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: May 26, 2023

DEFENDANTS' POST-TRIAL ANSWERING BRIEF

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I. PRELIMINARY STATEMENT

This case arises from a fundamental disagreement between the parties about how Plaintiff Texas Pacific Land Corporation ("TPL" or the "Company") should be governed. Defendants—TPL's largest stockholder (Horizon Kinetics) and another large TPL stockholder (SoftVest)—believe that TPL should be governed as it has been throughout its 135-year history.[1] During this time, TPL has had a unique—and uniquely successful—business model. Born out of the bankruptcy of a 19th century land-grant railroad company, TPL operated as a liquidating trust for the first 133 years of its existence, with no ability to authorize new shares, let alone to use such shares as equity currency for external acquisitions. Instead, TPL established a practice of repurchasing shares in the open market, and then retiring those shares.

In 2021, the Company was converted into a Delaware corporation. But its Certificate of Incorporation—by granting TPL no authorized-but-unissued shares—ensured that TPL could not stray from its historical practice of avoiding potentially dilutive share issuances, unless approved by a majority of stockholders. Now, however, TPL's management and a majority of its Board seek to rid TPL of these historical governance restrictions. Specifically, at TPL's 2022 Annual Meeting, a majority of TPL's Board—over the objection of Defendants' designees—proposed

[1] The terms "Defendants," "Horizon Kinetics," and "SoftVest," have the meanings assigned in Defs.' Pre-Trial Br. ("DPTB").

that stockholders approve an amendment to TPL's Certificate of Incorporation to multiply the number of TPL's authorized shares sixfold ("Proposal Four"). If approved, Proposal Four would leave TPL with ***billions*** of dollars' worth of unissued TPL stock—effectively giving TPL a blank check to dilute stockholders through stock-based acquisitions and lucrative equity compensation grants to management. Indeed, the evidence presented at trial confirmed that obtaining the ability to enter into such transactions was the primary purpose for which management designed Proposal Four.

Under Delaware law and TPL's charter, the decision of whether to grant TPL this authority rests with TPL's stockholders. And here, the holders of a majority of TPL's shares have voted against Proposal Four. TPL, however, believes it has a trump card by which it can wrest the right to decide whether to issue new TPL stock from TPL's stockholders and instead give it to a bare majority of TPL's directors—who own less than ***one-tenth of one percent*** of TPL's outstanding stock. Specifically, in connection with the conversion of TPL into a corporation, TPL and Defendants entered into a Stockholders' Agreement in June 2020. The Stockholders' Agreement requires Defendants to "vote all shares of Common Stock beneficially owned by such Stockholder…in accordance with the Board's

recommendations[.]"[2] Carved out of this commitment, however, are "any proposals (i) related to an Extraordinary Transaction or (ii) related to governance, environmental or social matters[.]"[3] The principal issue in this case is whether Proposal Four falls into at least one of these exceptions. It does, for at least four reasons:

First, the first carve-out to the voting commitment, for matters "related to an Extraordinary Transaction," encompasses any matter "related to" a "merger,…acquisition, [or] business combination."[4] And, here, TPL itself admitted in its 2022 proxy statement that a key purpose of Proposal Four was to facilitate "strategic acquisitions" with stock.[5] Discovery provided by TPL reinforced this important admission. Since 2021, TPL management has repeatedly sought to persuade the Board of its "strategic vision" of a TPL that actively engages in acquisitions with stock.[6] In 2021, for example, TPL management solicited a presentation from Credit Suisse to the Board, arguing that "stock focused mergers" would be "highly accretive" for TPL but required "[a]uthorizing additional shares."[7]

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[2] JX116:3 (§ 2(a)). References herein to exhibits on the parties' Joint Exhibit list are in the form JX[Exhibit Number]:[Page Number].
[3] *Id.* at 3–4 (§ 2(b)).
[4] *Id.* at 3–4 (§ 2(b)), 13 (§ 16(a)(v)).
[5] JX431:27.
[6] *See* JX318:8.
[7] *See* JX170:23–25.

In the months that followed, TPL attempted to negotiate significant acquisitions in exchange for TPL stock, but without a pre-existing share authorization that would enable it to consummate those acquisitions. TPL's potential counterparties perceived an "execution risk" as to TPL's ability to authorize sufficient shares to close these transactions, and the deals stalled.[8] In light of such difficulties, management informed TPL's Board that the lack of authorized shares had proven to be a "Key Headwind" to its "Strategic Vision" of growth via stock-based acquisitions.[9]

TPL cannot seriously dispute any of this. To the contrary, TPL's deponents repeatedly admitted that Proposal Four was "related to [TPL's] desire to pursue acquisitions with equity currency."[10] And, David Barry—TPL's co-Chairman and a signatory to the Stockholders' Agreement—conceded that the "primary purpose" of Proposal Four was "to do acquisitions" with stock.[11] Proposal Four is thus related to each of the acquisitions for stock that TPL would pursue if Proposal Four passes. As a result, it is subject to the voting commitment's first carve-out for matters related to an Extraordinary Transaction.

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[8] JX360:3.
[9] *See* JX318.8.
[10] Dobbs Dep. 185:5–13.
[11] Barry Tr. 314:10–22.

Second, the voting commitment's first carve-out also includes any matters "related to" a "recapitalization" of TPL. A recapitalization is a revision to the capital structure of a company. Here, Proposal Four would fundamentally revise TPL's capital structure by sextupling the amount of TPL's authorized shares. Under the dictionary meaning of the term, as well as ordinary usage in the business press and corporate press releases, such a transaction amounts to a "recapitalization" of TPL. That the parties here would have understood that a large share authorization would effect a "recapitalization" of TPL is especially clear. After all, in its 135-year history, TPL has ***never*** had ***any*** authorized-but-unissued shares. An enormous share authorization—such as Proposal Four proposes—would thus fundamentally transform TPL's capital structure. Indeed, the very section of TPL's Certificate of Incorporation that Proposal Four seeks to amend is titled "CAPITALIZATION."[12] Proposal Four thus proposes a recapitalization of TPL and is subject to the voting commitment's first carve-out.

Third, the Stockholders' Agreement includes in its definition of "Extraordinary Transaction" any "other matter involving a corporate transaction that require[s] a stockholder vote."[13] Delaware's General Corporation Law requires a stockholder vote to approve amendments to a certificate of incorporation. And

[12] JX431:25.
[13] JX116:13 (§ 16(a)(v)).

Delaware caselaw repeatedly references a "charter amendment" as a prime example of a "corporate transaction" requiring a stockholder vote. It is thus clear that a charter amendment—such as the one that Proposal Four undisputedly seeks to implement—is a "matter[] involving a corporate transaction that require[s] a stockholder vote."[14] Proposal Four is thus subject to the voting commitment's first carve-out.

Fourth, the Stockholders' Agreement's second carve-out—for matters "related to governance, environmental or social matters"—also permits Defendants to vote at their discretion on Proposal Four.[15] An absence of authorized-but-unissued shares imposes important governance restrictions on a corporation. Particularly relevant here, it effectively rules out any (i) substantial acquisitions for stock, (ii) dilutive equity grants to executives, or (iii) deployment of a poison pill or other takeover defense. In other words, TPL's lack of authorized-but-unissued shares places management on a "short leash," and requires them to govern TPL in a manner consistent with its historical practice of refraining from new share issuances. Proposal Four is plainly designed to remove this governance restriction through an amendment to its Certificate of Incorporation—TPL's foundational governance

[14] *Id.*
[15] *See id.* at 13.

document. Proposal Four is thus "related to governance" and subject to the voting commitment's second carve-out.[16]

Unable to overcome the plain reading of the Stockholders' Agreement, four months into this summary Section 225(b) proceeding and with less than a month before trial, TPL sought to shift focus. Specifically, TPL filed an Amended Complaint adding to its single breach-of-contract claim an allegation that "[i]n violation of Section 3 of the Stockholders' Agreement, Defendants have encouraged or participated in the solicitation of proxies against Proposal 4."[17] The claim fails on both the law and the facts. Perhaps most fundamentally, however, the standstill provision embodied in Section 3 of the Stockholders' Agreement is not within the narrow scope of this statutory summary proceeding. The only substantive relief TPL seeks is an order compelling Defendants under Section 225 to vote their shares in favor of Proposal Four. TPL would be entitled to such relief only if it could show a violation of the Stockholders' Agreement's voting obligation in Section ***2***. TPL's eleventh-hour pivot away from Section 2 confirms that TPL knows that it cannot show that it is entitled to relief under Section 2 and hopes that a purported violation of a different section of the Stockholders' Agreement will distract from this failure of proof.

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[16] *See id.*

[17] Am. Compl. ¶ 90.

Finally, TPL's claim for relief is barred as an equitable matter under the doctrine of unclean hands. The relief TPL seeks in this action is premised on its contention that it obtained sufficient votes that Proposal Four would have passed if Defendants had voted in favor of it. But, as TPL's testimony at trial confirmed, TPL solicited these votes via false and misleading disclosures. Specifically, shortly before TPL's 2022 Annual Meeting, it sent a letter to stockholders urging them to vote for Proposal Four because, absent passage of the proposal, independent experts feared that TPL would be "unable to meet its current and potential obligations."[18] In reality, however, TPL directors believed that TPL had a "fortress balance sheet" and they harbored no concerns about meeting upcoming obligations.[19] Faced with this discrepancy, the only director TPL called to testify at trial was forced to concede that TPL's solicitation was a "false statement."[20] And TPL misleadingly omitted that two of its directors opposed Proposal Four, despite those directors asking for clear disclosures on this point. As a result, regardless of the merits of TPL's contractual claim, the doctrine of unclean hands should prevent TPL from involving the Court in its effort to prevail on Proposal Four. TPL is accordingly entitled to no relief in this action.

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[18] JX511:2.
[19] Kurz Tr. 60:15–61:16.
[20] *See id.* at 67:19–68:1, 69:3–6.

II. FACTUAL BACKGROUND

A. The Texas Pacific Land Trust.

Texas Pacific Land Trust (the "Trust") was formed in 1888.[21] It arose in the wake of the bankruptcy of the Texas & Pacific Railway Company (the "Railway Company").[22] As inducement to build a railway stretching from Southern California to East Texas, the Railway Company was granted 3.5 million acres of land in the State of Texas by federal charter.[23] Unable to complete construction, the Railway Company filed for bankruptcy in 1888 and transferred its land to the newly-formed Trust for the benefit of the bondholders who had invested in the failed railroad.[24] The Trust was formed as a "liquidating trust" with the purpose of providing an orderly liquidation of the land that secured the defaulted bonds of the Railway Company.[25]

The Trust's charter did not permit the trustees to "issue new equity, eliminating the risk of shareholder dilution from stock issuance."[26] As a result, from its inception in 1888, the Trust never once issued additional equity.[27] Instead, the

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[21] Am. Compl. ¶ 19.
[22] JX613:5.
[23] *Id*. at 1–3.
[24] *Id*. at 3–5.
[25] *See* JX051:17.
[26] See *id.*
[27] *See id*. at 16; Glover Dep. 49:11–15.

Trust made a practice of returning capital to stockholders through dividends and stock buybacks.[28]

This long history of disciplined stockholder accretion won the admiration of numerous investors, including Murray Stahl, Horizon Kinetics' CEO, who has owned shares of TPL personally or professionally since 1985. Since 1995, Stahl has repeatedly emphasized that a primary reason for Horizon Kinetics' ownership was TPL's historical practice of repurchasing shares in the open market, and then retiring those repurchased shares.[29]

B. The Trust is reorganized as TPL.

From 1888 through 2018, the Trust was managed by three trustees who, under the Declaration of Trust, served until their death, resignation, or disqualification.[30] In February 2019, one of the three Trustees, Maurice Meyer III, resigned.[31] Following Mr. Meyer's resignation, the Trust originally nominated Preston Young, a commercial real estate broker who worked for Stream Realty Partners, a firm that managed properties affiliated with Dave Barry, one of the incumbent Trustees.[32] Subsequently, the Trust replaced Mr. Young with Donald Cook as its nominee for

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[28] JX051:16.
[29] *See* JX063.
[30] Am. Compl. ¶ 19.
[31] *Id*.; Oliver Tr. 240:8–15.
[32] *See* JX055:56–57; Oliver Tr. 240:16–24.

the successor trustee.[33] The stockholders overwhelmingly supported Eric Oliver, the President of SoftVest.[34]

During the ensuing proxy campaign and on the eve of the special meeting of stockholders, the Trust sued Mr. Oliver in Texas federal court, alleging that his solicitation materials contained misstatements or omissions.[35] Soon thereafter, Mr. Oliver counterclaimed. In doing so, Mr. Oliver noted that the Trust's stockholders had voted overwhelmingly for his candidacy.[36] After this became clear, the incumbent trustees (Messrs. Barry and Norris) engaged in a course of conduct intended to prevent the Trust's stockholders from casting their votes in favor of Mr. Oliver.[37] For instance, to forestall Mr. Oliver's election, the incumbent trustees purported to cancel the stockholder meeting at the last minute.[38] Mr. Oliver's counterclaim sought, among other things, to recognize the results of the stockholder meeting that went forward as planned, including the election of Mr. Oliver.[39]

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[33] *See* Am. Compl. ¶ 20.
[34] JX055:61–62; Oliver Tr. 242:8–18.
[35] *See* JX054:2 (¶ 3); Oliver Tr. 242:8–18.
[36] *See* JX055:45.
[37] *Id*.
[38] *Id.* at 45–46; Oliver Tr. 242:8–18.
[39] JX055:69.

The parties' competing claims were ultimately settled under a Settlement Agreement dated July 30, 2019.[40] Under the Settlement Agreement, the Trust formed a "Conversion Exploration Committee" to explore "whether the Trust should be converted into a C-corporation."[41] On March 23, 2020, at the Conversion Exploration Committee's recommendation, the Trustees announced that they had approved a plan to reorganize the Trust into a C-corporation.[42] Further to that plan, the Trustees arranged for the incorporation in Delaware of a new C-corporation, called Texas Pacific Land Corporation, on April 28, 2020.[43]

C. The Stockholders' Agreement.

On June 11, 2020, the Trust and Defendants entered into the Stockholders' Agreement at issue in this case.[44] Section 2 of the Stockholders' Agreement generally requires Defendants to vote "in accordance with the Board's recommendations."[45] But this voting commitment is subject to two carve-outs that are at issue in this case and are set forth in Section 2(b) of the Stockholders' Agreement:

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[40] Am. Compl. ¶ 22; Oliver Tr. 243:9–19.
[41] Am. Compl. ¶ 22; Oliver Tr. 243:9–19.
[42] Am. Compl. ¶ 24.
[43] *See* JX144:2 (§ 1).
[44] Am. Compl. ¶ 1.
[45] JX116:3 (§ 2(a)).

> Notwithstanding [the foregoing], the Stockholders shall not be required to vote in accordance with the Board Recommendation for any proposals
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> (i) related to an Extraordinary Transaction or
>
> (ii) related to governance, environmental or social matters; *provided, however*, that the Stockholders shall be required to vote in accordance with the Board Recommendation for any proposal relating to any corporate governance terms that would have the effect of changing any of the corporate governance terms set forth in the plan of conversion recommended by the Conversion Exploration Committee of the Trust on January 21, 2020.[46]

The Stockholders' Agreement defines "Extraordinary Transaction" as:

> [A]ny tender offer, exchange offer, share exchange, merger, consolidation, acquisition, business combination, sale, recapitalization, restructuring, or other matters involving a corporate transaction that require a stockholder vote[.][47]

D. TPL identifies its lack of authorized shares as a "Key Headwind" to its "Strategic Vision" of growth via external acquisitions.

On January 7, 2021, TPL filed an Amended and Restated Certificate of Incorporation fixing the total number of TPL's authorized shares at 7,756,156—an amount equal to the number of sub-share certificates of the Trust existing at this time.[48] The C-corporation became the successor of the Trust on January 11, 2021.[49]

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[46] *Id*. at 3–4 (§ 2(b)) (paragraph spacing added).
[47] *Id*. at 13 (§ 16(a)(v)).
[48] *See* JX144:3 (Art. IV).
[49] *See* Am. Compl. ¶ 12.

Since the conversion, TPL management has sought to reposition the Company away from its historical practice of orderly liquidation and into an active M&A player in the oil and gas industry.[50] This strategy is driven by management's questionable belief that it could exchange TPL stock for the stock of target companies trading at a lower price-to-EBITDA ratio and thereby create a combined, post-transaction company with a higher EBITDA per share than TPL has today.[51]

Defendants and their designees on TPL's Board oppose this strategy. They note that TPL's so-called "valuation premium" reflects not inexplicable market irrationality, but the market's recognition that TPL holds more valuable assets than its potential targets.[52] As a result, exchanging TPL stock for target stock would significantly dilute TPL's long-term value and diminish its value per share of TPL stock.[53] Indeed, TPL management admits that it does not know whether TPL would

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[50] *See* JX318:5 (discussing TPL leadership's desire to "transition[] approach to active management"); *see also* Glover Dep. 60:19–61:16. In identifying the "Key Criteria" for effecting this new "Strategic Vision," the first item TPL management identified was their plan to grow TPL "through [an] accretive acquisition program." JX318:8; *see also* JX292:5 ("The Company has previously communicated to the Board its strategic vision to accretively acquire assets that would grow each of the Company's current core business segments…."); JX360:10 ("We have [a] line of sight to several large Permian surface acquisitions and intend to prioritize those opportunities as we advance our multi-year strategic plan.").

[51] Hesseler Dep. 267:10–14.

[52] Oliver Tr. 253:6–13.

[53] *See id.*

be able to retain enough of its valuation premium after a stock-for-stock transaction such that TPL's post-merger price-per-share would increase.

Nonetheless, TPL insists on pursuing its strategy of growth-by-acquisitions.[54] Moreover, because its investment bankers have suggested that price-to-EBITDA "dislocations of th[e] magnitude" are unlikely to "persist long term,"[55] TPL management has argued that it is "imperative" that TPL "act quickly [to pursue] acquisition opportunities."[56]

However, TPL has faced an obstacle in its pursuit of this transformative vision.[57] As a result of its longstanding governance practice of never authorizing or making dilutive issuances and instead repurchasing and retiring existing shares, "[u]nlike almost every company in the S&P 500 or S&P Midcap 400, the Company does not have ***any*** authorized but unissued shares of Common Stock available for future issuances."[58]

In April 2021, the Board received a presentation from Credit Suisse discussing the possibility of amending TPL's charter to authorize additional shares.[59] Credit Suisse noted that "TPL currently has 100% of its total authorized shares outstanding,

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[54] Hesseler Dep. 124:15–125:24.
[55] *Id.* at 86:4–18.
[56] *Id.* at 136:7–14; *see also id.* at 86:21–87:5; Kurz Tr. 31:17–32:2.
[57] *See* Glover Dep. 121:6–18.
[58] JX431:26 (emphasis added).
[59] *See* JX170:23.

the highest of any mineral or E&P company."[60] Consistent with TPL management's views regarding a valuation premium, Credit Suisse noted that the recent "share performance by TPL creates an opportunity for stock focused mergers."[61] But in order to take advantage of this purported opportunity, TPL needed an "increase in the amount of shares authorized [to] provide [it] flexibility to investigate these potential opportunistic transactions."[62]

This advice was soon borne out in experience. As TPL management acknowledged in an internal presentation in April 2022, TPL's lack of "access to capital (i.e., authorized shares) ha[d] become a primary barrier to progressing transactions to formal decision points" and a "Key Headwind[]" to the "Strategic Vision" of TPL management.[63]

1. TPL's opportunity to consummate a major acquisition involving Oxy is halted by its lack of access to authorized-but-unissued common stock.

In November 2021, TPL initiated a process to explore a large-scale strategic acquisition of assets from Occidental Petroleum ("Oxy").[64] From the outset, because of TPL's limited cash reserves and desire to avoid taking on debt, TPL

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[60] *Id.* at 25.
[61] *Id*.
[62] *Id*.
[63] *See* JX318:8.
[64] *See* JX242.

management noted that "Oxy will need to be comfortable with consideration being mostly TPL shares (transaction will be >$1.5bn in size, so shares will be required)."[65] And because TPL did not have those shares already authorized, TPL would need to "request stockholder approval for suffic[ien]t shares of the Company's common stock to close the transaction."[66]

This ultimately proved to be the downfall of the transaction. Oxy perceived an "execution risk on the part of the Corporation to be able to get [such] necessary approvals [to] consummate the transaction."[67] As a result, Oxy demanded "a premium on the proposed price," which brought negotiations to "a standstill" in early May 2022.[68] The negotiations never resumed.[69]

2. TPL's opportunity for a multi-billion dollar acquisition of Brigham Minerals likewise fails.

On May 16, 2022, shortly after the Oxy deal fell through, TPL contacted the financial advisor of Brigham Minerals, Inc. ("Brigham") "and indicated [TPL was] no longer pursuing the [Oxy transaction] and would like to pursue a strategic

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[65] *Id.* at 1.
[66] JX292:6; Kurz Tr. 35:4–23.
[67] JX360:3; *see also* Glover Dep. 109:18–110:18 (Oxy "informed us they thought there was execution risk on our side because we didn't have shares, and they didn't really think we would be able to close the transaction. And so they really just priced us out of the market on – on their counter."); Dobbs Dep. 146:13–15 (similar); Kurz Dep. 72:5–8 (similar).
[68] JX360:3.
[69] Hesseler Dep. 191:4–9.

combination with Brigham."[70] On July 8, 2022, TPL submitted a non-binding proposal to acquire Brigham.[71]

The proposal was for a transaction at a $1.9 billion valuation with 100% stock-for-stock consideration.[72] As management noted in a presentation to the Board's Strategic Acquisitions Committee, such an acquisition was thought to be critical to "advanc[ing] [management's] multi-year strategic plan."[73] Specifically, "[a]fter several years of internal business building," in the second half of 2022, management felt TPL was "now prepared to deploy our playbook on external opportunities."[74] Moreover, management felt that the potential to use equity currency for such an acquisition represented a "relatively low cost of capital" creating a "unique opportunity."[75]

On September 6, 2022, Brigham announced that it had accepted an offer from a competing bidder.[76] In response to this news, TPL observed privately that the price it offered was "pretty much on target" and discussed the possibility of making "a

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[70] JX436:78.
[71] *See id.* at 79; JX362; JX372:2–4.
[72] JX360:6; *id.* at 9 ("TPL recommends 100% equity financing").
[73] JX360:10.
[74] *Id.* at 11.
[75] *Id*.
[76] *See* JX420.

competing bid…if we get the stock authorization" (i.e., if Proposal Four passes).[77] However, TPL ultimately could not do so because "[it] didn't have the authorized shares to act quickly [enough]."[78] The deal subsequently closed without TPL's involvement.

E. TPL's Board recommends a proposed share authorization over the objection of Defendants' Board designees.

On August 31, 2022, in the midst of TPL's failed efforts to consummate transactions with Oxy, Brigham, and other potential targets, TPL's Board discussed a potential proposal to increase the authorized shares of TPL's common stock. While Defendants' designees—Murray Stahl of Horizon Kinetics and Eric Oliver of SoftVest—opposed the proposal, it passed by a majority vote.[79]

On October 7, 2022, TPL filed its definitive proxy statement (the "Proxy") for its 2022 annual meeting.[80] Proposal Four in the Proxy sought approval of an amendment to the "Capitalization" section of TPL's Certificate of Incorporation to increase TPL's authorized shares of common stock from 7,756,156 to 46,536,936

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[77] JX422:1; *see also* Kurz Tr. 40:7–13.
[78] Hesseler Dep. 246:9–13.
[79] JX462:9; Stahl Tr. 194:6–197:20; Oliver Tr. 251:20–254:9.
[80] JX431.

shares—a sixfold increase.[81] The TPL Board recommended—by a majority vote, with Stahl and Oliver dissenting—that stockholders vote for Proposal Four.[82]

As the Proxy admits, TPL "desire[d] to have the flexibility to use Common Stock as consideration for the acquisition of additional assets."[83] And if Proposal Four were to pass, TPL "could…use its ability to issue additional Common Stock for…payment of consideration for acquisitions."[84] Indeed, TPL ended the Proxy's section on Proposal Four's purposes with a stark warning to stockholders: "failure to approve this Proposal Four…could, in effect, prevent the Company from purs[u]ing strategic acquisitions."[85]

F. Proposal Four fails at the annual meeting and TPL sues.

When the votes from TPL's November 16, 2022 annual meeting were tallied, Proposal Four failed.[86] Rather than accept the vote of its stockholders, however,

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[81] *See id.* at 25. While TPL now suggests that the number of newly authorized shares available for acquisitions may be limited by a subsequent stock split, this is sheer conjecture. Pl.'s Post-Trial Br. ("PPTB") at 20 n.10. The Board conspicuously reserved the right to not effect a stock split, should it "change its view on the desirability" of doing so. JX431:26. And regardless, even with a stock split, TPL would be left with many billions of dollars' worth of new stock available for acquisitions.

[82] JX431:25; JX462:9.

[83] JX431:27; JX565:9–11.

[84] JX431:26; JX565:9–11.

[85] JX431:27.

[86] Am. Compl. ¶ 79.

TPL adjourned the meeting with respect to Proposal Four until February 14, 2023.[87] On November 22, 2022—nearly twelve weeks after first learning that Defendants would vote against Proposal Four—TPL initiated this action.[88]

III. ARGUMENT

A. The carve-out for matters related to an Extraordinary Transaction applies to Proposal Four.

The Stockholders' Agreement's first carve-out provides that Defendants have no obligation to vote in accordance with the Board recommendation for any proposals that are "related to an Extraordinary Transaction."[89] The Stockholders' Agreement defines "Extraordinary Transaction" as "any tender offer, exchange offer, share exchange, merger, consolidation, acquisition, business combination, sale, recapitalization, restructuring, or other matters involving a corporate transaction that require a stockholder vote."[90]

By choosing to tether this carve-out to any proposal "related to" an Extraordinary Transaction, the parties to the Stockholders' Agreement gave this carve-out a broad scope. Under Delaware law, which governs the Stockholders' Agreement, the phrase "[r]elating to" is "paradigmatically broad" and means "to

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[87] *Id.* ¶ 81.
[88] *Id.* ¶ 85.
[89] JX116:3–4 (§ 2(b)).
[90] *Id*. at 13 (§ 16(a)(v)).

have some relation to." *Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures, VI, L.P.*, 2011 WL 549163, at *5 & n.34 (Del. Ch. Feb. 16, 2011); *see Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc.*, 2021 WL 1714202, at *35 (Del. Ch. Apr. 30, 2021) (applying the term's broad scope to contractual exceptions). It is a far-reaching "term[] often used by lawyers when they wish to capture the broadest possible universe" of potentially connected items. *Rummel Klepper & Kahl, LLP v. Del. River & Bay Auth.*, 2022 WL 29831, at *10 (Del. Ch. Jan. 3, 2022) (citation omitted).

1. Proposal Four is "related to" a "merger," "acquisition," or "business combination."

The first reason that Proposal Four is subject to the Extraordinary Transactions carve-out is that Proposal Four is "related to" a "merger," "acquisition," or "business combination."[91] The evidence for this point is overwhelming and largely not in dispute in this action.

For example, Proposal Four was borne out of a presentation to the TPL Board by Credit Suisse, in which the investment bank advised the Board that "[r]ecent outsized share performance by TPL creates an opportunity for stock focused mergers" and that "[a]n increase in the amount of shares authorized will provide TPL flexibility to investigate these potential opportunistic transactions."[92] Following this

[91] *See id.* (defining Extraordinary Transaction to include all of these terms).
[92] JX172:42.

presentation, the Board discussed placing a share authorization proposal on TPL's 2021 proxy statement, an idea management favored for the express purpose of obtaining flexibility to pursue "acquisitions."[93]

While the proposal to seek a share authorization amendment was ultimately tabled in 2021 because of a lack of consensus on the Board, in the months that followed, management continued to emphasize to the Board their "Strategic Vision" to grow TPL "through [an] accretive acquisition program."[94] Specifically, management argued that, "[a]fter several years of internal business building, [they] [were] now prepared to deploy [their] playbook on external opportunities."[95] To do so on a significant scale, however, TPL needed a significant share authorization.[96] Indeed, major transactions that TPL contemplated in 2022 with Oxy and Brigham had been scuttled as a direct result of TPL not having significant equity currency on hand at the time of the negotiations.[97] As a result of this difficulty in "progressing transactions to formal decision points," management saw TPL's lack of "access to…authorized shares" as a "Key Headwind[]" for their strategic vision.[98]

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[93] Hesseler Dep. 66:1–12.
[94] JX318:8; *see also* Hesseler Dep. 199:2–17, 203:19–204:10.
[95] JX360:11; Hesseler Dep. 200:5–11.
[96] *See* Hesseler Dep. 200:12–17; Glover Dep. 127:17–25.
[97] *See supra* Section II.D.
[98] JX318:8.

On the heels of TPL's failure to consummate the Oxy and Brigham transactions (described above), TPL's Board held a meeting on August 31, 2022 to discuss the Company's upcoming Annual Meeting.[99] At that meeting, management reiterated that "[g]iven the current environment, we continue to believe pursuit of external acquisitions is the value maximizing strategy."[100] As a result, management recommended that the Board pursue a "[b]inding share authorization for [an] incremental [38.71] million shares," including over 20 million shares that could be used for acquisitions.[101] Following this presentation, the Board approved, over the dissent of Defendants' Board designees, the inclusion of the share authorization proposal in TPL's 2022 Proxy.[102]

The Proxy publicly confirmed that acquisitions are one of Proposal Four's purposes. In summarizing the "Purposes of Increasing the Number of Shares of Authorized Common Stock," the Proxy states that "the Company desires to have the flexibility to use Common Stock as consideration for the acquisition of additional assets."[103] And it warned investors that "failure to approve this Proposal

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[99] *See* JX418:1.
[100] *Id.* at 111.
[101] *Id.*; Hesseler Dep. 237:1–238:15.
[102] JX462:9 (making this decision following a presentation stating that "the increase would give the Corporation flexibility with respect to future uses of shares, including as consideration for acquisitions").
[103] JX431:27.

Four…could, in effect, prevent the Company from pursuing strategic acquisitions."[104]

In light of this overwhelming record, TPL's witnesses conceded that Proposal Four is related to acquisitions.[105] In fact, TPL's co-Chairman admitted that acquisitions were Proposal Four's "primary" purpose.[106] And he felt that Mr. Stahl's well-known resistance to "do[ing] any significant acquisitions" was sufficient, by itself, to make "clear" that Mr. Stahl "would be opposed" to Proposal Four.[107]

The record is thus clear: Proposal Four is related to acquisitions that TPL sought, and that its incumbent leadership group continues to covet. Accordingly,

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[104] *Id*.

[105] *See* Barry Tr. 315:20–22; Hesseler Dep. 56:22–57:7 (acknowledging that "TPL's number of authorized but unissued shares" is "related to the company's ability to pursue M&A transactions"); *id.* at 143:2–15 (similar); Dobbs Dep. 185:10–13 (Q. "[Proposal Four] is related to the desire to pursue acquisitions with equity currency, correct?" A. "It is – that is one of the tools which it would provide."); Kurz Dep. 126:16–23 (Q. "And if this proposal does not pass, then TPL won't be able to pursue any large acquisitions with stocks, correct?" A. "That's correct."); *see also* JX405:1 ("On the share authorization, that was…more related to us having a share authorization so that we could raise capital through additional external equity, whether selling new equity into the market or effecting M&A.").

[106] Barry Tr. 314:10–22 (Q. "And so the primary purpose for those shares left over that would go into the authorized but unissued category was to do acquisitions. Right?" A. "It was -- once it goes into authorized but unissued there's multiple purposes for it. Of those purposes the primary -- the main one would be acquisitions.").

[107] JX443.

Proposal Four is "related to an Extraordinary Transaction," and Defendants had no obligation to vote for it.

a. The first carve-out is not limited to votes "to approve" Extraordinary Transactions.

In response to this argument, TPL argues that it did not have any acquisition under contract that would immediately proceed to closing if Proposal Four were to obtain stockholder approval.[108] But this proves nothing. The Extraordinary Transactions carve-out could have been drafted to be limited to proposals "to approve" specific, pending acquisitions. But it was not. Instead, it applies broadly to any proposal that is "***related to***" an acquisition, merger, or business combination.[109] Proposal Four easily meets that standard.

After all, TPL testified through its 30(b)(6) witness that the injury inflicted upon it by Defendants' failure to vote in favor of Proposal Four has been TPL's inability to close acquisitions that otherwise would have been available to it:

> Q. Has TPL been harmed by SoftVest and Horizon Kinetics voting against Proposal 4?
>
> A. Yes.
>
> Q. And is that harm that's already been inflicted, or is that, like, future harm, future potential harm?
>
> A. No, I think ***that harm's al- -- already been inflicted***.

[108] PPTB at 32–33.

[109] *See* JX116: 3–4, 13 (§§ 2(b), 16(a)(v)).

> Q. And what's the harm that's already been inflicted?
>
> A. Well, without access to shares for all the potential uses that we laid out in Prop 4, TPL is not able to realize those benefits by having those shares, and so in the time period from the annual meeting until now, that harm has been realized.
>
> Q. ***Because there's transactions that TPL couldn't do between November and today, right?***
>
> A. ***Correct***.[110]

Similarly, Karl Kurz, the chair of TPL's Strategic Acquisitions Committee and another of TPL's 30(b)(6) witnesses, stated that the reason TPL did not undertake any acquisitions when TPL's stock traded at an all-time high of about $2,700 in November 2022—the precise time Proposal Four went to a vote—was "[b]ecause we didn't have any shares authorized."[111] And Patrick Hesseler, TPL's Vice President of Acquisitions, admitted that TPL's strategy remains to pursue external acquisitions and that "there's lots of companies and lots of assets" with "willing sellers" to this day.[112]

In short, the only reason that TPL had not "progress[ed] transactions to formal decision points" at the time Proposal Four was proposed was that it lacked sufficient "access to capital (i.e., authorized shares)."[113] Thus, Proposal Four is related to each

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[110] Glover Dep. 183:13–184:4 (emphasis added).
[111] Kurz Dep. 59:14–16.
[112] Hesseler Dep. 82:1–14.
[113] *See* JX318:8.

of the potential acquisitions TPL might have pursued—or could pursue in the future—if Proposal Four were approved.[114]

Of course, the meaning of "related to" is not "limitless."[115] But Defendants' argument does not hinge on anything resembling a "limitless" interpretation of that term. Instead, Defendants argue that a proposal (i) borne out of frustrated attempts to advance a strategy of growth by acquisitions and (ii) proposed for the "***primary purpose***" of facilitating such an acquisition is "related to" an acquisition.[116] This is not a "limitless"—or even a controversial—interpretation, as TPL's own witnesses have confirmed by their repeated concessions that Proposal Four is "related to" acquisitions.[117]

TPL contends that this ordinary meaning of "related to" would render the Extraordinary Transactions carve-out overbroad.[118] As an initial matter, this is not accurate. For instance, TPL feigns concerns over determining when the ratification of an auditor would "relate to" an acquisition.[119] But while the ratification of an auditor may often not be related to an acquisition, if TPL's auditor had repeatedly

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[114] *See* Hesseler Dep. 138:6–15 (acknowledging that Proposal Four was "related to" "any potential future acquisition").
[115] PPTB at 34.
[116] Barry Tr. 309:2–310:13, 311:15–314:22, 315:20–23.
[117] *See id.*; *see also supra* note 106. None of TPL's caselaw concerns a remotely analogous relationship.
[118] PPTB at 33.
[119] *Id.*

frustrated TPL's attempts to consummate transactions, and TPL's proposal to ratify a new auditor was made for the very purpose of facilitating acquisitions, then such a proposal—like Proposal Four—would be "related to" acquisitions. There is nothing unreasonable in this conclusion.

In any event, TPL's insistence that it was a "sophisticated part[y] represented by sophisticated counsel" when it negotiated the Stockholders' Agreement undermines its argument that it should be able to avoid the ordinary meaning of the phrase "related to."[120] After all, it would have been simple enough for TPL to seek to include language indicating that the voting commitment's carve-out only extended to proposals "to approve" an Extraordinary Transaction. But it did not. And TPL is not entitled to ask the Court to rewrite the Stockholders' Agreement just because it now regrets the bargain that it struck.[121]

b. TPL's attempt to avoid the plain meaning of the Extraordinary Transactions carve-out fails.

TPL also argues that Proposal Four cannot be "related to an Extraordinary Transaction" because such an interpretation "is contrary to the structure of the

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[120] *Id.* at 64–65.

[121] *Id.* at 27 ("Under Delaware law, courts will not rewrite contracts to read in terms that a sophisticated party could have, but did not, obtain at the bargaining table." (quoting *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *6 (Del. Ch. June 21, 2012))).

SA."[122] Specifically, TPL argues that the structure of the Stockholders' Agreement suggests "certificate amendments and Extraordinary Transactions" are "distinct" concepts.[123] But Defendants have never argued that these terms are synonymous. Rather, the terms reflect overlapping—but not coextensive—concepts. By including "acquisition" in the definition of Extraordinary Transaction (among other terms that would not necessarily require a certificate amendment), the parties demonstrated an intent to carve-out "any" proposal "related to" these events from the voting commitment—***irrespective*** of whether such proposals also involved a certificate amendment.[124] Because Proposal Four plainly relates to an "acquisition," it thus falls squarely within the Extraordinary Transactions carve-out.

Similarly, TPL argues that a separate confidentiality agreement's prohibition on divulging non-public information relating to both "mergers and acquisitions" and "possible transactions" shows that these concepts are "distinct."[125] But, again, the reason for this is that these terms reflect overlapping—but not coextensive—concepts. Specifically, the "possible transactions" clause expands the agreement to include restrictions against sharing non-public information regarding possible transactions that are outside the scope of mergers and acquisitions.

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[122] *Id.* at 27–29.
[123] *Id*. at 28.
[124] *See* JX116:3–4, 13 (§§ 2(b), 16(a)(v)).
[125] PPTB at 35–36.

TPL's contrary interpretation is absurd. It cannot seriously be argued that a prohibition on disclosing non-public information relating to "mergers and acquisitions" prohibits divulging information only about already-closed transactions. To the contrary, the need for such confidentiality is at its peak when an M&A transaction has not yet been consummated. To be sure, there is some overlap between the confidentiality agreement's M&A and "possible transactions" prohibitions. This is by design. As Marc Weingarten—one of TPL's experts, who contends that he has more experience with similar agreements than virtually any lawyer in America—testified, parties to such agreements "often" take a "belt and suspenders approach" in order "to be sure they have got all different possible situations covered."[126]

TPL also argues Proposal Four cannot constitute an "Extraordinary Transaction" because a share authorization is not sufficiently "extraordinary."[127] But "Extraordinary Transaction" is a defined term in the Stockholders' Agreement. And, it is the definition—not the name—of a defined term that defines its scope.

In any event, TPL's proposed new share authorization is "extraordinary" in every sense of the word. TPL has never once authorized new shares—let alone the enormous amount of new shares contemplated by Proposal Four—in its entire 135-

[126] Weingarten Dep. 143:4–145:16.
[127] PPTB at 29–32.

year history.[128] Thus, as TPL's CEO testified, "the passage of Proposal 4" would be "a transformative moment for the company."[129] Such an event would plainly be an "extraordinary" event for TPL based upon the commonly understood meaning of that word.

TPL resists this truth on the grounds that share authorizations are generally coded as "routine" transactions under the extra-contractual New York Stock Exchange ("NYSE") rules. But while TPL and its sophisticated counsel ***could*** have sought to define "Extraordinary Transaction" by reference to NYSE's "routine"/"non-routine" designations, ***it did not***.

Moreover, TPL's contrary position would lead to irrational results. Acquisitions requiring an issuance of stock worth less than 20% of a company's market capitalization generally do not require a stockholder vote.[130] And TPL's market capitalization at the time of the 2022 annual meeting exceeded $20 billion.[131] Thus, TPL's position would mean that it could effectively render the Extraordinary

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[128] *See* JX431:25. While its legal form has changed, TPL still holds itself out as a company which was founded in 1888. *See* JX1034:2 (letter sent by Ty Glover to Goldman Sachs on July 8, 2022 using TPL letterhead which has an insignia reading Texas Pacific Land Corp. Est. 1888); Kurz Tr. 39:14–19 ("'Established 1888'... that's when Texas Pacific Land Corporation was established; right?" A. "That is correct."); JX511:7 (charting TPL performance in a continuous line from 2017 (when TPL was still a trust) through late 2022).

[129] Glover Dep. 121:14–18.

[130] *See* 8 *Del. C.* § 251(f).

[131] *See* JX536:1.

Transactions carve-out's reference to acquisitions a nullity by pursuing an acquisition in two steps (a share authorization and then an acquisition) rather than one (a vote to approve a share authorization for a specified acquisition). For example, TPL's proposed $1.9 billion acquisition of Brigham Minerals, Inc. in July 2022—one of the largest transactions TPL has ever considered, and which Mr. Barry acknowledged "would certainly come under [the] acquisition" prong of the definition of "Extraordinary Transaction"[132]—would not have required an issuance of more than 20% of TPL's common shares.[133]

Thus, the Shareholders' Agreement gives Defendants the right to vote at their discretion not just on proposals to approve a particular acquisition, but on any proposal "related to" an acquisition, such as Proposal Four.[134]

2. Proposal Four would effect a "recapitalization" of TPL.

Despite their many disagreements, the parties agree on one thing: a recapitalization is "a revision of the capital structure of a corporation."[135] Merriam-Webster, which provides the parties' agreed definition, further defines "capital structure" as "the makeup of the capitalization of a business in terms of the amounts

[132] Barry Dep. 179:15–20.
[133] JX360:6.
[134] JX116:3–4 (§ 2(b)).
[135] *See* PPTB at 36 (citing Merriam-Webster.com).

and kinds of equity and debt securities."[136] And here, as TPL's own expert has admitted, by increasing the "amount[]" of "equity" available to TPL sixfold, Proposal Four would effect a "revision of the capital structure of the corporation."[137]

Proposal Four thus fits squarely within the dictionary meaning of the term "recapitalization." In response, TPL asserts in conclusory fashion that a "recapitalization must…be something more than a mere 'change' in available capital."[138] But the very dictionary TPL cites provides that a recapitalization is a mere "revision of the capital structure," and TPL never explains the distinction it seeks to draw between the synonyms "change" and "revision."

Moreover, even if the meaning of the term were ambiguous, extrinsic evidence confirms Defendants' interpretation of the term. For example, Defendants' expert, Professor Guhan Subramanian, surveyed all *Wall Street Journal* articles mentioning "recapitalization" along with any of the phrases "authorized capital," "authorized common stock," or "authorized shares."[139] Of the 156 articles corresponding to these criteria, more than half "used 'recapitalization' to refer to an

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[136] *Capital Structure*, Merriam-Webster.com Dictionary, Merriam-Webster, *available at* https://tinyurl.com/3kkxrxfx.

[137] *See* Haas Dep. 224:3–9 (Q. "Is an increase in the number of authorized shares of stock in a company a change in the capital structure of that company?" A. "[Y]es, I think that would [be].").

[138] PPTB at 37–38.

[139] JX593:16–17 (¶ 28).

authorization of new shares."[140] Moreover, as Professor Subramanian notes "the term 'recapitalization' has been regularly used in the business press over the past century to refer to an authorization of new shares."[141]

Moreover, even if TPL's interpretation were credited, Proposal Four was "more than a mere change" in TPL's capital structure. During its entire 135-year history, TPL has ***never*** had authorized-but-unissued shares as part of its capitalization.[142] Proposal Four sought to fundamentally diverge from this historical practice by authorizing ***six times*** TPL's currently existing stock, providing TPL's Board with billions of dollars in equity currency to spend at its discretion.[143] Such a dramatic reversal of the historical approach to TPL's capital structure cannot be reduced to an insignificant "mere change" in TPL's capital structure.

Thus, regardless of which party's interpretation of the term "recapitalization" is credited, Proposal Four seeks to effect a recapitalization of TPL.

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[140] *Id.* at 17 (¶ 29).
[141] *Id.* at 17–18 (¶ 30); *see also* JX606:94 (referring to a charter amendment to authorize new shares as a "recapitalization").
[142] *See* JX051:16; Glover Dep. 49:11–15; Dobbs Dep. 195:7–15, 196:24–197:5.
[143] *See* JX431:25.

3. Proposal Four seeks approval of "a corporate transaction that requires a stockholder vote."

The definition of Extraordinary Transaction also includes "other matters involving a corporate transaction that require a stockholder vote."[144] Here, Proposal Four seeks to amend "Article IV of the Amended and Restated Certificate of Incorporation of the Company."[145] Under Section 10.1 of TPL's Certificate of Incorporation, "the affirmative vote of the holders of a majority in voting power of the outstanding shares of stock of the Corporation entitled to vote thereon, voting together as a single class, shall be required to amend, alter or repeal any provision of this Amended and Restated Certificate of Incorporation."[146] The charter amendment that Proposal Four would implement if passed thus requires a stockholder vote.

TPL is thus left to argue that Proposal Four is not a "corporate transaction." But Delaware courts have time and again included an "amendment to a certificate of incorporation" as an example of a "***corporate transaction***…on which stockholders [may be] asked to vote." *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 n.14 (Del. 1998) (emphasis added).[147] And Delaware law recognizes that "a corporate charter

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[144] JX116:13 (§ 16(a)(v)).
[145] JX431:25.
[146] JX144:9 (§ 10.1(B)).
[147] *Accord In re Wayport, Inc. Litig.*, 76 A.3d 296, 314 (Del. Ch. 2013) (discussing circumstances "[w]hen directors submit to the stockholders a ***transaction*** that

is both a contract between the State and the corporation, and the corporation and its shareholders." *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991). Here, Proposal Four seeks to have the stockholders enter into a new, amended charter. Entry into such a contract is a paradigmatic example of a "transaction."[148]

Next, TPL suggests that if the parties had wanted to include "certificate amendments" in the definition of Extraordinary Transactions, they should have used the specific words "certificate amendments."[149] But contracts may employ "broad and flexible term[s], encompassing a number of different events." *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 64 (Del. Super. Ct. 1995). That such terms "may encompass a spectrum of events of notable breadth does not make [them] less understandable or clear." *Id.* Thus, here, 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. *See id*.

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requires stockholder approval (such as a...charter amendment)" (emphasis added)); *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *29 (Del. Ch. Oct. 16, 2018) (similar), *aff'd*, 211 A.3d 137 (Del. 2019); *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 16–17 (Del. Ch. 2014) (same); *Bamford v. Penfold, L.P.*, 2020 WL 967942, at *20 (Del. Ch. Feb. 28, 2020) (same).

[148] *See Transaction*, Black's Law Dictionary (11th ed. 2019) (giving as examples "esp., the formation…of a contract").

[149] PPTB at 38.

To the contrary, it is TPL's interpretation that is undermined by the parties' purported ability to "address certificate amendments…expressly."[150] That ability means that TPL could have easily added to the definition of Extraordinary Transaction a proviso stating "For the avoidance of doubt, a proposal to increase the authorized shares of TPL is not an Extraordinary Transaction." Having elected not to do so—despite being represented by "highly sophisticated counsel"—TPL should be held to the full breadth of the ordinary meaning of the terms used in the Stockholders' Agreement's definition of Extraordinary Transaction.

In addition, TPL cites the principle of *ejusdem generis* to suggest that a phrase at the end of a list must be construed as applying to "things of the same general kind or class as those specifically mentioned" before it.[151] TPL thus suggests that the "other matters" clause only sweeps in "transformative transactions."[152] But, TPL itself, via its CEO Mr. Glover, who was a Rule 30(b)(6) witness, testified that "the passage of Proposal 4 would be…a ***transformative*** moment for the Company."[153] And this is clearly true, because Proposal Four would transform TPL from its 135-year history as a company with ***no*** authorized-but-unissued shares into a company

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[150] *Id.*
[151] *Id.* at 38–39 (quoting *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1265 (Del. 2004)).
[152] *Id.* at 39.
[153] Glover Dep. 121:6–18 (emphasis added).

with ***billions of dollars' worth*** of such shares.[154] Such an event would fundamentally transform the balance of power between TPL's Board and management and its stockholders. Thus, even accepting TPL's contention that the "other matters" clause is limited to "transformative transactions," Proposal Four plainly falls within its scope.

Finally, TPL argues that, even if it would be "transformative," the share authorization that Proposal Four seeks to approve is not a "transaction."[155] But as noted above, this is simply incorrect.[156] Delaware law recognizes that a charter amendment is a corporate "transaction" on which stockholders may be asked to vote.[157] Because this is precisely what the "matters involving a corporate transaction" clause covers, Proposal Four falls within the Extraordinary Transactions carve-out.

B. The carve-out for matters "related to governance, environmental or social matters" applies to Proposal Four.

Separate from the Extraordinary Transactions carve-out, the Stockholders' Agreement also carves out from its voting commitment any proposals "related to governance, environmental or social matters."[158] This carve-out also excuses

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[154] *See* JX431:25.
[155] PPTB at 40.
[156] *See* DPTB at 45–46 (collecting authorities).
[157] *See supra* note 148 and accompanying text.
[158] JX116:3 (§ 2(b)).

Defendants from any obligation to vote in favor of Proposal Four, because Proposal Four is clearly "related to" TPL's "governance."

1. The plain meaning of "governance" demonstrates that Proposal Four is related to governance.

In the corporate context, "governance" refers to "[t]he system or framework of rules and standards by which a company is—or companies generally are—managed, controlled, and held accountable."[159] This "framework of rules and standards" distinguishes "governance" from a company's business decisions made under these rules. Thus, for example, a decision to enter into a transaction would be a business decision, whereas the rules set by the corporation's charter and bylaws, under which the officers are empowered to act, would be governance.

For a Delaware corporation like TPL, the certificate of incorporation is "a foundational document that controls the governance of the entity." *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *14 (Del. Ch. Sept. 2, 2008). TPL admits as much by including its charter under the "governance documents" section of its website.[160] An amendment to this "foundational" "governance document"—such as the one Proposal Four seeks to effect—is plainly "related to governance."

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[159] *Corporate Governance*, Black's Law Dictionary (11th ed. 2019).
[160] *See* JX615; Oliver Tr. 292:3–8.

Delaware law requires corporations to define in their charter the number of shares the company is authorized to issue.[161] This is because the extent to which a company can issue additional stock is a critical component of the corporation's governance, which should be reserved for the corporation's stockholders. As the Delaware Supreme Court has noted, the "issuance of corporate stock is an act of fundamental legal significance having ***a direct bearing upon questions of corporate governance***, control and the capital structure of the enterprise." *STARR Surgical*, 588 A.2d at 1136 (emphasis added). Proposal Four, which seeks to amend TPL's charter on this topic, is thus "related to governance."

TPL's unique situation further reinforces the importance of the share authorization provision to TPL's governance. This is because, without any authorized-but-unissued shares, TPL has virtually no ability to, among other things, (i) consummate any acquisition using stock as consideration, (ii) issue dilutive stock or stock options to TPL executives, or (iii) deploy a poison pill or execute another takeover defense.[162] In short, TPL's lack of authorized-but-unissued shares confers substantial restrictions on TPL's governance—keeping TPL's Board and management on a short leash and restricting them from straying significantly from TPL's historical model of business.

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[161] 8 *Del. C.* § 102(a)(4).
[162] *See* JX593:32 (¶ 56).

Proposal Four was borne out of a desire of a majority of TPL's Board to break free from these governance restrictions. The Proxy concedes this, noting (i) that "the Company desires to have the flexibility to use Common Stock as consideration for the acquisition of additional assets," (ii) that TPL could use newly authorized shares for "grants made to employees under new or expanded existing compensation plans or arrangements," and (iii) that "the availability of more authorized shares of Common Stock for issuance may have the effect of discouraging a merger, tender offer, proxy contest or other attempt to obtain control of [TPL]."[163] Further, according to an "Action Plan" developed by TPL in late October 2022, shortly before the Annual Meeting, TPL was actively "[a]nalyz[ing] potential rights plan adoption and implications" should Proposal Four succeed.[164]

As Proposal Four is the precise vehicle by which TPL would carry out these intentions, Proposal Four is plainly "related to governance."[165]

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[163] JX431:25–27.

[164] JX930:4.

[165] In fact, in a draft letter to stockholders in advance of the 2022 Annual Meeting, TPL acknowledged the relationship of Proposal Four and governance, informing stockholders that they were "being asked…to approve, among other things, two very important proposals to ***enhance Texas Pacific's corporate governance*** and support our strategy." JX479:6 (emphasis added).

2. The Stockholders' Agreement's reference to "governance" is not restricted to TPL's cramped view of "ESG matters."

TPL argues that the Stockholders' Agreement's reference to "governance" refers only to a narrow subset of "ESG" matters.[166] This argument fails for several reasons.

First, TPL fails to cite a single authority suggesting that the meaning of "governance" in the ESG context is narrower than it is outside of that context. And when it is not in litigation, TPL takes a different position. The "Governance" portion of the "ESG" section of TPL's website, for example, uses "governance" in its ordinary sense—referring to the Board as a "governance body," referencing several of the Board's committees (including its compensation committee and its governance committee), and referring investors to TPL's "Governance Documents."[167] Similarly, TPL director Karl Kurz confirmed that the "G" of ESG encompasses ordinary-course governance items such as the terms of director elections, the make-up of committees, and stock ownership policies for directors.[168] Likewise, Marc Weingarten, TPL's expert on stockholder agreements, testified that he would understand the carve-out's reference to "governance" to include ordinary governance "issues like does the company have a staggered board, does it have a

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[166] *See* PPTB at 41.
[167] *See* JX931.
[168] Kurz Tr. 53:7–55:1.

separate CEO and chairman, what do the advance notification bylaws look like."[169] And TPL's own general counsel concedes that executive compensation—which Proposal Four was designed to facilitate—is an "often-looked-at thing" "as part of ESG."[170] There is thus no basis to read the ordinary sense of "governance" out of "ESG."

Second, the governance carve-out is subject to a proviso stating that "the Stockholders shall be required to vote in accordance with the Board Recommendation for any proposal relating to any corporate governance terms that would have the effect of changing any of the ***corporate governance terms set forth in the plan of conversion*** recommended by the Conversion Exploration Committee of the Trust on January 21, 2020."[171] This proviso would make no sense if the second carve-out were restricted to TPL's view of what constitutes an "ESG" matter—because none of the corporate governance terms listed in the plan of conversion fall under TPL's cramped view of "ESG." Instead, Annex B of the Plan of Conversion contains general "governance" terms such as the classification of the Board, the director exculpation and insurance, the authorization of preferred stock, and when actions may be taken by written consent.[172] The fact that TPL felt the need

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[169] Weingarten Dep. 194:6–196:25.
[170] Dobbs Dep. 86:22–89:10.
[171] JX116:3–4 (§ 2(b)) (emphasis added).
[172] *See* JX071:13–18.

to provide an exception to the second carve-out for such ordinary governance terms confirms that "governance" in the second carve-out is not restricted to TPL's cramped view of ESG items.

Third, if the parties had intended to restrict the second carve-out to "ESG matters," it would have been easy for them to use that language. In fact, however, they provided a carveout to the voting commitment for all proposals related to "governance, environmental ***or*** social matters."[173] The word "or" is, of course, disjunctive. It means that, if a proposal is related to ***any*** of "governance, environmental or social matters," the carve-out applies. Indeed, the Stockholders' Agreement expressly provides that, wherever it is used, "the word 'or' is not exclusive," unless "a clear contrary intention appears."[174] As there is no contrary intention expressed in the Stockholders' Agreement, TPL is not free to rewrite this disjunctive list into a conjunctive "ESG."[175]

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[173] JX116:3–4 (§ 2(b)) (emphasis added).
[174] *Id.* at 15 (§ 16(b)).
[175] TPL points to ***no*** instance in which the phrase "governance, environmental or social" was used to mean ESG. In fact, despite an apparent canvassing of sources, it can point to only a handful of uses of the phrase "governance, environmental, and social" to refer to ESG matters—and each one is in the context of a document that expressly discusses ESG using the acronym. *See* PPTB at 42–43.

3. The "proviso" to the governance carve-out supports Defendants' reading of the scope of the carve-out.

The voting commitment's carve-out for proposals "related to governance, environmental or social matters" is subject to a proviso stating that, notwithstanding this carve-out, "the Stockholders shall be required to vote in accordance with the Board Recommendation for any proposal relating to any corporate governance terms that would have the effect of changing any of the ***corporate governance terms set forth in the plan of conversion*** recommended by the Conversion Exploration Committee of the Trust on January 21, 2020."[176] TPL bears the burden of proving that the proviso applies. *Snow Phipps*, 2021 WL 1714202, at *28–29 (holding that Plaintiff bears the burden of proving that the exclusion to the exception applies). It cannot meet that burden.

The Plan of Conversion referenced by the proviso is attached to the minutes of the Conversion Exploration Committee from January 21, 2020.[177] In the minutes, the committee approves a "Plan of Conversion" "comprising (a) ***governance terms*** proposed to be given effect through the certificate of incorporation and bylaws of the Potential Corporation…and (b) a list [of] corporate and transactional ***steps***

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[176] JX116:3–4 (§ 2(b)) (emphasis added). As TPL has conceded, the proviso modifies only the "governance, environmental or social matters" carve-out and has no application to the Extraordinary Transactions carve-out. *See* Liekefett 30(b)(6) Dep. 184:4–185:24; Barry Dep. 156:12–157:5.

[177] *See* JX071.

proposed to be undertaken to give effect to the [Committee's resolutions on the] Potential Conversion."[178] The "governance terms" were included as Annex B to the Committee's resolutions, which notes that it "presents an overview of key ***governance terms***, proposed to be given effect through the Charter and Bylaws of 'post conversion' Texas Pacific Land Trust."[179] The "corporate and transactional steps" were included as Annex A, entitled "Overview of Steps to Conversion."[180] Together, Annexes A and B constituted the Plan of Conversion.[181]

The documents introduced at trial, and the uncontradicted testimony of Eric Oliver, all establish that there was no decision by the Committee on January 21, 2020, about any recommendation regarding the number of authorized common shares. Mr. Oliver testified at trial about the discussion of this subject at the meeting:

> I remember looking at John Norris, one of the two trustees, who was sitting in the corner, and I was, you know, halfway down the table. And I said, John, you know better than anybody, because he'd been a trustee for 20 years, that this shareholder base is passionate about retiring units. And if you authorize additional shares beyond what you issue, it's going to be like a slap in the face. And those shareholders should have a right to vote on that.[182]

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[178] *Id.* at 2 (emphasis added).
[179] *Id.* at 14 (emphasis added).
[180] *Id.* at 9.
[181] *Id.* at 7.
[182] Oliver Tr. 245:8–246:1.

Mr. Oliver further testified—again without contradiction from any other witness—that after he registered his objection, the Committee ended its meeting without making a recommendation regarding authorized common shares.[183] Rather, the "number of authorized common shares" was reserved for later discussion[184] and Annex B's list of "governance terms" does not reference the issue.[185] Reinforcing the fact that there was no recommendation made on that date, the Committee set forth in writing that the Trustees would "continue to consult with the Committee on…the number of authorized common shares."[186]

TPL acknowledged as much in communications with ISS shortly before the 2022 Annual Meeting.[187] Specifically on November 1, 2022, TPL sent Evercore, its investment banking advisor, "notes from [an] ISS call just now."[188] In response to a question from ISS about TPL's number of authorized shares, TPL confirmed that the "trustees continued to evaluate [this issue] ***between [the] plan [of] conversion and actual conversion***, and they ultimately left it up to the new board."[189]

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[183] *Id.* at 246:6–12.
[184] *See* JX071:7.
[185] *See id*. at 13–18.
[186] *See id.* at 7.
[187] *See* JX479.
[188] *Id.* at 1.
[189] *Id.* (emphasis added). Oliver emailed George Vlahakos of Sidley Austin LLP on March 2, 2021, "[i]s [the Conversion Committee's] work done," and Vlahakos responded the next day, "as discussed in the final committee meeting, the Trustees will continue to consult the committee members regarding board composition and

In an effort to escape these basic facts, TPL has pointed to a note on an illustration of the mechanics of the liquidation of the Trust into a corporation, which appeared in Annex A to the Plan of Conversion.[190] But Annex A contains a "list [of] corporate and transactional ***steps*** proposed to be undertaken to give effect to the [Committee's resolutions on the] Potential Conversion."[191] It does not contain "governance terms." Rather, the plan of conversion's "governance terms" are set forth in Annex B.[192]

Consistent with this, the note from Annex A states that, upon conversion, "TPL Sub-share certificate holders [will] receive 100% of the shares of common stock of TPL Corp as a distribution in liquidation of TPL."[193] This only describes the "steps" that would be taken by TPL at a single moment in time. It does not state a "governance term" that would be "chang[ed]" by approval of Proposal Four.[194]

Moreover, and in any event, the illustration TPL points to does not speak to whether TPL would have authorized-but-unissued shares. Instead, it merely

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authorized capital." Thus, as of March 3, 2021, no decision was made regarding authorized shares of the new C-corporation. JX1085. *See also* Oliver Tr. 247:9–248:6.

[190] JX071:12.

[191] *Id.* at 2 (emphasis added); Kesslen Tr. 145:4–147:6.

[192] *See* JX071:14 (Annex B) ("This document presents an overview of key ***governance terms***…." (emphasis added))

[193] JX071:12.

[194] *Cf.* JX116:3–4 (§ 2(b)).

illustrates the shares of TPL Corp. that the Trust would issue to effect the spinoff, and says that TPL sub-share certificate holders would "receive 100%" of them.[195] Indeed, because unissued shares by definition have not been issued, the Trust could not possibly possess them, let alone distribute them, at the time of conversion.

Finally, TPL argues that the proviso has a broad scope because it extends to proposals "relating to" any "corporate governance terms that would have the effect of changing any of the corporate governance terms set forth in the plan of conversion."[196] For this "relating to" language to be triggered, TPL must first identify a "corporate governance term[] that would have the effect of changing [one] of the corporate governance terms set forth in the plan of conversion."[197] It has not done so—increasing the number of authorized shares of common stock would not "chang[e]" any corporate governance term "set forth" in the written Plan of Conversion. Because such a term does not exist, TPL is not helped by the phrase "relating to" in the proviso.

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[195] JX071:12.
[196] *See* PPTB at 44–47.
[197] *See* JX116:3–4 (§ 2(b)(ii)).

C. TPL's extrinsic evidence is unpersuasive and largely inadmissible.

For the reasons explained above, the Court need not go beyond the Stockholders' Agreement's plain meaning in order to interpret its provisions. Even if it does so, however, TPL's extrinsic evidence would not change the outcome.

1. TPL's so-called "precedent agreements" involving different parties are irrelevant, and in any event fail to support TPL's position.

TPL first argues that "precedent agreements" support its interpretation of the Stockholders' Agreement.[198] By "precedent agreements," TPL means other agreements involving entirely different parties in different factual circumstances than those involved here. TPL does not present any evidence that any of the parties here reviewed—or were even aware of—any of these agreements in connection with drafting the Stockholders' Agreement.[199] And it points to no authority suggesting that such untethered past contracts should have any bearing on the interpretation of the Stockholders' Agreement.

Instead, the only authority TPL cites is *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228 (Del. 1997).[200] But in *DeVilbiss*, the Delaware Supreme Court merely stated that "[i]n construing an ambiguous contractual provision, a court

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[198] PPTB at 47–49.

[199] Mr. Haas even admitted that a third of the "precedent agreements" did not exist at the time of the Stockholders' Agreements' execution. Haas Dep. 215:25–216:9.

[200] *See* PPTB at 47 n.23.

may consider evidence of prior agreements and communications ***of the parties*** as well as trade usage or course of dealing." *Id.* at 1233 (emphasis added). Nothing in *DeVilbiss*—or any other authority TPL identifies—supports review of prior agreements of unrelated parties in order to interpret an ambiguous contract. The Court thus need not consider TPL's novel and unsupported method of contract interpretation.

Even if it did, however, TPL's proposed expert testimony on this point does not support its interpretation of the Stockholders' Agreement. TPL's position is based on the testimony of Steven Haas.[201] But Mr. Haas testified that he has never negotiated an agreement like the Stockholders' Agreement on behalf of an activist investor.[202] And while he claims to have some (very limited) experience negotiating on behalf of a company against an activist investor, he refused to answer questions at his deposition about this experience citing "confidential[ity]" concerns and professional responsibilities to his (unnamed) former clients.[203] Mr. Haas's refusal to answer such questions renders his opinions baseless and unreliable.

Moreover, the agreements relied upon by Mr. Haas do not actually support his conclusion. For instance, TPL argues that some agreements carve out both "any

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[201] *Id.* at 47–49.
[202] Haas Tr. 365:22–366:1.
[203] Haas Dep. 63:20–64:11, 66:2–67:6.

proposals relating to Extraordinary Transactions [and] any amendment to the Company's organizational documents."[204] But the first agreement it cites to show this has a definition of Extraordinary Transaction that does not reference either a "recapitalization" or "other matters involving a corporate transaction that require a stockholder vote."[205] Thus, unlike here, that contract's extraordinary transactions carveout arguably would not cover certificate amendments. Here, by contrast, the Stockholders' Agreement expressly included both of these terms in the definition of Extraordinary Transaction, rendering a further reference to "any amendment to the Company's organizational documents" unnecessary.[206]

And while a handful of the hundreds of agreements gathered by Mr. Haas may have included some redundant terms—such as carving out both "recapitalization" and certificate amendments from a voting commitment—this does not advance TPL's argument. Some variation in wording is to be expected among such disparate parties in disparate situations over several years. And TPL's other rebuttal expert, Mr. Weingarten, testified that the parties to such agreements "often" take a "belt and

[204] PPTB at 48.
[205] *See* JX034:11. This agreement also lacks a carve-out for governance matters. *See id.*
[206] PPTB at 48; JX116:13 (§ 16(a)(v)).

suspenders" or "cover the waterfront" approach to such agreements by intentionally using overlapping terms.[207]

2. The Stockholders' Agreement's drafting history does not support TPL's interpretation of the carve-outs.

TPL next turns to the drafting history of the Stockholders' Agreement in an attempt to support its interpretation. But TPL expressly waived its ability to make such an argument, because Section 17(g) of the Stockholders' Agreement, which governs its "Interpretation and Construction," expressly prohibits consideration of "events of drafting or preparation."[208]

TPL attempts to avoid this provision based on a footnote from the *DeVilbiss* decision stating that the parties' "course of dealing" could be examined "notwithstanding the presence of a routine integration clause." 702 A.2d at 1233 & n.10.[209] But Section 17(g) of the Stockholders' Agreement is no "routine integration clause." *Id.* at n.10.[210] It does not merely state—as in *DeVilbiss*—that prior statements not incorporated into the contract "shall not be binding upon any party."

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[207] Weingarten Dep. 143:4–145:7.
[208] JX116:16 (§ 17(g)).
[209] *See* PPTB at 52.
[210] The Stockholders' Agreement has a "routine integration clause" akin to the one in *DeVilbiss*, but it is found in another section, Section 17(i)—***not*** Section 17(g). *See* JX116:16.

Id. Instead, it states that "any controversy over interpretations of this Agreement ***will be decided without regard to events of drafting or preparation***."[211]

TPL cannot rely on the Stockholders' Agreement's drafting history. As TPL points out, Delaware courts afford great weight to parties' freedom of contract.[212] And this commitment is "at its height when stockholders enter into agreements about how they will exercise stockholder-level rights."[213] In order to fully respect their freedom of contract, Delaware law enforces the agreements of contracting parties as to the rules by which their contract should be interpreted. *Swipe Acquisition Corp. v. Krauss*, 2021 WL 282642, at *2 (Del. Ch. Jan. 28, 2021) ("[C]ontractual freedom…extends to selecting the law that governs the parties' relationship…."); *Senior Hous. Cap., LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *24–26 & n.264 (Del. Ch. May 13, 2013) (enforcing a provision waiving an interpretive principle of Delaware law). Here, the parties did so in Section 17(g), which binds TPL.[214]

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[211] *Id.* at 16 (§ 17(g)) (emphasis added).
[212] PPTB at 27.
[213] *Id.*
[214] JX116:16 (§ 17(g)). The only Delaware authority TPL can find for its contrary position is *XRI Inv. Holdings LLC v. Holifield*, 283 A.3d 581, 660–61 (Del. Ch. 2022). PPTB at 52. But *XRI* merely states that "parties to a contract generally cannot dictate the ***remedy*** (if any) that a court will award." 283 A.3d at 660 (emphasis added). This is irrelevant to Defendants' argument, which does not concern the remedies available to TPL.

Moreover, TPL agreed that "any and all drafts relating [to the Stockholders' Agreement] exchanged among the parties will be deemed the work product of all of the parties."[215] TPL's efforts to parse drafts by assigning each draft to the party that sent an email attaching it, and speculating about the state of mind of that party, is precisely what the parties agreed to avoid via the inclusion of this provision in the Stockholders' Agreement.

Further, as TPL acknowledges, the Stockholders' Agreement was a "settlement agreement" between the parties.[216] To this end, the draft term sheets exchanged between the parties were stamped as "***Confidential Settlement Communication[s]***."[217] Since the parties' discussions in negotiating this "more definitive settlement agreement" consisted of confidential settlement communications, TPL's attempt to rely on these documents is prohibited by Rule 408 as well.[218]

For all these reasons, the Court should not consider drafting history in interpreting the Stockholders' Agreement. In any event, however, the drafting history undermines rather than supports TPL's position. It reveals that when TPL

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[215] JX116:16 (§ 17(g)); *see, e.g.*, JX075:4.
[216] Pl.'s Pre-Trial Br., at 1 ("The parties then negotiated a more definitive settlement agreement: the SA.").
[217] *See, e.g.*, JX075:4.
[218] D.R.E. 408.

provided a draft with proposed carve-outs similar to those found in the ultimate agreement, TPL provided a footnote assuring Defendants that "[t]he definition of Extraordinary Transaction will pick up ***all significant corporate transactions***."[219] This assurance confirms the parties' understanding that the carve-outs being negotiated would be broad in scope. TPL's self-serving interpretation—that these carve-outs do not encompass a charter amendment that would reverse a 135-year policy, and provide the Board with billions of dollars of equity to deploy at its discretion—is entirely inconsistent with this understanding. Thus, even if the Court were to consider drafting history (which it should not), the history reinforces the conclusion that Defendants had no obligation to vote in favor of Proposal Four.[220]

D. The Court should reject TPL's claim for violations of Section 3 of the Stockholders' Agreement.

Four months after filing this summary proceeding, less than a month before trial, and only hours before the close of fact discovery, TPL sought to amend its Complaint on March 24, 2023. In the Amended Complaint, TPL's sole claim under Section 225(b) is unchanged from its original pleading, except that TPL now alleges that "[i]n violation of Section 3 of the Stockholders' Agreement, Defendants have

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[219] JX092:5 (emphasis added).

[220] *See also* Defs.' Pre-Trial Ans. Br. at 44–50 (discussing additional flaws in TPL's argument from drafting history).

encouraged or participated in the solicitation of proxies against Proposal 4."[221] TPL's prayer for relief was unaltered.[222] The only relief TPL seeks that even potentially relates to Section 3 of the Stockholders' Agreement is a bare declaration that the Stockholders' Agreement has been breached.[223]

In other words, TPL's last-minute Section 3 claim seeks no substantive relief. Its primary purpose appears to have been to distract from its inability to show a breach of Section 2's voting commitment, in hopes that purported violations of other provisions of the Stockholders' Agreement might color the Court's analysis of the actual issues at stake in this Section 225(b) proceeding. In any event, the claim fails on both legal and factual grounds.

As an initial matter, the claim is outside the limited scope of this summary Section 225(b) proceeding. Section 225(b) allows the Court to determine the "result" of a stockholder vote—not to consider breach of contract claims regarding standstill provisions.[224]

In addition, TPL cannot establish that the purported violations caused it any injury—an essential element of a breach of contract claim. *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *47 (Del. Ch. Nov. 30,

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[221] Am. Compl. ¶ 90.
[222] *Id.* at 27–28.
[223] *Id*.
[224] *See* 8 *Del. C.* § 225(b).

2020). The only purported injury is that, "but for Defendants' breaches, the Company's stockholders would have approved Proposal 4."[225] But TPL did not determine to propose Proposal Four until August 31, 2022[226] and did not file a preliminary proxy until September 16, 2022.[227] The majority of TPL's allegations regarding purported breaches of Section 3 of the Stockholders' Agreement came well before these dates.[228] None of these pre-Proposal Four communications were about—or could possibly have been about—Proposal Four.[229]

In addition, TPL identifies a few private communications with clients and friends of Defendants that occurred after the filing of the Proxy, it has failed to show that Proposal Four would have passed if these communciations had not taken place. After all, for Proposal Four to pass, an absolute majority of TPL's outstanding shares would have to vote in favor of it.[230] In fact, only about 35.18% of TPL's outstanding shares were voted in favor of the proposal as of November 2022.[231] On November 16, 2022—the day of the Annual Meeting—TPL's market cap was $20.24 billion.[232]

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[225] Am. Compl. ¶ 91.
[226] *See* JX462:9.
[227] Am. Compl. ¶ 4.
[228] *See id.* ¶¶ 36–51.
[229] *Id.* Most of them concern TPL's 20***21*** annual meeting, about which TPL has made no claims in this case. *Id*. ¶¶ 39–47.
[230] *See* JX431:7.
[231] *See* JX548:4.
[232] *See* JX536.

This means that for Defendants' purported violations of Section 3 to have been a "but for" cause of Proposal Four not passing, these communications would have had to flip the votes of the holders of ***$2.99 billion*** worth of TPL stock.[233]

There is no evidence that the handful of clients and personal friends with whom Defendants spoke in the communications in question held anything close to this amount of TPL stock. In fact, TPL has presented no evidence ***at all*** as to the purported stockholdings of these individuals.[234] Even if they had, TPL's Section 3 claim would fail for an additional reason: TPL has presented no evidence that ***any*** of the individuals in question would have voted for Proposal Four "but for" the purportedly improper contact Defendants had with them.

TPL has thus failed to establish that it was harmed by any purported violation of Section 3 of the Stockholders' Agreement. As a result, TPL's breach of contract claim with respect to Section 3 must fail.[235]

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[233] (50% - 35.18%) * $20.24 billion = $2.99 billion.

[234] The only "evidence" TPL's brief provides at all is a single hearsay statement from a non-party in an email to another non-party stating his "belie[f]" that he had "influence" with the holders of "20% of the outstanding…shares" in early 2022. JX303:2. Notably, while TPL deposed the author of this email, TPL did not ask him any questions about this statement. Far from being sufficient proof of causation, the email's stray statement about "influence" is entirely unreliable and should be excluded on hearsay grounds.

[235] Moreover, even if the Court were to reach the merits of TPL's claim, it would fail. The standstill provision has a carve-out for private communications to investors or prospective investors of the Defendants. JX116:6. Here, the post-Proxy communications identified in the Complaint were exactly that—private

E. TPL is barred from the relief it seeks under the doctrine of unclean hands.

In addition, even if TPL had an otherwise viable claim, the relief it seeks should be denied as an equitable matter under the doctrine of unclean hands. "The doctrine of unclean hands provides that a litigant who engages in reprehensible conduct in relation to the matter in controversy…forfeits his right to have the court hear his claim, regardless of its merit." *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 238 (Del. Ch. 2014) (cleaned up). Under this doctrine, courts refuse "to consider requests for equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which [the litigant] appeals." *Id.* at 237 (citation omitted). "Fraud will typically suffice to hold a party ineligible for relief under the unclean hands doctrine." *Id.* (citation omitted).

Here, TPL's claims hinge on its assertion that Defendants' "no" votes on Proposal Four were "outcome determinative."[236] Were this not the case, TPL's breach of contract claim would fail for lack of injury. Yet, in order to garner sufficient votes for Defendants' votes on Proposal Four to matter, TPL resorted to multiple misrepresentations in stockholder solicitation materials.

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communications with investors or prospective investors based entirely on publicly available information. The Standstill does not prohibit these communications.

[236] Am. Compl. ¶ 79.

For example, on November 8, 2022, TPL encouraged stockholders to vote for Proposal Four by quoting a Glass Lewis report stating:

> The Company currently does not currently [sic] 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.[237]

This statement was fraudulent. At trial, Karl Kurz—a TPL director—acknowledged that in November 2022, TPL "had excellent fundamentals," "high-quality cash flows with minimal capital needs," and "a fortress debt-free balance sheet."[238] As a result, Mr. Kurz was forced to concede that the quotation above, which TPL sent to stockholders to solicit votes in favor of Proposal Four, was a "false statement."[239] TPL's stock closed near an all-time high on November 7, 2022—the day before the false claim of financial distress—and has fallen precipitously since.[240]

Following trial, TPL updated its proxy solicitation disclosures in the wake of its admissions under oath of its prior misstatements.[241] For instance, TPL noted that,

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[237] JX511:2.
[238] Kurz Tr. 60:15–61:16.
[239] *See* Kurz Tr. 67:19–68:1, 69:3–6 ("I would say it's a false statement.") ("I would not like to have seen that statement in there."); *see also* Liekefett Tr. 108:22–109:6.
[240] *See* https://tinyurl.com/2d4ywseb.
[241] TPL, Schedule 14A (Apr. 25, 2023), *available at* https://www.sec.gov/Archives/edgar/data/1811074/000110465923049181/tm2313

despite to its prior statements, "the Company continues to believe that cash from operations, together with its cash and cash equivalents balances, will be sufficient to meet ongoing capital expenditures, working capital requirements and other cash needs for the foreseeable future."[242] But these revelations came much too late. By the time these disclosures were filed, the record date for votes on Proposal Four had passed more than ***seven months*** prior, locking in much of the vote on Proposal Four regardless of TPL's belated actions. Nonetheless, after the trial, Glass Lewis reversed its prior recommendation that stockholders vote for Proposal Four. As TPL disclosed in an SEC filing, Glass Lewis "updated its analysis and changed its voting recommendation for Proposal 4 with respect to the Company's 2022 annual meeting of stockholders. Glass Lewis changed its voting recommendation on Proposal 4 from 'for' to 'against'."[243]

In addition, in its Definitive Proxy, TPL hid from its stockholders that, unlike other proposals set forth to stockholders, the Board's recommendation for Proposal Four was not unanimous. Rather, the only Board members with significant

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614-1_defa14a.htm. The Court may take judicial notice of TPL's SEC filings. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162 , 170 (Del. 2006) (noting that the trial court may take judicial notice of facts in SEC filings that are "not subject to reasonable dispute").

[242] Schedule 14A (Apr. 25, 2023).

[243] TPL, Schedule 14A (May 10, 2023), *available at* https://www.sec.gov/Archives/edgar/data/1811074/000110465923058424/tm2315325d1_defa14a.htm.

ownership stakes in TPL—Eric Oliver and Murray Stahl—dissented from this recommendation and requested to have their dissent noted to investors.[244]

When seeking stockholder action, Delaware law requires a company to "disclose fully and fairly all material information within the board's control." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000). Materiality is defined broadly to include any facts for which "there is a substantial likelihood that a reasonable stockholder would consider [them] important in deciding how to vote." *Id.* (citation omitted). Here, the dissent of Stahl and Oliver—designees of TPL's largest stockholder and another large stockholder, respectively—would unquestionably be important to reasonable stockholders in deciding how to vote. *See Appel v. Berkman*, 180 A.3d 1055, 1058, 1063 (Del. 2018) (holding that the omission of a key Board member's reasons for their opposition to a "high stakes transaction" in the company's solicitation made it "misleadingly incomplete"); *Gilmartin v. Adobe Res. Corp.*, 1992 WL 71510, at *10–12 (Del. Ch. Apr. 6, 1992) (that two "key board members" thought it was a bad time to sell the natural gas company constituted information material to stockholders because "if disclosed, it would have alerted" stockholders that "a merger might not be in their best interests"). Indeed, discovery has confirmed this, revealing that numerous stockholders reached out to TPL to ask

[244] *See* Kurz Tr. 49:11–21, 51:6–10; JX1204.

whether Stahl and Oliver in fact supported the proposal.[245] But, rather than responding to these inquiries, TPL's general counsel instructed its investor relations not to respond.[246] TPL thus solicited votes on Proposal Four based on a materially deficient and misleading Proxy.

Because TPL engaged in such "reprehensible conduct in relation to the matter in controversy," it has "forfeit[ed] [its] right to have the court hear [its] claim." *In re Rural/Metro Corp.*, 102 A.3d at 238 (emphasis omitted). TPL's sole claim in this summary Section 225 proceeding—which seeks a judicial resolution to the stockholder vote on Proposal Four—should be denied under the doctrine of unclean hands. *See id.*

IV. CONCLUSION

Defendants respectfully request that the Court deny all relief requested by Plaintiff, find for Defendants, and grant Defendants all relief to which they are entitled.

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[245] *See* JX462:68, 76.
[246] *See* Dobbs Dep. 234:18–235:19.

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CERTIFICATE OF SERVICE

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