IN THE SUPREME COURT OF THE STATE OF DELAWARE

HORIZON KINETICS LLC, HORIZON KINETICS ASSET MANAGEMENT LLC, SOFTVEST ADVISORS, LLC, AND SOFTVEST, L.P.,	)	No. 478, 2023
Defendants-Below/Appellants,	)	Court Below: Court of Chancery
v.	)	C.A. No. 2022-1066-JTL
TEXAS PACIFIC LAND CORPORATION,	)	**PUBLIC VERSION FILED - FEBRUARY 1, 2024**
Plaintiff-Below/Appellee.	)	

APPELLANTS' CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal is about the voting rights of several stockholders of Texas Pacific Land Corporation ("TPL"). It arises from a case brought by TPL under Section 225 of the General Corporation Law and concerns a contested vote of a proposal brought forth by the Board of TPL. The contested vote concerned a proposed amendment to TPL's charter, its foundational governance document, to authorize nearly 40 million new shares of common stock.

TPL's charter is unusual in that it does not authorize enough shares to permit new share issuances. All of its authorized shares have already been issued, eliminating the risk that current stockholders can be diluted. A majority of TPL's directors wanted to amend the charter to increase the number of authorized common shares by a factor of six, with the intent of using the newly-created shares as capital, primarily for future acquisitions. Defendants, long-term TPL stockholders, preferred the legacy capitalization structure. They opposed the charter amendment.

A majority of TPL's Board voted in favor of a resolution to push forward with the proposed amendment, but Defendants' two Board designees, Murray Stahl and Eric Oliver, dissented. The Board then put the proposed charter amendment to a vote of stockholders. TPL's Board recommended that stockholders vote in favor of the amendment, which it dubbed "Proposal Four." But TPL did not disclose that the

directors with the greatest financial interest in TPL—Stahl and Oliver—were opposed. Defendants, who collectively owned about 21% of TPL, voted all their shares against Proposal Four.

When the polls were set to close in November 2022, Proposal Four was on track to fail. Instead of respecting the lack of stockholder support, TPL's Board took steps to keep the polls open and sued Defendants. TPL argued that Defendants' votes against Proposal Four violated a Stockholders' Agreement—set to expire as the polls closed—that required Defendants to vote with the Board's recommendation on some matters.

In response, Defendants explained that TPL's reductive reading of the Stockholders' Agreement skipped past a number of crucial reservations of the Defendants' rights to vote on many important matters. Under those reservations, Defendants were free to vote as they saw fit on proposals that are:

- related to a recapitalization;
- related to a merger, consolidation, acquisition, or business combination;
- related to any other matters involving a corporate transaction that requires a stockholder vote; or
- related to governance matters.

Proposal Four was all of those things—and if it was even ***one*** of those things, then Defendants were free to vote how they wanted.

On April 17, 2023, the Court of Chancery held a one-day trial. On December 1, 2023, Vice Chancellor Laster issued his Post-Trial Opinion ("Opinion" or "Op."). Despite characterizing some of Defendants' textual arguments as "logical" and "stronger" than TPL's, the Opinion found that all the disputed terms in the Stockholders' Agreement were ambiguous. It then held that the supposed ambiguities should be construed in TPL's favor in light of just two pieces of extrinsic evidence. As a remedy, the Opinion deemed all of Defendants' shares to be voted in favor of Proposal Four, thus disenfranchising Defendants by judicial fiat on a hugely consequential change to TPL's charter that eliminated a key feature of the company's capital structure that had been in place since its establishment in 1888. The Opinion thus deprived Defendants of the right to vote against a change that they steadfastly believed would be harmful to the economic value of their own TPL stock.

The Court of Chancery overcomplicated this case. Instead of deciding it based on the inherent meaning of the contract and ordinary dictionary definitions, it credited TPL's strained interpretations, relying in part on the Vice Chancellor's own "gut" feelings about one disputed term. Having swung open the doors to extrinsic evidence, the Court of Chancery decided the case based on an illogical parsing of a non-party's email to himself, and a separate one-sentence text message sent by one of the Defendants.

All told, the Opinion misread the Stockholders' Agreement, misinterpreted the small amount of extrinsic evidence that it discussed, and rendered a judgment that is facially incorrect and contrary to Delaware's important public policy interest against stockholder disenfranchisement.

Accordingly, Defendants appeal the Court of Chancery's Opinion and Final Order and Judgment.

SUMMARY OF ARGUMENT

The Court of Chancery's conclusion that Defendants were obligated to vote in favor of Proposal Four was erroneous, and should be reversed, for five primary reasons:

1. *First,* the Stockholders' Agreement's reservation of Defendants' voting rights for any matter "related to" a "merger,…acquisition, [or] business combination" applies to Proposal Four. *See* Section I.C.1 below. Under Delaware law, the meaning of the phrase "related to" is "paradigmatically broad." It signals an intent "to capture the broadest possible universe" of potentially connected items. The relationship between Proposal Four and an acquisition easily falls within this wide scope. After all, TPL admitted in its Proxy that a key purpose of Proposal Four was to facilitate "strategic acquisitions" with stock. In testimony presented at trial, TPL's then co-Chairman conceded that the "primary purpose" of Proposal Four was "to do acquisitions" with stock. And after trial, TPL argued that a stay of the final judgment [redacted] during the pendency of this expedited appeal. [redacted] In short, there could hardly be a closer relationship between Proposal Four and an acquisition. This

Court should thus enforce the plain terms of the Stockholders' Agreement and find that Proposal Four is unambiguously "related to" an acquisition.

2. *Second*, the Stockholders' Agreement's reservation of voting freedom for any matter "related to" a "recapitalization" unambiguously applies to Proposal Four. *See* Section I.C.2 below. Under settled Delaware law, courts look to dictionaries to determine the plain meaning of terms. The Vice Chancellor rightly held that "dictionary definitions also favor" the conclusion that Proposal Four would effect a "recapitalization" of TPL. Op. 40–41. Nonetheless, he rejected the dictionary definition of "recapitalization" in favor of (i) a surplusage argument based on an unrelated provision of the contract, and (ii) his own "gut." But applying standard canons of interpretation to the unrelated provision makes clear that the Vice Chancellor misconstrued it. In any event, the Vice Chancellor's redefinition of "recapitalization" would not resolve the provision's superfluities. There was no legal basis to depart from the ordinary dictionary meaning of "recapitalization," and the Vice Chancellor's resort to his own subjective sense of the word was error.

3. *Third*, the Stockholders' Agreement's reservation of Defendants' voting rights for any matter "related to" a "corporate transaction that requires a stockholder vote" unambiguously applies to Proposal Four. *See* Section I.C.3 below. Delaware law requires a stockholder vote to approve charter amendments. And

Delaware case law repeatedly references a charter amendment as a prime example of a "corporate transaction" requiring a stockholder vote. It is 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."

4. *Fourth*, the Stockholders' Agreement's reservation of Defendants' voting rights for matters "related to governance, environmental or social matters" permits Defendants to vote at their discretion on Proposal Four. *See* Section II below. The 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) poison pills and other takeover defenses. TPL's lack of additional authorized shares places its Board on a "short leash," and requires TPL to be governed in a manner consistent with its historical practice of not having new share issuances. Proposal Four is designed to remove this governance restriction through an amendment to its Certificate of Incorporation—TPL's foundational governance document. It is thus "related to governance." But the Court of Chancery credited TPL's argument that "governance" should be read out of the agreement entirely, and that the provision should apply only to "environmental or social matters." This contradicts not only the plain language of the contract, but its structure. This is

because the carve-out is subject to an exclusion that removes numerous ordinary governance measures from its scope. If ordinary governance measures were never in the governance carve-out to begin with—as TPL's cramped interpretation posits—the exclusion would be absurd. TPL's interpretation is unreasonable.

5. *Finally*, even if the plain language of the Stockholders' Agreement were ambiguous—and it is not—the Court of Chancery erred in finding that extrinsic evidence was sufficient to overcome Defendants' stronger reading of its objective terms. *See* Section III below. In making this determination, the Opinion relied entirely on two documents pre-dating Proposal Four, and concluded that they evidenced a subjective belief that the Stockholders' Agreement obligated Defendants to vote for a Board-supported stock authorization. But Delaware adheres to the objective theory of contracts, under which the subjective legal opinions of non-lawyers are inadmissible and irrelevant in interpreting contracts. This is especially true here, where the Opinion engaged in only a superficial analysis of the extrinsic evidence, failed to analyze other statements by the same individuals who drafted the evidence he cited, and did not evaluate the weight of the evidence through the lens required in disputes involving stockholder disenfranchisement. Thus, even if this Court were to reach extrinsic evidence, it should reverse and render judgment for Defendants.

STATEMENT OF FACTS

1. The Texas Pacific Land Trust exists for more than 130 years without authorizing new equity.

Texas Pacific Land Trust (the "Trust") was formed in 1888. It arose from the bankruptcy of the Texas & Pacific Railway Company as a liquidating trust for bondholders of the bankrupt Texas Pacific Railway project. Op. 2.

The governing Declaration of Trust did not permit the trustees to "issue new equity, **eliminating the risk of shareholder dilution** from stock issuance." A0146 (emphasis in original). As a result, from its inception in 1888, the Trust never did so. A0145. In fact, it regularly returned capital to stockholders through dividends and stock buybacks, retiring many of the shares it repurchased. *Id.*

This long history of stockholder accretion attracted many investors, including Murray Stahl, Horizon Kinetics' CEO, who has owned shares of TPL personally and professionally since 1985. Since authoring a research report on TPL in 1995, Stahl 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 them. *See* A0170.

2. The Trust faces a proxy contest in 2019, which ultimately leads it to explore converting into a C-corp.

The Trust was historically managed by three trustees who served until resignation, disqualification, or death, under the terms of the Declaration of Trust.

Op. 2. In February 2019, one of them resigned. *Id.* This led to a proxy contest to replace the trustee, during which the Trust's unitholders overwhelmingly supported Eric Oliver, SoftVest's President. Op. 2–3; A3355:8–18.

The proxy campaign led to litigation, which was settled in July 2019. Op. 3. Under the Settlement Agreement, the Trust formed a "Conversion Exploration Committee" to explore "whether the Trust should be converted into a C-corporation." A2800 ¶22.[1] In exploring this question, the Conversion Exploration Committee also discussed the "key governance terms" that would be "given effect through the Charter and Bylaws of [a] 'post conversion' Texas Pacific Land Trust." A0213. As part of this discussion, the committee members debated whether the new corporation should authorize extra shares that could be issued later for subsequent corporate purposes. A3358:8–3359:1. Stahl and Oliver vigorously opposed the idea, noting that it ran counter to TPL's historical governance practice of "retiring units," a practice that they, along with much of the stockholder base, were "passionate" about. *Id*. The debate was not resolved by the Conversion Exploration Committee, and the issue was left open. Op. 3–4, 56.

[1] The Amended Complaint is at A2793–883.

3. The Trust enters into the Stockholders' Agreement with Defendants, and subsequently converts into a C-corp.

On June 11, 2020, the Trust and Defendants entered into the Stockholders' Agreement. Op. 5; A0218–48. Section 2 requires Defendants to vote "in accordance with the Board's recommendations," but reserved Defendants' voting rights on a wide array of important matters:

> Notwithstanding Section 2(a), the Stockholders shall not be required 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; *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.

Op. 6 (quoting A0220–21 §2(b); formatting in Opinion).[2] 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[.]

Op. 33 (quoting A0230 §16(a)(v)).

[2] The Stockholders' Agreement is at A0218–48.

The Opinion refers to the first reservation as the "Transaction Exception" and the second reservation as the "Subject Matter Exception." Op. 6. The Subject Matter Exception contains a "provided, however" clause—an "exception to the exception"—setting out circumstances where Defendants would have to vote with the Board's recommendation notwithstanding the Subject Matter Exception. *Id.* The Opinion defines the clause as the "Conversion Plan Exclusion." *Id*. This brief adopts the Court of Chancery's terminology for the reservations and the exclusion.

On January 11, 2021, seven months after the Stockholders' Agreement was signed, the Trust converted into a C-corporation. Op. 8. The Certificate of Incorporation fixed the total number of authorized shares at 7,756,156—the same number of units previously authorized and issued by the Trust—and immediately distributed all of them to the holders of Trust certificates. *Id.* Thus, like the Trust, the newly formed TPL "lacked the authority to issue additional shares of common stock," because all the authorized shares were already in the hands of stockholders of the new C-corporation. *Id.*

4. TPL identifies its lack of authorized shares as a key headwind to its strategic vision of growing through external acquisitions.

Since the conversion, TPL's management has sought to reposition TPL as an active M&A player. Op. 11–12; *see* A0413, A0416 (discussing TPL leadership's desire to "transition[] approach to active management" and grow TPL "through [an]

accretive acquisition program"). However, TPL's management has faced an obstacle in its efforts to transform TPL from what was effectively a mailbox to collect royalty checks with just a few employees, to the burgeoning oil and gas empire that current management envisions. Op. 12; A1273 (Glover Dep. 121:6–18); A1296 (Glover Dep. 213:19–25). Namely, "[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." A0785 (emphasis added).

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 one of the "Key Headwinds" to the "Strategic Vision" of TPL management. A0416.

For instance, in November 2021, TPL initiated a process to explore a large-scale stock-based acquisition of assets from Occidental Petroleum ("Oxy"). Op. 11. Because of TPL's lack of authorized but unissued shares, Oxy perceived an "execution risk on the part of [TPL] to be able to get [the] necessary approvals [to] consummate the transaction," and demanded "a premium on the proposed price," which brought negotiations to "a standstill" in early May 2022. A0428. There was ultimately no deal.

On May 16, 2022, shortly after the Oxy deal fell through, TPL contacted Brigham Minerals, Inc. ("Brigham") "and indicated [TPL was] no longer pursuing the [Oxy transaction] and would like to pursue a strategic combination with Brigham." A0868. On July 8, 2022, TPL made an indicative proposal to acquire Brigham in a transaction valued at $1.9 billion with 100% stock-for-stock consideration. A0431. The terms of TPL's indicative proposal would thus require it to use its own common stock as currency for the deal, even though the necessary amount of authorized common stock to make such a deal did not exist at that point.

In September 2022, Brigham announced that it had accepted an offer from another bidder. Op. 12. In response to this news, TPL privately observed that the price it offered was "pretty much on target" and discussed making "a competing bid…if we get the stock authorization." *Id.* (quoting A0758). But as with Oxy, there ultimately was no deal.

5. 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 a number of other potential targets, TPL's Board discussed a potential stockholder proposal to increase the number of authorized shares of common stock. Op. 12 (citing A0874–903). Although the

Board resolution was opposed by Defendants' designees on the Board—Stahl and Oliver—it passed by a majority vote. Op. 13.

On October 7, 2022, TPL filed its definitive proxy statement (the "Proxy") for its 2022 annual meeting of stockholders (the "Annual Meeting"), which sought approval of an amendment to the "Capitalization" section of TPL's Certificate of Incorporation to increase the number of authorized shares of common stock from 7,756,156 to 46,536,936. *Id.*; A0784.[3] Well before the Proxy was filed, Stahl, counsel for Horizon Kinetics, and Oliver all informed TPL that Defendants would vote their shares against Proposal Four, but the Proxy did not disclose this information. A0986; *see* A0760–859.

As the Proxy admits, Proposal Four was made because TPL "desires to have the flexibility to use Common Stock as consideration for the acquisition of additional assets." Op. 14 (quoting A0786). If it passed, TPL "could…use its ability to issue additional Common Stock for…payment of consideration for acquisitions." Op. 13–14 (quoting A0785). 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 pursing [sic] strategic acquisitions." Op. 14 (quoting A0786).

[3] The Proxy is at A0760–859, with the Proposal Four discussion at A0784–87.

The Proxy, however, concealed from stockholders the fact that the Board's recommendation for Proposal Four was not unanimous, and that the only Board members with significant ownership stakes—Oliver and Stahl—opposed it and asked to have their position disclosed to stockholders. A3365:1–13; A3311:7–24; *see also* A3164:6–10 (TPL director testifying at trial that the Proxy did not provide a "full characterization"). Many stockholders felt this information was important and reached out to TPL to ask whether Stahl and Oliver supported the proposal. *See* A0939; A0947. TPL's investor relations staff was instructed by management not to respond. *See* A1850 (Dobbs Dep. 234:18–235:19). The Proxy also did not disclose the existence of a committee designed to pursue acquisitions, the Strategic Acquisitions Committee. *See* A0760–859.

Then, on November 8, 2022, as the Annual Meeting approached, TPL sent a letter to stockholders about Proposal Four. Op. 17 (citing A0969–74). Among other things, the letter encouraged stockholders to vote for Proposal Four by quoting a third-party proxy advisory firm report stating:

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

Op. 18 (quoting A0969).

As a TPL director admitted at trial, this statement was false. *Id.* As TPL has since acknowledged, at that time TPL "had excellent fundamentals," "high-quality cash flows with minimal capital needs," and "a fortress debt-free balance sheet." A3173:15–3174:16.

In an inappropriate effort to dampen the influence that Defendants' votes could have on other stockholders, TPL strategically waited until the day before the Annual Meeting to disclose publicly that Horizon Kinetics and SoftVest voted against Proposal Four. Op. 18.

6. Proposal Four fails at the Annual Meeting, and TPL sues.

On the day of the Annual Meeting, Proposal Four failed to get enough votes to pass by the time the polls were set to close in November 2022. *Id.* On November 22, 2022, TPL filed this action. A2817 ¶85. A one-day trial was held on April 17, 2023, and a post-trial oral argument on June 30, 2023.

7. Following trial, TPL is forced to make corrective disclosures and closes the Annual Meeting with a stale record date.

In the wake of its admissions at trial of its prior misstatements and omissions, TPL was forced to update its proxy solicitation disclosures. Op. 19–21. Among other things, in its updated solicitation materials, TPL noted that, despite its prior statements, it had sufficient cash to meet its needs. Op. 20.

TPL also finally disclosed that Oliver and Stahl voted against Proposal Four at the Board level, as well, as the existence of the previously undisclosed Strategic Acquisitions Committee. Op. 19–21.

But these revelations came 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. *See* Op. 19, 21–22; A3574.

8. The Vice Chancellor holds that all relevant parts of the Subject Matter Exception and the Transaction Exception are ambiguous, and rules in favor of TPL based on extrinsic evidence.

On December 1, 2023, the Court of Chancery issued its Post-Trial Opinion. Ex. A. It held that all the disputed voting provisions of the Stockholders' Agreement were ambiguous, but that an "ultimately dispositive source of extrinsic evidence" established that Defendants must vote with the Board on Proposal Four. Op. 47, 55, 57–62. The trial court entered the Final Order and Judgment on December 18, 2023. Ex. B.

TPL subsequently opposed a motion to stay the judgment, and as grounds for its opposition argued that implementing Proposal Four [redacted] Specifically, TPL informed the trial court that it was [redacted]

[redacted] In addition, TPL contended that a stay would cause it to [redacted] TPL stated that [redacted]

ARGUMENT

I. The Transaction Exception applies to Proposal Four.

A. Question Presented

Did the trial court err in holding that the Transaction Exception was ambiguous as applied to Proposal Four? This question was raised below (A3606–24) and considered by the Court of Chancery (Op. 33–47).

B. Scope of Review

The trial court's interpretation of the Stockholders' Agreement, including the terms within it, is reviewed *de novo*. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. Merits of Argument

The Stockholders' Agreement includes a "Transaction Exception" that makes clear that Defendants do not have to vote with a Board recommendation on proposals that are "***related to*** an Extraordinary Transaction." A0220–21 §2(b) (emphasis added). 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." A0230 §16(a)(v).

By tethering this description of Defendants' continued voting rights to any proposal "related to" an Extraordinary Transaction, the Stockholders' Agreement

gives it a broad scope. Under well-settled Delaware law, "'relating to' is a phrase that 'sweeps broadly.'" Op. 36 (quoting *City of Newark v. Donald M. Durkin Contracting, Inc.*, 2023 WL 5517793, at *5 (Del. Aug. 28, 2023)). It has been described as a "paradigmatically broad term[]" and "unquestionably broad in reach." *Id*. (quoting *Lillis v. AT & T Corp.*, 904 A.2d 325, 331 (Del. Ch. 2006)). Indeed, it is a "term[] often used by lawyers when they wish to capture the broadest possible universe" of potentially connected items. *Id.* (quoting *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058 at *10 (Del. Ch. Jan. 23, 2006)).

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

The first reason Proposal Four is subject to the Transaction Exception is that Proposal Four is "related to" a "merger," "acquisition," or "business combination." *See* A0230 §16(a)(v) (defining Extraordinary Transaction as all of these things). As the Opinion correctly held, "[o]ne of the reasons why management wanted to increase the Company's authorized shares was to facilitate acquisitions." Op. 11.

The close relationship between Proposal Four and such acquisitions could not be more clear. Proposal Four arose after a presentation to the TPL Board by Credit Suisse in May 2021, in which Credit Suisse advised that "outsized share performance by TPL creates an opportunity for stock focused mergers," and that an "increase in the amount of shares authorized will provide TPL flexibility to

investigate these potential opportunistic transactions." A0300. Following this presentation, the Board discussed making a new share authorization proposal to TPL's stockholders, which management favored doing for the express purpose of obtaining flexibility to pursue "acquisitions." A1101 (Hesseler Dep. 66:1–12); *see also* Op. 37.

The idea was tabled in 2021 because of a lack of Board consensus, but in the months that followed, management continued to "express[] its desire to increase the number of authorized shares to facilitate acquisitions." Op. 12. Management argued that, "[a]fter several years of internal business building, [they] [were] now prepared to deploy [their] playbook on external opportunities." A0436. To do so on a major scale, however, TPL needed a major share authorization. *See* A1134 (Hesseler Dep. 200:12–17). Indeed, the transactions that TPL contemplated in 2022 with Oxy and Brigham were scuttled as a direct result of TPL not having significant equity currency on hand during negotiations. Op. 11–12. And management recognized that TPL's lack of "access to…authorized shares" was preventing it from "progressing transactions to formal decision points," and posed a "Key Headwind[]" for the strategic vision of growth by acquisitions. A0416; Op. 12.

On the heels of TPL's failure to consummate deals with Oxy and Brigham, TPL's Board met on August 31, 2022, to discuss TPL's upcoming Annual Meeting.

Op. 12. At the Board meeting, management reiterated that "[g]iven the current environment, we continue to believe pursuit of external acquisitions is the value maximizing strategy." A0576. As a result, management recommended that the Board pursue "an increase of 38,780,780 shares to an aggregate of 47,536,936 shares" which management suggested "would give the Corporation flexibility with respect to future uses…including as consideration for acquisitions." Op. 12 (quoting A0880). Following this presentation, the Board approved, over the dissent of Defendants' two Board designees, the inclusion of the share authorization proposal in TPL's 2022 Proxy. Op. 13.

The Proxy expressly confirmed that acquisitions are one of Proposal Four's purposes. In explaining its purpose for obtaining the "ability to issue additional Common Stock," the Proxy announced that "the Company desires to have the flexibility to use Common Stock as consideration for the acquisition of additional assets." Op. 13–14 (quoting A0785–86). And it warned investors that "failure to approve this Proposal Four…could, in effect, prevent the Company from pursuing strategic acquisitions." Op. 14.

After trial, TPL again confirmed Proposal Four's close relationship to acquisitions. [redacted]

[redacted] For example, [redacted] Moreover, TPL contends that [redacted]

In light of this record, there can be no serious dispute that Proposal Four is "related to" an acquisition. TPL's witnesses conceded as much. A3428:20–22; A1098 (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"). TPL's then co-Chairman Dave Barry went so far as to admit that acquisitions were Proposal Four's "***primary***" purpose.

> 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.

A3427:10–22.

[4] *See also* [redacted]

Moreover, Barry felt that Stahl's well-known resistance to "do[ing] any significant acquisitions" was sufficient, by itself, to make "clear" that Stahl "would be opposed" to Proposal Four. A0871. Again, the linkage between Proposal Four and doing acquisitions could not be clearer. This Court should thus find that the Transaction Exception applies to Proposal Four because Proposal Four is "related to" an acquisition.

In the Opinion, the Court of Chancery agreed that Defendants have the "relatively stronger" interpretation of whether Proposal Four is "related to" an acquisition. Op. 38. Nonetheless, it found TPL's alternative interpretation sufficient to render the provision ambiguous. This was error. "To demonstrate ambiguity, a party must show that the instruments in question can be ***reasonably*** read to have two or more meanings." *Harrah's Ent., Inc. v. JCC Holding Co.*, 802 A.2d 294, 309 (Del. Ch. 2002) (emphasis added); *see also Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982) ("[C]reating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."). Here, TPL's alternative interpretation posits that the phrase "related to" restricts the Transaction Exception's acquisitions clause to only proposals ***to approve*** a specific acquisition. Op. 34. This reading is unreasonable and fails to render the Transaction Exception ambiguous, for two primary reasons.

The first reason is that TPL's cramped interpretation of "related to"—under which a proposal can be "related to" an acquisition only if it seeks to approve a specific acquisition—is incompatible with Delaware law, which provides a "paradigmatically broad" interpretation of "related to." Op. 36 (collecting authorities). Nevertheless, the Court of Chancery seemed to credit TPL's reliance on a New York Stock Exchange ("NYSE") rule that lets brokers vote on stockholder proposals without receiving instructions from the underlying stockholder, as long as the proposal is deemed "routine" under NYSE Rule 452. Op. 34–35 The NYSE deemed Proposal Four to be routine under Rule 452, but there is no basis to give that determination any weight in interpreting the Stockholders' Agreement, which does not incorporate or even mention any NYSE rule.

Yet the Vice Chancellor found that "it is plausible that transactional attorneys negotiating the Transaction Exception might still think in terms of familiar paradigms like Rule 452." *Id.* This is beside the point. If the drafters of the Stockholders' Agreement had wished to use the "different standard" employed by Rule 452, *see id.*, they would have incorporated it. *Id.* (noting this "obvious problem" with TPL's position). Having chosen not to do so, NYSE Rule 452 is irrelevant.

TPL also argued that the Transaction Exception's acquisition clause can be invoked only when the proposal relates to a specifically identified transaction because it applies when a proposal is "related to ***an*** Extraordinary Transaction." Op. 37 (quoting A0220 §2(b)(i)) (emphasis added). But, as the Court of Chancery rightly noted, the use of the indefinite article "an" merely means that the proposal must relate to ***at least*** one acquisition. Op. 38 ("English speakers use the indefinite article 'an' when they are not contemplating a specific referent.") (collecting authorities). Here, Proposal Four relates to many acquisitions. Indeed, TPL testified through its CEO that TPL was injured by Defendants' votes due to the resulting inability to close acquisitions that otherwise would have been available to it between November 2022 and today:

> 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***.
>
> 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***.

A1289 (Glover Depo 183:13–184:4 (emphasis added)).[5]

The second reason the Court of Chancery erred in accepting TPL's alternative reading is that an interpretation does not render language ambiguous "if it 'produces an absurd result' or a result 'that no reasonable person would have accepted when entering the contract.'" *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023) (citation omitted). TPL's cramped interpretation of "related to"—limiting it only to votes "to approve" a specific transaction—leads to irrational results that objectively could not have been intended by the drafters of the Stockholders' Agreement.

Specifically, the manifest, objective intent of the Transaction Exception's acquisition clause was to preserve Defendants' right to vote against, among other things, any attempt by TPL to expand via external acquisitions that would be put to a stockholder vote, which for TPL would necessarily include any stock-based acquisition due to its lack of authorized shares. Were TPL correct that this clause applies only to proposals to approve a specific transaction, however, TPL could

[5] *See also* p. 24 above (summarizing TPL's post-trial position that [redacted]

sidestep Defendants' right to vote on such matters entirely by the legal technicality of breaking its pursuit of an acquisition into two steps: first seeking a large share authorization for the purpose of obtaining shares; and then using the newly authorized shares as currency for acquisitions. Under TPL's interpretation, Defendants have the right to vote on ***neither*** of these steps, erasing the protection provided to Defendants by the Transaction Exception's acquisition clause.

To be sure, acquisitions requiring an issuance of stock worth more than 20% of a company's market capitalization require a stockholder vote even if the corporation already has enough unissued stock on hand to complete the transaction. *See* 8 *Del. C.* § 251(f). But this provides no substantial protection here. For example, TPL's proposed $1.9 billion acquisition of Brigham in July 2022 would not have required an issuance of more than 20% of TPL's common shares. A0431. Yet, as TPL's then co-Chairman acknowledged at trial, the proposed Brigham transaction "would certainly come under [the] acquisition" prong of the definition of "Extraordinary Transaction." A2070 (Barry Dep. 179:15–20).

As this concession confirms, when the parties entered into the Stockholders' Agreement, "no reasonable person would have accepted" an interpretation of the Transaction Exception's acquisition clause under which Defendants' right to vote on a future transaction like Brigham could be eviscerated by a technicality. *Waystar*,

294 A.3d at 1044. TPL's interpretation, which does just that, thus "produces an absurd result" and is insufficient to create any ambiguity in the acquisitions clause. *Id*.

In any event, as TPL's post-trial briefing acknowledged, the Transaction Exception undisputedly applies where an "*actual* transaction" is at issue. A3540 ("The Extraordinary Transaction Carveout, by contrast, extends only to *actual* transactions."). [redacted] Thus, even under TPL's preferred interpretation, the Transaction Exception applies to Proposal Four.

2. Proposal Four is "related to" a "recapitalization" of TPL.

The Stockholders' Agreement also defines Extraordinary Transaction to include a "recapitalization." Op. 33 (quoting A0230 §16(a)(v)). Here, Proposal Four would directly effectuate a recapitalization by amending Article IV of TPL's charter—titled "Capitalization"—and at a bare minimum is "related to" one.

The Stockholders' Agreement does not define recapitalization. "Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract." *Lorillard Tobacco*

Co. v. Am. Legacy Found., 903 A.2d 728, 738 (Del. 2006).[6] "This is because dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract." *Id*.

The dictionary definition of recapitalization is "a revision of the capital structure of a corporation." *See* A4027; A4038 ("To change the capital structure of (a corporation)."). TPL's then co-Chairman identified that "currently the capital structure [of TPL] is basically common stock." A2065 (Barry Dep. 162:6–7).

The definition of "capital structure," in turn, is "the makeup of the capitalization of a business in terms of the amounts and kinds of equity and debt securities." A4019. And, as TPL's own expert admitted, by dramatically increasing the "amount[]" of "equity" available to TPL, Proposal Four would effect a "revision of the capital structure of the corporation." *See* A2563 (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].").

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[6] *See also State of Del. Dep't of Nat. Res. & Env't Control v. McGinnis Auto & Mobile Home Salvage, LLC*, 225 A.3d 1251, 1260–61 (Del. 2020) (Valihura, J., dissenting) ("Delaware case law is well settled that undefined words are given their plain meaning based upon the definition provided by a dictionary.") (cited with approval in *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 339 n.84 (Del. 2022)).

The Court of Chancery was thus correct in finding that "dictionary definitions also favor" the conclusion that Proposal Four would be a "recapitalization" of TPL. Op. 40–41 (surveying relevant dictionary definitions). As the Opinion explained:

> Chaining these definitions together, an increase in the number of authorized shares changes the Company's capital stock. A change in the Company's capital stock changes its capital structure. And a change in the Company's capital structure is a recapitalization. These dictionary definitions also favor the Investor Group.

Op. 41.

This should have ended things, but the Opinion mistakenly held the recapitalization clause to be ambiguous as applied to Proposal Four on two grounds: (1) a surplusage argument based on an unrelated provision of the agreement; and (2) the Vice Chancellor's "gut." Op. 41–44. As explained below, neither ground creates ambiguity as applied to Proposal Four.

First, the Opinion noted that Section 3(g) of the Stockholders' Agreement limits Defendants' ability to make public comments about, among other things:

> (B) any change in the capitalization, dividend or share repurchase policy of [the Company],
>
> (C) any other change in the Trust's or [the Company's] business, operations, strategy, management, governance, corporate structure, or other affairs or policies, [and]
>
> (D) any Extraordinary Transaction[.]

Op. 8.

The Vice Chancellor credited TPL's argument that the phrase "change in the capitalization" must be something different from an "Extraordinary Transaction," because both of them appear in the same provision, and, therefore, a recapitalization must be something different than a change in capitalization. Not so. The phrase "change in the capitalization" must be read in conjunction with "policy," which appears after the series of items that includes "capitalization." This reading is faithful to the "series-qualifier canon" described by the United States Supreme Court: "Under conventional rules of grammar, '[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series.'" *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402–03 (2021) (alteration in original; quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts ("*Reading Law*") 147 (2012)). As explained in *Reading Law*, drafters can easily avoid this construction by either (a) including a "determiner," such as "a" or "the," before the additional elements in the series of terms, or (b) sequencing the terms differently.

Here, Section 3(g) references "the capitalization, dividend, or share repurchase policy." Because "the" is not repeated before each element, they are not separate and distinct, meaning that the "policy" series-qualifier should apply to each. Thus, the provision must be read to refer to TPL's capitalization policy, dividend

policy, and share repurchase policy. A change in TPL's capitalization policy—which could affect its financial accounting and revenue recognition—is different from a change to its capital structure. Read in this manner, there is no redundancy within Section 3(g).

Moreover, as the Opinion acknowledged, "parties often include redundancies and inconsistencies in their agreements, whether strategically or unwittingly." Op. 42. And, here, the notion that the parties intended to avoid all surplusage in Section 3(g) is unsupported by the language of the Stockholders' Agreement. *See, e.g.*, Section 3(g)(c) (prohibiting statements about "any" "change" in TPL's "business," rendering the subsequent prohibition on statements about an Extraordinary Transaction, which would necessarily also involve a change in TPL's business, superfluous). TPL's interpretation does not eliminate such surplusage, rendering the canon against surplusage inapplicable. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) ("[T]he canon against surplusage merely favors that interpretation which *avoids* surplusage[.]"). As a result, TPL's Section 3(g) argument is not reasonable, and is insufficient to create an ambiguity. *See Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 588 (Del. Ch. 2006) (canon against surplusage "does not change the fact that courts will not bend contract language to read meaning into the words that the parties obviously did not intend").

Second, the Vice Chancellor applied his own "gut" sense that a recapitalization must involve more than "an increase in the number of authorized shares." Op. 43. But the "subjective" or "gut" sense of one jurist does not out-rank the ordinary dictionary-derived definition of "recapitalization." If the sophisticated parties that drafted the Stockholders' Agreement had desired to employ this narrower notion of a recapitalization, they could have defined the term to so limit it. Having not done so, Defendants are entitled to the full breadth of the term's ordinary meaning, as elucidated by dictionaries.

To support his "admittedly subjective sense," the Vice Chancellor cited a definition from the *Oxford Advanced Learner's Dictionary* ("*Oxford Learner's*"). Op. 43. It defined recapitalization as "the act of providing a company, etc. with more money." *Id*. But Proposal Four is a recapitalization under this definition too. This is because *Oxford Learner's* defines "money" to include "what you…use to buy things." *See* A4011–12. TPL acknowledged that the main point of Proposal Four is to provide it with "equity ***currency***"—a medium of exchange with which it could buy things. *See, e.g.*, A1837 (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."). Proposal Four thus provides TPL "with more money" in the form of equity currency. Op. 43. This places

Proposal Four at the heart of even the *Oxford Learner's* definition of recapitalization—and at a bare minimum makes it "related to" one.[7]

Moreover, after this appeal was filed, TPL submitted an affidavit to the Court of Chancery from its CFO saying that, if Proposal Four is implemented, "TPL could use the stock ***to raise capital***." A3987 ¶8 (emphasis added); *see also* A0464 ("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." (emphasis added)). Thus, even if the definition of Proposal Four were limited to accessing "more money"—which it is not—Proposal Four would still be "related to" a recapitalization.

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

The Stockholders' Agreement's definition of Extraordinary Transaction also includes "other matters involving a corporate transaction that require a stockholder vote." A0230 §16(a)(v). There is no dispute that amending TPL's charter requires

[7] The utility of *Oxford Learner's* here is questionable. It is a simplified dictionary for non-native "learners" of the English language. *See* A4006 ("Since 1948, over 100 million English language learners have used OALD to develop their English skills for work and study."). That an ESL dictionary defines a word through a simplified example is not surprising, and should not be construed as limiting the scope of the term when employed by contract drafters. *Cf.* Op. 40–41 (concluding that definitions from *Merriam-Webster* and *Black's Law Dictionary* "favor the Investor Group").

a stockholder vote. *See* A0257 (Certificate of Incorporation §10.1(B)); *Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1242 n.63 (Del. 2021) (Valihura, J., dissenting) (explaining that charter amendments under 8 *Del. C.* § 242 require a stockholder vote).

TPL is thus left to argue that Proposal Four is not a "corporate transaction." But Delaware courts have frequently described 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.*, 707 A.2d at 43 n.14 (emphasis added).[8] And Delaware law recognizes that "a corporate charter 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), *superseded on other grounds by statute*, 8 *Del. C.* § 204. 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." *See* A0129 (giving as examples "esp., the formation…of a contract").

[8] *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 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).

The Opinion describes TPL's invocation 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. Op. 44–45. According to TPL, this means that the "other matters" clause only encompasses "transformative transactions." Op. 45. But, TPL's CEO testified that "the passage of Proposal 4 would be…a ***transformative*** moment for the Company." Op. 46 (emphasis added). And this is clearly true, because it would transform TPL from its 135-year history as a company with ***no*** authorized-but-unissued shares into a company with tens of millions of them. *See* A0784. That would fundamentally transform the delicate balance of power between TPL's Board and its stockholders. Even accepting TPL's contention that the "corporate transaction" clause is limited to "transformative transactions," Proposal Four comfortably falls within its scope.

Moreover, a ruling for TPL here adversely affects the rights of ***all*** TPL stockholders, not just Defendants. Giving the Board voting control of Defendants' more than 1.5 million shares—about 21% of the company—would essentially modify the statutory requirement that a charter amendment have "the affirmative vote of a majority of the outstanding stock." *See* 8 *Del. C.* § 242(b)(2). In substance, it would reduce the statutory threshold necessary for a Board to obtain stockholder approval of a charter amendment from about 50.1% of all shares down to about 29%.

Reading the Stockholders' Agreement in this manner "sacrifices important corporate law values" because it would let TPL "evade existing limitations on the scope and structure of private ordering." Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 Wash. U.L. Rev. 913, 959 (2021).[9]

This Court should not accept an interpretation like TPL's that is so fundamentally contrary to Delaware's statutory scheme, especially where it is not unambiguously in TPL's favor, and where TPL's Board never informed stockholders that it purportedly obtained a blocking right against opposition to potential charter amendments. And the straightforward way to avoid that outcome is to interpret the Stockholders' Agreement to mean what it unambiguously says—that Defendants were free to vote as they pleased on Proposal Four.

[9] *See also Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996) (explaining that "all amendments to certificates of incorporation…require stockholder action. Thus, Delaware's legislative policy is to look to the will of the stockholders in these areas."); *see also id.* (explaining that, "to amend the certificate of incorporation under 8 *Del. C.* § 242…a majority of the outstanding stock entitled to vote must vote in favor," which means "stockholders control their own destiny through informed voting. This is the highest and best form of corporate democracy.").

II. Proposal Four relates to governance, and thus falls within the Subject Matter Exception to Defendants' voting commitment.

A. Question Presented

Did the trial court err in holding that the Stockholders' Agreement is ambiguous about whether Proposal Four is related to governance, environmental or social matters. This question was raised below (A3624–35) and considered by the Court of Chancery (Op. 47–57).

B. Scope of Review

The trial court's interpretation of the Stockholders' Agreement, including the terms within it, is reviewed *de novo*. *SI Mgmt. L.P.*, 707 A.2d at 40.

C. Merits of Argument

The Subject Matter Exception reserves Defendants' right to vote as they wish on proposals "related to governance, environmental, or social matters." A0220 §2(b).

Proposal Four relates to a fundamental corporate governance term—the number of shares of TPL's authorized common stock. There is no dispute that this is a corporate governance term, and the Opinion did not find differently. This should have resulted in a ruling in Defendants' favor.

The Court of Chancery, however, credited as reasonable TPL's position that "governance" should basically be read out of this provision—limiting its scope to

only "environmental" and "social" matters like climate change, human rights, and board diversity. Op. 48. This reading does not comport with the contract, which expressly includes the term "governance" in the disputed provision. The plain meaning of "governance" includes the concept of corporate governance terms like those in corporate charters.

Crucially, Defendants' reading aligns with the architecture of the Subject Matter Exception, because it includes an internal carve-out, which the Opinion dubs the "Conversion Plan Exclusion," requiring Defendants to vote with the Board on any proposal that would change a corporate governance term "set forth in the plan of conversion recommended by the Conversion Exploration Committee of the Trust on January 21, 2020" (the "Conversion Plan"). Op. 6. This exclusion from the Subject Matter Exception makes sense only if the Subject Matter Exception encompasses ordinary corporate governance matters in the first place.[10] Thus, as explained below, this Court should find that Proposal Four falls unambiguously within the Subject Matter Exception, permitting Defendants to vote against it.

[10] Proposal Four does ***not*** fall within the Conversion Plan Exclusion, because, as the Opinion explained, an increase in authorized common shares would not change any corporate governance term set forth in the Conversion Plan.

1. The Conversion Plan Exclusion shows that the Subject Matter Exception plainly encompasses Proposal Four.

The Opinion describes the Conversion Plan Exclusion as an "exception to the exception" that "restores the obligation to comply with the Voting Commitment for any proposal that would have the effect of changing any of the ***corporate governance terms*** set forth in the Conversion Plan." Op. 6 (cleaned up; emphasis added). Defendants agree. In fact, the Conversion Plan Exclusion deals ***exclusively*** with "corporate governance terms"—specifically, some of those that would appear in TPL's post-conversion corporate charter.

The Opinion correctly reasons that "determining the clear meaning of the Subject Matter Exception ***requires*** considering the exception to the exception," *i.e.*, the Conversion Plan Exclusion. Op. 47 (emphasis added). Engaging in that required exercise shows clearly that the first use of "governance" in the Subject Matter Exception ("governance, environmental or social matters") ***must*** encompass the concept of corporate governance terms in corporate charters, such as stock authorization. It otherwise is not necessary to carve out those corporate governance terms from the scope of the Subject Matter Exception.

This reading is the only reasonable way to harmonize the Subject Matter Exception with the Conversion Plan itself, which is incorporated by reference into the Stockholders' Agreement. *See In re Nat'l Collegiate Student Loan Trs. Litig.*,

251 A.3d 116, 151 (Del. Ch. 2020) ("As long as a contract refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties." (cleaned up)). The Conversion Plan was attached to formal resolutions that refer to a series of "***governance terms*** proposed to be given effect through the charter and bylaws…as reflected by the documentation at Annex B" of the Conversion Plan. A0205 (emphasis added). Annex B, in turn, is titled "Charter and Bylaws Provisions." A0213. Its opening paragraph describes Annex B as being "an overview of key ***governance terms***, proposed to be given effect through the Charter and Bylaws" of TPL. *Id.* (emphasis added).

One of the governance terms on Annex B is "Blank Check Preferred Stock." It says: "Authority is granted to and vested in the Board to authorize the issuance of Preferred Stock from time to time in one or more series…." A0216. This shows clearly that, as used in the Conversion Plan, the authorization of preferred stock is a governance term. And if the authorization of ***preferred*** stock is a "governance term," then surely the authorization of ***common*** stock is a "governance term" too. And that is what Proposal Four is all about—authorizing new shares of common stock.

This harmonization of the Subject Matter Exception, the Conversion Plan Exclusion, and the Conversion Plan, is how contract interpretation is supposed to

work. *See Stream TV*, 279 A.3d at 342 ("If any of the canons of construction applied, it would be the elementary canon of contract construction where the intent of the parties must be ascertained from the language of the contract. Reading the agreement as a whole, other provisions within the Omnibus Agreement shed light on what the parties meant by 'other disposition.'") (cleaned up). Read in this light, the ***only*** reasonable interpretation of governance in the Subject Matter Exception is that it encompasses corporate governance terms of the sort that appear in charters. A provision authorizing a certain number of shares of common stock fits neatly into this category. Thus, Proposal Four is a "proposal…related to governance, environmental or social matters" on which Defendants "shall ***not*** be required to vote in accordance with the Board Recommendation." A0220 (emphasis added).

If that's right—and it is—then TPL cannot prevail unless Proposal Four falls within the Conversion Plan Exclusion. As the Opinion held, it does not. The thrust of the Conversion Plan Exclusion is this: Even though Defendants have voting freedom for proposals related to governance, environmental or social matters, they still have to vote with the Board on any proposal related to a corporate governance term that would change a governance term set forth in the Conversion Plan.

And as the Opinion correctly held, Proposal Four would not do so. That's because the Conversion Plan's "list of key governance terms did ***not*** identify an

agreement on the corporation's authority to issue new shares. That point had been left open." Op. 5 (emphasis added); *see also* Op. 56 (explaining that lack of agreement on authorized common shares in Conversion Plan "is precisely why debate continued after the conversion was complete, ultimately giving rise to this case.").

2. Defendants' interpretation comports with the ordinary meaning of governance.

The Opinion did not address or rely on *any* dictionary definition of governance or corporate governance, which is contrary to this Court's jurisprudence. *See*, *e.g.*, *Stream TV*, 279 A.3d at 339 n.84.[11]

The failure to engage with dictionary definitions of governance was pivotal, because Defendants' reading of governance matches its ordinary meaning in the corporate context. There, governance means the "system or framework of rules and standards by which a company is—or companies generally are—managed, controlled, and held accountable." *See* A0111. For a Delaware corporation, the certificate of incorporation is the centerpiece of that "system or framework of rules and standards." Other dictionaries agree. For example, the *Oxford Learner's*

[11] *See also*, *e.g.*, *Options Clearing Corp. v. U.S. Specialty Ins. Co.*, 2021 WL 5577251, at *8 (Del. Super. Nov. 30, 2021) (LeGrow, J.) ("Well-settled Delaware law instructs this Court to look to dictionaries for assistance in determining the plain meaning of undefined contract terms.").

Dictionary that the Vice Chancellor consulted on recapitalization, defines governance as "the activity of governing a country or controlling a company or an organization; the way in which a country is governed or a company or institution is controlled." A4035–36.

Defendants' reading of governance also aligns with the interpretation of TPL's own expert. As Marc Weingarten explained, "[g]overnance refers to the allocation of power between and among the board and stockholders." *See* A1599 ¶77. He also testified that "governance" refers to "the extent to which shareholders get to participate in the decision-making process of the company." *See* A2363–64 (Weingarten Dep. 21:20–22:17); *see also* A1597 ¶72 (explaining that "corporate governance" means "the relative rights and powers of the board and the stockholders").

3. Proposal Four is unambiguously related to governance in the ordinary sense of the word.

Proposal Four is "related to governance" in the ordinary sense of the word in several important ways. For starters, it seeks to amend a corporate charter, something that one decision has described as the agreement "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) (describing certificate of incorporation and limited liability company agreements as "foundational"

governance documents). As if that were not enough to make Proposal Four related to governance, the specific amendment that Proposal Four seeks would authorize TPL to issue more common stock. As this Court once wrote, 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." *STAAR Surgical*, 588 A.2d at 1136 (emphasis added). Here again, the relatedness between Proposal Four and TPL's governance is clear.

The changes that Proposal Four would bring about are also clearly "related to governance." Broadly speaking, the historical lack of additional authorized stock at TPL has kept its directors on a "short leash" under tight control by TPL's stockholders. Without additional authorized shares, TPL cannot use its common stock as currency for an acquisition, or to TPL executives (aside from the limited number of previously-issued common shares in TPL's treasury). A1049–50 ¶56. The lack of shares also prevents TPL from using common stock to deploy a "poison pill" or execute another takeover defense designed to ward off a proxy contest or a potential acquiror.

This "short leash" gives TPL's stockholders a high level of control over events that might dilute their ownership.[12] A decision to authorize tens of millions of new shares upsets this delicate "allocation of power" between directors and stockholders. A1599 ¶77. Indeed, TPL's expert, Weingarten, conceded that "[i]f there was a provision in the charter that said the board shall not make acquisitions for stock unless the shareholders approve it and there's ***a proposal to change that*** to say we can do it if we – just if we want to, that ***would relate to governance***." A2432–33 (Weingarten Dep. 297:11–298:7) (emphasis added). And that is exactly what Proposal Four is—a proposal to remove the Board's existing inability to make acquisitions with stock.

It is patently obvious that Proposal Four is designed to reallocate power by loosening the governance restrictions imposed by the original charter's lack of additional authorized common stock. TPL conceded this by offering to its stockholders the following sales pitches when asking stockholders to vote for Proposal Four:

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[12] The principle of anti-dilution was central to the way that TPL operated from its founding in 1888 through the present, a period during which it regularly repurchased its own shares on the open market, and never issued new stock. As Murray Stahl put it in his first-ever report about Texas Pacific Land Trust in 1995, his investment thesis was that it was "slowly but steadily buying itself out of public ownership. It is accomplishing this by consistently applying its cash flow to the repurchase and retirement of its own shares." A0170.

(i) "[T]he Company desires to have the flexibility to use Common Stock as consideration for the acquisition of additional assets," Op. 14 (quoting A0786);

(ii) TPL could use newly authorized shares for "grants made to employees under new or expanded existing compensation plans or arrangements," *id.* (quoting A0785); and

(iii) 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]," A0786.

In these ways, Proposal Four plainly sought to change key aspects of TPL's governance. Indeed, a draft letter created before the 2022 Annual Meeting acknowledged the relationship of Proposal Four and governance, stating that stockholders were being asked "to approve, among other things, two very important proposals to ***enhance Texas Pacific's corporate governance*** and support our strategy." A0965 (emphasis added). Even the Opinion acknowledged that TPL "has never had authorized but unissued shares, meaning that increasing the authorized shares ***will give the board the freedom to take action without seeking stockholder approval beyond anything the Company could have done before.***" Op. 50 (emphasis added).

Despite its accurate observation that Proposal Four goes to the heart of the allocation of power between stockholders and directors, the Opinion speculated that, "[i]n the abstract," some hypothetical "governance professionals" might not agree

"that the issue touches on governance"—and on that thin reed decided that the meaning of governance in the Subject Matter Exception was ambiguous. Op. 50. But it was not the task of the trial court to imagine what some unnamed governance professionals may think in "the abstract."[13] A trial court's task instead is to determine the meaning of disputed contractual language by referring to key indicators of meaning inherent in the contract, and core interpretative materials such as dictionaries. Here, the Opinion failed to do so.

4. TPL's interpretation of governance in the Subject Matter Exception is not reasonable.

For its part, TPL contends that "governance" in the Subject Matter Exception can only mean "subjects like climate change, human rights, and board diversity." Op. 48. TPL bases this on the fact that "governance" is followed by the words "environmental or social." TPL argues that governance here does not mean governance in the ordinary sense, but instead means "ESG." The problem with TPL's argument is that TPL's directors, experts, and its own website all interpret ESG to extend to ordinary-course governance items such as director elections, governance documents, and executive compensation. A3743. For example, the "Governance" portion of the "ESG" section of TPL's website uses "governance" in

[13] The same goes for the trial court's speculation about "how transactional attorneys would expect the Transaction Exception to operate." Op. 35; *see* p. 26 above.

its ordinary sense—referring to the Board as a "governance body," referencing several of the Board's committees (including its compensation and governance committees), and referring investors to TPL's "Governance Documents." *See* A3017–26. TPL director Karl Kurz confirmed at trial that the "G" of ESG encompasses ordinary-course governance items such as terms of director elections, make-up of committees, and stock ownership policies for directors. *See* A3166:7–3168:1. Indeed, "executive compensation is regularly included as part of 'governance' in the ESG context." *See* A1054–55 ¶66 (collecting authorities). And since TPL's Proxy admits that TPL "could…use its ability to issue additional common stock for…grants made to employees," Proposal Four would be subject to the ESG carve-out even under TPL's cramped view of "ESG matters." *See* A0785; A1971 (Kurz Dep. 150:3–5).

If TPL meant to refer only to ESG matters in the Subject Matter Exception, it needed to do so explicitly. But it did not. It referred to "governance." Thus, TPL's proffered interpretation of the Subject Matter Exception is not reasonable, and the Opinion's contrary holding was error. This is particularly obvious in light of the presence of the Conversion Plan Exclusion within the Subject Matter Exception. As explained above, the Conversion Plan Exclusion ***expressly references*** a document (the Conversion Plan) that is chock full of corporate governance terms, including

one dealing with stock authorization. The Conversion Plan said nothing about topics like climate change or human rights. If the "governance, environmental or social" matters referenced in the Subject Matter Exception did not encompass typical corporate governance matters, then it would make no sense to add a carve-out that addresses ordinary corporate governance terms.

Put differently: If the Subject Matter Exception covered only environmental and social justice matters and the like, then the Conversion Plan Exclusion would be pointless, since those topics are absent from any of the "corporate governance terms" itemized and described in the Conversion Plan. That is not how Delaware courts interpret contracts. *See Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 387 (Del. 2012) (rejecting interpretation of company's charter that would "ignore the limited scope of the 'provided, however' provision and thereby render it 'superfluous'"); *Waystar*, 294 A.3d at 1044 ("[W]e endeavor 'to give each provision and term effect' and not render any terms 'meaningless or illusory.'") (citation omitted).

The Opinion's only articulated basis for finding TPL's alternative construction of "governance" in the Subject Matter Exception to be reasonable was that Defendants' interpretation supposedly "would largely swallow the Voting Commitment." Op. 55. As support, he cited Defendants' view that they need not

vote with the Board's recommendation on director elections. Op. 55 n.35. In 2021, Defendants did in fact vote contrary to the Board's recommendation in a director election. A3378:15–19; A1674 (Stahl Dep. 249:5–9). But the Court of Chancery was not asked to determine whether director elections fall within the Subject Matter Exception. In this context, its conclusion that "if the Voting Commitment means anything, it forces the Investor Group to vote with the Board on director elections," was beside the point, and needlessly explored the outer limits of the Subject Matter Exception instead of focusing on the question actually being litigated. Op. 55.

In any event, there are many topics on which Defendants would still have a voting obligation under Defendants' reading of the Subject Matter Exception—*e.g.*, a proposal to appoint an outside auditor, a proposal to enter a new business line, a proposal to invest corporate cash in a certain way, among many others. By contrast, a proposal for a massive new share authorization, which shifts the delicate balance of power between TPL and its stockholders, plainly relates to governance, and permits Defendants to vote how they want because of the Subject Matter Exception. *See* A1599 ¶77 ("Governance refers to the allocation of power between and among the board and stockholders.").

In the face of all of this, the Court of Chancery's crediting of TPL's interpretation of the Subject Matter Exception was error. It found ambiguity where none exists, and its ruling should be reversed.

III. The Vice Chancellor failed to properly weigh the extrinsic evidence in interpreting any ambiguity.

A. Question Presented

Did the trial court err in its application of extrinsic evidence to the Stockholders' Agreement in interpreting Defendants' rights to vote against Proposal Four? This question was raised below (A3745–54) and considered by the Court of Chancery (Op. 57–62).

B. Scope of Review

This Court reviews questions of law and contract interpretation *de novo* and factual findings for clear error. *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018).

C. Merits of Argument

Even if this Court were to consider extrinsic evidence, it does not support TPL's interpretation of the Stockholders' Agreement—and certainly is not sufficient to overcome Defendants' stronger interpretation of its objective terms. Op. 38.

As an initial matter, Section 17(g) of the Stockholders' Agreement, which governs its "Interpretation and Construction," expressly prohibits consideration of "events of drafting or preparation." A0233 §17(g). The Court of Chancery rightly held that this provision—which it called the No Drafting History Clause—bars consideration of contract negotiation history. Op. 27–33.

After finding ambiguity, the Vice Chancellor rendered his ruling based on just two pieces of purported extrinsic evidence among tens of thousands of documents produced in this case. Op. 61–62. He held that these two documents suggested that Stahl and Oliver must have subjectively believed that Defendants would be bound to vote with the Board on a proposal for a new stock authorization. *Id*. Doing so constituted legal error for at least two reasons.

First, "Delaware law adheres to the objective theory of contracts." *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014). This means that the "'parties' intent' is a term of art" under Delaware contract law. Op. 23. "Rather than referring to what the parties[] subjectively believed, it refers to the parties' shared intent as 'would be understood by an objective, reasonable third party.'" *Id*. Here, as the Opinion recognized, an objective, reasonable third party would find, based on the objective text, that Defendants had the "relatively stronger" reading of "related to" as it appears in the Stockholders' Agreement. Op. 38. Since that is the true test of contract meaning, it should have been the end of the matter. *Lorillard*, 903 A.2d at 740 (the "true test" of contract interpretation "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").

Nonetheless, the Opinion looked at evidence of purported subjective views of legal meaning to overturn the best interpretation of the Stockholders' Agreement's objective terms. Specifically, it relied on (1) a text message from Eric Oliver to his son, a Vice President and lead analyst of TPL at SoftVest, stating that Oliver was "lobbying for our ability to vote against" a share authorization proposal that pre-dated Proposal Four, and (2) notes from a non-party that purportedly reference pieces of a conversation with Murray Stahl supposedly suggesting that Stahl believed Horizon Kinetics would have to vote for an earlier share authorization. Op. 61–62. Under the objective theory of contracts, evidence purporting to reflect subjective interpretations is "not admissible," "unhelpful," and "irrelevant." Op. 25. Moreover, as this Court has recognized, "witnesses' opinions about various legal questions" are not entitled to weight, because "questions of legal interpretation are reserved for the Court." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 60 n.102 (2019) (quoting *CSH Theatres, L.L.C. v. Nederlander of S.F. Assocs.*, 2018 WL 3646817, at *22 n.248). The Court of Chancery's "dispositive" reliance on this evidence, *see* Op. 61, was legal error.

In explaining why it relied on these documents, the Opinion miscategorized them as "course of performance" evidence. *See* Op. 61 (citing Restatement (Second) of Contracts § 202). But neither of those documents constitute a course of

performance of the Stockholders' Agreement. Course of performance is a sequence of conduct where (1) the agreement of the parties involves repeated occasions for performance by a party; and (2) the other party knowingly accepts the performance or acquiesces in it without objection. Restatement (Second) of Contracts § 202(4); *see also* 6 *Del. C.* § 1–303(a) (similar). The principle "does not apply to action on a single occasion." Restatement (Second) of Contracts § 202(4) cmt. g. Here, the two documents relied upon by the Vice Chancellor at most constitute one-off commentary on potential future disputes, and were not even communications with TPL. They do not in any way represent repeated performance of the Stockholders' Agreement by any of the Defendants—or any performance at all, for that matter. *Cf.* Op. 61. They are thus not "course of performance" evidence.[14]

[14] *Radio Corp. of America v. Philadelphia Storage Battery Co.*, which was also cited in the Opinion, likewise discussed the principle of applying an interpretation given to a contract "by the acts and conduct of the parties." 6 A.2d 329, 340 (Del. 1939). This is merely an early formulation of the course of performance principle and the "acts and conduct" required should thus be the same as those required to trigger that principle. Moreover, the quotation from *Radio Corp*. cited in the Opinion was dicta, mentioned as part of an argument the Court rejected. It thus certainly cannot be read to justify a deviation from this Court's adherence to the objective theory of contracts or to authorize turning the process of ascertaining the parties' intent into a question of "what the parties subjectively believed." Op. 23 (citing *Salamone*, 106 A.3d at 367–68). In any event, Defendants' prior performance of the Stockholders' Agreement is consistent with their position here. In 2021, they voted against the Board's recommendation in a director election. *See* A2672.

Second, where an agreement is ambiguous, the extrinsic evidence and the objective terms of an agreement must be weighed together. *See Harrah's*, 802 A.2d at 317. Thus, there cannot be a judgment adopting TPL's interpretation unless TPL's extrinsic evidence supports its reading in a way that is sufficiently clear to "overcome" Defendants' stronger reading of the contract's objective terms. *Id.* Here, the Court of Chancery erroneously failed to weigh *all* the evidence in this matter. Instead, after concluding the Stockholders' Agreement is ambiguous, it proceeded to decide the case based solely on its assessment of the relative weight of the extrinsic evidence. Op. 62. This was legal error. And, here, when a proper weighing of the evidence is performed, including the relative strength of the parties contractual interpretations, it is clear that TPL's extrinsic evidence comes nowhere close to overcoming Defendants' stronger interpretation of the Stockholders' Agreement's objective terms.

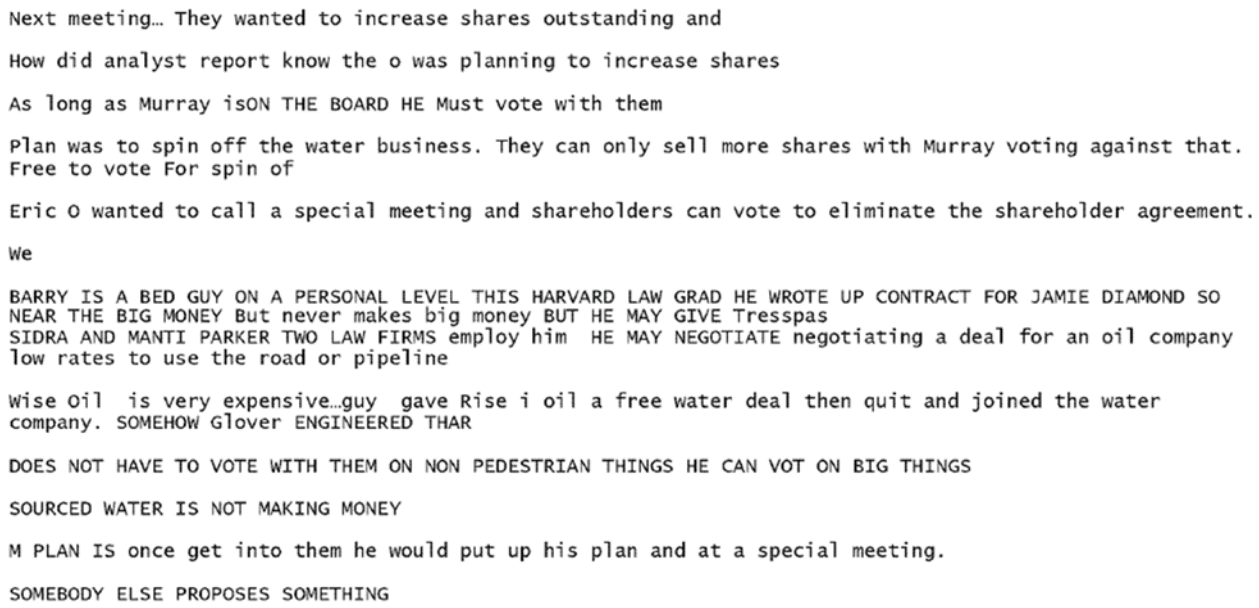
As mentioned above, the Opinion relied heavily on a September 2021 text message from Eric Oliver of SoftVest, to his son Kline Oliver, a Chartered Financial Analyst and Vice President of SoftVest, stating: "We are also lobbying for our ability to vote against if the Board does move forward." A0401–02. In response, Kline wrote: "Right, I get that. It's an uphill battle." A0402. Eric Oliver responded: "Want the minutes to reflect our stance." *Id.* This exchange suggests, at most, that

SoftVest anticipated opposition at the Board level to its views about the merits of a potential share authorization proposal, or to Defendants' ability to vote their shares against such a proposal. It does not suggest in any way that SoftVest believed that any such opposition had legal merit, or that the Stockholders' Agreement required SoftVest to vote in favor of a new share authorization if the Board proposed one. For the Court of Chancery to view the phrase "lobbying for our ability" to be a dispositive concession of contractual meaning, which it did, was clear error.

Moreover, and in any event, it was error to attribute Oliver's purported view to the Horizon Kinetics defendants. Oliver has no role at Horizon Kinetics. He is employed only by SoftVest. SoftVest held only 1.69% of TPL's stock entitled to vote on Proposal Four. *See* A1000; A0765. How these shares are voted on Proposal Four has no effect on the outcome of the vote on Proposal Four. *Cf.* A3574. Accordingly, the subjective views of SoftVest's president should be irrelevant to the outcome of Proposal Four and the Court of Chancery's erred by relying on them to decide this dispute.

The only other piece of extrinsic evidence cited in the Court of Chancery's analysis is an email that Lawrence Goldstein—a third party who has no role with Defendants—sent to himself in October 2021 that the Court of Chancery found to

reflect notes of a call with Stahl. A0407–08. The notes are hard to comprehend, to put it charitably. A portion is shown below:[15]



Next meeting… They wanted to increase shares outstanding and

How did analyst report know the o was planning to increase shares

As long as Murray isON THE BOARD HE Must vote with them

Plan was to spin off the water business. They can only sell more shares with Murray voting against that. Free to vote For spin of

Eric O wanted to call a special meeting and shareholders can vote to eliminate the shareholder agreement.

We

BARRY IS A BED GUY ON A PERSONAL LEVEL THIS HARVARD LAW GRAD HE WROTE UP CONTRACT FOR JAMIE DIAMOND SO NEAR THE BIG MONEY But never makes big money BUT HE MAY GIVE Tresspas
SIDRA AND MANTI PARKER TWO LAW FIRMS employ him HE MAY NEGOTIATE negotiating a deal for an oil company low rates to use the road or pipeline

Wise Oil is very expensive…guy gave Rise i oil a free water deal then quit and joined the water company. SOMEHOW Glover ENGINEERED THAR

DOES NOT HAVE TO VOTE WITH THEM ON NON PEDESTRIAN THINGS HE CAN VOT ON BIG THINGS

SOURCED WATER IS NOT MAKING MONEY

M PLAN IS once get into them he would put up his plan and at a special meeting.

SOMEBODY ELSE PROPOSES SOMETHING

Goldstein testified that he does not recall the email and that portions of it were "pure speculation on [his] part." A2220 (Goldstein Dep. 151:4–24), A2219 (Goldstein Dep. 148:7–11; 148:23–149:6) ("I have no recollection of anything that went on or of this email."); A2222 (Goldstein Dep. 161:8–13) ("I don't know where that word came from…."); A2225 (Goldstein Dep. 173:16–20) ("Mr. Stahl never discussed with me anything about proposals."). But, whatever these notes may mean, they certainly do not reflect, as the Opinion concluded, "Stahl's contemporaneous understanding that Horizon had to comply with the Voting

[15] Defendants have counted the words in this image against their word limitation.

Commitment for purposes of a Board-endorsed proposal to increase the authorized shares." Op. 10. Not even close. To the contrary, the document states: "DOES NOT HAVE TO VOTE WITH THEM ON NON PEDESTRIAN THINGS HE CAN VOT [sic] ON BIG THINGS." A0407. The Opinion describes this portion of the document as Goldstein's "summariz[ing of] the Voting Commitment," but inexplicably fails to address the fact that the proposal to increase TPL's share count six-fold is certainly a "non-pedestrian" item. Op. 10–11, 62; A0407–08. If anything, this email supports Defendants.

Moreover, the suggestion that Oliver and Stahl subjectively believed that they were bound to vote their company's shares in favor of any proposal for new stock authorizations does not cohere with the facts. For example, at a January 2020 meeting, the Trust's Conversion Committee discussed whether the post-conversion company should have more authorized common shares than those that would be issued to holders of the Trust's sub-share certificates upon conversion into a C-corp. *See* A3358:8–3359:1. Specifically, Oliver testified at trial—without contradiction from any witness—that:

> 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.

A3358:8–3359:1.

In the context of such adamant opposition to a share authorization, it is not reasonable to believe that Oliver intentionally relinquished any right to vote against a new share authorization when the Stockholders' Agreement was negotiated and signed just a few months later.

The facts concerning Stahl are similar. For instance, on August 5, 2021, TPL's Board held a meeting. A3361:22–3362:6. At that meeting, Micheal Dobbs—TPL's general counsel—suggested that the Stockholders' Agreement would require Defendants to vote in favor of a proposed stock authorization. A3363:21–3364:12. Stahl immediately disagreed, noting that Defendants would be relieved of any such obligations because a share authorization would be "a recapitalization of the company." *Id*. In other words the direct, uncontested evidence of the Defendants from a Board meeting—in contrast to the inscrutable "notes" of a third party that the Vice Chancellor somehow found "dispositive" (Op. 61)—show that Defendants understood that they were free to vote against a proposed stock authorization. *See also* A0860 (Oliver referring to Proposal Four as "extraordinary"). And TPL

ultimately decided not to include a stock authorization in its 2021 annual meeting. The Court of Chancery's analysis entirely ignored this evidence.[16]

In sum, the extrinsic evidence cited by the trial court falls far short of overcoming Defendants' stronger reading of the Stockholders' Agreement's objective terms. And it is worth emphasizing that this case implicates Delaware's "important public policy interest against disenfranchisement." *Salamone*, 106 A.3d at 371 (quoting *Harrah's*, 802 A.2d at 313). In the absence of a clear manifestation of intent to extend Defendants' voting commitment to share authorization proposals, the trial court should not have handcuffed them from voting against the highly consequential Proposal Four, as "[a] court ought not to resolve doubts in favor of disenfranchisement." *Salamone*, 106 A.3d at 370 (quoting *Rainbow Navigation, Inc. v. Yonge*, 1989 WL 40805, at *2 (Del. Ch. Apr. 24, 1989)). For that reason too, this Court should reverse, and render a decision that lets Defendants vote against Proposal Four.

[16] As noted above at p. 57, witnesses' interpretations of legal terms are not entitled to evidentiary weight, and the Vice Chancellor erred by finding otherwise. *See In re Shorenstein Hays-Nederlander Theatres LLC*, 213 A.3d at 60 n.102. But assuming *arguendo* that it was appropriate for the Court of Chancery to consider such materials as being the "dispositive source of extrinsic evidence," then it should also have considered the materials cited above, which the Opinion did not do.

CONCLUSION

Defendants respectfully request that this Court reverse the judgment of the Court of Chancery, dismiss TPL's claims, and render judgment in favor of Defendants.

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CERTIFICATE OF SERVICE

I, Michael A. Carbonara, Jr., Esquire, hereby certify that on February 1, 2024, a copy of the foregoing document was served on the following counsel in the manner indicated below:

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