**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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

**DEFENDANTS' MOTION TO COMPEL**
**PLAINTIFF'S PRODUCTION OF DOCUMENTS AND INFORMATION**

This case involves a dispute regarding a voting restriction in a Stockholders' Agreement between Plaintiff Texas Pacific Land Corporation ("TPL") and two of its largest stockholders, Defendants Horizon Kinetics LLC and Kinetics Asset Management LLC (together, "Horizon") and SoftVest Advisors, LLC and SoftVest, L.P. (together, "SoftVest") (Horizon and SoftVest, collectively, "Defendants"). 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(a). "Stockholders shall not be required," however, "to vote in accordance with the Board Recommendation for any proposals (i) related to an

Extraordinary Transaction or (ii) related to governance, environmental or social matters[.]" §2(b).

The parties' dispute concerns whether a stockholder proposal at TPL's 2022 Annual Meeting to increase the number of TPL authorized shares by nearly six-fold ("Proposal 4") falls into one of these exceptions. As Defendants will prove at trial, it does. Indeed, TPL itself admitted in its 2022 proxy statement that a key purpose of Proposal 4 was to facilitate "strategic acquisitions." In essence, the enormous increase in authorized stock proposed under Proposal 4 would provide TPL with a blank check to pursue such paradigmatic Extraordinary Transactions. For this and other reasons, Proposal 4 was "related to" an Extraordinary Transaction.[1] It was also related to TPL's governance. For instance, TPL's 2022 proxy statement admits that a purpose of Proposal 4 was to enable it to make "grants" to employees and to consider "expanded…compensation plans." And executive compensation—particularly in the ESG context which TPL argues informs the Stockholders' Agreement's governance term—"relat[es] to" TPL's governance.

As the company that both negotiated the Stockholders' Agreement and proposed Proposal 4, TPL and its custodians possess the vast majority of information

[1] *Fla. Chem. Co. v. Flotek Indus., Inc.*, 262 A.3d 1066, 1083 (Del. Ch. 2021) ("[O]ur courts have considered the connector 'relating to' to be 'paradigmatically broad.'").

relevant to this case. However, TPL has been miserly in the information it is willing to share. For example, while Defendants proposed six custodians in the parties' initial proposed protocols, TPL proposed only two. TPL has since added two others, but has steadfastly refused to include two custodians (Micheal Dobbs, TPL's General Counsel, and Donald Cook, a critical board member)[2] who possess relevant information. In addition, although TPL acknowledged in its initial proposal that its two proposed custodians used law firm email addresses for relevant business, Plaintiff has refused to provide Defendants with hit reports they have requested for these email accounts. TPL claims a privilege concern with doing so but, as the custodians' attorneys, Plaintiff's counsel's review of such documents would waive no privilege—and certainly the mere provision of hit reports would not. Finally, in order to assess the potential transactions to which Proposal 4 relates, Defendants have consistently asked TPL to provide all counter-party names and codenames TPL developed to refer to potential transactions or transactional counter-parties. TPL delayed three weeks before providing any such data. And when it finally did, on January 18, 2023, it only provided codenames for select (not all) transactions and no codenames for potential transaction parties. Moreover, the next day, without so

[2] Recently, TPL offered to review Dobbs' communications, but only to the extent they were sent to one of Defendants' custodians. Since Defendants already have these communications, this was no concession at all.

much as running a hit report on the full list of relevant names, TPL declared that it will not search for or review documents hitting on the names or codenames of their various proposed transactions.

As a result, Defendants have been forced to bring this Motion to Compel and ask that the Court compel TPL to: (1) add Dobbs and Cook as custodians, (2) provide full hit reports for the original custodian's firm email addresses, and (3) provide and review documents hitting on all counter-party names and codenames developed by TPL to refer to any transactions considered in 2022.

## BACKGROUND

### A. Plaintiff refuses to collect from custodians with relevant information.

1. On December 15, 2022, the Court entered a stipulated scheduling order in this matter, scheduling a one day trial on April 17, 2023, and requiring substantial completion of the parties' document productions by January 30, 2023.

2. On December 20, 2022, the parties exchanged initial proposed search and collection protocols.[3] Plaintiff proposed ***only two*** individual custodians (John R. Norris III and David E. Barry, TPL's Co-Chairmen of the Board and former trustees of TPL's predecessor, Texas Pacific Land Trust) and ***no members of management*** as custodians. Defendants by contrast proposed six custodians. In the

[3] Ex. C (December 20, 2022 Email from Adam Schulman); Ex. B (December 20, 2022 Email from Alberto Chávez).

parties' meet and confer on December 22, 2022, Defendants requested four TPL custodians, including Tyler Glover (TPL's Chief Executive Officer), Chris Steddum (TPL's Chief Financial Officer), Micheal Dobbs (TPL's General Counsel), and General Donald Cook (TPL Director).[4]

3. Plaintiff ultimately agreed to collect and search Glover's and Steddum's emails, but still refuses to add Dobbs with nothing but a pretextual justification. First, Plaintiff alleges that Dobbs is not a relevant custodian because he did not serve as General Counsel when the Stockholders' Agreement was negotiated.[5] Further—despite representing that running search terms on Dobbs' documents produced approximately 10,000 unique hits—Plaintiff claims that Dobbs does not possess information relevant to this litigation that could not be obtained from other management custodians.[6] However, Dobbs was the primary person communicating with Defendants regarding Proposal 4 on behalf of TPL. And he has unique information—as his 10,000 unique hits demonstrate.

4. On December 28, 2022, Plaintiff refused to add General Cook as a custodian on the basis that he is a TPL director and therefore does not possess

[4] Ex. D (December 22, 2022 Email from Alberto Chávez).
[5] Ex. G (January 3, 2023 Email from Robert Garsson). Plaintiff made the same objection regarding Steddum but agreed to collect and search Steddum's emails, demonstrating that this objection is merely pretense.
[6] Ex. L (January 10, 2023 Email from Charlotte Newell).

management-level documents.[7] Defendants reiterated their request to add General Cook as a custodian on January 5, 2023,[8] and Plaintiff again refused.[9] General Cook serves as the Chair of the Nominating and Corporate Governance Committee and serves on the Compensation Committee.[10] Thus, he is likely to possess key information related to governance, executive compensation, and other central issues in this case related to the interpretation of the Stockholders' Agreement as it relates to Proposal 4. To the extent that Plaintiff contended that the addition of General Cook presented a burden issue, Defendants requested that Plaintiff provide a hit report on multiple occasions.[11]

**B. Plaintiff refuses to review documents related to transaction and party codenames.**

5. Defendants' First Set of Interrogatories, served December 13, 2022, sought information on parties with whom TPL discussed potential mergers and acquisitions, relevant to TPL's understanding of Extraordinary Transactions as well as the potential uses of stock raised from Proposal 4.[12] Plaintiff produced a list of 19 transactions on Schedule A to its Responses and Objections, but withheld names

[7] Ex. E (December 28, 2022 Email from Robert Garsson).
[8] Ex. H (January 5, 2023 Email from Robert Ritchie).
[9] Ex. K (January 9, 2023 Email from Charlotte Newell).
[10] *See* https://www.texaspacific.com/about/board-of-directors.
[11] *See* Ex. K (January 9, 2023 Email from Alberto Chávez); Ex. H (January 5, 2023 Email from Robert Ritchie).
[12] Ex. A (Def. First Set of Interrogatories No. 21).

from all but 5 entries.[13] To date, with only days remaining before the parties' substantial completion deadline, Plaintiff has provided only a single update to this list, providing Defendants with only 6 of the 19 counterparties relevant to Defendants' Interrogatory.[14]

6. Likewise, in an effort to engage in meaningful discussion regarding search terms, on December 29, 2022, Defendants requested any codenames that were used by TPL with respect to potential acquisitions, mergers, or other transactions during the relevant time period.[15] Finally, on January 18, 2023—weeks after Defendants' request—Plaintiff provided 14 codenames of the 19 potential transactions listed on Schedule A.[16] However, Plaintiff still has not provided any other codenames relevant to these projects—including codes used for the companies involved in these potential transactions.[17] Worse yet, without even providing hit reports, Plaintiff has refused to include documents hitting on these critical terms—which are likely to be among the most relevant documents in this case—in any search protocol.[18]

---

[13] Ex. I (Pl. Resp. and Obj. to Def. First Set of Interrogatories, Schedule A).
[14] Ex. N (January 18, 2023 Email from Adam Schulman).
[15] Ex. F (December 29, 2022 Email from Alberto Chávez).
[16] Ex. O (January 18, 2023 Schedule A).
[17] Ex. N (January 18, 2023 Email from Adam Schulman); Ex. P (January 19, 2023 Email from Alberto Chávez).
[18] Ex. Q (January 19, 2023 Email from Robert Garsson).

### C. Plaintiff refuses to provide requested hit reports on custodians' law firm email accounts.

7. Plaintiff's initial search and collection protocol listed just two custodians, Norris and Barry. In addition to their roles with TPL, during the relevant time periods Norris worked for the law firm Norris & Weber and Barry worked for the law firm Kelley Drye & Warren ("Kelley Drye"). In its initial search proposal, Plaintiff included Norris' and Barry's firm email accounts as email accounts to be searched.

8. On January 9, 2023, however, Plaintiff notified Defendants of its intention to significantly limit discovery from Barry's and Norris' firm email accounts. First, Plaintiff now refuses to collect (or provide hit reports for) Barry's Kelley Drye account on the grounds that Defendants served Kelley Drye with a third-party subpoena in this matter on January 6, 2023. Additionally, Plaintiff informed Defendants that it refuses to collect (or provide hit reports for) Norris' full law firm email account and that its collection would be strictly limited only to documents containing the terms "Texas Pacific" or "TPL."[19]

[19] Ex. M (January 16, 2023 Email from Charlotte Newell).

## ARGUMENT

### A. The scope of document discovery is broad.

9. Under Court of Chancery Rule 26(b)(1), "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Ct. Ch. R. 26(b)(1). "The scope of permissible discovery is broad, and the burden is on the objecting party to show why the information is improperly requested." *Deutsche Bank Nat'l Tr. Co. Americas v. Burley*, 2022 WL 17261514, at *3 (Del. Ch. Nov. 29, 2022). Court of Chancery Rule 37 provides that an opposing party may request an order to compel production where a party refuses to provide responsive, relevant and non-privileged information. Ct. Ch. R. 37(a)(2).

### B. Plaintiff must add Micheal Dobbs and General Donald Cook as document custodians.

10. Micheal Dobbs, TPL's General Counsel, is a relevant custodian who possesses responsive information. Indeed, Dobbs was the key contact for Plaintiff in communications with Defendants regarding the Annual Meeting and Proposal 4. And Dobbs was almost certainly communicating internally with TPL personnel about these conversations. Likewise, Dobbs would have inherited documents and emails even if he wasn't employed by TPL at the time of the execution of the Stockholders' Agreement.

11. In addition, Dobbs undoubtedly had communications with other TPL stockholders and members of the Board of Directors regarding the potential uses of Proposal 4. These potential uses will provide critical support for Defendants' argument that Proposal 4 "relate[s] to" an Extraordinary Transaction (such as a merger, acquisition, or other business combination) or the governance of TPL, and thus falls into one of the carve-outs to the Stockholders' Agreement's voting restriction. Nor is it plausible that Defendants could obtain all of the relevant information held by Dobbs from other custodians: As Plaintiff has repeatedly represented, Dobbs possesses approximately 10,000 unique, de-duped documents responsive to Defendants' search terms.[20]

12. For his part, General Cook has been the most involved and vocal supporter for Proposal 4 and is a key board member of TPL, serving as the Chair of the Nominating and Corporate Governance Committee as a member of the Compensation Committee. As a result, Cook's documents are likely to show Proposal 4's relation to executive compensation, which will support Defendants' argument that Proposal 4 is "related to" governance, and thus falls into one of the Stockholders' Agreement's carve-outs to the voting commitment at issue in this case. Moreover, by virtue of his integral involvement in the oversight of TPL,

[20] *See* Ex. G (January 3, 2023 Email from Robert Garsson).

General Cook is also likely to possess documents and communications concerning other potential uses of Proposal 4, and documents relevant to TPL's interpretation of the Stockholders' Agreement.

13. To the extent that Plaintiff claims that adding General Cook as a custodian poses an undue burden, Plaintiff has provided no hit reports or any other justification for such a position. *See BTG Int'l Inc. v. Wellstat Therapeutics Corp.*, C.A., No. 12562-VCL, at 43 (Del. Ch. Oct. 4, 2016) (TRANSCRIPT) (noting the need to provide a hit report to demonstrate undue burden because "[o]therwise, it's just you making stuff up. It's you making stuff up about what the burden is, and nobody has the ability to test it. And we are in a trust-but-verify world."); *see also In re Columbia Pipeline Grp., Inc.*, C.A. No. 2018-0484-JTL, at 16 (Del. Ch. Sept. 15, 2021) (TRANSCRIPT) ("I'm also quite disappointed that ordinary procedures weren't followed in terms of providing a hit report."); *Virtus Cap. L.P. v. Eastman Chem. Co.*, C.A. No. 9808-VCL, at 24 (Del. Ch. July 23, 2015) (TRANSCRIPT) ("That means if somebody asks you for a hit report, you're going to give it to them.").

### C. Defendants are entitled to documents related to Plaintiff's contemplated transactions.

14. As noted above, a central issue in this case is whether Proposal 4 was "related to" an "Extraordinary Transaction" which is defined in §16(a)(v) of the Stockholders' Agreement as any "tender offer, exchange offer, share exchange,

merger, consolidation, acquisition, business combination, sale, recapitalization, restructuring, or other 'matter[] involving a corporate transaction that require[s] a stockholder vote.'" In order to search for and obtain responsive information related to such transactions, it is necessary to identify counter-party and codenames used internally to refer to the potential counter-parties in them.

15. Defendants asked for Plaintiff to produce these codenames on December 29, 2022 so that it could engage in good faith negotiations regarding a search protocol. For three weeks, Plaintiff ignored Defendants' repeated requests until, finally, Plaintiff provided a partial list of codenames on January 18, 2023. The partial list, however, provides only select codenames identifying transactions themselves. Plaintiff has still not provided a comprehensive list of even these codenames, and has not provided any codenames relating to potential parties to these transactions, as Defendants had also requested. Nor has Plaintiff provided the complete list of counter-parties relevant to Schedule A.

16. Moreover, while Plaintiff has suggested that it will eventually provide this information, it has pre-emptively refused to review documents hitting on these terms—regardless of the burden (which, because it has not provided a hit report on these terms, Plaintiff still does not even know).[21] Plaintiff has offered no

[21] Ex. Q (January 19, 2023 Email from Robert Garsson).

justification for its blanket refusal to review and produce these documents, which are within the scope of discovery. Plaintiff should thus be compelled to provide a complete list of counter-party names and codenames used to identify any (1) potential TPL transactions in 2022 or (2) the parties to those transactions, and to review and produce responsive documents hitting on these terms.

**D. Defendants are entitled to complete hit reports on Barry's and Norris' firm email accounts.**

17. Despite initially proposing to collect and search of Barry's and Norris' law firm email accounts, Plaintiff now refuses to do so because: (1) Norris' law firm email account allegedly cannot be collected and searched in its entirety due to attorney-client privilege; and (2) collecting and producing Barry's law firm emails would allegedly be needlessly duplicative in light of Defendants' third-party subpoena to Kelley Drye. Neither is an adequate justification to avoid conducting a full collection of these email accounts.

18. First, there is no risk that collecting and searching Norris' firm email account breaks the attorney-client privilege. Under Delaware Rule of Evidence 502, a communication remains privileged when not shared with those other than the attorney and client. D.R.E. 502(a)(2). Accordingly, because of their attorney-client relationship, Plaintiff's counsel's collecting Norris' email account will not break

privilege.[22] As a result, Plaintiff's refusal to even collect Norris' firm emails that do not contain the words "Texas Pacific" or "TPL" is indefensible.[23] And there is certainly no justification for not even providing a hit report from Norris' firm email to allow Defendants' to craft their discovery requests. *See BTG Int'l Inc.*, C.A. No. 12562-VCL, at 42 ("Providing a hit report doesn't reveal any State secrets. It doesn't reveal any privileged information.").

19. Finally, Plaintiff now objects to reviewing Barry's Kelley Drye email account on the grounds that it is duplicative of a subpoena Defendants served on Kelley Drye. But the subpoena provides no basis to avoid this review. While the Court may limit discovery that it deems unreasonably cumulative or duplicative, "[o]bjections to discovery on this basis are usually denied [] unless the discovery request is *fully* duplicative and meant to harass the producing party." *Hamilton Partners*, 2016 WL 612233, at *6 (cleaned up) (emphasis in original). In this case, Defendants' discovery requests to Plaintiff and its third-party subpoena to Kelley Drye "[are] neither fully duplicative nor oppressive." *Id.* Rather, Defendants expect that "different individuals will produce different documents responsive to the same requests for production, a reality that defeats any fear of fulsome overlap" and also

[22] This is further protected by the confidentiality order in this action. D.I. 31, ¶ 18(g).
[23] Indeed, Defendants have not made a similar objection relative to the email for Jay Kesslen, Horizon's General Counsel.

allows Defendants "to test the truth, accuracy and completeness of extant and forthcoming production." *Id.* (cleaned up).

## CONCLUSION

20. Defendants respectfully request that the Court grant this Motion to Compel.

YOUNG CONAWAY STARGATT & TAYLOR LLP

OF COUNSEL:

*/s/ Alberto E. Chávez*

VINSON & ELKINS LLP

Rolin P. Bissell (No. 4478)
James M. Yoch, Jr. (No. 5251)
Alberto E. Chávez (No. 6395)
Michael A. Carbonara, Jr. (No. 6769)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Christopher E. Duffy
John Goodwin
1114 Avenue of the Americas
32nd Floor
New York, NY 10036
Tel: (212) 237-0000

Robert P. Ritchie
Meredith Jeanes Lyons
K. Virginia Burke DeBeer
2001 Ross Avenue, Suite 3900
Dallas, TX 75201
Tel: (214) 220-7823

*Attorneys for Defendants Horizon Kinetics LLC; Horizon Kinetics Asset Management LLC; SoftVest Advisors, LLC; and SoftVest, L.P.*

Words: 2,997

Dated: January 19, 2023

## CERTIFICATE OF SERVICE

I, Alberto E. Chávez, Esquire, hereby certify that on January 26, 2023, a copy of the foregoing documents were served on the following counsel in the manner indicated below:

**BY FILE & SERVEXPRESS**

A. Thompson Bayliss, Esq.
Adam K. Schulman, Esq.
George Mason Thomson, Esq.
Peter C. Cirka, Esq.
Abrams & Bayliss LLP
20 Montchanin Road
Suite 200
Wilmington, DE 19807

*/s/ Alberto E. Chávez*
Alberto E. Chávez (No. 6395)