not in the carveout. Under a belt and suspenders approach, the absence of a certificate amendment in the carveout is best read as a reflection of the parties' intent to *exclude* it there.

omit key language. The Proxy ties any change of plans to "*material changes in the Company's financial condition or results of operation or the market price for the Common Stock* that would cause the Board to change its view on the desirability of effecting the Stock Split." JX-431:26 (emphasis added).

As to the "135-year history," the definition of "Extraordinary Transaction" contains no reference to it—and when Defendants sought to insert "ordinary course" provisions, they were rebuffed. PPTB 54-56. A "135-year history" is a misnomer in any event. The Trust had a 133-year history, in which it was unable to create new interests as a matter of trust law. The parties, including Defendants, determined to move on from that history, by reorganizing the Trust into a Delaware corporation (*e.g.*, authorizing creation of its blank check preferred stock). TPL has a two-year history, and within that period, the Board has repeatedly considered increasing authorized shares. *Id.* 9-10, 18-19.

3. Proposal 4 Is Not Related to an Acquisition, Merger or Business Combination

The evidence confirms that TPL was not contemplating any particular stock transaction when Proposal 4 was approved by the Board on August 31, 2022. PPTB 32. Defendants consequently offer conflicting arguments that Proposal 4 concerns prior or future theoretical transactions. Each of Defendants' positions are factually and legally incorrect.

a. Defendants' Internally Conflicting Proposal 4 Origin Stories Should Be Disregarded

Defendants offer conflicting origin stories for Proposal 4:

- First, "Proposal 4 was borne [sic] out of a [May 3, 2021] presentation to the TPL Board by Credit Suisse" (DPTB 22); and then
- It was "borne [sic] out of frustrated attempts to advance a strategy of growth" in August 2022 (*id.* 28); and then
- A third birth occurred in October 2022, when Proposal 4 was "borne [sic] out of a desire by a majority of TPL's Board to break free from … governance restrictions." *Id*. 42.

Contrary to Defendants' conflicting narratives, the record proves that Proposal 4 was not the brainchild of investment bankers or a management team hungry to make deals with common stock. DPTB 15-16. The Board approved Proposal 4 because "for Delaware C corps [a share authorization] is kind of a normal course of business. It provides a lot of flexibility for the corporation: executive compensation plans, issuing stock dividends, acquisitions, general corporate purposes." Kurz Tr. 7:12-16; JX-431:26. TPL's Board had considered a share increase (and stock split) since its inception; Stahl and Oliver's dissent caused the Board to defer inclusion of such a proposal in the Company's proxy for its first annual meeting. JX-154:367; PPTB 9-10.

The evidence also refutes Defendants' argument that funding potential acquisitions was the "primary purpose" of Proposal 4. DPTB 24-25. Defendants' selective quotation from Barry's testimony omits key words. Barry testified about the "primary purpose" of Proposal 4 *after* factoring out the stock split: "The shares that would be *left over* would be for acquisitions, would be for incentive plans, directors plans and the option if we wanted to sell stock to raise cash … once it goes into authorized but unissued, there's multiple purposes for it. Of those purposes, the primary—the main one would be acquisitions." Barry Tr. 314:3-22 (emphasis added). Barry consistently testified that funding potential acquisitions was "one of the many purposes [of Proposal 4]." Barry Dep. 60:9-12. In response to counsel's question "It was the primary reason, wasn't it?" Barry said, "You're trying to put words in my mouth. It was the reason we did it—one of multiple reasons we did it." *Id.* 229:25-230:2.

b. Defendants' Recitation of TPL's Potential Acquisitions History Is Likewise Counterfactual

Defendants wrongly contend that the Board adopted Proposal 4 "on the heels" of two potential transactions with Occidental Petroleum and Brigham Minerals. DPTB 24-25. Defendants say these were "scuttled as a direct result of TPL not having significant equity currency on hand at the time of the negotiations." DPTB 23. Both points are incorrect.

First, TPL considered *eighteen* potential transactions during the pertinent 2022 time period (not just two). PPTB 16-17. Most were for cash, not stock. *Id.* TPL evaluated and negotiated conservatively; no stock deal resulted in a binding offer, let alone a signed agreement. *Id.* As of August 31, 2022, when the Board resolved to put Proposal 4 on the ballot, TPL had already passed on the Occidental and Brigham deals that Defendants highlight. *Id.*; JX-436:81-82; JX-322:16; JX-331:1.

Second, the Occidental discussions were "scuttled" because the parties fundamentally disagreed on valuation: Occidental sought a "greater than 12x EBITDA" and management explained this was "an unattractive proposition" and consequently "recommend[ed] not continuing transaction discussions until valuation expectations decrease." JX-322:16; JX-331:1. Negotiations ended without even a non-binding proposal.[3]

Third, Brigham failed to progress because Stahl opposed the deal. This was particularly significant because Horizon owned 3-4% of Brigham's stock. Glover

[3] Defendants make much of a statement *from Occidental* that its high price was connected to a perceived "execution risk" due to lack of authorized shares. DPTB 17. TPL, however, viewed Occidental's price hike as a potential "negotiating tactic" (Kurz Tr. 19:9-16), and believed that Occidental had struggled to provide data supporting its own valuation. JX-322:3 (information "ha[d] not been well organized").

Dep. 211:21-212:5; JX-357:2; JX-1107:3. After meeting Stahl, Brigham became "concerned with [Stahl's] support of the deal." JX-379:1. TPL consequently backed away. JX-436:81-82. Defendants' contention that a lack of authorized shares was the "only reason" TPL did not progress with the two potential transactions, DPTB 27, is demonstrably false.

Finally, Defendants rely heavily on a single slide prepared by Patrick Hesseler, a junior member of the management team, listing acquisitions as part of a "Strategic Vision" and lack of shares as a "Key Headwind." DPTB nn.6, 50, 63, 94, 98, 113 (all citing JX-318:8). Setting aside his seniority, TPL management has no authority to engage in transactions over $10 million. Kurz Tr. 13:12-14:3. The SAC vets such transactions in the first instance, and only the full Board may approve them. *Id.* Defendants' effort to show that Proposal 4 is somehow related to an acquisition through Hesseler's lone slide underscores their lack of proof on this point.

c. Defendants' Interpretation of "Related to" Is Limitless

First, the SA's plain language provides that the Extraordinary Transaction Carveout applies to proposals "related to *an* Extraordinary Transaction"—a single, specific, identifiable transaction. Unable to point to any such identifiable

transaction, Defendants turn to the theoretical. Indeed, Defendants claim Proposal 4 is related to:

- "each of the acquisitions for stock that TPL would pursue if Proposal Four passes." DPTB 4.
- "acquisitions that TPL sought, and that its incumbent leadership group continues to covet." *Id.* 25.
- "each of the potential acquisitions TPL might have pursued—or could pursue in the future—if Proposal Four were approved." *Id.* 27-28.

These varied assertions contravene the SA's plain language; "related to *an* Extraordinary Transaction," means a single, specific, identifiable deal. Defendants' formulation again ignores that the parties "knew how" to address potential transactions. SA A-3; PPTB 35-36 (confidentiality provisions extend to "possible transactions"). Defendants' suggested interpretation based on past and future hypotheticals is limitless and would eviscerate their Voting Commitment. PPTB 32-33.

Second, Defendants point to witness testimony that TPL has been harmed by the failure of Proposal 4 to pass, including with respect to potential transactions. *See* DPTB 26-27. *See, e.g.*, Glover Dep. 112:23-113:8 ("Wouldn't even sign an NDA with us, because they knew we didn't have the financing to close on the deal."). The fact that lack of access to authorized stock can have a chilling effect on potential

theoretical transactions does not mean a stock authorization is related to *an actual* Extraordinary Transaction.

Third, Defendants' inquiry to the NYSE regarding theoretical transactions remains apt by analogy, despite their backpedaling. Indeed, the same actual-versus-theoretical distinction stands behind the NYSE's determination in this case that Proposal 4 is "routine." PPTB 30-31. Like the Extraordinary Transaction Carveout, the routine/non-routine distinction preserves the franchise for actual, specific, highly significant transactions that alter an entity's nature. *Id.*

Defendants also downplay other restraints, including the NYSE's 20% rule. TPL must obtain stockholder approval for any transaction that requires *issuing* 20% or more of the outstanding, authorized shares of common stock. *Id.* 31-32 (citing authority). Proposal 4 does not, contrary to Defendants' alarmist rhetoric, enable the Board to circumvent the stockholder franchise by breaking a transaction into two steps. *Id.*; DPTB 32-33. The franchise is preserved at the second step.[4] Further, for these and all decisions, directors remain bound by their fiduciary duties.

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[4] Defendants argue that the Extraordinary Transaction Carveout is a "nullity" under TPL's interpretation because it does not enable them to vote against acquisitions *under* the 20% threshold by blocking a share authorization. DPTB 32-33. But that does not make the carveout a nullity. It simply means that Defendants did not succeed in obtaining a carveout as broad as they would now like.

Defendants also misstate the role of the NYSE's 20% rule in protecting the franchise by repeatedly referring to hypothetical events using raw dollar amounts rather than

d. Defendants' Efforts to Salvage Their Limitless Interpretation Fail

Defendants have no answer to TPL's showing that Defendants' unbounded interpretation of "related to" (i) destroys Defendants' Voting Commitment, a result at odds with Delaware law, PPTB 34-35 (citing authority), and (ii) runs afoul of Delaware decisions holding that contracts should not be interpreted to render absurd results, including interpreting exceptions to destroy the provisions they modify. *Id.* 34, 39-40 (same).

Instead, Defendants argue that their formulation is neither limitless nor "controversial" because Proposal 4 was "(i) borne [sic] out of frustrated attempts to advance a strategy of growth by acquisitions and (ii) proposed for the '***primary purpose***' of facilitating such an acquisition." DPTB 28 (emphasis in original). The evidence, however, flatly contradicts these points for reasons already discussed. *Supra* at 8-9.

This formulation is unworkable in any event. Defendants prove as much by arguing that a proposal to ratify an auditor appointment may be "related to acquisitions" where an auditor opposes acquisitions and the Board seeks a new

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percentages. *E.g.*, DPTB 19 ("$1.9 billion"); *id.* 17 ("multi-billion"); *id.* 20 n.81 ("billions of dollars' worth of new stock"); *id.* 35 (similar); *id.* 39 (similar); *id.* 57 (similar). The percentage-based test accommodates companies of all sizes and treats them in an equivalent manner.

auditor appointment to facilitate acquisitions. DPTB 28-29. If subjective motivation must be probed, parties to stockholder agreements will never have certainty about voting commitments short of discovery and trial. That is not the way stockholder agreements (or any contracts) are meant to work.

Defendants also suggest that the Extraordinary Transaction Carveout should have been limited to proposals "to approve" the enumerated transactions. *Id.* 29. But this hindsight suggestion is meaning-altering. The Board could just as well recommend voting "AGAINST," for example, a third-party tender offer or a stockholder proposal. In any event, "related to" or "relating to" are commonplace in extraordinary transaction carveouts, including in agreements negotiated by Defendants' counsel at Vinson & Elkins and Gibson Dunn. JX-556:4; JX-34:11, JX-704:10.

In short, none of Defendants' efforts to defend their limitless interpretations of "related to" an acquisition is availing.

4. Proposal 4 Is Not Related to a Recapitalization

Defendants contend that a share authorization "effects" a recapitalization because it is a "revision of the capital structure of a corporation." DPTB 33. Defendants are wrong.

First, Defendants ignore the principal legal authority on the meaning of "recapitalization," which holds that the term has no fixed meaning and is contract-specific. PPTB 37 (citing authorities). Under the SA, "recapitalization" must be more than a mere change in capitalization—a point Defendants deem "conclusory," but which is rooted directly in the language of the contract. PPTB 38 (citing SA § 3(g)'s use of "change in the capitalization").

Second, Defendants conflate share authorization and issuance. Departing from the *Black's Law Dictionary* definition they previously championed, Defendants now cite *Merriam-Webster*'s definition of "capital structure": the "*amounts* and kinds of equity and debt securities." *Id.* 33-34 (emphasis added). "Amounts" is best read as referring to the value of issued securities—not the raw number of authorized, unissued shares. For example, a hypothetical company with one $700 million debt facility does not have "1" debt security in its capital structure; that company's capital structure would register the *value* of the $700 million debt facility. This is consistent with *Black's* reference to the "*relative proportions of* short-term debt, long-term debt, and capital stock." PPTB 37 n.18 (emphasis in original).

Third, Defendants again cite Subramanian's investigation of the word "recapitalization," in old *Wall Street Journal* articles, but without addressing the

principal defects in his work that TPL has identified. PPTB 50-51. Subramanian's opinion is plagued by survivorship bias and other flaws, *e.g.*, that only one of his chosen eighty articles was published within the past eighteen years, and concerned the recapitalization of an Italian bank. *Id.*; Subramanian Tr. 340:17-345:20. Defendants have no response to these deficiencies.

Fourth, Defendants pluck one answer from Haas' day-long deposition responding to Defendants' myriad hypotheticals (named "Haas Hypothetical No. _"). Haas offered no opinion on the meaning of recapitalization (because that would be improper[5]), but attempted to respond to Defendants' overlapping hypotheticals. Defendants focus on his affirmative response to one of these: "[i]s an increase in the number of authorized shares of stock in a company a change in the capital structure of the company?" DPTB 34 n.137. But Haas' testimony, fairly read as a whole, makes clear that he uses "capital structure" and "recapitalization" differently than Defendants do. *E.g.*, Haas Dep. 221:23-25 ("does change in capital structure, to you, have the same meaning as the word 'recapitalization'? A. No. It is a different meaning.").

[5] E.g., *In re Columbia Pipeline Gp., Inc. Merger Litig.*, 2022 WL 2902769, at *1 (Del. Ch. July 14, 2022) ("it is improper for witnesses to opine on legal issues"; precluding Subramanian testimony concerning materiality) (cleaned up).

Finally, Defendants repeat their refrains about Proposal 4's size and TPL's historical practice—which fail for the reasons stated above. *Supra* at 6-7.

5. Proposal 4 Is Not Related to "Other Matters Involving a Corporate Transaction That Require a Stockholder Vote"

Defendants' arguments regarding the last clause in the Extraordinary Transaction Carveout are similarly misguided.

First, the SA reflects that the parties referred to certificate amendments expressly—as in the Standstill (Section 3)—when they intended to address them. *Supra* at 4-5. Defendants suggest, however, that the parties' express reference to certificate amendments in the Standstill (Section 3) somehow means TPL should have included a proviso in the Extraordinary Transaction Carveout (in Section 2) specifying that, "for the avoidance of doubt," a certificate amendment increasing authorized shares "is not an Extraordinary Transaction." DPTB 38.

This is backwards. Precisely because certificate amendments are addressed elsewhere expressly, the parties had no need to "avoid doubt" by specifying that an Extraordinary Transaction does not refer to a certificate amendment indirectly. *Supra* at 4-5. Defendants also overlook the reality that they have the burden of establishing that the carveout applies.

Second, within the phrase "other matters involving corporate transactions that require a stockholder vote," the term "corporate transaction" is necessarily a limiting

one, and Proposal 4 does not pass through the screen it imposes. PPTB 39-40. Although Defendants respond that a certificate amendment is a corporate transaction as a matter of law, their cited authorities in no way bear this out. DPTB 36-37. *SI Management, LP v. Wininger* references certificate amendments in a parenthetical in a footnote identifying an evidentiary issue on which the court "express[ed] no opinion." 707 A.2d 37, 43 n.14 (Del. 1998).

Defendants also cite four of this Court's decisions, all addressing disclosure duties.[6] DPTB 36-37 n.147. Like the Supreme Court in *SI Management*, this Court used the term "corporate transaction" but did not analyze the relationship between corporate transactions and certificate amendments. The same is true of *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991). In making the commonplace observation that a corporate charter is a contract, the court did not endorse the position Defendants advance—that the term "corporate transaction" in a contract must be interpreted to include certificate amendments. *Id.* at 1136.

Defendants also seek to dodge the limiting function of the term "corporate transaction" in the carveout by misconstruing the testimony of TPL's CEO, Tyler

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[6] *In re Wayport, Inc., Litig.*, 76 A.3d 296, 314 (Del. Ch. 2013); *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 16-17 (Del. Ch. 2014); *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *29 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019); *Bamford v. Penfold, L.P.*, 2020 WL 967942, at *20 (Del. Ch. Feb. 28, 2020).

Glover. DPTB 38 ("Proposal 4 would be… a ***transformative*** moment for the Company." (emphasis in original)). But the enumerated terms in the definition of Extraordinary Transaction—"merger, consolidation, acquisition" and the like—do not relate to mere "moments" or gateways to later potential transformative transactions for reasons already discussed. *Supra* at 11-13. Defendants' focus on hypotheticals infects their arguments that Proposal 4 relates to an Extraordinary Transaction.

B. Proposal 4 Does Not Come Within the ESG Carveout

1. "Governance, Environmental or Social Matters" Refers to ESG, and Proposal 4 Is Not Related to ESG

The evidence overwhelmingly shows that the phrase "governance, environmental or social matters" refers to ESG. Defendants no longer dispute that the order in which the three terms appear is immaterial, and copious evidence shows that different orderings are interchangeable. PPTB 42-43 (citing evidence).

Defendants continue to argue that because the term "or" rather than "and" appears in the phrase, it cannot refer to ESG. DPTB 45. But they ignore that the disjunctive formulation is common. Defendants, their counsel, and Delaware statutes have used it. PPTB 43 (citing evidence).

The evidence is also clear that "ESG" refers to "sustainability and ethical impact." PPTB 42. Defendants contend that, because TPL and others have at times

associated the "G" in "ESG" with matters unrelated to social and environmental impact, "governance" must mean the same thing within ESG as it means when it appears as a standalone term. DPTB 43. But Defendants do not respond to the legal point that "specific words limit the meaning of general words" where the contract as a whole supports that result. *In re IAC/InterActive Corp.*, 948 A.2d 471, 496 (Del. Ch. 2008) (cleaned up); PPTB 41. The SA as a whole supports that result here. The parties used "governance" as a standalone term—outside the grouping of "governance, environmental or social matters"—in other provisions in which they intended to give the term a broader meaning. SA § 3(g).

Most significantly, Defendants concede that if the carveout is understood to refer to ESG matters, *Proposal 4 does not come within it*. Kesslen admitted this both in his deposition and at trial. Kesslen Tr. 153:1-18. Subramanian is unaware of any scholarship, article, or other authority in which the term "ESG" is used to refer to a share authorization. Subramanian Tr. 358:2-17. Indeed, Subramanian stated repeatedly that the idea that any person would use ESG in this way was "bizarre." *See, e.g.*, Subramanian Dep. 234:24-238:3, 241:9-13.

To avoid this result, Defendants insist that "governance" be interpreted as a standalone term and not as part of the phrase in which it appears. They argue that if the carveout applied only to ESG matters, the Proviso "would make no sense."

DPTB 44. The Proviso, they note, refers to the terms in the Plan of Conversion, and those terms are unrelated to ESG. *Id.*

But that does not rob the Proviso of its function. The Proviso applies to proposals "relating to" corporate governance terms that would "have the effect of changing" terms in the Plan of Conversion. SA § 2(b). An ESG-focused stockholder proposal could easily have that effect. A proposal to expand the Board to include an additional director with environmental expertise, for example, would have the effect of changing the Plan's corporate governance terms, which place an upper limit on the number of directors. Such a proposal comes within the Proviso.

2. Proposal 4 Is Not Related to "Governance" Even as a Standalone Term

Even setting aside ESG, the term "governance" plays a specific function in agreements between companies and activist stockholders. In that context, "governance" refers to matters such as board size and classification that "directly alter the rights of stockholders or how a company is governed." JX-600 ¶¶ 69-70.

Defendants do not address this context. Nor do they provide any support for their alternative, Voting Commitment-destroying interpretation of "governance" advanced by their witnesses—that *all* proposals on which stockholders vote are "related to governance," save perhaps proposals to ratify auditor appointments. PPTB 44, 60 (citing testimony). And Defendants no longer contend that the Proviso

rescues this untenable interpretation. They do not respond to TPL's demonstration that it is wholly illogical to posit that, after the ESG Carveout eviscerates the Voting Commitment, the Proviso then puts a limited set of proposals back in. *Id.* 47 n.22.

Rather than addressing the fatal consequences of their interpretation of "governance," Defendants revert to Subramanian's metaphor. According to Subramanian, the Board is currently on a "short leash" because it has no ability to make acquisitions for stock, no way to fund equity compensation plans, and no means of establishing takeover defenses. DPTB 41; Subramanian Tr. 332:3-13.

This "leash" metaphor depends on both myopia and a critical oversight. By focusing on only stock-based transactions, Defendants obscure that TPL can make acquisition with cash, debt or preferred stock. PPTB 17. More broadly, they overlook the fact that TPL can use its blank-check *preferred* stock[7] for *all* of these purposes. Subramanian acknowledges the preferred stock in passing, recognizing that it could be used to "effectuate" a rights plan—and then opining that if Proposal 4 passed, common stock rather than preferred stock could be used for that purpose. JX-593 ¶ 56 n.49. This explodes the "short leash" fiction. Subramanian's leash metaphor is defective on its own terms and certainly cannot change the fact that

[7] JX-144:2 ("authority is hereby expressly granted to and vested in the Board to authorize the issuance of Preferred Stock").

Defendants' interpretation of "governance" would leave nothing of their Voting Commitment.[8]

3. If Defendants' Interpretation Is Credited, Proposal 4 Falls Within the Proviso

If Defendants' expansive interpretations of "governance" and "related to" are credited, Proposal 4 falls within the Proviso. PPTB 44-47. In response, Defendants contend that the absence of authorized but unissued shares of common stock—the feature of TPL's conversion that they exalt above all others—is not a term set forth in the Plan of Conversion. DPTB 46-50. As a result, they argue, the Proviso does not apply.

This contradicts Defendants' narrative. Defendants emphasize that *before* the Committee formulated the Plan of Conversion on January 21, 2020, the Trust could not create new interests. DPTB 1. Defendants further emphasize that *at* the January 21, 2020 Committee meeting, this key feature remained unchanged. DPTB 47 (quoting Oliver's trial testimony about rejecting authorization of additional shares in Committee). Defendants also emphasize that *after* the Trustees adopted the Plan of Conversion the same "historical governance restriction" applied. DPTB 1, 48. In

[8] Defendants' citation to *STAAR Surgical*—for the proposition that "issuance of corporate stock is an act of fundamental legal significance having a direct bearing on questions of corporate governance," 588 A.2d at 1136; DPTB 41—yet again conflates authorization with issuance.

Subramanian's words, there is "no headroom" because TPL lacks unissued common stock. DDX-1:14. The Plan of Conversion bears this out: it provides that "all" of the shares of the new corporation—"100%"—would be distributed. JX-71:9, 12.

Proposal 4, however, *would* change this element of the Plan of Conversion. Defendants assert strenuously—and correctly—that Proposal 4 would have the effect of changing the 100% distribution, "no headroom" term. DDX-1:14. And because Proposal 4 relates to and changes a corporate governance term—which it certainly does if Defendants' overbroad interpretation of "governance" is used—it falls within the Proviso.

Although this conclusion flows from their own narrative, Defendants resist it. They argue that the Proviso extends only to "terms" in Annex B of the Plan of Conversion, while the "no headroom" feature is preserved in a "step" or "note" in Annex A. DPTB 49-50. But the Committee's resolutions specifically define the "Plan of Conversion" to include "Annexes A and B." JX-71:7.

Even if the Proviso were limited to the "terms" in Annex B, Proposal 4 would come within it. Annex B reflects the Committee's "expect[ation]" that the charter would contain "provisions customarily contained in organizational documents of publicly traded Delaware corporations." JX-71:14; PPTB 45. A provision setting forth the number of authorized shares is not just customary, but mandatory. 8 *Del.*

C. § 102(a)(4). Annex B, therefore, like Annex A, addresses authorized shares. The number of shares was indisputably a "term" under Annex B, although the parties had not yet reached an agreement on what the number would be. Defendants simply ignore this point.[9] If Defendants' broad "governance" construct brings Proposal 4 within the carveout, then the Proviso applies.

C. Defendants Shunt Aside or Ignore the Extrinsic Evidence, Which Weighs Decisively Against Their Interpretation

1. Defendants Seek to Avoid Virtually All Extrinsic Evidence

Defendants respond to TPL's discussion of extrinsic evidence by pretending half of it does not exist and urging the Court to disregard the rest. TPL discussed four categories of evidence in its opening brief: (1) trade usage, as illuminated by its two rebuttal experts and a survey of hundreds of precedent agreements; (2) drafting history; (3) Defendants' pre-litigation communications acknowledging their Voting Commitment; and (4) Defendants' sharply conflicting testimony, in which they claimed that the Voting Commitment is effectively meaningless. PPTB 48-61.

Defendants ignore the third and fourth categories. Having done so, they are barred from addressing such matters in their remaining brief. *See In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001) ("In its opening post-trial brief,

[9] Defendants' arguments also are contrary to the drafting history. *Infra* at 28-33.

Tyson did not argue…. As a result, I consider Tyson to have waived any arguments about these issues."); *see also Barrett v. Am. Country Hldgs., Inc.*, 951 A.2d 735, 745 (Del. Ch. 2008) (party "pulled out this argument for the first time in its post-trial answering brief, and it was therefore not fairly presented."); *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916, at *16 (Del. Super. Aug. 31, 2006) (waived claim "asserted for the first time ever in its second post trial brief").[10]

2. Trade Usage Is Properly Before the Court and Undermines Defendants' Interpretation

Defendants argue that the first category of evidence—trade usage—is out of bounds, claiming that the law does not permit consideration of "prior agreements of unrelated parties" to interpret a contract. DPTB 51-52. In support, they perplexingly quote the Supreme Court's *DeVilbiss* decision: "a court may consider evidence of prior agreements and communications ***of the parties*** as well as trade usage or course of dealing." *Id.* (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997)). The emphasis is Defendants', but it does not somehow cause "as well as trade usage" to drop from the list. *See also, e.g.*, *Columbia Pipeline*, 2022 WL 2902769, at *4 ("There are many ways in which Subramanian

[10] Defendants' final brief is limited in any event to matters on which they bear the burden. Tr. 374:16-375:3.

might have provided helpful expert opinions about standstill agreements. He could have analyzed the prevalence of Don't-Ask-Don't-Waive standstills in the marketplace.").

In urging the Court to disregard TPL's rebuttal experts,[11] Defendants blind themselves to a central legal concept. Under Delaware law, a court must read a contract "in full and situated in the commercial context between the parties." *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 926-27 (Del. 2017). "[W]hen assessing 'commercial context,' the court may consider guidance from 'experienced commentators' when seeking to understand the basic business relationship between parties in order to give sensible life to a contract." *In re Nat'l Collegiate Student Loan Trusts Litig.*, 2020 WL 5049402, at *17 (Del. Ch. Aug. 27, 2020) (cleaned up).

This is precisely what Plaintiff's rebuttal experts have done. Weingarten explains that "governance" has a particular meaning in agreements between companies and activist stockholders, focused on "actual governance" matters such as board size and classification. JX-600:29-30. In that context, the contract

[11] Defendants also say Haas' trade usage survey is "baseless and unreliable" because he declined to divulge client confidences, DPTB 52, ignoring that the Court has already overruled that objection and admitted Haas as an expert. Tr. 361:1-12.

interpretation issues here are "no-brainers": "[D]efendants' position was clearly wrong." Weingarten Tr. 371:2-8.

Haas' survey illuminates the contractual context in another way—via precedent agreements demonstrating that, where parties intend to include certificate amendments in standstill provisions or voting commitment carveouts, they do so explicitly. PPTB 48-49 & n.24 (discussing precedents in Haas' survey, and the Jack-in-the-Box and Fred's stockholder agreements negotiated by Defendants' counsel). That evidence is probative and appropriate.

3. The Drafting History Is Properly Before the Court and Undermines Defendants' Interpretation

Defendants largely ignore the merits of TPL's drafting history evidence, and they urge the Court to do the same. They do not address the thoughtful discussion of provisions barring drafting history in *Garden State Plaza Corp. v. S.S. Kresge Co.*, 189 A.2d 448, 456 (N.J. App. Div. 1963). PPTB 52.

Defendants apparently concede that evidence inadmissible for one purpose may be admissible for another. *See* D.R.E. 105 (discussing admission of evidence "for a purpose" but not "for another purpose"). Defendants have repeatedly put the drafting history at issue by making erroneous claims about the parties' negotiations and intentions:

- "Ordinary course" requests: Most significantly, Defendants specifically sought to expand the Extraordinary Transaction Carveout to reach transactions outside the "ordinary course." The Trust refused, and similarly refused to accede to an ordinary course covenant. PPTB 54-55; JX-108:14-15. Nevertheless, Defendants have insisted throughout this litigation that they would not have agreed to vote with the Board on any proposal that would enable TPL to deviate from the Trust's historical practices. JX-550:4, JX-1118:40.
- Carveout breadth: Defendants claim the Voting Commitment does not even bind them to vote with Board recommendations concerning director elections. But in seeking a third (ultimately rejected) carveout, they specifically acknowledged the new carveout would not capture "Director elections." *Compare* Kesslen Tr. 165:5-9; *with* JX-87:5.
- Recapitalization: Defendants claim that they "negotiated for inclusion of the term recapitalization" in the Extraordinary Transaction Carveout. JX-1118:46. *But see* JX-105:13 (incorporated in Extraordinary Transaction definition by TPL in first draft agreement without discussion).

- Proviso: Defendants argue that "Annex B's list of 'governance terms' does not reference" authorized shares, ignoring that TPL struck their request to limit the Proviso to terms "explicitly" set forth. DPTB at 47. JX-111 at 6.

Thus, irrespective of Defendants' assertions, drafting history is appropriately before the Court to rebut Defendants' erroneous contentions concerning the parties' negotiations and intent.

Defendants take aim at TPL's authorities and introduce their own, but none of this shows that Section 17(g) bars the Court from performing its usual function in considering probative evidence. Defendants argue that in *XRI*, the Court stated only that parties may not dictate remedies, and it did not address contractual restrictions on methods of adjudication. DPTB 55 n.214. But there, the Court surveyed multiple similar situations, including evidentiary matters (integration clauses and oral modification prohibitions). *XRI v. Holifield*, 283 A.3d 581, 659-61 (Del. Ch. 2022).

Defendants' other authorities do not help them. The first stands for the unexceptionable proposition that courts will enforce choice of law clauses. *Swipe Acquisition Corp. v. Krauss*, 2021 WL 282542 (Del. Ch. Jan. 28, 2021). In the second, the Court observed in a footnote that the drafter of a form contract had been "canny" in including a provision waiving *contra proferentem*. *Senior Hous. Cap.,*

LLC v. SHP Senior Hous. Fund, LLC, 2013 WL 1955012, at *26 n.264 (Del. Ch. May 13, 2013). That observation scarcely means that this Court may not consider relevant evidence for any purpose.

Defendants also argue the drafting history is inadmissible under Rule 408. DPTB 56. That is plainly wrong, and it would bar review of the negotiating history in all disputes concerning settlement agreements or releases. Rule 408 exists to encourage settlement, and therefore prohibits use of negotiations to prove liability *in the matter then being settled* should negotiations falter. *E.g.*, *Cates v. Morgan Portable Bldg. Corp.*, 780 F.2d 683, 691 (7th Cir. 1985) (settlement-related evidence inadmissible "in the dispute that was the subject of negotiation"). Rule 408 plays no role in an action to *enforce* a settlement agreement: "Obviously a settlement agreement is admissible to prove the parties' undertakings in the agreement, should it be argued that a party broke the agreement." *Id.* The SA released the 2019 federal proxy claims. SA § 5 (requiring execution of release appended to July 2019 Settlement Agreement). Use of negotiating history may have been prohibited in that case, but Rule 408 does not apply in the present action to enforce the SA. And even if it did, Rule 408(b) permits use of such evidence for "another purposes"—*e.g.*, rebutting Defendants' false assertions about the parties' intentions and negotiations.

Defendants' final word on drafting history is that it purportedly weighs in *their* favor. DPTB 56-57. But Defendants highlight only one item: a footnote in a draft term sheet stating "[t]he definition of Extraordinary Transaction will pick up all significant corporate transactions." *Id.* 57; *see supra* at 17-19 (discussing inapplicability of this language). Defendants then repeat their refrain about Proposal 4's purported size and TPL's purported historical practices.[12] These arguments fail for the reasons stated above. *Supra* 6-7. They also fail because Proposal 4 is not a transaction at all. PPTB 40.

Defendants' post-trial brief, like their pre-trial briefs and presentation at trial, reflects a remarkable flight from the evidence relevant to contract interpretation. Defendants ignore the highly damaging contemporaneous documents and testimony of their witnesses (PPTB 51-61), like Stahl's conversation with Goldstein in which he acknowledged that Defendants "must vote with" TPL on a share increase (about which he was less than forthcoming). Stahl Tr. 217:14-227:8; JX-210. Defendants likewise fail to synthesize their witnesses' ever-shifting testimony about what the contract means (consistent with Oliver's directive to keep TPL's general counsel "guessing"). Oliver Tr. 279:10-17; JX-395. They otherwise invite the Court to

[12] Defendants' invocation of TPL's "135-year" history in the context of the drafting history is particularly ironic given the ordinary course provisions they sought and did not obtain.

disregard both trade usage and drafting history. They offer scant evidence of their own on contract interpretation. At trial, Defendants did not ask Stahl or Oliver *any* questions about what the SA means. Kesslen, who negotiated the SA, confirmed that the SA has two carveouts but offered no testimony on their meaning. Kesslen Tr. 143:3-19. He addressed the Proviso in slightly greater detail, but focused almost exclusively on a portion of the Plan of Conversion rather than the contract or its meaning. *Id.* 143:20-148:3.

Defendants have consistently sought to wish away the evidence relevant to contract interpretation, just as they refuse to grapple with fundamental interpretive principles. The reason is clear. The evidence establishes that Defendants breached their Voting Commitment.

II. DEFENDANTS BREACHED THE STANDSTILL

A. Defendants' Breaches Are Incontrovertible

Defendants scarcely bother to contest that they breached the Standstill. Their sole merits defense comes in a short footnote invoking "a carveout for private communications." DPTB 60 n.235. The "carveout," which Defendants tellingly do not quote, applies only to statements (1) "based on publicly available information," (2) understood to be "confidential communication[s]," and (3) "not made with an intent to circumvent any of the restrictions" in the Standstill. SA § 3 at 6.

Defendants run afoul of all three requirements. Their communications were not based on publicly available information. The detailed breakdown of Board activities and alignment Stahl conveyed to Lawrence and Phillip Goldstein is an obvious example. PPTB 11-13 (citing evidence). The "Call to Arms" in the Bregman/Goldstein collaboration effort is another. *Id.* 14. Defendants' outreach to stockholders was not understood to be confidential. Oliver told the recipients of his "Do this!" campaign to "spread the word." *E.g.*, JX-447. Finally, Defendants plainly intended to circumvent the Standstill.

B. TPL's Claim Is Properly Before the Court—As Is Evidence of *All* Their Standstill Breaches

Defendants next contend that their Standstill breaches are outside the scope of Section 225. But Section 225 is a "broad statutory mandate" under which the Court has "discretion to determine the boundaries of its inquiry." Balotti & Finkelstein, *Section 225*, § 7.21 (4th Ed. 2023-1 Supp.). "[I]t is common in Section 225 cases for this court to address the consequences that stockholder voting agreements have…." *Levinhar v. MDG Med., Inc.*, 2009 WL 4263211, at *11 (Del. Ch. Nov. 24, 2009).

Defendants' Standstill breaches—uncovered during limited discovery—infected the voting on Proposal 4. That was their purpose. Oliver admitted that in sending his "Do this!" message, he was telling stockholders how to vote. PPTB 20; Oliver Tr. 283:24-284:5. Recipients of his outreach confirmed that they had voted

as instructed. PPTB 21-22. Defendants urge the Court to view TPL's Standstill claim as a distraction and a sign of desperation, but it is integral to the parties' dispute. Among other things, the evidence of Defendants' Standstill breaches demonstrates their flagrant disregard for their contractual obligations.

Defendants brush aside much of their misconduct by claiming that their breaches before the Board's August 31, 2022 adoption of Proposal 4 do not matter. But these earlier breaches are potent evidence of Defendants' coordination in lobbying stockholders. When Goldstein wrote, after TPL filed its Preliminary Proxy Statement on September 16, 2022, that "NOW WE ALL MUST LOBBY SHAREHOLDERS," he was firing up relationships created during the 2019 proxy contest and nurtured during the first 18 months of TPL's corporate life. PPTB 14-17. These earlier breaches also show that Defendants understood the restrictions the Standstill imposed—although they chose not to abide by them. JX-238 (November 2021 email acknowledging Standstill drafted by Kesslen); Kesslen Tr. 177:21-178:17. All of this evidence is properly before the Court.

C. TPL Has Established Injury

Defendants contend that their breaches cannot have injured TPL,[13] stating that for Proposal 4 to pass, the holders of "***$2.99*** billion worth of TPL stock" would have needed to vote in its favor. DPTB 60. In proportionate terms, Proposal 4 fell short by slightly less than 15%. DPTB 60 n.233. In an effort to recruit other activists to TPL, Goldstein explained that *beyond* Defendants' holdings, he and Stahl "believe we have influence with the holders of another 20% of the outstanding 7,745,375 shares." JX-303:2. Defendants seek to disavow the 20% representation, labeling it "a single hearsay statement from a non-party in an email to another non-party." DPTB 60 n.234. But the figure appears in "TPL Activism Statistics," a document "prepared" by Bregman—Horizon's president and co-founder—and circulated to prominent activist investors. JX-314; JX-303:11-12. Defendants cannot credibly run from Bregman's work.

The evidence shows how Defendants targeted significant stockholders in the 20% influence group. The recipients of Oliver's "Do this!" campaign had substantial investments of their own or oversaw others'. PPTB 63 n.30. The same is true of the recipients of Goldstein's September 16, 2022 outreach: "NOW WE

[13] Defendants' knowing and intentional breaches of the SA have also caused TPL to incur legal fees and other expenses, which likewise constitute injury.

ALL MUST LOBBY SHAREHOLDERS." JX-754.[14] [redacted] the TPLT Blogger, whose webpage had 500,000 views as of September 19, 2022, received the message.[15]

If the scope of TPL's injury is uncertain, Defendants should bear the burden given their persistent discovery abuses. Stahl unabashedly destroyed evidence and was untruthful in his deposition and trial testimony. PPTB 13 n.7; Stahl Tr. 206:17-207:13. Oliver testified untruthfully in deposition about the "Do this!" campaign. *Id.* 20. Defendants invoked suspicious engagement letters. JX-50; JX-782 (Kesslen charged Oliver and Stahl a $1 and $10 fee, respectively). Defendants have never fully responded to TPL's interrogatories seeking information about their communications with stockholders before the 2022 annual meeting. JX-746:2-6. Indeed, having strategically excluded Bregman from their custodian list, Defendants produced just *one* document referencing the 20% figure they now seek to evade

[14] *E.g.*, (1) Phillip Goldstein and Andrew Dakos of Bulldog Investors, a registered investment adviser (https://bulldoginvestors.com/leadership-team/); (2) David Spier, a portfolio manager at Nitor Capital Management, an asset management firm (https://www.linkedin.com/in/david-spier-8b599128); (3) David Bellet, the Chairman of Bellet Capital Management (https://www.linkedin.com/in/david-bellet-41b5105); (4) others at Larry Goldstein's SMP Asset Management, an asset management firm (https://www.smplp.com/).

[15] https://tpltblog.com/?s=500k.

(Goldstein produced 11). Notwithstanding Defendants' discovery abuses, TPL adduced significant evidence that Defendants' misconduct infected the vote.

III. DEFENDANTS FAIL TO ESTABLISH THE DEFENSE OF UNCLEAN HANDS

Three days before trial, Defendants first pled the defense of unclean hands. Neither the assertions in Defendants' amended answer nor the matters aired for the first time at trial support the defense, on which Defendants bear the burden.

A. The Defense as Pled Is Meritless

In their amended answer, Defendants assert that TPL's hands are unclean because the Company (1) did not disclose that Stahl and Oliver voted against Proposal 4 at the August 31, 2022 Board meeting, (2) did not disclose the formation of the SAC, and (3) adjourned the 2022 annual meeting without changing the record date. Dkt. 220 at 44-45. Defendants do not address the second or third issues in their post-trial brief and have thus waived them. *Supra* at 25-26 (citing authority).

As for the first, boards of directors operate collectively, and TPL properly disclosed the Board's recommendation. There is no mandate to report individual directors' votes unless the individual director reports it in writing.[16] Stahl

[16] *See* 7 CFR § 240.14a-101 (Item 4(a)(1) of Schedule 14A) requiring disclosure of an individual director's vote if the director provides the company written notice of their opposition.

recognized this at trial. Stahl Tr. 223:23-224:2 (individual director votes generally not made public). *E.g.*, *Appel v. Berkman*, 180 A.3d 1055, 1062 (Del. 2018) ("our decision in no way implies that the decision for a particular director's dissent or abstention will always be material").

As of the November 16, 2022 meeting, stockholders either knew, or likely presumed, how Stahl and Oliver voted on Proposal 4 in their capacity as directors. Defendants' rampant Standstill breaches went a long way in this regard. PPTB 19-22; *supra* at 3, 33-34 *see also, e.g.*, JX-434:1 (Oliver October 8, 2022 email to stockholder: "When the proxy says 'The Board recommends' it means a majority of the Board."). Further, TPL promptly disclosed Horizon's vote against Proposal 4. Horizon cast its vote "AGAINST" Proposal 4 on Friday, November 11. TPL reported it before market open on Tuesday, November 15.

Further, given Defendants' focus on the issue at trial, on April 25, 2023 before market open, TPL issued a supplemental proxy disclosure (the "Supplemental Disclosure"[17]) stating that, among other things, the resolution was "adopted by an 8-to-2 vote with Messrs. Stahl and Oliver dissenting," while noting that "as a matter

[17] Texas Pacific Land Corporation, Definitive Additional Materials (Schedule 14A) (Apr. 25, 2023), https://www.sec.gov/Archives/edgar/data/1811074/000110465923049181/tm2313614-1_defa14a.htm.

of policy, the Company does not disclose specific votes by members of its Board or Board votes in general, unless required by 17 CFR § 240.14a-101 (Item 4(a)(1) of Schedule 14A) or other applicable law, and expects to continue that practice in the future." That day, 47 additional shares were voted for Proposal 4.[18] Over the next three days, the number of votes "FOR" Proposal 4 dropped by only 223 shares, or 0.0029% relative to the 7,710,932 shares outstanding on the record date:

Date[19]	Votes For	Votes Against
Monday April 24	***2,709,450***	3,949,686
Tuesday April 25 ***Supplemental Disclosure Issued***	***2,709,497***	3,949,641
Wednesday April 26	2,709,470	3,949,669
Thursday April 27	2,709,237	3,950,056
Friday April 28	***2,709,227***	3,949,988

[18] Texas Pacific Land Corporation, Form 8-K (May 18, 2023), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001811074/000110465923062322/tm2316194d1_8k.htm (the "Voting Disclosure").

[19] *Id.* Voting tallies in the Voting Disclosure are "as of the beginning of each business day." This chart is adjusted accordingly.

Defendants ignore this voting data, which was publicly filed on May 18, 2023—the day the annual meeting closed, and the day before they filed their opening post-trial brief.[20]

B. The New Argument Introduced at Trial Does Not Establish Unclean Hands

For the first time at trial, Defendants attacked TPL's November 8, 2022 letter to stockholders (the "Stockholder Letter"), which directly quoted Glass Lewis's commentary on Proposal 4. "[W]here a defendant raises an argument or invokes for the first time a defense in the middle of a trial, the most sensible outcome is a finding that the party waived its argument or defense." *Daugherty v. Dondero*, 2023 WL 461112, at *6 n.53 (Del. Ch. Jan. 27, 2023) (collecting authorities).

Specifically, Defendants challenge one of three quotes in the Stockholder Letter from Glass Lewis's November 1, 2022 report:

[20] Instead, Defendants claim that "numerous stockholders" inquired about Stahl and Oliver's votes on Proposal 4. DPTB 64-65 & n.245. In support, they cite two (not "numerous") emails. In one, a stockholder asked if Stahl was "obligated" to vote for Proposal 4—not how he voted. JX-462:68. The other (JX-462:76) was sent by Brian Ferguson, a "good friend" of Oliver, who Oliver instructed to ask TPL about Board level voting. Oliver Dep. 166:7-171:12.

- "The Company currently does not currently have sufficient shares available for issuance to meet its existing obligations. We are concerned that the Company is unable to meet its current and potential obligations and believe it is important that the Company obtain additional common shares available for issuance in the future."

JX-511:2.

Glass Lewis's concerns could have been stated more clearly. The same holds for the letter, even though it accurately quoted Glass Lewis. There is no dispute that TPL was then, and is now, unable to meet "potential obligations" under its equity plans—an apparent source of Glass Lewis's "concern."[21] But TPL was then, and is now, in a strong financial position and has repeatedly disclosed that its cash on hand is sufficient to meet its needs.[22]

After trial, TPL promptly issued the April 25 Supplemental Disclosure clarifying the various matters Defendants raised at trial, including the Glass Lewis

[21] TPL's two equity plans, which were approved by stockholders and the Board, including Stahl and Oliver, "impose current and potential obligations on the company." PPTB 10 & n.6; Stahl Tr. 211:21-23. When Glass Lewis made its statement, TPL did not have sufficient shares to issue the total shares authorized to be issued as awards under the plans. Although the plans authorized the issuance of 85,000 shares, TPL had 45,224 as of November 2022. Stahl Tr. at 211:2-213:4; JX-919 at 56-57, 67; JX-431 at 26; PPTB 10 & n.6.

[22] *E.g.*, JX-1035:18, Form 10-Q filed August 3, 2022 ("We believe that cash from operations, together with our cash and cash equivalents balances, will be sufficient…for the foreseeable future."); JX-1050:19, Form 10-Q filed November 2, 2022 (same); JX-726:25, Form 10-K filed February 22, 2023 (same).

quote.[23] Defendants suggest this disclosure came "too late." DPTB 63. Here, they note the passage of time and record date, which they claim has "lock[ed] in" the vote on Proposal 4. *Id*.[24] But Defendants cite no evidence concerning turnover or that selling stockholders could not or did not consider changing their votes. *Id.* Defendants' citation-free assertion is telling, given evidence should have been available. Stahl Tr. 203:14-17; *see also generally In re Del Monte Foods Co. S'holders Litig.,* 25 A.3d 813, 819 n.1 (Del. Ch. 2011) ("The production of weak evidence when strong is, or should have been, available can lead only to the conclusion that the strong would have been adverse.") (cleaned up). In any event, if any stockholders disposed of their shares between November 16, 2022 and May 18, 2023, (i) they remained able to change their vote and (ii) this impacted votes both "FOR" and "AGAINST." And Defendants note that two weeks later, on May 9, Glass Lewis changed its recommendation, after which roughly 2% of the vote shifted. DPTB 63; Voting Disclosure at Ex. A.

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[23] Supplemental Disclosure at 2-3.

[24] TPL advocated for a trial in early February 2023; Defendants opposed TPL's motion to expedite and sought a mid-April trial. Dkt. 7. Having argued for and obtained a two and a half month delay (practically doubling the time to trial), Defendants cannot now invoke the passage of time as a basis to avoid their contractual obligations.

As significantly, Defendants themselves bear responsibility for any delay. Defendants and their designees received the November 8 Stockholder Letter when TPL filed it with the SEC. Kesslen received a copy on November 9 from Horizon Senior Vice President John Becker, who characterized it as "aggressive." JX-511:1. Although Defendants now allege that TPL's quotation from Glass Lewis was "fraudulent,"[25] they and their designees did nothing to raise this purported "fraud," let alone rectify it, until the April 17, 2023 trial. They never raised it with TPL in the course of litigation, despite the mandate to plead defenses (*e.g.*, omitted from Defendants' April 14, 2023 amended answer, Dkt. 220) and TPL's interrogatories targeting the same.[26] JX-563:15-16; JX-737:2-9. Nor did Defendants produce any contemporaneous documents in which they (or Stahl or Oliver) questioned the accuracy of the Stockholder Letter.[27] As directors, Stahl or Oliver had a duty to act if they believed that the November 8 filing was misleading.[28] They did not do so.

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[25] Defendants allege as much without referencing the applicable standard (*e.g.*, scienter), let alone attempting to prove as much.

[26] It appears that the first reference to the Stockholder Letter in this litigation was a single sentence in the Pre-Trial Order, which does not quote or mention the Glass Lewis language Defendants attack. Dkt. 227 at 60.

[27] Indeed, Defendants collectively produced just one copy of the letter itself: JX-511:2-3.

[28] *E.g.*, *In re Pattern Energy Gp. S'holders Litig.*, 2021 WL 1812674, at *61 (Del. Ch. May 6, 2021) (plaintiff adequately pled claim that directors "failed to correct a Proxy they knew to be false and misleading").

Presumably, much of Defendants' pre-trial silence about the Stockholder Letter means that they, and their designees, likewise failed to identify any issue concerning the Glass Lewis quotation in real time. Perhaps this flows from Stahl and Oliver's understanding of the Company's equity plans, and the fact that Glass Lewis's commentary regarding "potential obligations" is correct. Needless to say, if Stahl and Oliver believed they had identified a mistake in the Company's public filings and knowingly chose not to raise it, that would raise serious questions about their own conduct. It is unclear when Defendants determined that the Stockholder Letter's quotation of Glass Lewis was potentially problematic. But each day they waited to raise it in lieu of launching a trial attack was a deliberate choice. This is not an equitable approach to invoking the equities. *See Am. Healthcare Admin. Servs., Inc. v. Aizen,* 285 A.3d 461, 485 (Del. Ch.), judgment entered, (Del. Ch. 2022) ("[U]nclean hands is . . . not a weapon to be wielded by parties seeking to excuse their own inequitable behavior by pointing out a trifling instance of impropriety by their counterpart.").

In sum, none of Defendants unclean hands arguments—all somewhat ironic given their own protracted, intentional contractual breaches—have merit. The Company's prompt, clarifying Supplemental Disclosure, and the minimal voting

change thereafter, underscores that Defendants' unclean hands argument fails, and cannot provide a basis to avoid their contractual violations.

IV. TPL IS ENTITLED TO RELIEF

TPL is entitled to relief. Defendants' breach of their Voting Commitment was outcome-determinative as of November 16, 2022. PPTB 24 & n.13. The same was true when the annual meeting closed on May 18, 2023.[29] If Defendants had voted the 1,587,902[30] shares they control in favor of Proposal 4—as they were contractually obligated to do—the measure would have passed. The Court should enter judgment in favor of TPL, including declaring that Proposal 4 has been approved.

[29] Voting Disclosure at 1.

[30] This figure is based on Defendants' Interrogatory responses. JX-563:26. A November 18, 2022 voting report from Mackenzie Partners indicates that Defendants voted 1,772,071 shares against Proposal 4. JX-543:3.

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CERTIFICATE OF SERVICE

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