EFiled: Jun 26 2023 03:53PM EDT
Transaction ID 70262069
Case No. 2022-1066-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TEXAS PACIFIC LAND CORPORATION, Plaintiff, v. HORIZON KINETICS LLC, HORIZON KINETICS ASSET MANAGEMENT LLC, SOFTVEST ADVISORS, LLC, AND SOFTVEST, L.P., Defendants.	)	C.A. No. 2022-1066-JTL **PUBLIC VERSION** Filed: June 26, 2023

DEFENDANTS' POST-TRIAL REPLY BRIEF

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Dated: June 16, 2023

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I. PRELIMINARY STATEMENT

In the Stockholders' Agreement, TPL agreed to grant Defendants two broad carve-outs from their commitment to vote with the recommendations of TPL's Board.[1] Those carve-outs are for any proposals "related to" either (i) an "Extraordinary Transaction"—which is defined to include an "acquisition," "recapitalization," or any "other matters involving a corporate transaction that require a stockholder vote"—or (ii) "governance, environmental or social matters."[2] As Defendants' Post-Trial Answering Brief explains, Proposal Four—the proposal to amend TPL's charter to enable it to issue massive amounts of new common stock—falls squarely within the plain meaning of both of these carve-outs. In its Post-Trial Reply Brief, TPL makes two main attempts to avoid this result. Both lack merit.

First, TPL seeks to minimize the testimony of its own witnesses, including those who admitted that the "primary purpose" of Proposal Four was to facilitate acquisitions with stock, and that Proposal Four arose from frustrated attempts to pursue such acquisitions. For example, TPL characterizes Patrick Hesseler as a "junior member of the management team." But Mr. Hesseler was TPL's Vice

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[1] Capitalized terms not defined herein have the meaning given to them in Defendants' Post-Trial Answering Brief ("DPTAB").

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

President of Acquisitions, tasked with preparing important Board presentations on TPL's proposed acquisition strategy. TPL nonetheless attempts to diminish his stature because he acknowledged that Proposal Four was "related to" acquisitions and that TPL's lack of stock had proven to be a "Key Headwind" to TPL's strategy of growth-by-acquisitions. Similarly, TPL seeks to distance itself from its own Chairman—David Barry—because he conceded under oath that the "primary purpose" of Proposal Four was to facilitate acquisitions with stock.

TPL's self-interested spin cannot wash away its own witnesses' sworn testimony. And even if it could, the points made by these witnesses were corroborated by TPL's other witnesses, including its designated corporate representatives. Taken as a whole, that testimony makes plain that Proposal Four is "related to" an "Extraordinary Transaction," and Defendants are not obligated to vote in accordance with the Board's recommendation on it.

For similar reasons, Proposal Four is "related to governance." After all, without a share authorization in its core governance document, TPL is constrained from making any large stock-based acquisitions without stockholder approval. Proposal Four is specifically designed to cast off this current governance restriction. Nor can TPL sidestep the "governance" carve-out by unilaterally re-naming it the "ESG carve-out." The Stockholders' Agreement never uses the term "ESG." And

even if it had, TPL's witnesses admitted that Proposal Four is related to matters that are undisputedly part of "ESG," such as executive compensation.

Second, TPL argues that the Stockholders' Agreement's carve-outs, if given their plain meaning, would provide Defendants with broader relief from the voting commitment than TPL thinks is appropriate. But as TPL recognizes, it is a "sophisticated" party who was "represented by sophisticated counsel," and was aware of the options available to it in drafting the Stockholders' Agreement.[3] Delaware courts do not rescue such parties from contract provisions that they later regret. "Parties have a right to enter into good and bad contracts, the law enforces both." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

Similarly, TPL argues that the Stockholders' Agreement's carve-outs cannot apply to a proposal to amend TPL's Certificate of Incorporation because the carve-outs do not include the words "certificate amendments." But there is a logical reason for this: the scope of the carve-outs is broader than amendments to corporate governance documents such as the Certificate of Incorporation. It captures, for example, ***any*** proposal "involving a corporate transaction that requires a stockholder vote" whether or not that "corporate transaction" is a certificate amendment. TPL cites no authority stating that courts should not enforce the full scope of these broad

[3] Plaintiff's Post-Trial Brief ("PPTB") at 5, 27, 64.

terms. To the contrary, TPL's argument that the parties "knew how" to make explicit references to certificate amendments undermines its thesis: if the parties meant to exclude certificate amendments from broad carve-outs whose ordinary meaning encompasses them, they would have said so explicitly. But they did not, and the Court should thus apply the ordinary meaning of the language in the carve-outs.

Finally, TPL's attempt to force Defendants to vote in favor of Proposal Four is barred under the doctrine of unclean hands. TPL's primary response to this argument is to suggest that Defendants waived it. Not so. Defendants pled the affirmative defense of unclean hands. And the only reason they did not plead all of the factual details of that claim is because those factual details were brought into full relief by TPL's corporate representatives for the first time at trial. In any event, TPL did not object to this testimony at trial on the grounds that it is not "within the issues made by the pleadings," meaning that these issues should "be treated in all respects as if they had been raised in the pleadings." Ct. Ch. R. 15(b).

When they are, it is clear that TPL's unclean hands bar it from obtaining relief in this Court. TPL's claim depends on its contention that it solicited sufficient votes in favor of Proposal Four to render Defendants' votes outcome-determinative. But, as TPL's corporate representatives admitted at trial, TPL solicited these votes by making material misrepresentations. TPL cannot, consistent with equity, seek a

judicial declaration of victory on a vote that was corrupted by its own admitted misrepresentations to voting shareholders.

Accordingly, and for all the reasons explained in Defendants' Post-Trial Answering Brief, the Court should deny TPL any relief and enter a judgment for Defendants on all claims.

II. ARGUMENT

A. Proposal Four comes within the Extraordinary Transaction carve-out.[4]

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

TPL argues that Proposal Four had nothing to do with "investment bankers or a management team hungry to make deals with common stock."[5] But the evidentiary record starkly contradicts this assertion.[6] It shows that, shortly after TPL became a corporation, management invited Credit Suisse to pitch to the Board that "stock focused mergers" would be "highly accretive" but require "[a]uthorizing additional shares."[7] After the Board failed to reach consensus on the issue, management made repeated presentations pressing a "Strategic Vision" to grow TPL

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[4] This brief, consistent with the Court's comments at trial, focuses on issues on which TPL contends Defendants bear the burden of proof. Those matters are the application of the two carve-outs, PPTB at 25; the causation element of TPL's Section 3 claim, Plaintiff's Post-Trial Answering Brief ("PPTAB") at 3; and the application of unclean hands to TPL's right to invoke relief, PPTAB at 39.

[5] PPTAB at 8.

[6] *See* DPTAB at 22–25.

[7] JX170:23–25.

"through [an] accretive acquisition program."[8] Management argued that "after several years of internal business building," they were "now prepared to deploy [their] playbook on external opportunities."[9] In order to pursue this strategy, however, TPL's witnesses admit that TPL needed a share authorization.[10]

In the face of these admissions, TPL resorts to diminishing the stature of its own witnesses. For instance, TPL characterizes Patrick Hesseler—its Vice President of Acquisitions, who repeatedly conceded that Proposal Four was related to TPL's acquisition strategy and that TPL's lack of authorized shares had proven a "key headwind" to this strategy—as a mere "junior member of the management team."[11] This is false. As Mr. Hesseler acknowledged at his deposition, he was responsible for TPL's acquisition strategy and drafted management's presentations to the Board on this subject.[12] As Shawn Amini, another of TPL's Vice Presidents, testified, such responsibilities placed Mr. Hesseler squarely in the realm of TPL's "senior management."[13] Moreover, even if Mr. Hesseler could be dismissed as a junior functionary (which the record contradicts), his testimony and documents were

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[8] JX318:8; *see also* Hesseler Dep. 199:2–17, 203:19–204:10.
[9] JX360:11; *see also* Hesseler Dep. 200:5–11 (discussing this language).
[10] *See, e.g.*, Barry Dep. 222:2–8; Kurz Dep. 59:14–16; Hesseler Dep. 200:12–17; Glover Dep. 127:17–25.
[11] PPTAB at 11.
[12] Hesseler Dep. 22:21–23:5, 236:17–237:5.
[13] Amini Dep. 129:4–12 (Q. "[W]e see Mr. Hesseler, the VP of acquisitions…I assume these are a senior management of the company, correct?" A. "Yes.").

corroborated by other members of senior management. Both Tyler Glover, TPL's CEO, and Micheal Dobbs, TPL's General Counsel, also confirmed that TPL's lack of access to stock to use as currency was a "key headwind" to its acquisition strategy, and that Proposal Four was designed precisely to relieve TPL of this headwind.[14]

In addition, TPL seeks to distance itself from the testimony of its Chairman, David Barry, that the "primary purpose" of Proposal Four "would be acquisitions."[15] TPL tries to do so by pointing out that Mr. Barry clarified that this primary purpose would apply only to the portion of the potential newly authorized shares that were not distributed to existing shareholders as part of a hypothetical stock split.[16] This misses the point. The dispute in this case concerns TPL's proposed use of the shares ***beyond*** any potential stock split.[17] And, as TPL's Chairman admitted, the "primary purpose" of the proposal to authorize ***those*** shares "would be acquisitions."[18]

Lastly, TPL argues that the evidence contradicts Defendants' contention that Proposal Four was "borne out of frustrated attempts to advance a strategy of growth

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[14] *See* Glover Dep. 109:18–110:18; Dobbs Dep. 169:9–16; *see also* DPTAB at 25 n.105 (collecting similar testimony).
[15] PPTAB at 9.
[16] *Id*.
[17] Defendants did not oppose authorizing shares if the use of such shares were restricted to a mere stock split. Stahl Tr. 207:14–20. Thus if all TPL desired was a stock split, then there would have been no dispute at all. But TPL's Board majority refused to agree to such a restriction. *See, e.g.*, JX925:5.
[18] PPTAB at 9; Barry Tr. 314:3–22.

by acquisitions"[19] and that TPL's potential Oxy and Brigham transactions were "scuttled as a direct result of TPL not having significant equity currency on hand at the time of the negotiations."[20] But the testimony of Mr. Barry (its Chairman) and Tyler Glover (its CEO) says otherwise. Mr. Barry testified that in "2021 and 2022" there were acquisition opportunities that TPL was "unable to even pursue because of our lack of available stock."[21] This lack of authorized shares "inhibited [TPL's] ability to even consider a transaction" at this time.[22] "[S]ellers knew [TPL] couldn't act"[23] and, as a result, according to Mr. Barry, TPL was "sort of a joke."[24]

Thus, in the case of both Brigham and Oxy, TPL sent proposals in hopes "that [TPL] could get them to agree to wait for [TPL] to get the stock authorized."[25] But those hopes were dashed, because Brigham and Oxy both "knew [TPL] couldn't act" without more stock.[26] So, "for example, in Brigham's case, they went and got acquired by somebody else pretty close to the price [TPL was] going to offer."[27] In fact, after the competing bid was publicly accepted, TPL internally discussed

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[19] PPTAB at 14.
[20] *Id*. at 9.
[21] *See* Barry Tr. 307:19–24.
[22] *Id.* at 309:2–6.
[23] *Id.* at 309:15–17.
[24] *Id.* at 312:10–16.
[25] *Id.* at 310:4–13.
[26] *Id.* at 309:15–19.
[27] *Id*.

whether it should "consider[] a competing bid for Brigham if we get the stock authorization."[28] But, because TPL did not have unissued stock available at that time, it concluded that the "ship ha[d] sailed" and the transaction closed without TPL's involvement.[29] And Mr. Glover testified that, after TPL sent a proposal to Oxy, Oxy "informed [TPL] 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."[30] TPL's board meeting minutes corroborate this testimony.[31]

In short, the evidence overwhelmingly confirms that Proposal Four (i) grew out of frustrated attempts to advance a strategy of growth by acquisitions and (ii) was proposed to shareholders for the "primary purpose" of facilitating such an acquisition.[32] While TPL argues that TPL's interpretation of the phrase "related to" is overbroad, on any reasonable interpretation of the phrase, a proposal with that background and "primary purpose" is plainly "related to" an acquisition.

In its Answering Brief, TPL makes several attempts to avoid this conclusion, but each fails. For example, TPL argues that TPL's interpretation of "related to" is

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[28] JX422:1.
[29] *Id*.
[30] Glover Dep. 110:9–18.
[31] *See* JX360:3; *see also* Kurz Dep. 72:5–8.
[32] DPTAB at 28.

unworkable because it requires an inquiry into "subjective motivation," which purportedly is "not the way stockholder agreements (or any contracts) are meant to work."[33] TPL cites to no authority for its assertion that contractual provisions cannot turn on subjective intent—because there is none. Parties may draft contractual provisions however they wish.[34] In fact, the Stockholders' Agreement itself has other provisions that hinge on subjective intent, such as the provision in Section 3 carving out communications "not made with an ***intent*** to circumvent any of the [preceding] restrictions."[35]

Moreover, if the parties here had intended to preclude any need to inquire into the intent of a proposal, they could easily have done so. For instance, they could have specified that the Extraordinary Transactions carve-out only applied to recommendations for or against any proposal "to approve" a proposed acquisition.[36] Or they could have tied the carve-out to whether the proposal is coded by the New

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[33] PPTAB at 15.

[34] And parties routinely draft contractual provisions to implicate subjective intent. *See, e.g.*, *In re P3 Health Grp. Holdings, LLC*, 2022 WL 15035833, at *7 (Del. Ch. Oct. 26, 2022) (interpreting provision turning on whether "claims or allegations aris[e] from or relat[e] to fraud or intentional misrepresentation").

[35] JX116:6 (§ 3) (emphasis added).

[36] *See* DPTAB at 26–27. TPL argues that the carve-out could not have "been limited to proposals 'to approve' the enumerated transactions" because that would not capture proposals that the Board recommended voting against. PPTAB at 15. But the carve-out could easily have been written to capture all recommendations for *or* against such proposals.

York Stock Exchange as "routine" or "non-routine."[37] As a sophisticated party represented by sophisticated counsel, TPL was undoubtedly well aware of such options in drafting the Stockholders' Agreement and could have sought to limit the Extraordinary Transactions carve-out accordingly.[38] Having failed to do so, TPL cannot now argue that the contract's broad "related to" language should be given something less than its full effect and ordinary meaning.

In addition, TPL argues that the Extraordinary Transactions carve-out should be limited to proposals to approve a specific, pending transaction because it applies to proposals "related to ***an*** Extraordinary Transaction."[39] But the indefinite article merely means that the proposal must relate to ***at least*** one acquisition. Here, Proposal Four relates to many acquisitions. In fact, to prevail on its breach of contract claim, TPL must demonstrate, among other elements, that the alleged breach caused it "injury." *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *47 (Del. Ch. Nov. 30, 2020). In an attempt to meet this burden, TPL testified through its 30(b)(6) witness that its injury has been TPL's inability to close acquisitions that otherwise would have been available to it between

[37] *Cf.* PPTB at 29–30.
[38] *Cf. id.* at 27 ("[C]ourts will not rewrite contracts to read in terms that a sophisticated party could have, but did not, obtain at the bargaining table").
[39] PPTAB at 11.

November 2022 and today.[40] Proposal Four is related to each of these potential acquisitions and the other acquisitions that TPL would pursue in the future if Proposal Four were approved.[41]

Nor is it difficult to see why the parties agreed to the broad, "related to" formulation of the Extraordinary Transactions carve-out. As Defendants have explained, the narrower "to approve" interpretation favored by TPL would mean that TPL could sidestep the Extraordinary Transactions carve-out 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). TPL argues that this is of little concern because stockholders would still have the right to vote on a transaction requiring the issuance of 20% or more of TPL's outstanding stock.[42] But this provides no comfort where even the largest of TPL's potential transactions—including both the Oxy and Brigham transactions—would not have required the issuance of 20% or more of TPL's outstanding stock.[43]

In light of such facts, it would have been bizarre for the parties to limit the Extraordinary Transactions carve-out to proposals "to approve" a potential

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[40] Glover Dep. 183:13–184:4; *see also* DPTAB at 26–27 (quoting same)
[41] *See, e.g.*, Hesseler Dep. 138:6–15 (acknowledging that Proposal Four was "related to" "any potential future acquisition").
[42] PPTAB at 13.
[43] DPTAB at 32–33.

transaction. And they did not do so: 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" a merger, acquisition, or business combination such as Proposal Four.

2. **Proposal Four is "related to" a recapitalization.**

The Stockholders' Agreement also defines Extraordinary Transaction to include any "recapitalization."[44] In its opening brief, TPL defined "recapitalization" as "a revision of the capital structure of a corporation."[45] In response, Defendants pointed out that Merriam-Webster, which provides TPL's proffered definition, further defines "capital structure" as "the makeup of the capitalization of a business in terms of the amounts and kinds of equity and debt securities."[46] And 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."[47]

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[44] JX116:13 (§ 16(a)(v)).
[45] *See* PPTB at 36 (citing Merriam-Webster.com).
[46] *Capital Structure*, Merriam-Webster.com Dictionary, *available at* https://tinyurl.com/3kkxrxfx.
[47] *See* Haas Dep. 224:3–9 (Q. "Is an increase in the number of authorized shares of stock in a company a change to the capital structure of that company?" A. "…[Y]es, I think that would [be].").

Proposal Four thus fits squarely within the dictionary definition of the term "recapitalization" that TPL itself provided. In response, TPL runs from the definition of recapitalization that it once championed.[48] And if Merriam-Webster's definition is used, TPL suggests interpreting it to refer only to the "amount[]" of ***issued*** "equity."[49] But the word "issued" is found nowhere in Merriam-Webster's definition. Nor would practitioners read such a limitation into the definition. TPL's own purported expert on the subject confirmed as much by agreeing that "an increase in the number of ***authorized*** shares of stock in a company" would be "a change to the capital structure of [the] company."[50]

Next, TPL turns to *Black's Law Dictionary*, which defines "recapitalization" as "[a]n adjustment…of a corporation's capital structure…through amendment of the articles of incorporation…." Recapitalization, Black's Law Dictionary (11th ed. 2019). TPL points out that *Black*'s defines "capital structure" with reference to the "relative proportions of short-term debt, long-term debt, and capital stock" of a company.[51] TPL suggests that "capital stock" in this definition must mean only "issued" stock. But, in fact, *Black's* defines "capital stock" to mean "[t]he total number of shares of stock that a corporation ***may*** issue under its charter or articles

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[48] *See* PPTAB at 16 (suggesting that "the term has no fixed meaning").
[49] *Id*.
[50] *See* Haas Dep. 224:3–9 (emphasis added).
[51] PPTAB at 16 (emphasis omitted).

of incorporation."[52] Accordingly, under *Black's* definition, like that of Merriam-Webster, an increase in the amount of stock TPL is ***authorized*** to issue constitutes a "recapitalization" of TPL.[53]

Consistent with this definition, Defendants' expert, Professor Guhan Subramanian, identified dozens of instances in which the business press and corporate investor relations departments have "used 'recapitalization' to refer to an authorization of new shares."[54] TPL dismisses this evidence as "plagued by survivorship bias and other flaws."[55] What TPL appears to mean is that Professor Subramanian did not analyze every article discussing a share authorization, but only those that used the term "recapitalization." But as Professor Subramanian explained at trial, this criticism misses the mark because he was "not trying to find out all the ways a new share authorization has been described."[56] Rather, his "goal was to understand whether recapitalization has been used to describe a new share authorization, and the answer is clearly yes over the past 120 years."[57] TPL also criticizes Professor Subramanian's analysis because most of the articles using "recapitalization" to describe a share authorization are more than 20 years old. This

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[52] Capital Stock, Black's Law Dictionary (11th ed. 2019) (emphasis added).
[53] *See* Subramanian Tr. 326:20–328:17 (discussing same).
[54] JX593:17 (¶ 29); DPTAB at 34–35.
[55] PPTAB at 17.
[56] Subramanian Tr. 326:8–9.
[57] *Id.* at 326:8–15.

criticism also falls flat. After all, TPL provides no reason to believe that the meaning of "recapitalization" has changed over time such that it once meant a share authorization, but no longer does. And, if the definition of "recapitalization" has been consistent over time, then the date of the articles Professor Subramanian reviewed is not relevant to his analysis.

Finally, as Defendants pointed out in their Answering Brief, even if TPL's proposed interpretation of "recapitalization"—i.e. "something more than a mere 'change' in available capital"[58]—were credited, Proposal Four would still effect a "recapitalization" of TPL.[59] Proposal Four proposes to dramatically end TPL's uninterrupted 135-year history of having ***never*** had authorized-but-unissued shares 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.[60] Such a fundamental reversal of the historical approach to TPL's capital structure cannot be reduced to an insignificant "mere change in capitalization"[61]

In response, TPL astonishingly argues that "TPL has a two-year history" completely separate from the 133-year prior history of the trust.[62] But this is not

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[58] PPTB at 38; *see also* PPTAB at 16 ("Under the SA, 'recapitalization' must be more than a mere change in capitalization….").
[59] DPTAB at 35.
[60] *See* JX431:25.
[61] PPTAB at 16 (employing this definition of recapitalization).
[62] *Id.* at 7.

how TPL presents itself to investors or the SEC. The top of every single page of its definitive proxy statement soliciting votes for Proposal Four sent to all shareholders, and filed with the SEC—bears a logo with the words "Texas Pacific Land Corp." and "Est. 1888."[63] TPL's website prominently features the same logo, along with a stock chart that uses ***one continuous line*** to show its performance over the past five years.[64] The Court should firmly reject TPL's attempt to portray itself as a two-year old company, which it is obviously doing for strategic litigation purposes. The pre-litigation record (and current website) is the more reliable barometer of TPL's actual history.

In addition, TPL argues that the size of Proposal Four's proposed share increase will amount to a mere doubling of its authorized shares ***if*** a contemplated share split is effectuated.[65] But TPL's market capitalization at the time of the 2022 annual meeting was more than $20 billion.[66] A "commonplace doubling" of TPL's stock would thus provide TPL with billions of dollars of equity currency to spend at the Board's discretion—an extraordinary departure from its history of never having any authorized-but unissued-shares. Thus, even if a stock split is enacted—and there

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[63] *See* JX431.
[64] Tex. Pac. Land Corp., *Stock Quote*, https://www.texaspacific.com/investors/stock-data/quote (last visited June 16, 2023); *see also* DPTAB at 32 n.128.
[65] PPTAB at 6.
[66] *See* JX536:1.

is no assurance it would be[67]—Proposal Four would still have a "transformative" effect on TPL's capital structure,[68] which cannot be minimized as a "mere change in capitalization."[69]

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

Lastly, the definition of Extraordinary Transaction includes "other matters involving a corporate transaction that require a stockholder vote."[70] It is undisputed that a share authorization is a matter "that require[s] a stockholder vote" under Delaware law.[71] TPL is thus left to argue that it is not a "corporate transaction."[72] But as Defendants have pointed out, Delaware courts have time and again included an "amendment to a certificate of incorporation" as an example of a "***corporate***

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[67] TPL's Board can decline to enact a split if, in its unilateral discretion, it determines that there has been a "material change" in circumstances affecting the advisability of doing so. JX431:26. One thing that has changed materially since TPL convened its annual meeting in November 2022 is its stock price, which was nearly double at that time than what it is now. *See Texas Pacific Land Corporation: Historical Data*, Yahoo! Fin., *available at* https://tinyurl.com/2d4ywseb (noting that TPL's closing price on November 15, 2022, the day before the 2022 Annual Meeting, was $2,699.90 and its closing price on June 15, 2022, was $1,362.10).

[68] *See* Glover Dep. 121:14–18 (noting that "the passage of Proposal 4" would be "a transformative moment for the company").

[69] PPTAB at 16.

[70] JX116:13 (§ 16(a)(v)).

[71] *See* DPTAB at 36–37.

[72] PPTAB at 18–19.

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).[73]

In response, TPL argues that the holding of such cases did not hinge on this characterization. But this is beside the point. These cases establish, and TPL cannot reasonably dispute, that, at a minimum, sophisticated Delaware jurists and lawyers understand an amendment to a certificate of incorporation to be a "corporate transaction." This makes sense given that Delaware law understands a charter to be a "contract" between a corporation and its stockholders.[74] And an amendment to a contract is indisputably a "transaction."[75]

In addition, TPL suggests that even if a certificate amendment is a "corporate transaction that require[s] a stockholder vote" the Court should nonetheless find it to not fit in the Stockholders' Agreement's definition of an Extraordinary Transaction because the parties could have been more specific. In particular, TPL contends that, because the parties showed themselves to be capable of referencing "certificate amendments" elsewhere, the lack of an explicit reference here purportedly indicates an affirmative intent to exclude it.[76] Put differently, TPL contends that because the parties could have chosen to use certain narrower terms,

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[73] *See also* DPTAB at 36–37 n.147 (collecting cases).
[74] *See id.* at 36–37.
[75] *Id.* at 37.
[76] PPTAB at 4–6, 18.

their use of broader terms should be interpreted to exclude those narrower terms—even if doing so modifies the ordinary meaning of the broader terms that were utilized.

TPL cites no authority for this novel principle of contract interpretation. Nor is there one. Rather, under Delaware law, 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.*

If anything, the fact that the parties "knew how to refer to certificate amendments,"[77] undermines TPL's interpretation. For if so, the parties easily could have specified that "certificate amendments" were ***not*** included under the otherwise-broad language of the Stockholders' Agreements' carve-outs.[78] Having elected not to do so, 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.

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[77] *Id.* at 5.

[78] *See* DPTAB at 36–38; *see also Slack Techs., LLC v. Pirani*, 143 S. Ct. 1433, 1441 (2023) (noting that an argument that a drafter could have used more explicit language found elsewhere in the same instrument "does not prove much" because it at most shows that the drafters could have been more explicit in favor of ***either*** side's position—and thus shows no intent to adopt one reading over the other).

B. Proposal Four comes within the carve-out for governance, environmental or social matters.

4. The "governance, environmental or social matters" carve-out is not limited to what TPL defines as "ESG" matters.

In an attempt to distract from the actual language of the Stockholders' Agreement's carve-out for "governance, environmental or social matters," TPL unilaterally re-names the carve-out the "ESG Carveout."[79] In urging its view, TPL contends that the ESG acronym has "attained the status of a term of art."[80] But TPL points to ***no*** instance in which the phrase "governance, environmental or social" was used to mean ESG in whatever "term of art" context that TPL now attributes to it.[81] In fact, despite an apparent canvassing of sources, TPL 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***.[82]

Such examples fall far short of showing that the Stockholders' Agreement's use of a different phrase, outside of the context of a discussion of "ESG," amounts to the invocation of a "term of art." Rather, each of the disjunctive terms of the carve-out for "governance, environmental or social" matters should be given their

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[79] PPTAB at 20.
[80] Pl.'s Pre-Trial Br. at 37.
[81] *See* PPTB at 42–43.
[82] *See id.*

ordinary meaning—and not be restricted to a "term of art" that the Stockholders' Agreement never uses.

Crucially, the structure of the Stockholders' Agreement confirms this interpretation. This is because the "governance, environmental or social matters" carve-out is subject to a proviso—or a carve-out to the carve-out—for 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."[83] If the "governance, environmental or social" matters reference in the carve-out did not encompass "governance" matters, as TPL contends, then it would make no sense to add a proviso that expressly addresses ordinary "corporate governance terms."[84]

In response, TPL offers a tortured hypothetical involving a proposal that simultaneously implicates both environmental matters and ordinary governance matters—and argues that in such a situation the proviso could perhaps have some meaning even if the second carve-out were limited to TPL's cramped view of "ESG matters."[85] But the strained nature of this hypothetical only confirms the unreasonableness of TPL's interpretation. After all, TPL does not—and cannot—provide any coherent explanation as to why the parties would wish to generally allow

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[83] *See* DPTAB at 44 (emphasis omitted).
[84] *See id.* at 44–45.
[85] PPTAB at 22 (arguing that the proviso could hypothetically apply to a "proposal to expand the Board to include an additional director with environmental expertise").

Defendants freedom to vote as they wished on "ESG matters," except to the extent that such a proposal would ***undo*** a governance term the parties had previously agreed upon. The far more natural interpretation is that the parties intended "governance" in the carve-out in its ordinary sense and wished to exclude particular governance proposals from that carve-out.

5. **Proposal Four is "related to governance."**

As Defendants' Answering Brief explains, Proposal Four—which seeks to amend TPL's foundational governance document—is related to TPL's governance.[86] Throughout its history, TPL's lack of authorized-but-unissued shares has effectively precluded it from (i) consummating any acquisition using stock as consideration, (ii) issuing dilutive stock or stock options to TPL executives, or (iii) deploying a poison pill or executing another takeover defense.[87] Proposal Four is designed to free TPL from these governance restrictions and is thus plainly related to governance.[88]

In its Answering Brief, TPL points to no evidence that would contradict this argument. Instead, TPL points to "the fact that TPL can use its blank-check *preferred* stock for *all* of these purposes."[89] But while this may be a theoretical

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[86] *See* DPTAB at 39–42.
[87] *See id.* at 41.
[88] *See id.* at 42.
[89] PPTAB at 23 (emphasis in original).

possibility, at his deposition, Tyler Glover—TPL's CEO and 30(b)(6) witness—gave testimony that demolishes TPL's new argument about preferred stock:

> **Q.** [H]ave there [been] any discussions about issuing the preferred stock for any purpose?
>
> **A.** It's been discussed. ***The Board's never felt like it was in the best interest of the stockholders to issue that preferred stock.***
>
> **Q.** Why is that?
>
> **A.** Well, there's a couple of reasons why we think sellers would be hesitant to take. If you don't have any common stock to convert that into, it kind of serves as, like, a permanent debt instrument. And so the fear is that if you -- if you find a seller that's willing to take that, they're going to wan[t] that dividend rate to be so high that it would make it, you know, less accretive for us.
>
> **Q.** Less accretive for the Company or for the shareholders -- the common shareholders?
>
> **A.** The common shareholders.
>
> **Q.** And, in fact, it would be dilutive to the common shareholders, right?
>
> **A.** It could be, yes.[90]

TPL's Chairman, David Barry, similarly testified that despite its blank-check preferred stock, "TPL couldn't act" on acquisitions in 2022 and potential "sellers knew [it] couldn't act."[91] Mr. Barry further explained that, "if you're a buyer, the first question the seller asks is: do you have the currency to pay me? And in our

[90] Glover Dep. 128:13–129:7 (emphasis added).
[91] Barry Tr. 309:15–17.

case, currency can include cash, debt, stock. We don't have stock. They know we can't perform."[92] As a result, TPL was "sort of a joke" and "ha[d] no credibility" in the M&A arena.[93] Its "lack of [] authorized stock was basically cutting [it] out of almost everything."[94] Indeed, on "a number of transactions," TPL "couldn't even get in the data room to consider whether to do a transaction."[95] In other words, even though it possessed "blank-check preferred stock," it was TPL's lack of authorized ***common*** stock that kept its Board on a short leash from a governance standpoint. Proposal Four sought to loosen these restrictions and is thus "related to governance."

TPL is thus left to argue that the Court should not give the phrase "related to governance" its natural interpretation because doing so would provide too great an exception to the Stockholders' Agreement's voting commitment.[96] But, again, while TPL may wish it had not agreed to such a broad carve-out, as a sophisticated party represented by sophisticated counsel, it cannot avoid the Stockholders' Agreement's ordinary meaning because of "after-the-fact regrets." *See Milford Power Co. v. PDC Milford Power, LLC*, 866 A.2d 738, 748 (Del. Ch. 2004).

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[92] *Id*. at 309:23–310:3.
[93] *See id*. at 312:10–313:6.
[94] *Id*. at 312:1–2.
[95] *Id*. at 311:19–23.
[96] PPTAB at 22–24.

6. Even if the governance carve-out were limited to "ESG matters," Proposal Four would still fall within it.

TPL also asserts that "Defendants concede that if the carveout is understood to refer to ESG matters, *Proposal Four does not come within it.*"[97] This is a blatant mischaracterization of Defendants' position. In reality, Defendants' Answering Brief strongly emphasized that TPL's directors, experts, and website, all interpret the ESG acronym to extend to ordinary-course governance items such as director elections, governance documents, and executive compensation, and do not understand it to be confined to matters involving "sustainability and ethical impact" as TPL now contends.[98] And it noted that TPL's general counsel, Micheal Dobbs, conceded that "executive compensation" is an "often-looked-at thing" "as part of ESG."[99] Thus, since TPL's Proxy admits that TPL "could…use its ability to issue additional common stock for…grants made to employees,"[100] Proposal Four would be subject to the ESG carve-out even under TPL's cramped view of "ESG matters."

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[97] *Id.* at 21 (emphasis in original).
[98] DPTAB at 43–44.
[99] *Id.* at 44 (citing Dobbs Dep. 89:3–89:10).
[100] *See* JX431:26; Kurz Dep. 150:3–5; *see also id.* at 132:21–133:17; Hesseler Dep. 48:9–13, 258:10–21; Dobbs Dep. 219:8–15; Glover Dep. 125:6–22.

Nor is there any basis for TPL's assertion that Jay Kesslen "conceded" at trial that Proposal Four is unrelated to ESG matters.[101] To the contrary, this was Mr. Kesslen's trial testimony on the subject:

> **Q.** But if the Court agrees that this is an ESG carve-out, you agree that Proposal Four would not fit within this carve-out. Right?
>
> **A.** ***Incorrect***.[102]

TPL also suggests that Professor Subramanian conceded that Proposal Four was unrelated to ESG.[103] In fact, however, Professor Subramanian has an entire section of his report explaining that "The Share Authorization is Related to Governance ***in the ESG Context*** as Well."[104] Similarly, at his deposition, he stated that it "would be a share authorization as related to governance, which is the G part of ESG; so to that extent the answer [to the question of whether a share authorization has been identified as part of ESG] is absolutely."[105]

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[101] *See* PPTAB at 21.

[102] Kesslen Tr. 152:18–21 (emphasis added). TPL is also incorrect that Mr. Kesslen conceded this at his deposition. Instead, he said he would "have difficulty" answering the hypothetical, since "there's little consensus on what ESG means," and the "ESG framework" he typically uses is in the narrow context of "the investment management industry." *See* Kesslen Dep. 350:13–25.

[103] PPTAB at 21.

[104] JX593:37–38 (emphasis added).

[105] Subramanian Dep. 234:15–21; *see also* JX593:37–38.

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

7. TPL has not established a "trade usage" that could clarify the Stockholders' Agreement.

Turning to extrinsic evidence, TPL first argues that its rebuttal experts established a "trade usage" that can clarify the Stockholders' Agreement.[106] But in order for trade usage to be considered in the interpretation of a contract, the party proffering the purported custom must prove that it is "certain, uniform, reasonable and general, and…of such long standing as to have become so generally known, recognized and acted on by the trade, as to raise a fair presumption that the parties in entering into their engagements, did so with a silent reference to the usage, and a tacit agreement that their rights and responsibilities should be determined by it." *Paciaroni v. Crane*, 408 A.2d 946, 954 (Del. Ch. 1979) (citation omitted); *see also* 12 Williston on Contracts § 34:12 (4th ed.) (similar). "Since the custom or usage must be so uniform, long-established, generally acquiesced in and well-known to induce the belief that the parties contracted with reference to it, it cannot be proved by reference to a few isolated instances." 12 Williston on Contracts § 34:12.

Here, TPL has come nowhere close to establishing a "trade custom" consistent with these requirements. Instead, TPL's primary argument is that it was able to identify a few agreements (among hundreds that it surveyed) that carve out from a

[106] PPTAB at 27.

voting commitment both certificate amendments and a recapitalization. But, as Defendants explained in their Answering Brief, this does not suggest that the parties to those agreements understood those terms to contain no overlap whatsoever.[107] In fact, TPL has offered no evidence whatsoever about how the parties to those unrelated "precedent agreements" interpreted any of the terms therein. And, even if they did, a "few [such] isolated instances," certainly does not establish a "uniform, long-established, generally acquiesced in and well-known" trade usage that would warrant departing from the ordinary meaning of the Stockholders' Agreement's actual terms. *Id.*

In addition, TPL argues that it was able to retain another expert to declare, in conclusory fashion, that, based on his experience, TPL should win.[108] Such conclusory *ipse dixit* is not probative for any purpose and does nothing to establish that the "parties contracted with reference to" a well-known "trade usage." *Id.*; *Manerchia v. Kirkwood Fitness & Racquetball Clubs, Inc.*, 2010 WL 1114927, at *3 (Del. Mar. 25, 2010) (ruling that an expert opinion is "insufficient" where "it is conclusory").

Beyond these evidentiary shortcomings, it is not clear what "trade usage" TPL is even claiming to establish. TPL contends that Mr. Weingarten has shown that

[107] DPTAB at 30.
[108] PPTAB at 28–29.

"governance" refers to "actual governance."[109] But TPL never explains what the distinction between "governance" and "actual governance" is. The argument thus amounts to a mere vacuous tautology and does nothing to undermine Defendants' interpretation. TPL also contends that Mr. Haas's precedent agreements suggest that when parties intend to carve out "certificate amendments" from a voting commitment, "they do so explicitly."[110] But the parties did so here by "explicitly" carving out any proposals related to "matters involving a corporate transaction that require a stockholder vote."[111] And, in any event, it is not clear how Mr. Haas could possibly reach this opinion, given that he has no insight into which "parties intend[ed] to include certificate amendments" beyond those who did so "explicitly." Since Mr. Haas is not a "soothsayer," his opinion sheds no light on what other parties subjectively intended. *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2022 WL 2902769, at *1 (Del. Ch. July 14, 2022) (citation omitted).

8. **Defendants' witnesses did not concede TPL's interpretation.**

TPL also claims that Defendants' witnesses "acknowledg[ed] their Voting Commitment" before this litigation and subsequently gave an interpretation of the exceptions to that commitment that TPL thinks is overly broad.[112] But this does not

[109] PPTAB at 28.
[110] PPTAB at 29.
[111] JX116:13 ((§ 16(a)(v)).
[112] PPTAB at 26, 33.

support TPL's case. It merely confirms that the Stockholders' Agreement contains a voting commitment (which is undisputed), and that Defendants' witnesses believe the exceptions to this voting commitment are broad (which supports Defendants' case, not TPL's).

To suggest otherwise, TPL resorts to mischaracterizing the evidence. For example, TPL contends that Murray Stahl "acknowledged that Defendants 'must vote with' TPL on a share increase."[113] In support, TPL points to an email from Lawrence Goldstein—a third party who has no role with Defendants—to himself.[114] The notes are almost entirely incomprehensible, and are inadmissible hearsay. In fact, the email's author testified that he does not recall the email and that portions of the email are "pure speculation on my part."[115] But, whatever these notes may mean, they certainly do not, as TPL argues, "acknowledg[e] that Defendants 'must vote with' TPL on a share increase."[116] To the contrary, the document states that Horizon Kinetics "does ***not*** have to vote with [the TPL Board] on non[-]pedestrian things."[117]

In addition, TPL chides Defendants for focusing too much on the objective meaning of the words of the Stockholders' Agreement, rather than inquiring further

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[113] *Id.* at 33.
[114] *See* JX210.
[115] Goldstein Dep. 151:4–24; *see also id*. at 148:7–11.
[116] PPTAB at 33.
[117] JX210:1 (emphasis added).

into the subjective intentions of the parties.[118] But this is because this is what is legally relevant: "Delaware law adheres to the objective theory of contracts, i.e., a contract's construction should be that which would be understood by an objective, reasonable third party." *Fletcher v. Feutz*, 246 A.3d 540, 555 (Del. 2021) (citation omitted). Thus, in interpreting a contract, the "true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). As a result, TPL's contentions about the parties' subjective understandings would not be relevant to the meaning of the Stockholders' Agreement even if they did support TPL's interpretation, which they do not.

9. **Section 17(g) bars any inquiry into the Stockholders' Agreement's drafting history.**

Under Delaware law, parties may select the rules under which a contract will be interpreted. Parties may do so generally, by selecting an entire body of interpretive rules. *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…."). Or parties may do so specifically, by contracting for specific interpretive principles to govern an agreement. *Senior Hous.*

[118] PPTAB at 34.

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 took advantage of this freedom of contract in Section 17(g) of the Stockholders' Agreement, which governs its "Interpretation and Construction."[119] Among other things, the parties agreed in this provision that the Stockholders' Agreement would be interpreted and construed "without regard to events of drafting or preparation."[120] TPL provides no basis to ignore the plain meaning of this provision. The only Delaware case TPL cites as purported "support" for doing so is *XRI Investment Holdings LLC v. Holifield*, 283 A.3d 581 (Del. Ch. 2022). It is unclear what relevance TPL believes *XRI* has to this issue. TPL states that, in *XRI*, "the Court surveyed multiple similar situations, including evidentiary matters (integration clauses and oral modification prohibitions)."[121] But *XRI* did not survey them in any way that advances TPL's argument. Rather, *XRI* merely held that such provisions cannot "insulate [a contract] from the implications of [the parties'] ***subsequent*** actions." *XRI*, 283 A.3d at 660 (emphasis added). "The reason for this is that parties have a right to renounce or amend [a prior] agreement in any

[119] JX116:16 (§ 17(g)).
[120] *Id.*
[121] PPTAB at 31.

way they see fit and by any mode of expression they see fit." *Id.* at 659. These contractual principles regarding subsequent actions simply have nothing to do with the question of whether parties may contractually select the rules that will govern the interpretation of their existing agreement. *XRI* is completely irrelevant here.

TPL is thus left to rely on a 60-year-old case from an out-of-state intermediate appellate court.[122] Rather than following this stale, out-of-state case, the Court should follow recent Delaware law confirming that parties may select the interpretive principles that will govern their agreements. For example while the rule of *contra proferentem* is typically a tool courts may use to interpret an ambiguous agreement, Delaware courts enforce agreements to disable the Court from being able to use that tool. *Senior Hous. Cap.*, 2013 WL 1955012, at *24–26 & n.264. The parties' agreement here that the Stockholders' Agreement should be interpreted without regard to events of negotiation or drafting should be likewise enforced.

In addition, TPL suggests that, even if review of drafting history is generally inappropriate here, it can be appropriately used to rebut Defendants' references to drafting history. But Defendants do not rely on drafting history. TPL's floundering attempts to find examples of Defendants doing so only prove the point. For instance, TPL seizes on the word "negotiated" in a sentence in Defendants' pre-trial brief

[122] *Id.* at 29 (citing *Garden State Plaza Corp. v. S. S. Kresge Co.*, 189 A.2d 448 (N.J. App. Div. 1963)).

stating that "Defendants negotiated for inclusion of the term 'recapitalization' in the definition of Extraordinary Transaction."[123] But the meaning of this sentence is simply that Defendants agreed to a contract with a definition of Extraordinary Transaction that includes "recapitalization." Its meaning does not depend at all on "events of drafting or preparation."

Similarly, Plaintiffs have attempted to misconstrue Defendants' prior argument that, in the context of the parties' dispute, it would be unreasonable to interpret Defendants as having agreed to give TPL's Board a blank check to pursue acquisitions with newly authorized stock.[124] But this argument does not rely on "events of drafting or preparation" at all. Rather, it simply makes reference to "the context and circumstances from which [the contract] arose." *Coker v. Walker*, 2013 WL 1858098, at *4 n.37 (Del. Ch. May 3, 2013). Reference to this broader context is not prohibited by Section 17(g).[125]

Finally, TPL points to Defendants' argument that "Annex B's list of 'governance terms' does not reference" authorized shares.[126] And TPL suggests

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[123] JX1118:46.

[124] *Id.* at 40.

[125] In any event, in a similar context, the Court permitted Defendants' counsel to elicit testimony regarding the negotiation history without any waiver of Defendants' objection under Section 17(g), stating that "there will be no waiver, precisely because we're attempting to make a full record so that whoever needs to can go to the Delaware Supreme Court." Kesslen Tr. 140:16–141:5.

[126] PPTAB at 31.

that, in response to questions posed by TPL at depositions, Defendants' witnesses interpreted the carve-outs as not binding Defendants in director elections.[127] Here again, Defendants do not rely at all on events of drafting or preparation for such arguments. Thus, it is entirely unclear why TPL believes this argument opens the door for TPL to rely on such evidence in violation of Section 17(g).

10. **Even if admissible, the Stockholders' Agreement's drafting history supports Defendants' interpretation.**

When drafting the Stockholders' Agreement, TPL provided a draft with proposed carve-outs similar to those found in the ultimate agreement.[128] In it, TPL provided a footnote assuring Defendants that the "definition of Extraordinary Transaction will pick up ***all significant corporate transactions***."[129] To argue that this does not confirm Defendants' interpretation, TPL is forced to suggest that Proposal Four is not even "significant" to TPL. This is nonsense, as the evidentiary record in this case makes abundantly clear. For example, Tyler Glover testified that the "passage of Proposal 4 would be…***a transformative moment for the Company***."[130] And TPL's fallback argument, that, even if "significant," Proposal

[127] *Id.* at 30.
[128] JX092:5.
[129] *Id.* (emphasis added).
[130] *See, e.g.*, Glover Dep. 121:14–18 (emphasis added).

Four would not effect a "corporate transaction," lacks merit under clear Delaware law, as explained above.[131]

D. Defendants bear no burden on TPL's claim for violations of Section 3 of the Stockholders' Agreement, and, in any event, TPL's causation argument is untenable.

TPL's claim for violations of Section 3 of the Stockholders' Agreement is nothing but a distraction from the substantive issues in dispute in this summary Section 225 proceeding. As Defendants' point out in their Answering Brief, and TPL concedes by silence, 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.[132]

TPL's restraint in seeking remedies is born of necessity. If Defendants were entitled to vote their shares as they saw fit under Section 2 of the Stockholders' Agreement, TPL cannot ask the Court to reverse Defendants' votes because of purported violations of a separate section of the agreement that does not concern the voting restriction. Nor can TPL ask the Court to reverse or invalidate the votes of non-party stockholders simply because Defendants purportedly told them facts about the proposal that TPL wanted to hide from them. After all, if the information Defendants told such stockholders (such as the fact that Defendants opposed

[131] *See supra* Section II.A.3.
[132] DPTAB at 58.

Proposal Four) was material, TPL itself had an obligation to disclose it to the stockholders. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1171 (Del. 2000) ("Directors must disclose all material facts within their control that a reasonable stockholder would consider important in deciding how to respond to the pending transaction."). And if such information was not material, then it was—by definition—not important to their decision in how to vote. *See id.* TPL thus has no basis to ask the Court to determine the result of the vote on Proposal Four based on its Section 3 claim.

As a result, the Section 3 claim is improper in this summary Section 225(b) proceeding. Section 225(b) allows the Court to determine the "result" of a stockholder vote—not to consider whether to issue declarations on issues with purported connections to that vote. *See* 8 *Del. C.* § 225(b).

The Court should thus not consider TPL's Section 3 claim at all. But if it does, the claim fails for the reasons laid out in Defendants' Answering Brief.[133] Because TPL bears the burden to establish this claim, it largely falls outside the scope of this sur-reply brief. However, because TPL contends that Defendants should bear the burden on the issue of injury, Defendants will briefly respond to that argument here.[134]

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[133] *Id.* at 57–60.
[134] *See* PPTAB at 38.

As an initial matter, there is no basis for TPL's attempt to place such a burden on Defendants. TPL bears the burden of proof on each element of its breach of contract claim, one of which is injury. *Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship*, 2017 WL 1191061, at *36 (Del. Ch. Mar. 30, 2017). And TPL tellingly cites no caselaw in support of shifting that burden here.

Moreover, TPL's contention that it has established injury is baseless. TPL argues that a hearsay statement in an email from a non-party to another non-party suggests that Defendants had "20% 'soft' voting influence" in addition to their shareholdings.[135] TPL claims this is plausible because, in another hearsay email, the same non-party claimed that Steve Bregman, an employee of Horizon Kinetics, drafted the 20% statistic.[136] But TPL elected not to depose Mr. Bregman and, while they did depose the non-party that wrote the statement, they cite none of his testimony about this statistic in their brief—because none of it supported TPL's contentions.[137]

Further, even if Defendants did have "soft" voting influence over 20% of TPL's stockholders, since Proposal Four fell 15% short of the votes required for approval, in order to establish injury, TPL would need to show that three-quarters of

[135] JX303:12.
[136] PPTAB at 37.
[137] *See id.*

this 20% block would otherwise have voted for Proposal Four but for the smattering of communications that TPL now contends violated Section 3. TPL has presented absolutely no evidence to support such a contention. To the contrary, the contention is implausible and contradicted by the evidence that is in the record. To the extent Defendants have "influence" over stockholders, it is because such stockholders believe in Defendants' vision for the company—including their well-known opposition to dilutive issuances and acquisitions with stock. Thus, the idea that 75% of such stockholders would have supported a proposal to sextuple TPL's authorized shares and provide incumbent management with billions of dollars in equity currency is preposterous.

TPL has thus fallen far short of its burden to prove that the votes of the holders of $2.99 billion worth of TPL stock that voted against Proposal Four would have voted against the proposal but for the communications at issue. Indeed, this fact is particularly clear here since the purportedly violative communications stated nothing about Proposal Four other than that Eric Oliver opposed it.[138] This disclosure could not possibly have changed the outcome of the vote on Proposal Four because, before voting closed, ***TPL itself disclosed Mr. Oliver's opposition***.[139]

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[138] *See* PPTAB at 37–38.
[139] JX525.

E. TPL's claims are also barred under the doctrine of unclean hands.

TPL's brief fails to address the fact that Delaware companies must "disclose fully and fairly all material information within the board's control." *Skeen.*, 750 A.2d at 1172. TPL does not mention *Skeen* or *Gilmartin v. Adobe Res. Corp.*, 1992 WL 71510 (Del. Ch. Apr. 6, 1992), cited by Defendants for the same proposition. Instead, it offers a federal regulation that TPL claims would require a company to disclose a director's opposition only if the director had noted it in writing.[140] But the dissenting board votes of Messrs. Oliver and Stahl ***are*** noted in writing, in TPL's own board minutes.[141] And whatever the federal regulations might require, they do not excuse TPL from avoiding its obligations under Delaware law as reflected in *Skeen*, *Gilmartin*, and *Appel v. Berkman*, 180 A.3d 1055, 1058, 1063 (Del. 2018).

TPL also argues that, despite making a "false statement" in a proxy solicitation about Proposal Four, the Court should refrain from applying the unclean hands doctrine. TPL admits that its November 8, 2022 letter to shareholders "could have been stated more clearly," but this understates things.[142] TPL's own director admitted to its falsity at trial, and said he "would not like to have seen that statement

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[140] *See* PPTAB at 39 n.16 (citing Item 4(a)(1) of Schedule 14A).
[141] *See* JX474 at 9; JX475 at 1–2 (minutes of later Board meeting showing that Board, including Messrs. Oliver and Stahl, approved entering "into the official records of the Corporation" the earlier minutes reflecting in writing Messrs. Oliver and Stahl's opposition to Proposal Four).
[142] *See* PPTAB at 43.

in there."[143] And the Court found there to be "ample evidence to bring the crime-fraud exception into play on the fraud side" regarding what transpired during the process of drafting that solicitation.[144]

TPL tries to sweep its mess under the rug by arguing that Defendants waived their unclean hands defense.[145] But Defendants raised it in their Answer to TPL's Amended Complaint.[146] And, it was ***only five days before trial*** that TPL produced one of the documents used at trial to question Mr. Liekefett about the drafting of the false solicitation, following this Court's order granting in part Defendants' Motion to Compel.[147]

Moreover, the issue was tried with TPL's consent. While TPL did make a privilege assertion at trial that the Court rejected, it did not object to Defendants' questions on this topic on relevance or any other grounds. Nor could it, as the November 8, 2022 letter was marked as a trial exhibit, and was expressly referenced in the Stipulated Joint Pre-Trial Order.[148] As a result, even if the issue were not fully "raised by the pleadings," it was "tried by express or implied consent of the parties"

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[143] Kurz Tr. 69:3–6.
[144] Liekefett Tr. 105:14–22.
[145] PPTAB at 42.
[146] Defs.' Answer to Verified Am. Compl. (Dkt. 220 at 44).
[147] Order Granting Motion to Compel in Part (Dkt. 204) (April 11, 2023).
[148] *See* Joint Pre-Trial Order (Dkt. 227 at ¶ 60).

and should "be treated in all respects as if [it] had been raised in the pleadings." Ct. Ch. R. 15(b); *accord James v. Glazer*, 570 A.2d 1150, 1154 (Del. 1990).

Next, TPL makes a half-hearted suggestion that the statements in question were not actually false. Specifically, TPL argues that "Glass Lewis's commentary regarding 'potential obligations' is correct."[149] This contradicts Mr. Kurz's admission of its falsity.[150] And even if TPL could conjure some "potential" obligations it might possibly have undertaken and been unable to meet, Glass Lewis' commentary was not limited to such "potential obligations." Rather, TPL quoted Glass Lewis's concern that TPL could not meet "***current***" or "***existing*** obligations."[151]

This was indisputably a "false statement."[152] It was also material. What could be more material to stockholders than a statement about a company's ability to meet its existing obligations? And TPL's stock reacted accordingly, falling from an all-time high at the close of trading on November 7, 2022—the day before this disclosure was made—to roughly half that value today.[153]

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[149] PPTAB at 46.
[150] Kurz Tr. 68:1.
[151] JX511:2 (emphasis added).
[152] Kurz Tr. 67:19–68:1.
[153] *See Texas Pacific Land Corporation: Historical Data*, Yahoo! Fin., *available at* https://tinyurl.com/2d4ywseb.

Finally, TPL claims it cured its fraud by issuing corrective disclosures after trial. But this Court can take judicial notice of the fact that, between the record date for Proposal Four of September 22, 2022 and April 25, 2023, 6,226,000 shares of TPL common stock had been exchanged on the open market.[154] Other than stock held by Defendants, TPL had 5,938,861 outstanding shares as of the record date.[155] Thus, by the time TPL issued its corrective disclosures, its unaffiliated stockholder base had turned over more than 100%.

TPL is left to argue that stockholders who had already sold their TPL shares were still eligible to vote.[156] But they would have no incentive to do so. TPL's disclosures thus came too late to make a full impact. The impact a timely disclosure might have had, however, was apparent from the fact that over 200,000 shares were added to the votes "against" Proposal Four after the supplemental disclosure.[157]

In the end, the question before the Court is whether the unclean hands doctrine should apply where a company concealed material information from shareholders about Board members' votes on a proposal being made to stockholders, and sent

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[154] *See id.*

[155] JX543 (showing that Defendants owned 1,772,071 shares); JX431:6 (showing that total shares outstanding were 7,710,932).

[156] PPTAB at 44.

[157] TPL, Form 8-K (May 18, 2023), *available at* https://www.sec.gov/ix?doc=/Archives/edgar/data/0001811074/000110465923062322/tm2316194d1_8k.htm.

shareholders admittedly false information about that proposal. It does. Equity dictates that TPL forfeited any right to ask this Court to rescue Proposal Four from the rejection pile where it currently sits. The Court should leave it there.

III. CONCLUSION

Defendants respectfully submit that the Court should deny all relief requested by Plaintiff, and enter judgment in favor of Defendants on all claims.

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Dated: June 16, 2023

Words: 9,974

CERTIFICATE OF SERVICE

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