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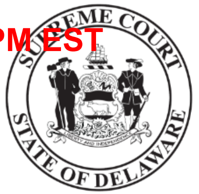

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BROOKFIELD ASSET MANAGEMENT, INC., ORION US HOLDINGS 1 L.P., BROOKFIELD BRP HOLDINGS (CANADA) INC., BRIAN LAWSON, HARRY GOLDGUT, RICHARD LEGAULT, SACHIN SHAH, and JOHN STINEBAUGH, Defendants-Below, Appellants/Cross-Appellees, v. MARTIN ROSSON and CITY OF DEARBORN POLICE AND FIRE REVISED RETIREMENT SYSTEM (CHAPTER 23) Plaintiffs-Below, Appellees/Cross-Appellants.	No. 406, 2020 Court Below: Court of Chancery of the State of Delaware, Consolidated C.A. No. 2019-0757-SG

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<u>CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL</u>

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Police and Fire Revised Retirement
System (Chapter 23)

Dated: February 18, 2021

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NATURE OF PROCEEDINGS

In this interlocutory appeal, defendants ask this Court to abandon a generation of controlling precedent, including *Gentile v. Rossette*,[1] granting minority stockholders direct standing where a controlling stockholder expropriates their economic interest and voting power. The trial court correctly denied defendants' motion as barred by *stare decisis*.[2] The trial court, however, incorrectly rejected plaintiffs' direct voting power expropriation claim.[3]

Plaintiffs challenge the unfair private sale of TerraForm Power, Inc. ("TerraForm") stock to Brookfield[4] for $650 million (the "Private Placement"), which enriched Brookfield by hundreds of millions of dollars and solidified and expanded its control over TerraForm. The Private Placement constitutes classic controller expropriation from minority stockholders. Brookfield dominated TerraForm and minority stockholders through its majority stockholding and contractual power to appoint Brookfield executives as TerraForm's top officers and as a majority of TerraForm's board of directors (the "Board").

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[1] 906 A.2d 91, 99-100 (Del. 2006).

[2] Memorandum Opinion, dated October 30, 2020 (the "Opinion" or "Op.") at 2, Exhibit A to Appellants' Opening Brief ("Br.").

[3] *Id*. at 26-32.

[4] References to "Brookfield" mean defendant Brookfield Asset Management, Inc., and its affiliates including defendants Orion US Holdings 1 L.P. ("Orion Holdings"), and Brookfield BRP Holdings (Canada) Inc. ("BRP Holdings").

The Private Placement partially funded TerraForm's acquisition of Saeta Yield, S.A. (respectively, "Saeta" and the "Saeta Acquisition"). Brookfield conceived of the Saeta Acquisition and Private Placement, and orchestrated them through its appointees at TerraForm.

The Board's Conflicts Committee originally anticipated funding the Saeta Acquisition through available liquidity and a $400 million equity offering made *pro rata* to all stockholders (the "Equity Offering"), with a Brookfield-suggested "backstop" agreement under which Brookfield would buy any unpurchased stock for $10.66 per share. But just minutes after stockholders authorized additional stock to fund the Saeta Acquisition, Brookfield set out to exclude minority stockholders and capture all of the benefits of the Equity Offering for itself. Brookfield quickly convinced the barely-advised Conflicts Committee to increase TerraForm's equity sale to $650 million. With the help of TerraForm's conflicted financial advisor, Brookfield then convinced the Conflicts Committee to abandon the Equity Offering and instead sell the stock to Brookfield at the discounted backstop price in lieu of conducting the Equity Offering.

By diverting the Equity Offering from all stockholders to itself, Brookfield increased its voting power and economic ownership of TerraForm from 51% to 65.3%, with a corresponding reduction to the minority stockholders' interests. The Private Placement brought Brookfield to the precipice of the supermajority

threshold in TerraForm's charter for stripping minority stockholders of various protections. Brookfield did not pay a fair price for increasing its stake. The minority stockholders received no compensation for falling further under Brookfield's domination. And Brookfield was able to purchase stock below the prevailing market prices, at the backstop price which was predicated on a multi-year stock price low and which did not reflect the substantial upside of the then-unannounced Saeta Acquisition.

After plaintiffs filed suit, Brookfield engineered a buyout of TerraForm's minority stockholders (the "Merger"). The Special Committee of directors appointed to negotiate for the minority comprised the same directors who approved the unfair Private Placement. The Special Committee ignored plaintiffs' outreach and did not even try to seek consideration for plaintiffs' derivative claims.

Plaintiffs lost derivative standing when the Merger closed, and their direct claims are the only current avenue to hold defendants accountable for the unfair Private Placement. Plaintiffs' complaint undisputedly states entire fairness claims. And *Gentile* undisputedly permits plaintiffs to directly challenge the Private Placement. The trial court correctly held that plaintiffs' allegations "fit *Gentile*'s transactional paradigm to a T."[5]

[5] Op. at 35-37.

This Court should uphold *Gentile* and affirm the finding that plaintiffs have direct standing. Defendants neither directly confront *Gentile*'s reasoning nor accurately characterize the legal standard it applied. Boiled down, defendants' argument is that because *Gentile* cited *In re Tri-Star Pictures, Inc. Litigation*,[6] this Court must have erroneously applied the special injury test (which prevailed when *Tri-Star* was decided) in lieu of the current test announced in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[7] However, *Gentile* mentioned "special injury" only once, and did so disapprovingly and in passing.[8] *Gentile* expressly applied and relied on *Tooley*, which ***lowered*** stockholders' burden to establish direct standing by holding that alleging direct harm to stockholders is sufficient and dispensed with the ***additional*** special injury requirement. In any event, *Tooley* did not address or overrule *Tri-Star*'s analysis of why minority stockholders suffer harm independent of the corporation in circumstances like those present here. *Tri-Star* remains instructive and was not undermined by the shift in standards. Defendants otherwise express mere disagreement with *Gentile* and fall far short of the high standard needed to establish grounds to completely abandon precedent. For these reasons and others, the Court should affirm.

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[6] 634 A.2d 319 (Del. 1993).

[7] 845 A.2d 1031 (Del. 2004).

[8] *Gentile*, 906 A.2d at 102 n.28 (citation omitted).

SUMMARY OF ARGUMENT

1. Denied. Plaintiffs have direct standing to challenge the Private Placement. Defendants distort *Gentile* as applying a special injury analysis and rejecting *Tooley*. *Gentile* itself explained that its holding "fits comfortably within the analytical framework mandated by *Tooley*[,]" which liberalized the standard for direct standing. *Gentile*, applying *Tooley*, correctly relied on *Tri-Star*'s analysis finding individual harm to stockholders.

Ironically, ***defendants*** abandon *Tooley*'s pragmatic two-part inquiry—who was harmed and who is entitled to the remedy?—in favor of dogmatic insistence that "dilution" claims are derivative. But defendants rely on inapposite authorities that do not involve comparable controller extractions. *Gentile* explained that categorizing the facts here as "dilution" inaccurately describes the "real-world impact" of the controller's expropriation of the minority's interest. Defendants ignore this analysis, and never explain why this Court should blind itself to reality.

Defendants also ignore the well-settled rule that some claims, including *Gentile* claims, are dual-natured and can be pursued both directly and derivatively. Their position that plaintiffs' claims cannot be direct because they are derivative therefore fails.

2. Denied. Precedent is not overruled "'except for urgent reasons and upon clear manifestation of error.'"[9] Unable to meet this rigorous standard, defendants invent an arbitrary category of "unsettled" decisions not worthy of precedential dignity. *Gentile*'s narrow rule, which requires a stock issuance that increases a controller's economic interest and voting power, has engendered no confusion. Rather, defendants identify trial court decisions that knowingly apply legal principles from *Gentile* (and other cases) to factual circumstances that do not meet *Gentile*'s clearly defined elements. This is ordinary course common law development and not a reason to abandon precedent. Mere disagreement is insufficient to overcome *stare decisis*, and defendants identify no legal or other developments that justify reversing *Gentile*.

3. Denied. Defendants' policy arguments are irrelevant under *Tooley* and have no basis in practice or experience. Defendants cite no authority for *Gentile* purportedly causing marketplace uncertainty, and Delaware courts have found that in reality, acquirors neither value nor pursue derivative claims. Defendants cite no examples of double-recoveries, and the trial courts have ample equitable tools to prevent such hypothetical harm without abrogating stockholders' individual rights.

4. The trial court erred in finding that plaintiffs failed to plead reasonably conceivable direct claims for voting power dilution. Such claims are well-

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[9] *White v. Liberty Ins. Corp.*, 975 A.2d 786, 790-91 (Del. 2009) (citations omitted).

established in Delaware law, as stockholders suffer the injury from wrongful voting power dilution. The trial court erroneously analyzed plaintiffs' claims through an entrenchment lens when the entire fairness standard governs, and impermissibly drew inferences against plaintiffs, including by effectively rejecting—as a matter of law—the possibility that a controller would need to engage in an entrenching transaction.

STATEMENT OF FACTS

A. The parties.

Prior to the Merger, TerraForm was a Delaware corporation that acquired, owned and operated solar and wind assets in North America and Western Europe.[10]

Plaintiffs City of Dearborn Police and Fire Revised Retirement System (Chapter 23) ("Dearborn") and Martin Rosson each held TerraForm stock before the Merger.[11]

Defendant Brookfield is a Canadian alternative asset manager.[12] Defendants Orion Holdings, a Delaware limited partnership, and BRP Holdings, a Canadian corporation, are Brookfield affiliates through which Brookfield controlled TerraForm before the Merger.[13]

Defendants Shah, Lawson, Goldgut, and Legault are Brookfield senior executives who Brookfield appointed as TerraForm directors in October 2017, and together comprised a majority of TerraForm's seven-member Board before the Merger.[14] Shah is CEO of Brookfield Renewable Partners ("BR Partners"), the

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[10] A086 (Verified Stockholder Derivative and Class Action Complaint, ¶ 13, C.A. No. 2020-0050-SG (Del. Ch. Jan. 27, 2020) (the "Complaint" or ("Compl.")).

[11] A086 (*Id.* ¶ 12); A044 (Verified Stockholder Derivative and Class Action Complaint, ¶ 10, C.A. No. 2019-0757-SG (Del. Ch. Sept. 19, 2019 (the "Rosson Complaint")).

[12] A087 (Compl. ¶ 14).

[13] A087-89 (*Id.* ¶¶ 14, 17-18).

[14] A089-91; A095 (*Id.* ¶¶ 19-22, 37-38).

Brookfield affiliate that acquired TerraForm.[15] Defendant Stinebaugh was TerraForm's CEO. Stinebaugh is a Brookfield Managing Partner and received no direct compensation from TerraForm.[16]

B. Brookfield becomes TerraForm's controlling stockholder.

TerraForm was formed in 2014. TerraForm's original sponsor and controlling stockholder declared bankruptcy in 2016 and was unable to continue owning and operating TerraForm.[17] In March 2017, TerraForm entered into an agreement through which Brookfield acquired 51% of TerraForm's common stock and became TerraForm's controlling stockholder (the "2017 Merger").

In connection with the 2017 Merger, Brookfield and TerraForm entered into various sponsorship agreements (the "Sponsorship Agreements") establishing their rights and obligations related to Brookfield's governance and operation of TerraForm. Under those agreements, Brookfield provided management and administrative services to TerraForm, and appointed TerraForm's CEO, Chief Financial Officer, and General Counsel.[18] Brookfield could also designate four of the Board's seven directors as long as Brookfield was TerraForm's majority

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[15] A090-91 (*Id.* ¶ 22); A318-319 (Transmittal Decl. of Ned Weinberger in Support of Pls.' Answering Brief in Opp'n to Defs.' Mot. to Dismiss ("Weinberger Decl.") Ex. 1 at 18, ALT-123).

[16] A091 (Compl. ¶ 23)

[17] A091-93 (*Id.* ¶¶ 25-29).

[18] A093-94 (*Id.* ¶¶ 33-35).

stockholder.[19] Brookfield appointed its executives to each such directorship.[20] The Sponsorship Agreements required that TerraForm's three non-Brookfield directors comprise a Conflicts Committee charged with reviewing and approving conflicted transactions with Brookfield.[21]

C. TerraForm seeks to finance a buyout of Saeta through the Equity Offering.

Around January 2018, Brookfield approached TerraForm regarding a transformative opportunity to acquire Saeta—a Spanish entity that owned and operated wind and solar energy assets—for $1.2 billion (*i.e.*, the "Saeta Acquisition").[22] TerraForm had the debt capacity and cash to fund most or all of the Saeta Acquisition.[23] Brookfield, however, recognized from non-public information available to it the substantial upside associated with the Saeta Acquisition.[24] Brookfield therefore attempted to steer TerraForm into funding the

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[19] A095 (*Id.* ¶ 37).

[20] A095 (*Id.* ¶ 38)

[21] A096 (*Id.* ¶ 40).

[22] A082-83; A098 (*Id.* ¶¶ 3, 44).

[23] A083; A107-08 (*Id.* ¶¶ 4, 52).

[24] The non-public information is extensively described and reproduced in the Complaint, and includes (i) TerraForm's intention to enter into the Saeta Acquisition, (ii) long-term projections for TerraForm and Saeta, (iii) business plans for TerraForm both including and excluding Saeta, and (iv) presentations reflecting the projected increase in TerraForm's stock price and accretion resulting from the Saeta Acquisition. A098-107; A111-114 (*Id.* ¶¶ 45-51, 59-60). TerraForm

Saeta Acquisition with a backstopped equity offering, which could allow Brookfield to cement its control of TerraForm at a discount.[25]

At a January 26, 2018 meeting, the Conflicts Committee sought an explanation for why a funding plan with "more debt and less equity" would not be as advantageous to TerraForm as Brookfield's proposal.[26] On February 6, 2018, the Conflicts Committee approved a support agreement with Brookfield (the "Support Agreement"), pursuant to which Brookfield contracted to backstop (the "Backstop") a $400 million public equity offering that could be made *pro rata* to all stockholders (the "Equity Offering").[27] The Support Agreement called for Brookfield to purchase for $10.66 per share any stock not purchased in the Equity Offering. The Backstop price represented TerraForm's average stock price over a five-day period during which TerraForm had not yet disclosed its intention to pursue the Saeta Acquisition. The five-day period covered a multi-year nadir for TerraForm's stock price, including the two lowest closing prices for TerraForm's stock in a nearly two-year period.[28]

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admitted that this information was material and non-public in a filing below concerning confidential treatment.

[25] A083; A108; A110-11 (*Id.* ¶¶ 4, 53, 57-58).

[26] A110-11 (*Id.* ¶¶ 57-58).

[27] A083-84; A114-15 (*Id.* ¶¶ 5, 61-63).

[28] A115; A129-30 (*Id.* ¶¶ 63, 103).

The Conflicts Committee did not consult an independent financial advisor when it approved the Support Agreement, relying instead on: (a) representatives of Brookfield (*i.e.*, TerraForm's counterparty); (b) TerraForm's management (*i.e.*, Brookfield); and (c) TerraForm advisor Barclays Capital Inc. ("Barclays"), which had received millions of dollars in fees from Brookfield on numerous retentions and which, concurrently with its work on the Saeta Acquisition, was underwriting a far larger, unrelated transaction for Brookfield.[29] The Support Agreement required TerraForm to retain an "independent financial advisor" to advise TerraForm and the Conflicts Committee concerning the Equity Offering.[30]

On February 7, 2018, TerraForm publicly disclosed its intention to acquire all outstanding shares of Saeta via tender offer (the "Tender Offer"). TerraForm announced its expectation to fund the $1.2 billion acquisition with $800 million in available liquidity and the $400 million Equity Offering.[31] The Tender Offer commenced on May 3, 2018.[32] On May 10, 2018, TerraForm issued a proxy statement seeking stockholder approval to issue up to 61 million shares of stock to facilitate the Equity Offering (the "Share Issuance").[33]

D. Brookfield steers TerraForm into the Private Placement.

Stockholders approved the Share Issuance at TerraForm's May 23, 2018 meeting.[34] Minutes later, Brookfield managing partner and TerraForm CEO

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[29] A109-11; A114-15 (*Id.* ¶¶ 55-58, 61).

[30] A116 (*Id.* ¶ 66).

[31] A116-17 (*Id.* ¶ 67).

[32] A117 (*Id.* ¶ 69).

Stinebaugh proposed to the Board that TerraForm raise $650 million—rather than $400 million—through the Equity Offering.[35] Brookfield senior executive and TerraForm director Shah immediately indicated Brookfield's willingness to backstop the entire $650 million offering. Stinebaugh then suggested that Brookfield could instead simply buy all $650 million of TerraForm stock.[36]

TerraForm had little time to finalize a new financing plan. Spanish authorities required the open Tender Offer to be fully funded by June 11, 2018.[37] And yet, the Conflicts Committee's first meeting with its financial advisor, Greentech Capital Advisors Securities, LLC ("Greentech"), did not occur until after the May 23, 2018 Board meeting.[38]

At that meeting, Greentech provided the Conflicts Committee its only written presentation,[39] which contained no advice regarding the fairness of a private placement to Brookfield, and specifically contemplated that Brookfield would backstop a $650 million offering even though that proposal was first made mere hours earlier.[40] Greentech's materials revealed that a $650 million equity

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[34] A117 (*Id.* ¶¶ 70-71).

[35] A118 (*Id.* ¶ 73).

[36] A084-85; A118 (*Id.* ¶¶ 7, 74).

[37] A125-26 (*Id.* ¶ 92).

[38] A084-85; A119-20 (*Id.* ¶¶ 7, 77-78).

[39] A119-20 (*Id.* ¶ 78).

[40] A118; A119-20 (*Id.* ¶¶ 73, 78).

offering would "significantly reduce returns" and accretion from the Saeta Acquisition relative to a $400 million offering.[41] Nevertheless, the following day the Conflicts Committee approved increasing the Backstop to $650 million.[42]

Most of the information presented to the Conflicts Committee after May 24, 2018 was geared towards convincing the Conflicts Committee to abandon the Equity Offering in favor of a $650 million private placement with Brookfield. During this period, the Conflicts Committee received no advice concerning whether a private placement with TerraForm's controller (whether or not at a discount) was fair or superior to TerraForm's financing alternatives.[43]

At a June 4, 2018 Conflicts Committee meeting, Barclays advised it would not proceed with the Equity Offering absent TerraForm's pre-commitment not to exercise the Backstop.[44] Relying on a recommendation from management (*i.e.*, Brookfield), the Conflicts Committee approved exercising the Backstop in lieu of the Equity Offering.[45] On June 7, 2018, the Board authorized the sale of

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[41] A120 (*Id.* ¶ 80).

[42] A123 (*Id.* ¶ 84).

[43] A084-85; A122-24 (*Id.* ¶¶ 7, 83, 86).

[44] A125-26 (*Id.* ¶ 92).

[45] A085; A126 (*Id.* ¶¶ 8, 93).

60,975,609 TerraForm shares to Brookfield for $650 million using the $10.66 per share Backstop price (*i.e.*, the "Private Placement").[46]

TerraForm funded the Saeta Acquisition with the $650 million from the Private Placement and available liquidity.[47] On June 25, 2018, TerraForm's stock closed at $11.77 per share, 10.4% above the $10.66 per share Private Placement price. In less than two weeks, Brookfield had obtained an unrealized profit of $68 million.[48] On January 23, 2020, just prior to the Complaint's filing, TerraForm's stock closed at $17.30 a share, representing $400 million in unrealized profit to Brookfield from the Private Placement.[49]

E. The Private Placement exacerbated Brookfield's domination of TerraForm's minority stockholders.

Replacing the anticipated $400 million Equity Offering with the $650 million Private Placement increased Brookfield's economic interest in and voting power over TerraForm from a slim 51% majority to a 65.3% near-supermajority.[50] Without the Private Placement, Brookfield would have lost its voting majority upon TerraForm's $250 million public offering in 2019 (the "2019 Offering").

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[46] A085; A126 (*Id.* ¶¶ 9, 94).

[47] A085; A127 (*Id.* ¶¶ 9, 96).

[48] A127 (*Id.* ¶ 98).

[49] A128 (*Id.* ¶ 99). TerraForm's stock price closed at $18.35 per share on May 8, 2020. A293.

[50] A131 (*Id.* ¶ 105).

The 2019 Offering represented a 57% per share premium over the Private Placement (*i.e.*, $16.77 vs. $10.66 per share), and Brookfield did not purchase sufficient stock in the offering to maintain its ownership percentage.[51] Under TerraForm's certificate of incorporation (the "Charter"), if Brookfield lost majority control, one of its four Board designees would be replaced by an independent director, converting the Board to majority-independent.[52]

The Private Placement effectively empowered Brookfield to eliminate the Charter's supermajority vote requirement provision (the "Supermajority Vote Requirement"), which protected TerraForm's minority stockholders from Brookfield.[53] TerraForm disclosed in 2019 that Brookfield (through the Board) intended to use its increased voting power at TerraForm's 2020 annual stockholders meeting to amend the Charter to sunset the Supermajority Vote Requirement.[54]

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[51] A131-32 (*Id.* ¶ 106).

[52] A095 (¶ 37); A236-37 (Transmittal Aff. of Stephen C. Childs, Esq. in Support of Defs.' Opening Br. in Support of Mot. to Dismiss and Stay ("Childs Aff."), Ex. 2, Art. 6 § 3(a-b)).

[53] A132 (*Id.* ¶ 108). Under the Supermajority Vote Requirement, the amendment, alteration, or repeal of various Charter provisions—included those relating to director removal, voting and dividend rights, liquidation, dissolution, winding up, and the Supermajority Vote Requirement itself—require the approval of 66.7% of TerraForm's stockholders. A133-34 (*Id.* ¶¶ 109-10).

[54] A135 (*Id.* ¶¶ 113-14).

F. The Special Committee obtains no value for plaintiffs' derivative claims in the Merger.

On January 11, 2020, after Rosson filed his complaint and Dearborn demanded TerraForm's books and records, Brookfield-affiliate BR Partners made an unsolicited proposal to acquire all of TerraForm's public shares in exchange for BR Partners units or shares of Brookfield Renewable Corporation ("BR Corp").[55] The following day, the Board formed a special committee comprised of the Conflicts Committee directors to consider a transaction with Brookfield (the "Special Committee").[56]

On or after January 27, 2020, the Special Committee asked its counsel to "consider [Dearborn's] Complaint and any potential effects arising from the Complaint on the Special Committee's consideration of [BP Partners'] Proposal."[57] The Special Committee next considered this litigation at its February 19, 2020 meeting, when it valued plaintiffs' claims as "de minimis" relative to a proposed Brookfield buyout and "not sufficiently material to factor into the negotiation of the economic terms" of a merger. The Special Committee concluded at that meeting "that further consideration of the value of the derivative claims would not be constructive or necessary."[58] The Special Committee partially based its

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[55] A329 (Weinberger Decl., Ex. 1 at ALT-133).

[56] *Id*.

[57] A331 (*Id*. at ALT-135).

decision on its "members' prior familiarity with the derivative claims and the facts at issue"—*i.e.*, the fact that the Special Committee members themselves had approved the Private Placement.[59]

On March 16, 2020, BR Partners and BR Corp agreed to acquire all TerraForm stock not held by Brookfield, subject to approval by TerraForm's minority stockholders (*i.e.*, the "Merger"). The Merger closed July 31, 2021.[60]

G. Relevant proceedings to date.

On September 19, 2019, Rosson filed his derivative and class action complaint.[61] On January 27, 2020, Dearborn filed a derivative and class action complaint alleging breaches of fiduciary duty by all defendants (*i.e.*, the "Complaint").[62] On February 13, 2020, the trial court consolidated the actions and designated the Complaint as operative.[63] Plaintiffs allege that the unfair Private Placement harmed TerraForm's minority stockholders "through a reduction in economic value and voting power[.]"[64]

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[58] A334 (*Id*. at ALT-138).

[59] *See id*.

[60] A452.

[61] A038-77 (Rosson Complaint).

[62] A078-144 (Complaint).

[63] A145-53.

[64] A140 (Compl. ¶ 135).

Defendants moved to dismiss plaintiffs' direct claims, arguing that *Gentile* should be overturned and that plaintiffs' claims should be deemed exclusively derivative. Defendants did not challenge the factual sufficiency of plaintiffs' allegations.[65] The trial court issued its Opinion denying the motion to dismiss on October 30, 2020[66] and issued an implementing Order on November 24, 2020.[67]

Defendants sought certification of an interlocutory appeal, which was granted on November 24, 2020. Defendants filed a Notice of Appeal on November 30, 2020.[68] This Court accepted the interlocutory appeal on December 14, 2020.[69] Plaintiffs filed a Notice of Cross-Appeal on December 23, 2020.[70]

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[65] A159-213 (Defs.' Mot. to Dismiss and Stay).

[66] A402-47 (Oral Arg. Via Zoom Regarding Defs.' Mot. to Dismiss, argued on July 16, 2020 ("Oral Arg."); Opinion.

[67] Exhibit B to Br. (Order Denying Defs.' Mot. to Dismiss, dated November 24, 2020 (the "Order")).

[68] Filing ID 66145192 (Notice of Appeal from Interlocutory Order and Opinion).

[69] Dkt. 2 at 3-4.

[70] Filing ID 66208074 (Notice of Cross-Appeal).

ARGUMENT

I. PLAINTIFFS HAVE DIRECT STANDING BECAUSE DEFENDANTS FAIL TO UNDERMINE *GENTILE* LET ALONE DEMONSTRATE IT WAS CLEARLY ERRONEOUS.

A. Question Presented

Whether *Gentile* and its progeny should be overruled such that plaintiffs are deprived of direct standing to pursue damages for the expropriation of their economic interest and voting power via the Private Placement.[71]

B. Scope of Review

This Court reviews an order deciding a motion to dismiss *de novo*.[72]

C. Merits of Argument

In *Gentile*, this Court thoughtfully applied *Tooley* and found that a transaction materially indistinguishable from the Private Placement effected an individual harm on stockholders and could be directly challenged. Defendants' assignments of error fail—particularly their incorrect assertions that *Gentile* applied a special injury analysis and that plaintiffs' claims must be exclusively derivative rather than dual-natured. At most, defendants present grounds for disagreement with *Gentile* and fall far short of demonstrating "'urgent reasons and

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[71] A139-43 (Compl. ¶¶131-49), A275-312 (Pls.' Ans. Br.); A402-447 (Oral Arg.).

[72] *In re Santa Fe Pac. Corp. S'holder Litig*., 669 A.2d 59, 70 (Del. 1995).

[] clear manifestation of error'" necessary to overcome *stare decisis* and overrule precedent.[73]

1. The Private Placement individually harmed plaintiffs and can be directly challenged under *Tooley* and *Gentile*.

Before *Tooley*, *Elster v. American Airlines, Inc.*[74] placed a high burden on stockholders seeking to sue directly by requiring them to allege a "special injury" in circumstances "where the alleged injury is to both the corporation and to the stockholder[.]"[75] *Elster* did not define special injury.[76] Later authorities, however, interpreted special injury as "a wrong that 'is separate and distinct from that suffered by other shareholders, . . . or a wrong involving a contractual right of a shareholder [] which exists independently of any right of the corporation.'"[77]

Tooley eliminated the heightened special injury requirement. Instead, *Tooley* holds that whether a stockholder's claims are direct or derivative "must turn ***solely*** on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders,

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[73] *White*, 975 A.2d at 790-91 (citations omitted).

[74] 100 A.2d 219, 222 (Del. Ch. 1953).

[75] 845 A.2d at 1037 (citation omitted).

[76] *Id.* (citations omitted).

[77] *Id*. at 1035 (citation omitted; ellipses in original); *see id*. at 1037 (alternatively observing post-*Elster* decisions as interpreting special injury to involve a wrong "inflicted upon the stockholder alone or where the stockholder complains of a wrong affecting a particular right").

individually)?"[78] "Although each [*Tooley*] question is framed in terms of exclusive alternatives (either the corporation or the stockholders), some injuries affect both the corporation and the stockholders."[79] If this "dual aspect is present," a stockholder "can choose to sue individually."[80] Thus, critically, *Tooley*'s elimination of the confusing special injury requirement liberalized direct standing: if stockholders and the corporation can both claim injury and entitlement to a remedy, then following *Tooley*, a stockholder may bring direct claims even if its alleged injury was suffered by all other stockholders.

Just two years later, this Court applied *Tooley*'s two-part inquiry in *Gentile* to facts materially indistinguishable from plaintiffs' challenge to the Private Placement. The *Gentile* plaintiffs challenged a transaction where a corporation issued additional equity to its controlling stockholder in exchange for debt forgiveness. That debt conversion increased the controller's economic stake and voting power from 61% to 93%. After the corporation was acquired, the Court of Chancery dismissed the challenge to the debt conversion as a purely derivative claim for which the plaintiffs had lost standing.[81]

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[78] *Id.* at 1033 (emphasis in original).

[79] *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 655 (Del. Ch. 2013).

[80] *Id*. (citing *Loral Space & Commc'ns Inc. v. Highland Crusader Offshore P'rs, L.P.*, 977 A.2d 867, 868 (Del. 2009) ("*Loral*")).

[81] *Gentile,* 906 A.2d at 93.

In reversing, this Court acknowledged that in certain circumstances, "claims of corporate overpayment are treated as causing harm solely to the corporation, and thus, are regarded as derivative."[82] Accordingly, an allegation that a controller caused "the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value" could be viewed as an overpayment claim concerning harm to the corporation.[83] A stockholder may assert a derivative claim to recover that overpayment.[84] However, in the controlled company context, "the public (or minority) stockholders also have a separate, and direct, claim" for an excessive issuance that transfers relative economic interest and voting power from the minority to the controller.[85] In *Tooley* terms, the minority stockholders have a direct claim because they were directly harmed:

> Because the shares representing the "overpayment" embody both economic value and voting power, the end result of this type of transaction is an improper transfer—or expropriation—of economic value and voting power from the public shareholders to the majority or controlling stockholder. For that reason, the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares. ***A separate harm also results: an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest. As a consequence, the public shareholders are***

[82] *Id.* at 99.

[83] *Id.* at 100.

[84] *Id.*

[85] *Id.*

> ***harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited***.[86]

Put another way, "the harm *Gentile* seeks to remedy arises 'when a controlling stockholder, with sufficient power to manipulate the corporate processes, engineers a dilutive transaction whereby that stockholder receives an exclusive benefit of increased equity ownership and voting power for inadequate consideration."[87] "In such circumstances, the public shareholders are entitled to recover the value represented by that overpayment—an entitlement that may be claimed by the public shareholders directly and without regard to any claim the corporation may have."[88]

Under *Tooley* and *Gentile*, plaintiffs can directly challenge Brookfield's underpayment in the Private Placement and recover damages. Through the Private Placement, Brookfield's economic interest and voting power increased from 51% to 65.3%, and the collective economic interest and voting power of all other stockholders was reduced from 49% to 34.7%. Plaintiffs allege that Brookfield did not pay a fair price for this redistribution. The trial court correctly held—and

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[86] *Id.* (emphasis added).

[87] *Markusic v. Blum*, 2020 WL 4760348, at *4 (Del. Ch. Aug. 18, 2020) (alteration in original).

[88] *Gentile*, 906 A.2d at 100.

defendants do not meaningfully dispute—that "[t]he facts alleged in the Complaint fit *Gentile*'s transactional paradigm to a T."[89]

* * *

Unable to differentiate *Gentile*, defendants assert that *Gentile* conflicts with and serves as an "exception" to *Tooley*. Defendants arguments are unavailing.

(a) *Gentile* was correctly decided under *Tooley*—as this Court has already explicitly held.

Defendants' principal argument—that *Gentile* rejects *Tooley* in favor of a special injury analysis—is wrong.[90] "Special injury" is mentioned just once in *Gentile*, in a footnote overruling a pre-*Tooley* decision that rejected direct standing under a special injury analysis.[91] Defendants invent a purported reliance on a special injury analysis based on *Gentile*'s reference to stockholders' "separate harm" from any corporate injury and *Gentile*'s finding that stockholders were injured "uniquely and individually[.]"[92] However those findings appear in *Gentile* because they address *Tooley*'s first prong—asking who was harmed and answering that stockholders themselves were harmed irrespective of corporate injury.

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[89] Op. at 35-37.

[90] *See* Br. at 19-21.

[91] *Gentile*, 906 A.2d at 102 n.28 (overruling *Behrens v. Aerial Commc'ns, Inc.*, 2001 WL 599870 (Del. Ch. May 18, 2001)).

[92] Br. at 20-21 (quoting *Gentile*, 906 A.2d at 100).

Far from contradicting or creating an exception to *Tooley*, *Gentile*'s holding is expressly couched in *Tooley*'s two-part analysis, and this Court in *Gentile* explained that its ruling "***fits comfortably within the analytical framework mandated by Tooley.***"[93] Again, *Gentile* held that stockholders suffered a "separate harm" distinct from any harm to the corporation because of the controller's extraction of economic value and voting power from the minority.[94] This Court explained that "[t]he harm to the minority shareholder plaintiffs resulted from a breach of a fiduciary duty owed to them by the controlling shareholder, namely, not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders."[95] And consistent with *Tooley*'s instruction that "[t]he second prong of the [*Tooley*] analysis should logically follow" from identifying the harmed parties,[96] *Gentile* determined that minority stockholders could directly recover for the controller's breach of that duty owed to them.[97] Given *Gentile*'s express discussion of and attribution to *Tooley*, defendants' unexplained and incorrect assertion that *Gentile* applied a special injury analysis rather than a *Tooley* analysis cannot justify overturning precedent.

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[93] *Gentile*, 906 A.2d at 102 (emphasis added).

[94] *Id.* at 100.

[95] *Id.* at 103.

[96] *Tooley*, 845 A.2d at 1036.

[97] *Gentile*, 906 A.2d at 100, 103.

Also unavailing is defendants' complaint that *Gentile* relies on *Tri-Star*.[98] Defendants incorrectly assert that *Tooley* overruled *Tri-Star*, which permitted direct standing in similar circumstances to *Gentile* and the Private Placement.[99] While reviewing prior caselaw, *Tooley* noted that *Tri-Star* addressed the special injury concept that was being discarded, but did not discuss or overrule *Tri-Star*'s result.[100] This Court's reference to *Tri-Star* when deciding in *Gentile* that stockholders suffered non-corporate harm does not signal a return to special injury jurisprudence, but merely recognizes that the special injury analysis partially concerns the same issue as *Tooley*'s first prong—*i.e.*, whether stockholders were directly harmed.

Because *Tooley* liberalized direct standing by removing the special injury requirement that overlaid the direct harm requirement, any decision permitting direct standing under a special injury analysis is valid precedent concerning stockholder harm under *Tooley*'s first prong. *Tooley* notably rejects no prior holding permitting direct standing under a special injury analysis, and even notes that a decision finding direct standing under a special injury analysis would have reached the same result under *Tooley*'s framework.[101] Further, because *Gentile*

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[98] 634 A.2d 319.

[99] *See* Br. at 19.

[100] *Tooley*, 845 A.2d at 1038 n.21.

expressly deemed the plaintiffs' claims direct under both "*Tooley* and *Tri-Star*, properly applied[,]" any hypothetical error from relying on *Tri-Star* and applying a heightened special injury requirement would be inconsequential and harmless.[102]

(b) Inapposite derivative dilution precedent does not refute direct standing under *Tooley* and *Gentile*.

Defendants also assert that economically dilutive transactions "typically" produce derivative claims and that *Gentile* impermissibly allows a direct recovery for corporate injury.[103] This argument fails to undermine *Gentile* for several reasons.

Defendants' argument is effectively that plaintiffs' claims must be ***exclusively*** derivative because purely economic dilution claims "typically" ***may*** be pursued derivatively. However, typicality necessarily implies some variance, and an observation of what is typical cannot supplant a proper *Tooley* analysis. In citing to factually inapposite decisions stretching back to the 1990s, defendants ignore that during that same period this Court consistently treated the factual

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[101] *Id.* at 1037-38 (discussing *Lipton v. News Int'l, Plc*, 514 A.2d 1075, 1078 (Del. 1986)); *see also Feldman v. Cutaia*, 951 A.2d 727, 733-34 (Del. 2008) (explaining that *Tooley* determined that *Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348 (Del. 1988), was correctly decided notwithstanding *Kramer*'s reliance on a special injury analysis)).

[102] *Gentile*, 906 A.2d at 99 ("We conclude that the plaintiffs are correct and that *Tooley* and *Tri-Star*, properly applied, compel the conclusion that the debt conversion claim was both derivative and direct.").

[103] Br. at 30-32.

conditions present here as permitting direct claims, including in *Tri-Star*, *Gentile*, *Gatz*, and *Loral*.[104]

It is well-established that certain misconduct simultaneously harms both stockholders directly and the corporation, and that in such circumstances both direct and derivative claims may be pursued.[105] The existence of such dual-natured claims was reaffirmed just last month.[106] *Gentile* thoughtfully demonstrates why transactions where a controller increases its economic ownership and voting power at the minority's direct expense can be challenged directly. This Court subsequently held in *Loral* that direct *Gentile* and derivative dilution claims may be prosecuted simultaneously.[107] Because Delaware law does not treat direct standing and derivative standing as mutually-exclusive, defendants' argument that

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[104] *Compare* Br. at 30 (collecting cases) and *Loral*, 977 A.2d 867; *Gatz v. Ponsoldt*, 925 A.2d 1265 (Del. 2007); *Gentile*, 906 A.2d 91; *Tri-Star*, 634 A.2d 319.

[105] *Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996), *overruled by Brehm v. Eisner*, 746 A.2d 244 (Del. 1998) ("Courts have long recognized that the same set of facts can give rise both to a direct claim and a derivative claim."); *Carsanaro*, 65 A.3d at 655 (discussing dual-natured injury giving rise to direct and derivative claims and collecting cases; quoted *supra*). By failing to argue in their opening brief that plaintiffs' claims do not qualify for dual-natured standing, Defendants waived this issue. *See* Supr. Ct. R. 14(b)(vi)(A)(3).

[106] *Morris v. Spectra Energy P'rs (DE) GP, LP*, 2021 WL 221987, at *6 n.39 (Del. Jan. 22, 2021) (citing *El Paso Pipeline GP Co. LLC v. Brinckerhoff*, 152 A.3d 1248, 1262 (Del. 2016)).

[107] *Loral*, 977 A.2d at 869-70.

dilutive stock issuances can be challenged derivatively categorically fails to defeat direct standing.[108]

Defendants' argument regarding the "typical" treatment of dilutive issuances also ignores that *Tooley*'s test is pragmatic rather than doctrinal, and *Gentile*'s holding is firmly rooted in the reality of the challenged transaction and resulting harm. The *Gentile* paradigm presents "atypical" facts: a self-dealing controller advantaging itself in a zero-sum contest with minority stockholders over economic interest and voting power, the latter of which implicates no corporate injury as discussed in Section II, *infra*.[109] This Court in *Gentile* refused to force-fit those facts into inapposite circumstances traditionally giving rise to exclusively derivative dilution claims, where there is no similar contest among existing stockholders. Indeed, this Court definitively rejected categorizing the *Gentile* plaintiffs' action as challenging "dilution," explaining:

> In this case, we adopt a more blunt characterization—extraction or expropriation—because that terminology describes more accurately the real-world impact of the transaction upon the shareholder value and voting power embedded in the (pre-transaction) minority interest, and the uniqueness of the resulting harm to the minority shareholders individually, than does a description framed in terms of "dilution."[110]

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[108] *See Carsanaro*, 65 A.3d at 655 (citing *Loral*, 977 A.2d at 868).

[109] *See Gentile*, 906 A.2d at 100 n.21 (discussing "the dual character of the harm" arising from "this atypical type of transaction").

[110] *Gentile*, 906 A.2d at 102 n.26.

Defendants do not challenge (and thereby concede) *Gentile*'s assessment of the "real-world impact" of a transfer of economic ownership and voting power from minority stockholders to a controller. Defendants fail to explain why this Court should suddenly blind itself to reality and elevate the form of the challenged transaction—a dilutive issuance—over its substance. "[E]quity will not permit a fiduciary to deprive his beneficiaries of their entitlement to seek direct redress for fiduciary misconduct by structuring a transaction so as to obscure that entitlement."[111] In the Private Placement, TerraForm "exercise[d] its control over the corporate machinery to cause an expropriation of economic value and voting power from the public shareholders."[112] Under this Court's precedent and generally applicable equitable principles, that TerraForm did so via a dilutive equity issuance neither negates the direct nature of plaintiffs' injury nor bars direct standing.[113]

Finally, defendants' dogmatic insistence that dilution claims are inherently derivative collapses beneath its own weight, as even defendants acknowledge that

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[111] *Gatz*, 925 A.2d at 1280.

[112] *See id.* at 1281.

[113] *See id.; Gentile*, 906 A.2d at 102 ("The *Tri-Star* type of transaction was found to be wrongful because it resulted in an improper extraction or expropriation, by the controlling shareholder, of economic value and voting power that belonged to the minority stockholders. The specific manner in which this was accomplished was causing the corporation to issue, to the controlling stockholder, shares having more value than the value of what the corporation received in exchange.").

stockholders have direct standing to challenge dilutive stock issuances that effect a change in control.[114] Permitting direct standing where the transaction changes control but not where it extends control makes little sense if the reason wrongful dilutive issuances are deemed corporate injury is because the corporation obtained too little consideration for its stock. Moreover, *Gentile* rejected differentiating between transactions that change control and those that merely extend control when determining whether direct harm exists, finding that the distinction "distracts from" the nature of the direct harm, "denigrates the seriousness of the breach of fiduciary duty causing that harm[,]" and "condones overreaching by fiduciaries[.][115] Defendants take no issue with that conclusion. Defendants' rule also ignores the reality that control exists on a continuum, and—as here—increased voting power above a bare majority can dramatically impact stockholder rights.

(c) Defendants' policy arguments do not undermine *Gentile*.

Whether a stockholder's claims are direct or derivative "must turn ***solely***" on the two-part *Tooley* analysis.[116] Defendants' policy arguments that address neither

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[114] Br. at 39 (citing *El Paso*, 152 A.3d at 1266 (Strine, C.J., concurring) and *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 184 (Del. 1986)).

[115] *Gentile*, 906 A.2d at 102 ("A rule that focuses on the degree or extent of the expropriation, and requires that the expropriation attain a certain level before the minority stockholders may seek a judicial remedy directly, denigrates the gravity of the fiduciary breach and condones overreaching by fiduciaries[.]").

Tooley prong—*i.e.*, their search for a reason to overrule *Gentile* notwithstanding *Tooley*—are irrelevant and ineffective.

Defendants' complaint that *Gentile* permits direct recoveries for corporate harms incorrectly presupposes that the harm from *Gentile* paradigm transactions is exclusively derivative.

Defendants' assertion that *Gentile* is "unruly" because it allows multiple parties to recover for the same harm inexplicably treats the issue as a matter of first impression and ignores the longstanding allowance of dual-natured claims. The potential for concurrent prosecution of direct and derivative claims could not have been lost on this Court when it decided *Gentile*. Defendants fail to address *Loral*,[117] which expressly considered this issue and holds that a derivative dilution claim and a direct *Gentile* claim can be maintained simultaneously. Moreover, while defendants speculate about a hypothetical scourge of double-recoveries resulting from *Gentile*, they identify no instances of a double-recovery. The "broad remedial power of [the] court to address breaches of the duty of loyalty"[118] and the transitive property of entity litigation[119] both solve that hypothetical

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[116] *Tooley*, 845 A.2d at 1033 (emphasis in original).

[117] 977 A.2d at 868-70. *Loral* was expressly invoked by Plaintiffs below. A309 (Pls.' Ans. Br. at 30).

[118] *In re Loral Space & Commc'ns Inc. Consol. Litig.*, 2008 WL 4293781, at *33 (Del. Ch. Sept. 19, 2008).

problem. And defendants' stated concern that direct stockholder claims could compete with bankruptcy claims is unsubstantiated and makeweight, including because any such claims would be competing over virtually worthless stock.[120]

Defendants' celebration of derivative litigation rules fails because Delaware purposefully exempts direct claims from those rules.[121] Rules such as the continuous ownership rule and the demand requirement have no place outside the derivative context, and no legitimate reason counsels for converting direct claims to derivative claims simply to invoke those rules. Converting direct claims into derivative claims—and thus expropriating stockholders' individual rights—is particularly inappropriate where doing so permits the wrongdoer to participate *pro rata* in any recovery through its share ownership or, as here, prevents accountability altogether.

In that vein, this Court should reject defendants' suggestion to eliminate direct *Gentile* claims because the *Primedia* doctrine[122] affords an avenue to post-merger recovery for pre-merger derivative claims.[123] *Primedia* imposes additional

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[119] *See Baker v. Sadiq*, 2016 WL 4375250, at *1-4 (Del. Ch. Aug. 16, 2016) (explaining that entity-level harm may be appropriately remedied by direct relief under the transitive property of entity litigation).

[120] *See* Br. at 37.

[121] *See* Br. at 35.

[122] *See Morris*, 2021 WL 221987, at *11 (adopting framework of *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455 (Del. Ch. 2013)).

[123] *See* Br. at 39-40.

burdens on stockholders, requiring allegations that (a) the derivative claim is material to the merger value; and (b) the buyer did not pay for and will not pursue the claim.[124] *Primedia* thus provides, at best, a mere possibility that an extinguished derivative claim will give rise to a direct claim. Moreover, the value of a resuscitated *Primedia* claim may be substantially lower than that of the extinguished derivative claim. A defendant may argue that damages are not the maximum damages available on the derivative claim, but instead the value that should have been obtained in a merger for the derivative claim after discounting for litigation risk.[125] And where, as here, a merger involving a controlling stockholder gives rise to a potential *Primedia* claim, a defendant may argue for an additional layer of discounting to exclude the controller's *pro rata* interest in the derivative claim. *Primedia* is thus an ineffective substitute for stockholders' direct *Gentile* claim as it provides the expropriating controller with multiple new avenues to reduce or entirely avoid a damages award.

Finally, defendants offer no support for their assertion that standing under *Gentile* "complicates real-world commercial transactions[.]"[126] In the real world, "[a]cquirers buy businesses, not claims" and know that mergers cannot extinguish

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[124] *Morris*, 2021 WL 221987, at *3 (citation omitted).

[125] For avoidance of doubt, plaintiffs would oppose any such argument.

[126] Br. at 34 (capitalization omitted).

direct claims.[127] "While the courts may indulge the notion that [pre-merger derivative] claims still 'survive'" a merger in the acquirer's hands, "they usually die as a matter of fact" because acquirers do not pursue them.[128] Defendants' stated concern has even less purchase here, where Brookfield will not pursue claims against itself, the Special Committee did not obtain any Merger consideration for plaintiffs' derivative claims, and defendants opportunistically advance their standing argument hoping to foreclose ***any*** recovery against them.[129]

2. *Stare decisis* compels this Court to uphold *Gentile*.

Stare decisis forms a critical component of the common law. "It is well-established in Delaware jurisprudence that once an issue of law has been settled by a decision of this Court, 'it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside[.]'"[130] The doctrine is "grounded upon public policy" and its "support rests upon the vital necessity that there be stability in our courts in adhering to decisions deliberately made after careful consideration."[131] Indeed, so strong is the effect of *stare decisis* in our legal

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[127] *See Carsanaro*, 65 A.3d at 664.

[128] *Golaine v. Edwards*, 1999 WL 1271882, at *5 (Del. Ch. Dec. 21, 1999).

[129] *Id.* ("By denominating a claim as derivative in this context, the court comes very near to immunizing the defendants from any culpability for the conduct complained of.").

[130] *White*, 975 A.2d at 790-91 (citations omitted).

[131] *Oscar George, Inc. v. Potts*, 115 A.2d 479, 481 (Del. 1955) (collecting cases); *see also Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000) ("The law

system that "[a]dhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'"[132]

Given *stare decisis*'s critical function in the development of the law and the public's trust of the judicial process, this Court will not overturn its precedent "except for urgent reasons and upon clear manifestation of error.'"[133] Thus, when this Court has overruled itself, it has done so based on overwhelmingly compelling records. For example, defendants cite *Travelers Indemnity Co. v. Lake*,[134] where this Court abolished the *lex loci delicti* rule only after recognizing (a) that Delaware applied the rule in tort cases but not contract cases, leading to difficulties in adjudicating cases; (b) "dramatic[]" legal changes since the rule was announced, including the abandonment of the rule in the majority of states; and (c) societal changes that rendered the rule anachronistic. By contrast, defendants identify no changed circumstances and no relevant doctrinal, legal, or other developments

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of the case doctrine, like the stare decisis doctrine, is founded on the principle of stability and respect for court processes and precedent.").

[132] *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted).

[133] *White*, 975 A.2d at 790-91 (citations omitted); *see Payne*, 501 U.S. at 827 ("*Stare decisis* … promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.") (citation omitted).

[134] 594 A.2d 38, 46 (Del. 1991) (cited Br. at 28).

since *Gentile*. Further, defendants identify no unanticipated consequences from *Gentile* creating a precedential emergency or other "urgent reasons" to overrule *Gentile*. Defendants at most assert that *Gentile* could have been differently decided based on arguments that were considered and rejected in *Gentile*—nowhere near a "clear manifestation of error" as is necessary to reverse precedent.

Unable to meet the high standard for overturning precedent, defendants argue that "*Gentile* is not settled law[.]"[135] This is a false distinction: there is no class of "unsettled" decisions of this Court entitled to lesser precedential status. Even if it were valid, defendants' "settled law" dichotomy would not counsel for reversing *Gentile*. Defendants assert that *Gentile* is unsettled because it "undermines the settled expectations created by *Tooley*[.]"[136] However *Gentile* itself repeatedly makes clear that *Gentile* is consistent with *Tooley*. And accepting defendants' position would merely lead to the conclusion that *Tooley* conflicts with "settled expectations" of special injury jurisprudence, and *Tooley* therefore constitutes "unsettled" precedent.

Nor does purported post-*El Paso* debate undermine *Gentile*'s precedential value.[137] While defendants allege widespread consternation over *Gentile*, they identify only then-Chief Justice Strine's concurrence in *El Paso*. The Court of

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[135] *See* Br. at 28.

[136] *Id.* (emphasis omitted).

[137] *See* Br. at 24-26 (citing *El Paso*, 152 A.3d 1248).

Chancery cases defendants cite as questioning *Gentile*'s status merely acknowledge the *El Paso* concurrence without adding more.[138] Those decisions do not call for overruling *Gentile*.[139] Defendants' claimed groundswell of support for overturning *Gentile* is merely trial court judges noting, in passing, that then-Chief Justice Strine would overturn *Gentile*.

Further, the *El Paso* concurrence itself does not dilute *Gentile*'s precedential value. Delaware law does not change because new Supreme Court Justices are appointed. Rather, this Court takes care that "respect for its own precedents and principles of *stare decisis* contribute to the Court's stability during times when its composition changes."[140] *Gentile* is a unanimous decision "deliberately made after careful consideration"[141] by Justice Berger, Justice Holland, and Justice Jacobs, each of whom also decided *Tooley* and one of whom decided *El Paso*. The *El*

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[138] *See* Br. at 29 (citing *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *26 n.206 (Del. Ch. July 21, 2017, *corrected* Aug. 8, 2017) (citing *El Paso* concurrence for the proposition that whether *Gentile* is good law is debatable), *aff'd*, 184 A.3d 1291 (Del. 2018) (Table); *Mesirov v. Enbridge Energy Co., Inc.*, 2018 WL 4182204, at *8 n.77 (Del. Ch. Aug. 29, 2018) (citing *El Paso* concurrence as creating "reason to question whether *Gentile* will remain the law of Delaware")).

[139] *See Gatz Props., LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1220 (Del. 2012).

[140] A492-520 at A513 (Hon. Karen L. Valihura, Del. Sup. Ct., The Role of Appellate Decision-Making in the Development of Delaware Corporate Law—A View from Both Sides of the Bench, Lecture at Seventeenth Annual Albert A. De Stefano Lecture on Corporate, Securities, & Financial Law at Fordham Corporate Law Center (Apr. 3, 2017), in 23 Fordham J. Corp. & Fin. L. 5, 22 (2017)).

[141] *See Oscar George*, 115 A.2d at 481 (collecting cases).

Paso concurrence addressed a matter that was not at issue, not briefed, and not necessary for decision. The short concurrence merely expressed disagreement with *Gentile*; it identified no difficulty of application or post-*Gentile* developments warranting reversal. In such circumstances, permitting one jurist's divergent viewpoint to upset precedent would impermissibly invite reconsideration of all of this Court's precedents, threatening the necessary and positive legal stability embodied by the application of *stare decisis* to this Court's jurisprudence.[142]

Defendants' attempt to portray *Gentile* as confusing also does not undermine its precedential impact. Purported trial court confusion does not meet the rigorous standard for reversing precedent. This Court's role is to correct misapplication of precedent by the trial courts, even revisiting the same topic repeatedly as it has done on issues such as demand futility and the materiality of disclosures. There has also been no actual confusion in applying *Gentile*'s rule.[143] Only once, in *Gatz*

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[142] *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) ("reexamination of well-settled precedent could nevertheless prove harmful" because "[t]o overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability").

[143] *See Almond ex rel. Almond Family 2001 Tr. v. Glenhill Advisors, LLC*, 224 A.3d 200 (Del. 2019) (Table) (affirming dismissal by summary opinion "on the basis of and for the reasons assigned by the Court of Chancery"); *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 247 (Del. 2019) (affirming dismissal that found that plaintiffs failed to allege the existence of a controlling stockholder); *Fuchs v. Wren Hldgs., LLC*, 129 A.3d 882 (Del. 2015) (Table) (affirming post-trial

v. Ponsoldt,[144] has this Court reversed a decision addressing whether a case properly invoked direct standing under the *Gentile* paradigm, and the error there related to the trial court's interpretation of the facts and not the law. Rather than difficulty in applying *Gentile*'s rule, defendants identify cases where trial courts considered extending direct standing beyond the *Gentile* paradigm. For example, defendants focus on *El Paso* and *Carsanaro*,[145] but in those decisions the trial court correctly recognized the narrow rule stated in *Gentile* and attempted to apply one of *Gentile*'s principles to other circumstances. This reflects thoughtful, ordinary course common law development rather than confusion, let alone grounds to discard precedent.[146]

Finally, defendants' attempt to distinguish *Gentile* from this case fails. By not raising this argument in their opening brief below, defendants waived it.[147] But the argument is also incorrect. *Gentile* did not turn on the fact that the corporation

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judgment by summary order where defendants' contested direct standing under *Gentile*); *Loral*, 977 A.2d 867 (affirming class certification, finding trial court correctly determined that pending derivative action did not bar concurrent direct standing under *Gentile*).

[144] *Gatz*, 925 A.2d at 1279-81.

[145] 65 A.3d 618.

[146] *See El Paso*, 152 A.3d at 1251 ("The Court of Chancery … issued a thoughtful opinion arguing that the derivative plaintiff's claims … could also be considered direct[.]").

[147] *See* Supr. Ct. R. 8; *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived") (citation omitted).

was dissolved, leaving stockholders as the only party capable of recovering. *Loral* expressly rejects the unavailability of a corporate-level recovery as a precondition to direct standing under *Gentile*.[148] Defendants' argument is thus barred by controlling precedent which was addressed below, but which defendants ignore in prosecuting their appeal.[149]

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[148] *Loral*, 977 A.2d at 869-70 ("Loral reads *Rossette* as permitting a direct claim only in cases where the related derivative claim is no longer available. Loral misreads *Rossette*.").

[149] *See* A275-312 (Pls.' Ans. Br.); A402-447 (Oral Arg.).

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS SEEKING DAMAGES FOR BROOKFIELD'S EXPROPRIATION OF THEIR VOTING POWER.

A. Question Presented

Whether plaintiffs have direct standing and pleaded a reasonably conceivable challenge to the expropriation of stockholders' voting power accomplished via the Private Placement.[150]

B. Scope of Review

This Court reviews an order deciding a motion to dismiss *de novo*.[151]

C. Merits of Argument

Plaintiffs can directly challenge the expropriation of their voting power in the Private Placement. Delaware has long recognized that wrongful voting dilution directly injures stockholders, who vote, rather than the corporation, which does not vote. The trial court's reasonable conceivability analysis erroneously applied entrenchment law rather than entire fairness law, and impermissibly drew legal inferences in defendants' favor which rendered it effectively impossible to plead entrenchment.

1. Plaintiffs' voting dilution challenge is direct under *Tooley*.

This Court should hold that plaintiffs have stated a direct claim irrespective of *Gentile*. *Tooley* holds that stockholders can pursue a direct cause of action to

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[150] A298-303 (Pls.' Ans. Br. at 19-24).

[151] *In re Santa Fe*, 669 A.2d at 70.

remedy an injury "independent of any alleged injury to the corporation."[152] Minority stockholders' loss of nearly one-third of their voting power via the Private Placement is harm entirely independent of any harm to TerraForm. Indeed, the loss of voting power did not harm the TerraForm at all. Stockholders "have a right to vote their shares."[153] Corporations do not.[154] Thus, "[v]oting power dilution may constitute a direct claim" precisely because "it can directly harm the shareholders without affecting the corporation, and any remedy for the harm suffered under those circumstances would benefit the shareholders."[155]

Defendants argue that plaintiffs' claims cannot be direct because "[i]n a typical dilutive issuance, any impact on voting power that minority holders experience is merely a collateral, indirect effect flowing from the alleged under-payment to the company."[156] Of course, a controller expropriation of significant voting power is not a "typical dilutive issuance." Defendants rely on *Agostino v. Hicks*, but the plaintiff there did not allege any loss of voting power, let alone a substantial loss, as plaintiffs allege here. Rather, the *Agostino* plaintiff obliquely

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[152] 845 A.2d at 1039 (emphasis added).

[153] *Avacus P'rs, L.P. v. Brian*, 1990 WL 161909, at *7 (Del. Ch. Oct. 24, 1990).

[154] *See* 8 *Del. C.* § 160(c) ("Shares of its own capital stock belonging to the corporation . . . shall neither be entitled to vote nor be counted for quorum purposes.").

[155] *Oliver v. Boston Univ.*, 2006 WL 1064169, at *17 (Del. Ch. Apr. 14, 2006) (citation omitted).

[156] Br. at 33.

alleged that issuance of unexercised warrants to a significant company stockholder "precluded the pursuit of value maximizing transactions and the payment of a control premium to the stockholders" in a subsequent transaction.[157] Finding that the plaintiff had asserted nothing more than a "claim of mismanagement"—*i.e.*, a classic derivative claim—and that any alleged direct harm amounted to "rank speculation," the Court deemed the plaintiff's claims derivative.[158]

Plaintiffs have not alleged mere mismanagement, and are not speculating as to their injury. Plaintiffs allege a massive, disloyal expropriation of voting power by a controller that owed duties directly to the minority, accomplished through the last-second abandonment of the *pro rata* Equity Offering in favor of the Private Placement. Through Brookfield's self-dealing, minority stockholders went from holding nearly half of TerraForm's voting power (49%) to barely one-third (34.7%), with a commensurate increase to Brookfield's voting power.[159] Thus, defendants' self-serving characterization of the Private Placement as a "typical dilutive issuance," and the harm to stockholders as merely "collateral," is wrong.[160]

2. The trial court erred in finding that plaintiffs did not state a reasonably conceivable claim absent *Gentile*.

The sole bases for defendants' motion to dismiss were: (a) plaintiffs' claims purportedly were exclusively derivative under *Tooley*;[161] and (b) *Gentile* should be

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[157] 845 A.2d 1110, 1122 (Del. Ch. 2004).

[158] *Id*. at 1123.

[159] A040-41 (Rosson Complaint ¶ 5).

[160] Br. at 33.

overruled.[162] Nevertheless, the trial court undertook a Rule 12(b)(6) reasonable conceivability analysis of plaintiffs' factual allegations.[163] Finding that it was "not reasonably conceivable that the Private Placement served to entrench Brookfield's control of TerraForm," the trial court found that, but for the application of *Gentile*, plaintiffs failed to state a cognizable claim.[164] The trial court's decision was erroneous for at least two reasons.

First, the trial court erroneously determined that plaintiffs' claims sounded in entrenchment. But "[u]nder current law, the entire fairness framework governs any transaction between a controller and the controlled corporation in which the controller receives a non-ratable benefit."[165] Here, plaintiffs allege that Brookfield did not fairly compensate minority stockholders for their massive transfer of voting power. Plaintiffs' well-pleaded allegations of procedural and substantive unfairness "precluded [the trial court] from dismissing" any claims against Brookfield under Rule 12(b)(6).[166]

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[161] A185-91 (Defs.' Mot. to Dismiss and Stay).

[162] A191-210 (Defs.' Mot. to Dismiss and Stay).

[163] Op. at 28-32.

[164] *Id*.

[165] *In re Hansen Med., Inc. S'holders Litig.*, 2018 WL 3025525, at *5 (Del. Ch. June 18, 2018) (citation omitted).

[166] *See id*. at *5, *9; *see also Klein v. H.I.G. Cap., L.L.C.*, 2018 WL 6719717, at *16 (Del. Ch. Dec. 19, 2018) ("The possibility that the entire fairness standard of review may apply tends to preclude the Court from granting a motion to dismiss

Second, even assuming, *arguendo*, that their claims against Brookfield were dependent on an entrenchment, plaintiffs adequately allege entrenchment by pleading facts creating a reasonable inference that Brookfield sought and obtained "the means to perpetuate its control position"[167] through the Private Placement. Before the Private Placement, Brookfield held a narrow majority of TerraForm's voting power. Following the Private Placement, Brookfield held near-supermajority voting power, which Brookfield then sought to use to eliminate minority stockholder protections in TerraForm's Charter.

The trial court misapplied the applicable pleading standard under Rule 12(b)(6), including impermissibly drawing inferences in defendants' favor.[168] For example, one benefit to Brookfield of increased voting power was the ability to be diluted later while retaining control. The 2019 Offering—which was at a 57% premium to the Private Placement—was such a dilutive transaction. The trial court dismissed this benefit, finding that because corporate control is significantly

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under Rule 12(b)(6)" unless the controller can conclusively demonstrate entire fairness) (internal quotations omitted).

[167] *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2007 WL 7053964, at *8 (Del. Ch. Dec. 11, 2017).

[168] *See Central Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011) ("When reviewing a ruling on a motion to dismiss, we (1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) do not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.") (citation omitted).

valuable that it was "not reasonably conceivable that Brookfield would have declined to participate in the 2019 offering if such an action would have cost Brookfield" its control.[169] This placed an impossible burden on plaintiffs—in pigeonholing plaintiffs to an entrenchment claim, the trial court (a) presumed as a matter of law that a controller would never entrench itself because it would never need to do so; and (b) required plaintiffs to plead proof of the controllers' intent to engage in a specific future dilutive transaction. This portion of the Opinion, if affirmed, would provide *carte blanche* for controller entrenchment as long as the controller acts preemptively. Instead, it was sufficient that plaintiffs alleged facts from which the court could reasonably infer that Brookfield harbored an "objective … to retain control" through the Private Placement and defendants' motion should have been denied.[170] Similarly, the trial court rejected any benefit to Brookfield from achieving near supermajority control—which Brookfield stated an intent to exploit—based on *post hoc* developments and the incorrect conclusion that because Brookfield did not fully gain supermajority voting power that the increase in voting power was a non-event.[171]

Equally erroneous was the trial court's finding that "no damages could attach to" plaintiffs' claims because the Merger has purportedly "mooted the

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[169] Op. at 30.

[170] *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 186 (Del. Ch. 2005).

[171] *See* Op. at 31.

issue."[172] Compensatory damages are "generally measured by the harm inflicted on the plaintiff at the time of the wrong."[173] Here, the Private Placement immediately harmed minority stockholders because Brookfield failed to fairly compensate them for their lost voting power. In any event, plaintiffs were not required to plead damages. "A plaintiff's obligation at the pleading stage is simply to allege (1) that a fiduciary duty exists and (2) that the fiduciary breached that duty…. [R]esulting damages are absent from th[e] list of elements."[174]

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[172] *Id.*

[173] *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 42 (Del. Ch. 2014).

[174] *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2018 WL 3120804, at *18 (Del. Ch. June 25, 2018) (internal quotations omitted).

CONCLUSION

For the foregoing reasons, this Court should (a) affirm the Opinion's finding that plaintiffs have direct standing under *Gentile*; and (b) reverse the Opinion's finding that plaintiffs' Complaint did not state a direct claim challenging the expropriation of their voting power.

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