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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

APPELLEES' REPLY BRIEF ON CROSS-APPEAL

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Dated: April 1, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Statutes

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS FOR EXPROPRIATION OF VOTING POWER.

As explained in plaintiffs' Opening Brief on Cross-Appeal,[1] the trial court erred by finding that plaintiffs would not be able to prosecute claims challenging the expropriation of one-third of their voting power if *Gentile* is overturned.[2] Defendants assert that "[t]he trial court's reasoning and findings against plaintiffs' voting dilution claim should be affirmed in all respects."[3] But defendants fail to support the trial court's reasoning or findings. Rather than simply analyzing whether minority stockholders' massive loss of voting power gave rise to direct harm, the court below conducted a Rule 12(b)(6) reasonable conceivability analysis for which defendants did not even advocate when moving to dismiss. The trial court also erroneously assessed whether plaintiffs stated entrenchment claims against Brookfield because the plaintiffs' claims should have been evaluated only for entire fairness. Finally, the trial court erroneously applied an entrenchment analysis relying on impermissible defendant-friendly presumptions.[4]

First, defendants never address head-on plaintiffs' argument that voting dilution can only be considered *direct* harm under *Tooley*, including because only

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[1] ("Opening Brief" or "OB").

[2] *Id*. at 43-49.

[3] *See* Answering Brief on Cross-Appeal ("AB") at 35.

[4] OB at 43-49.

stockholders hold voting power.[5] Defendants instead repeat their mantra that dilution typically permits a derivative claim, without explaining how a corporation is harmed by the dilution of stockholders' voting power. Defendants falsely suggest that, under *Tooley*, there can be no direct claim where the corporation experiences a separate injury.[6] *Tooley*, however, holds that stockholders can pursue a direct cause of action to remedy an injury "independent of any alleged injury to the corporation[,]"[7] and "[c]ourts have long recognized that the same set of facts can give rise both to a direct claim and a derivative claim."[8] Indeed, as this Court recently reaffirmed in *Morris v. Spectra Energy Partners (DE) GP, LP*, *Tooley* recognizes that claims can be "dual-natured," *i.e.*, "both direct and derivative."[9] The trial court's categorical rejection of direct voting power dilution claims contradicts

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[5] *Id*. at 43-44.

[6] *See* AB at 35 ("The only supposed harm Plaintiffs have alleged is a claim for over-dilution that cannot be inflicted 'without injuring the corporation'") (citation omitted).

[7] *Tooley v. Donaldson, Lufkin & Jenrette, Inc*., 845 A.2d 1031, 1039 (Del. 2004) (emphasis added).

[8] *Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996).

[9] 2021 WL 221987, at *6 n.39 (Del. Jan. 22, 2021).

binding precedent including *Tri-Star* and should be reversed.[10] Defendants' assertion that *Tri-Star* was overruled by *Tooley* is without merit.[11]

Second, defendants never address the fact that the trial court conducted a Rule 12(b)(6) analysis that was not the basis of defendants' motion. Indeed, even though defendants answered all substantive allegations of plaintiffs' Complaint and did not challenge the Complaint's factual sufficiency when moving to dismiss,[12] defendants now falsely (and for the first time) assert that the Complaint fails to adequately allege that Brookfield "did something wrongful" or that the Private Placement "was not fair."[13] Defendants rely on *Hindlin v. Gottwald*, arguing that dismissal was

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[10] *Compare* Opinion at 26-28 *with In re Tri-Star Pictures*, *Inc., Litig.,* 634 A.2d 319, 330 (Del. 1993) ("Although it is true that claims of waste are derivative, a claim of stock dilution and a corresponding reduction in a stockholder's voting power is an individual claim."); *Oliver v. Boston Univ.*, 2006 WL 1064169, at *17 (Del. Ch. Apr. 14, 2006) (finding post-*Tooley* that "[v]oting power dilution may constitute a direct claim, 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.").

[11] *See Williams Cos. S'holder Litig.*, 2021 WL 754593, at *18 (Del. Ch. Feb. 26, 2021) ("*Tooley*, however, did not expressly overrule the cases applying the special-injury test, and the decision suggested that some of those cases might have reached the right outcome, thus opening the door for litigants to rely on decisions predating *Tooley*.").

[12] CAR001 (Defendants' Answer and Affirmative Defenses to the Verified Stockholder Derivative and Class Action Complaint, C.A. No. 2019-0757-SG (Del. Ch. Nov. 17, 2020)).

[13] AB at 31-32.

appropriate because dilution "is not *per se* wrongful."[14] But defendants fail to mention that in *Hindlin*, unlike here, the plaintiff did not allege any "expropriation of control" or even "the existence of a controller or control group."[15] *Hindlin* is clearly inapposite and thus fails to support defendants' argument.

Third, defendants offer no explanation for the trial court's failure to evaluate plaintiffs' claims for entire fairness. As plaintiffs explained in their Opening Brief: '"Under 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."'[16] Defendants do not disagree, offering only the *non sequitur* that direct standing does not necessarily attach simply because entire fairness applies.[17] While defendants correctly note that plaintiffs must "'allege some facts that tend to show that the transaction was not fair,'"[18] they go no further and the Complaint easily satisfies the minimal entire fairness pleading burden.[19] Because entire fairness review applies, the trial court erred in conducting an entrenchment analysis.

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[14] AB at 31 (citing 2020 WL 4206570, at *4 (Del. Ch. July 22, 2020)).

[15] 2020 WL 4206570, at *7.

[16] OB at 46 (quoting *In re Hansen Med., Inc. S'holders Litig.*, 2018 WL 3025525, at *5 (Del. Ch. June 18, 2018) (emphasis added)).

[17] AB at 31-32.

[18] *Id*. at 32 (citation omitted).

[19] *See, Hamilton P'rs LP v. Highland Cap. Mgmt., LP*, 2014 WL 1813340, at *12 (Del. Ch. May 7, 2014) ("The possibility that the entire fairness standard of review may apply tends to preclude the Court from granting a motion to dismiss under Rule

Fourth, in defending the trial court's misapplication of the Rule 12(b)(6) pleading standard, defendants themselves advance arguments that contradict Rule 12(b)(6).[20] For example, while plaintiffs alleged that, following the Private Placement, TerraForm (a) went from bare majority to near near-supermajority voting power, and (b) promptly sought to use its newfound voting power to amend TerraForm's Charter, defendants ask the Court to draw a competing, *unpled* and defense-friendly inference that the proposed Charter amendment was pursued solely at the behest of Institutional Shareholder Services.[21] The Court's "task at the pleading stage, however, is not to weigh competing inferences but rather to draw reasonable inferences in favor of the plaintiff."[22] The reasonable inference to draw here is that, through the Private Placement, Brookfield sought and obtained "the

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12(b)(6) unless the alleged controlling stockholder is able to show, conclusively, that the challenged transaction was entirely fair based solely on the allegations of the complaint and the documents integral to it."); *Williams v. Ji*, 2017 WL 2799156, at *5 (Del. Ch. June 28, 2017) ("The entire fairness standard of review 'normally will preclude dismissal of a complaint on a Rule 12(b)(6) motion to dismiss[.]'") (quoting *Orman v. Cullman*, 794 A.2d 5, 20 n.36 (Del. Ch. 2002)); *In re Atlas Energy Res., LLC*, *Unitholder Litig*., 2010 WL 4273122, at *11 (Del. Ch. Oct. 28, 2010) (stating plaintiffs are only required to allege facts that "suggest" that a transaction is not entirely fair) (citation omitted); A283 ("the Complaint alleges unfair voting power expropriation, which is a well-established direct claim addressing harm to stockholders.").

[20] AB at 33-35.

[21] *Id*. at 34.

[22] *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 17 (Del. Ch. 2009).

means to perpetuate its control position."[23] The trial court could not conclusively determine Brookfield's reasons for pursuing the anti-minority Charter amendment at this stage and on this record, and particularly not on the thin grounds suggested by defendants.

Fifth, defendants provide no support for the trial court's application of entrenchment law. Defendants do not explain why entrenchment should depend on whether the controlling stockholder eventually needed to use that power. The trial court's approach would create latent entrenchment claims that might not be actionable until years or decades after entrenching transactions. That is inconsistent with Delaware claim accrual law and unnecessarily invites laches issues and litigation hardships including document and witness memory spoliation.[24]

The trial court's approach also leaves the court answering hypothetical questions about whether the transaction that ultimately dilutes the controller would have occurred but for the initial entrenching transaction. Instead of assessing the entrenching transaction as of the time it occurred, the trial court required *plaintiffs* to demonstrate—on a motion to dismiss—that the future controller-dilutive

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

[24] *See Jepsco, Ltd. v. B.F. Rich Co., Inc.*, 2013 WL 593664, at *9 (Del. Ch. Feb. 14, 2013) ("A cause of action for breach of fiduciary or statutory duty accrues at the moment of the alleged wrongful act.").

transaction would have occurred absent the initial entrenching transaction. Beyond requiring plaintiffs to prove a hypothetical simply to state a claim, the trial court further complicated matters by conclusively presuming that no controller would allow itself to lose control because control is valuable—effectively eliminating entrenchment as a claim in most circumstances. The unprecedented approach to entrenchment authorizes a controller to entrench itself so long as it does so at an opportune time, rather than when entrenchment becomes absolutely necessary.

Finally, defendants incorrectly assert that plaintiffs lack allegations supporting a reasonable inference that Brookfield sought to entrench and extend its voting control over TerraForm. The most—if not only—reasonable explanation for Brookfield's stock purchase is that Brookfield intended and desired to increase its interest in TerraForm, which includes both economic and voting rights. It is inappropriate at the motion to dismiss stage to conclusively infer that Brookfield had no motive to entrench and expand its control, and certainly nothing in the pleading stage record supports that defense-friendly inference. At the pleading stage, plaintiffs are not required to plead—much less prove—a controller's express admissions of its entrenchment intent.

CONCLUSION

For the foregoing reasons and those presented in plaintiffs' Opening Brief, the Court should reverse the Opinion's finding that plaintiffs' Complaint did not state direct claims challenging the expropriation of their voting power.

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