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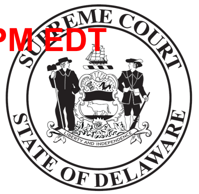

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF DEARBORN POLICE AND FIRE REVISED RETIREMENT SYSTEM (CHAPTER 23), MARTIN ROSSON, and NOAH WRIGHT, on behalf of themselves and all other similarly situated former stockholders of TERRAFORM POWER, INC., Plaintiffs-Below, Appellants v. BROOKFIELD ASSET MANAGEMENT INC., BROOKFIELD INFRASTRUCTURE FUND III GP LLC, ORION US GP LLC, ORION US HOLDINGS 1 LP, HARRY GOLDGUT, BRIAN LAWSON, RICHARD LEGAULT, SACHIN SHAH, JOHN STINEBAUGH, BROOKFIELD RENEWABLE PARTNERS, L.P., and BROOKFIELD RENEWABLE CORPORATION, Defendants-Below, Appellees.	No. 241, 2023 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0097-KSJM **Public Version Filed on: September 6, 2023**

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GLOSSARY

Term	Definition
Appellants or Plaintiffs	Martin Rosson, Noah Wright, and City of Dearborn
Appellees or Defendants	BAM, BIF, Orion GP, Orion LP, BEP, BEPC, Goldgut, Legault, Lawson, Shah and Stinebaugh
BAM	Brookfield Asset Management Inc.
BEP	Brookfield Renewable Partners, L.P.
BEPC	Brookfield Renewable Corporation
BIF	Brookfield Infrastructure Fund III GP LLC
Brookfield	BAM, BIF, Orion GP, Orion LP, BEP, BEPC, collectively, and each entity's respective affiliates
Board	TERP's board of directors
CEO	Chief Executive Officer
Committee or Special Committee	The special committee of the Board formed on January 12, 2020, consisting of Carolyn Burke, Christian Fong, and Mark McFarland
Complaint	The Verified Amended Stockholder Class Action Complaint filed in the Trial Court on January 27, 2020
Conflicts Committee	The standing conflicts committee of the Board consisting of Carolyn Burke, Christian Fong, and Mark McFarland
DPS	Dividend/distributions per share
Goldgut	Harry Goldgut
Greentech	Greentech Capital Advisors Securities LLC
Kirkland	Kirkland & Ellis LLP
Lawson	Brian Lawson
Legault	Richard Legault
McFarland	Mark McFarland
Merger	Brookfield's acquisition of all outstanding shares of TERP stock on July 31, 2020
Orion GP	Orion US GP LLC
Orion LP	Orion US Holdings I LP
Proxy	The Schedule 14A proxy statement filed by TERP with the SEC on June 29, 2020

Saeta	Saeta Yield, S.A.
Shah	Sachin Shah
Stinebaugh	John Stinebaugh
TERP	TerraForm Power, Inc.
Transcript Ruling or Tr.	The Trial Court's June 9, 2023 Transcript Ruling on Defendants' Motion to Dismiss
Trial Court	Court of Chancery of the State of Delaware

NATURE OF PROCEEDINGS

This direct action on behalf of TERP stockholders challenges a quintessential conflict transaction under Delaware law: a controller-led minority buyout. Plaintiffs appeal from the Trial Court's Transcript Ruling[1] finding that Defendants satisfied the conditions for dismissal under *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"). That dismissal arose from multiple reversible legal errors.

Brookfield was TERP's majority stockholder and dominated TERP's Board and senior management, designating four Brookfield executives to TERP's seven-member Board, and appointing TERP's three most-senior officers. TERP—a "YieldCo" that distributed dividends from a portfolio of income-producing energy generation assets—was also fully dependent on its sponsor Brookfield for future growth opportunities. In 2020, Brookfield leveraged its extreme control to buy out TERP's minority stockholders through the Merger.

Brookfield opportunistically made its initial buyout proposal when TERP was trading at a multi-year low. Brookfield also refused to support alternative transactions. Greentech, a financial advisor to the Special Committee, immediately warned the Committee that it was "not the optimal time to realize maximum value

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[1] The Transcript Ruling ("Tr. at __") is attached hereto as Exhibit A.

for T[ERP]" and that a "robust market check [wa]s a must." *Infra* at 12. Thus, despite Brookfield's refusal to support alternative transactions, the Committee's advisors began developing a market outreach strategy.

Brookfield then furnished the Committee with projections that excluded any growth at TERP, contravening TERP's management projections, to implicitly threaten that Brookfield would starve TERP of growth if the Committee rejected the Merger. Following that threat, Brookfield's dominance and potential reprisal pervaded the Committee's deliberations, ensuring the Committee could not maintain the *status quo* by rejecting the Merger. The Committee's financial advisors repeatedly underscored TERP's dependence on Brookfield for future growth, the materiality of Brookfield growth opportunities to TERP's standalone value, and the potential for Brookfield to retaliate by starving TERP of growth opportunities if the Committee rejected a deal. The Committee ultimately acquiesced and recommended the Merger at a price that undervalued TERP.

The Trial Court found that Plaintiffs failed to adequately allege coercion under *MFW* because the coercive acts Plaintiffs alleged fell short of the explicit coercion alleged in *In re Dell Techs. Inc. Class V Stockholders Litigation*, 2020 WL 3096748 (Del. Ch. June 11, 2020). That was error. The *Dell* court made clear that subtler,

implicit threats can prevent a committee from fulfilling its function as required for *MFW* cleansing.

The Trial Court also erred in finding that *MFW* was satisfied because Plaintiffs failed to plead the Proxy was materially deficient. The Proxy was materially misleading or omissive in at least five ways—each of which bear on the critical question of stockholders' ability to assess the fairness of the Merger consideration—and each of which independently require reversal.

First, the Proxy failed to disclose substantial nonratable benefits that would inure to Brookfield in the Merger, including $130 million in expected incremental management fees and $1 billion in potential debt refinancing benefits. Those benefits were highly material in determining whether the $3.3 billion Merger consideration was fair.

In what it described as a "close call," the Trial Court erroneously ruled that information concerning Brookfield's expected $130 million in incremental management fees was immaterial, because stockholders could divine it through a complex formula in the Proxy. But doing so was virtually impossible given the Proxy's failure to disclose the formula's inputs or where to obtain that information, and Delaware law does not require stockholders to undertake such scavenger hunts. The Trial Court deemed the $1 billion in potential debt refinancing benefits to

Brookfield not "sufficiently certain to require disclosure" even though "certainty" is not the disclosure standard and the Committee had been repeatedly advised of that benefit and told it should be allocated to TERP stockholders through Merger negotiations. The Trial Court also erroneously found the Proxy's generalized disclosure of both benefits—but omission of their magnitude—sufficient. However, knowing the benefit's magnitude was necessary for stockholders to adequately assess the Merger price.

Second, the Proxy failed to disclose the Committee's advisors' potential conflicts of interest. The Proxy omitted that: (i) Morgan Stanley—which had recently received approximately $100 million in fees from, and had concurrent financing engagements with, Brookfield—also held an almost *half-billion dollar* Brookfield stake; and (ii) the Committee's legal advisor, Kirkland, was concurrently advising Brookfield on another transaction and had a longstanding and lucrative pre-Merger relationship with Brookfield.

The Trial Court acknowledged that it did not "love" the existence of either potential conflict but it never examined their materiality from stockholders' perspective, summarily dismissing those claims by relying on its earlier finding that the Committee had purportedly met its duty of care in hiring its advisors. However, regardless of a committee's care in hiring an advisor, Delaware law requires

disclosure of an advisor's *potential* conflicts with a merger counterparty, and stockholders logically would share the Trial Court's concerns regarding those potential conflicts.

Third, the Proxy omitted the Committee's failure to apprise itself of its advisors' potential conflicts by seeking routine conflict disclosures, and that Morgan Stanley and Kirkland concealed their conflicts from the Committee. The Trial Court again failed to analyze the disclosures from stockholders' perspective, and dismissed the claim by relying on its erroneous determination that the potential conflicts themselves were immaterial. But the conflict information is material because it informs the sufficiency of the Committee's oversight and process, regardless of the materiality of the advisors' potential conflicts.

Fourth, the Proxy failed to disclose that the Merger would dilute TERP minority stockholders' dividends. This was critical information to TERP's yield-focused investors, who communicated the importance of the dividend during Merger negotiations. The Trial Court erroneously held that TERP stockholders were not entitled to clear and transparent disclosure of that information, as they theoretically could have calculated the dilution themselves by searching for information and engaging in a complex computation that Delaware law does not require.

Fifth, the Proxy failed to disclose that Greentech had warned the Committee that it was not the optimal time to maximize TERP stockholder value and that a "robust market check" was a "must." In dismissing that claim, the Trial Court impermissibly adopted defense-friendly inferences, finding the advice "less informative" because it was in Greentech's initial proposal, while ignoring Plaintiffs' well-pled allegations that Greentech was uniquely positioned to give the advice because it had advised TERP's Board and Conflicts Committee consistently for a year-and-a-half prior to its retention.

The Trial Court's erroneous rulings should be reversed.

SUMMARY OF ARGUMENT

1. Judicial cleansing is unavailable under *MFW* because Brookfield's threat eliminated the Special Committee's ability to "say no" and preserve the *status quo*. 88 A.3d at 645. The Trial Court deemed Plaintiffs' implicit coercion allegations insufficient by distinguishing them from explicit threats made in *Dell* despite *Dell*'s ruling that subtler, implicit threats can also coerce committees and foreclose *MFW* cleansing.

2. Judicial cleansing is unavailable under *MFW* because Plaintiffs' well-pled allegations entitled Plaintiffs to "a rational inference that material facts were not disclosed [in the Proxy] or that the disclosed information was otherwise materially misleading." *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018). The Trial Court erroneously rejected Plaintiffs' arguments respecting several material Proxy omissions, including: (i) the extent to which Brookfield would benefit economically from the Merger; (ii) Morgan Stanley and Kirkland's potential conflicts; (iii) the Committee's failure to apprise itself of or manage those potential conflicts; (iv) that the Merger would be dilutive to TERP's minority stockholders; and (v) Greentech's caution to the Committee that it was a suboptimal time to sell and that a market check was imperative.

STATEMENT OF FACTS

A. The Parties

Plaintiffs were TERP stockholders before the Merger. A36, ¶15.

Defendant BAM is a Canadian asset management company. A37, ¶16. Defendants BIF, Orion GP, and Orion LP held dispositive voting power over BAM's shares. A37, ¶¶18-20. BEP and BEPC were controlled by BAM. A38, ¶¶21-22. The foregoing entities and their affiliates are collectively referred to as "Brookfield" herein.

Brookfield controlled TERP after acquiring 51% of TERP's common stock in March 2017. A42, ¶¶34-35. As of the Merger, Brookfield owned approximately 62% of TERP. A50, ¶49. Brookfield dominated TERP's Board and management. Brookfield appointed its managing partner, Stinebaugh, as TERP's CEO, and he served in that role through the Merger, and appointed other Brookfield executives as TERP senior executives. A39-A40, A43, A50; ¶¶27, 38, 49. The Director Defendants—Goldgut, Legault, Lawson, and Shah—were also Brookfield senior managers who each served as a TERP director through the Merger, and collectively comprised a majority of TERP's seven-member Board. A44, A50; ¶¶40, 49.

TERP was a Delaware "Yieldco"—an entity designed to distribute dividends from a portfolio of income-producing energy generation assets—that owned and

operated solar and wind assets in North America and Europe. A31, A40 A133-A134; ¶¶3 n.1, 28, 207. TERP did not develop energy projects and instead relied entirely on Brookfield for growth. A110-A111, ¶170. Specifically, TERP acquired renewable assets via a right of first offer agreement with Brookfield. A48-A49, A112-A113; ¶¶47-48, 172.

B. TERP Agrees to Acquire Saeta

In January 2018, Brookfield pushed TERP to acquire Saeta—a Spanish renewable energy company that was an attractive target in line with TERP's growth mandate—for $1.2 billion (the "Saeta Acquisition"). A50-A59, ¶¶50-57. Brookfield recognized from nonpublic information the Saeta Acquisition's substantial upside and steered TERP into an equity offering to fund the acquisition while allowing Brookfield to cement its TERP control at a discount. A60, ¶59.

On February 6, 2018, after relying on Brookfield's advice and without consulting an independent advisor, TERP's Conflicts Committee approved a $400 million equity offering to fund the Saeta Acquisition (the "Equity Offering"), including a backstop agreement for Brookfield to purchase all unpurchased Equity Offering stock for $10.66 per share (the "Backstop"). A61-A62, A66-A67; ¶¶61-62, 68-70. The Backstop price was based on TERP's trading price immediately

before the market knew of the Saeta Acquisition and represented a multi-year nadir for TERP's stock price. A67-A68, A82-A84; ¶¶71, 113.

In May 2018, at Brookfield's urging and contrary to Greentech's advice that doing so could harm TERP stockholders, the Board increased the Equity Offering and the Backstop from $400 million to $650 million. A70-A76, ¶¶80-95. Brookfield then pressured the Conflicts Committee to abandon the Equity Offering in favor of a Brookfield private placement (the "Private Placement"), which the Conflicts Committee approved on June 4. A78-A80, ¶¶99-104. On June 7, the Board authorized the Private Placement through which TERP sold $650 million shares directly to Brookfield at $10.66 per share while the Board and Brookfield possessed material nonpublic information concerning the Saeta Acquisition's positive impact on TERP. A79-A80, ¶104.

The Private Placement allowed Brookfield to increase its TERP ownership and voting power from 51% to 65.3%. A80, ¶105. For the next year-and-a-half, Greentech continued to advise TERP's Board and Conflicts Committee, providing quarterly market briefings and earnings reviews. A93-A95, ¶141.

In September 2019 and January 2020, Plaintiffs pursued litigation challenging the Private Placement and seeking damages for fiduciary breaches (the "Private

Placement Action"). A86-A87, ¶122. By answering the Private Placement Action complaint, defendants conceded that Plaintiffs asserted actionable claims. A33, ¶6.

C. Brookfield Submits an Opportunistic Merger Proposal

On January 11, 2020, with the Private Placement Action pending and the market-implied exchange ratio between TERP and BEP stock at a 52-week low, Brookfield (through BEP) made an unsolicited proposal to acquire all non-Brookfield TERP shares in exchange for shares of a newly formed entity, BEPC, at a 0.36x BEPC-to-TERP exchange ratio. A89, A117-A118; ¶¶128, 178. Brookfield stated that it would not "support any alternative sale, merger or similar transaction involving [TERP]." A183, A1070.

On January 12, the Board formed the Special Committee, consisting of the same directors from the Conflicts Committee that approved the unfair Private Placement. A92, ¶¶138-39. The Board selected McFarland as the Special Committee's chair. A92, ¶139.

D. The Committee Hires Conflicted Advisors

The Special Committee chose as its financial advisors: (i) Greentech, because of its "thorough understanding of [TERP] and its assets" given its involvement in the Private Placement and regular presentations to the Board and Conflicts Committee over the prior year-and-a-half; and (ii) Morgan Stanley, given "its

involvement in the transaction by which Brookfield acquired [control of] the Company ....” A92, A93; ¶¶138, 140.

In its first presentation on January 12, Greentech told the Committee that: (i) it was “not the optimal time to realize maximum value for T[ERP]”; (ii) third parties might value TERP’s minority stake more than Brookfield; and (iii) a “robust market check is a must to ensure maximum value for [TERP]’s public shareholders[.]” A93, ¶¶140-41. Greentech emphasized that its “Expert Knowledge of [TERP’s] Situation and Assets”—gained from its quarterly briefings with the TERP directors as well as its extensive renewables market experience—made it “Best Able to Run a Thorough Market Check[.]” A97, ¶144.

On January 13, Morgan Stanley advised the Committee that there would be “certain limitations on conducting an effective market check under the current circumstances” and “a traditional football field analysis would not accurately reflect how Brookfield values the Proposed Transaction.” A98, ¶146. Morgan Stanley further advised of “the potential value that Brookfield would derive from the Proposed Transaction as a result of, among other things, Brookfield’s management fee structure with respect to BEP,” noting that (i) Brookfield’s expected management fee increase was “a Key Consideration for the Special Committee” that would

warrant a higher transaction premium, and (ii) an accretive deal would "result[] in greater distributions to Brookfield." A99, ¶147.

Morgan Stanley had significant conflicts, which it concealed from the Committee. A99-A101, ¶¶149-51. In the two years before the Merger, Morgan Stanley received (i) $65 million to $90 million in fees from Brookfield and (ii) $5 million to $15 million in fees from Brookfield-controlled TERP. A99, ¶149. Additionally, concurrent with its Special Committee engagement, Morgan Stanley held an approximately *$470 million* Brookfield stake and received millions of dollars from Brookfield for Morgan Stanley's service as "a lender and a participant" in financings for Brookfield affiliates." A100, ¶¶150-51. Morgan Stanley's engagement letter did not disclose those conflicts and the Committee never asked Morgan Stanley for a conflict disclosure. A100-A101, ¶¶151-52; A1142.

On January 17, the Special Committee hired Kirkland as its legal advisor. A102, ¶154. Kirkland told the Committee "that it did not have any conflicts of interest that would affect its ability to serve as legal counsel to the Committee[,]" and did not disclose its (i) concurrent engagement advising Brookfield on an equity investment in Superior Plus Corp. and (ii) longstanding and lucrative relationship advising Brookfield affiliates on multi-million and billion-dollar transactions in the years immediately preceding the Merger. A103-A104, ¶¶154-55. As with Morgan

Stanley, the Committee never requested a conflict disclosure from Kirkland or otherwise investigated Kirkland's potential conflicts. A103-A104, ¶155.

E. Brookfield Coerces the Committee by Threatening to Block TERP's Growth

Notwithstanding Brookfield's purported refusal to support alternative transactions, Greentech and Morgan Stanley—recognizing the necessity of a market check—began to develop a "third party outreach strategy" in mid-January 2020, including identifying specific parties potentially interested in purchasing all of TERP or just the minority stockholders' stake. A101-102, ¶153.

On January 29, the Special Committee met with Greentech and Morgan Stanley to discuss progress on diligence, including scheduled meetings with both TERP management (*i.e.*, Brookfield's Stinebaugh and others) and BEP management. A104, ¶156. The financial advisors told the Committee it would be important to determine management's plans for TERP absent a Brookfield takeover. *Id.*

On or about February 3, Brookfield, through BEP, furnished the Committee with five-year projections. *See* A317. The five-year forecast Brookfield gave the Committee during Merger negotiations "d[id] not align with" TERP management's ordinary course 5-year forecast, because it excluded "growth at the TERP level[,]"

indicating that Brookfield would prevent TERP's growth if the Committee rejected the Merger. A111-A112, ¶171; A952.

On February 4, the Committee discussed with its advisors how "Brookfield's role as [TERP]'s controlling stockholder and sponsor" impacted its "prospects as a standalone entity[.]" A105, ¶159; A620-A621. The Committee also discussed TERP's "alternatives to the Proposed Transaction [] and how such alternatives impacted the valuation analysis to be performed by Morgan Stanley and Greentech." A105-A106, ¶160; A620-A621. The Committee yielded to Brookfield's purported refusal to consider alternative transactions, and—despite Greentech's unequivocal advice on a market check's necessity—determined the financial advisors should not consider or solicit alternative bids. *Id.*

Through most of February 2020, Greentech and Morgan Stanley engaged in diligence with Brookfield to develop valuations. A105-A107, ¶¶159-64. On February 26, the financial advisors presented their valuations to the Committee. A110, ¶169.

Greentech advised the Committee of "Key Valuation Issues," which included that TERP was "nearly fully reliant on Brookfield for growth," its ability to achieve Greentech's standalone valuations was subject to Brookfield's continued support and "the value of Brookfield's growth plan for TERP [wa]s a material factor in

determining the fair value of the offer for TERP's public stockholders." A110-A111, ¶¶169-70; A946.

Greentech's warnings were a result of the five-year no-growth forecast Brookfield had furnished to the Committee. Greentech even presented financial analyses assuming Brookfield would stop TERP's growth, resulting in a significantly lower TERP standalone valuation. A111-A112, ¶171. The analysis showed that TERP's implied exchange ratio would be reduced from an overall valuation range of 0.33x-0.44x "[b]ased on management projections, inclusive of management growth projections" to 0.24x-0.34x when excluding growth. *Compare* A955 *with* A956. Greentech explained that a Brookfield deal would "alleviate[] potential concerns about the ability/willingness of [Brookfield] to grow TERP as a standalone entity[.]" A111-A112, ¶171; A957.

Like Greentech, Morgan Stanley highlighted TERP's dependence on Brookfield for growth and—acknowledging Brookfield's implicit threat—warned that "TERP ha[d] a limited ability to operate [itself] without Brookfield's influence and support" and if the Committee were to "Turn Down [a Brookfield] Offer," Brookfield could retaliate by stifling TERP's growth, driving down TERP's stock price, and then later acquiring TERP at an even lower price. A112-A113, ¶172. Morgan Stanley emphasized Brookfield's control over TERP, highlighting that,

because Brookfield controlled TERP's Board, management, and future business opportunities, TERP had a "limited ability to operate TERP without Brookfield's influence and support." *Id.*

Morgan Stanley also demonstrated that Brookfield's offer (and the ultimate Merger consideration) was not fair to stockholders, recognizing several factors that supported a significant premium increase, including: (i) Brookfield expected $406.6 million in increased management fees from refinancing TERP's debt; (ii) "Brookfield could pay [a] .410x exchange ratio and still achieve ~15% FFO [*i.e.*, funds from operations] accretion in 2021[;]" and (iii) "[p]ro forma 2021 DPS [*i.e.*, dividends per share] is dilutive … [W]ould need an exchange ratio of at least 0.397x to be DPS neutral[.]" A114, ¶174.

Morgan Stanley calculated that Brookfield's potential to receive interest expense savings and incremental management fees from TERP's debt refinancing had an over $1 billion net present value to Brookfield *pro forma*. A116, ¶176. And Morgan Stanley noted that BEP had underperformed its peers since announcing its TERP proposal and, had Brookfield not submitted its proposal, Morgan Stanley "expected TERP to appreciate in-line with the industry" (*i.e.*, 10-15% stock price growth), which would have meaningfully increased the Merger's implied exchange ratio. A115-A116, ¶175.

Finally, both Morgan Stanley and Greentech confirmed that Brookfield's offer was opportunistic, as it occurred when the implied exchange ratio was at a nearly two-year nadir. A114-A115, ¶175.

F. The Special Committee Caves

Faced with the prospect of Brookfield retaliation, the Committee countered Brookfield's initial proposal on February 28 with a 0.42x exchange ratio proposal, and Brookfield countered with a 0.365x exchange ratio proposal on March 6. A117, ¶¶177-78.

On March 10, the Committee met to consider Brookfield's counterproposal, and Greentech and Morgan Stanley again emphasized that the growth embedded in its standalone TERP valuation depended on Brookfield acting like a "supportive sponsor." A118, ¶179. Using "TERP management['s] 5-Year Business Plan Levered DCF (average of high and low of the range)," Morgan Stanley calculated a 0.448x implied exchange ratio based on BEP's current share price. A136, ¶213. Morgan Stanley also noted the "[s]ubstantial future upside for [Brookfield] from refinancing TERP debt at BEP that should be shared with TERP shareholders[.]" A118, ¶179.

That same day, the Special Committee countered Brookfield with a 0.40x exchange ratio. A118-119, ¶180. Morgan Stanley and Greentech recommended that

the Committee communicate to Brookfield, *inter alia*, that its offer was "DPS dilutive to TERP shareholders" and that the Committee had "received feedback from investors highlighting the importance of the dividend as they evaluate the merits of the deal." A118, ¶180. Committee chair McFarland told Brookfield's Shah the Committee "would need an exchange ratio [that is] at least … DPS neutral in 2021." A119, ¶180.

On March 11, the Committee met—without its advisors—to discuss Brookfield's latest counter of a 0.37x exchange ratio, which Shah had delivered to McFarland that same day. A119, ¶181. The Committee decided to counter with a 0.39x exchange ratio and to accept any Brookfield counter of at least 0.38x, despite indicating just a day prior that the final exchange ratio needed to be approximately 0.40x to make it "DPS neutral" to TERP stockholders. *Id.* McFarland communicated the 0.39x counteroffer to Shah the same day. A322.

Through negotiations the following day that also occurred without the input or involvement from the Committee's advisors, McFarland and Shah reached a handshake agreement on a proposed 0.381x exchange ratio. *Id.*

G. The Committee Approves the Merger

On March 16, 2020, the Special Committee received presentations from its financial advisors indicating that Brookfield's 0.381x offer (i) still significantly

undervalued TERP and (ii) would be accretive to BEP's FFO and CAFD (cash available for distribution) and while being dilutive to TERP stockholders' DPS. A119-A125, ¶¶182-91.

Both financial advisors again acknowledged Brookfield's implicit threat. In describing the "Key Consideration for TERP Shareholders in Evaluating the Transaction with Brookfield," Greentech warned the Committee of TERP's "Dependence on [Brookfield] for Growth," explaining:

- "TERP's ability to achieve [Greentech's] standalone going concern valuations presented herein are subject to continued support by BAM/Brookfield (the "Sponsors") to deliver such growth absent a Transaction as the Sponsors are also the parties supporting the Transaction";
- "With no in-house project development efforts and no / limited M&A staff, TERP is nearly fully reliant on the Sponsors for Growth";
- "Therefore, *the value of the Sponsors' growth plan for TERP, and their willingness and ability to deliver it for the benefit of TERP shareholders absent the Transaction*, is an important qualitative factor in assessing the value of TERP as a standalone entity"; and
- "The Value of TERP Class A Common Stock could be negatively impacted to the extent the Sponsors deliver growth which is less than the assumptions contained in the TERP Management Models."

A119-A120, ¶184 (emphasis added). After noting that, unlike TERP management's forecasts, BEP's five-year forecasts for TERP included no growth at the TERP level

and warning that "TERP is fully dependent on Brookfield for future growth,"[2] Greentech again explained how excluding growth from TERP's projections would significantly reduce its implied valuation range for TERP from an overall valuation range of 0.31x-0.41x "[b]ased on TERP Management Model, inclusive of Management growth" to 0.24x-0.34x based on "TERP and BEP Management Models."[3]

Morgan Stanley likewise reiterated the risk that Brookfield could punish TERP if the Committee rejected the Merger, again highlighting Brookfield's grip on TERP's Board, personnel, and growth prospects, and explaining that Brookfield "could significantly impact TERP's ability to execute its business plan," which "depend[ed] on Brookfield's ability to identify and present acquisition opportunities to TERP." A122-A123, ¶188.

Facing potential Brookfield retaliation, the Committee recommended that the Board approve the Merger, which it did on March 16, 2020. A125-A126, ¶¶191-93. Pursuant to the Merger, Brookfield acquired each TERP share it did not already own for consideration equivalent to 0.381 BEP units payable in either BEPC shares or BEP limited partnership units. A126-A127, ¶194. Based on BEP's March 15, 2020,

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[2] A120, ¶185; *see also* A699, A703.

[3] *Compare* A702 *with* A703.

closing share price, the implied consideration was $14.36 per share (*i.e.*, significantly below the values calculated by Morgan Stanley and Greentech). *Id.*

H. The Proxy

On June 29, 2020, TERP filed its Proxy. A147, ¶231. Among other things, the Proxy omitted that:

- Brookfield could make hundreds of millions of dollars through unique benefits derived from the Merger;[4]
- The Committee's advisors' potential conflicts, including (i) that Morgan Stanley had a nearly half-billion-dollar equity interest in Brookfield, and (ii) Kirkland had significant concurrent and recently-concluded Brookfield engagements;[5]
- Kirkland's and Morgan Stanley's failure to disclose their conflicts to the Committee, and the Committee's failure to ask for conflict disclosures from the advisors;[6]
- The Merger would be dilutive to TERP stockholders' dividend yield;[7] and
- Greentech's advice to the Committee that it was a suboptimal time to realize maximum value for TERP stockholders and that a "robust market check" was a "must."[8]

TERP's minority stockholders approved the Merger on July 29, and the

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[4] A149-A150, ¶¶237-38.

[5] A100-A101, A102-A103, A148-A149; ¶¶150-51, 154, 235-36.

[6] A100-A101, A103-A104; ¶¶151, 155.

[7] A151, ¶239.

[8] A93-A95, A96-A97, A147-A148, ¶¶141, 144, 232-33.

Merger closed on July 31, 2020. A153, ¶242.

ARGUMENT

I. THE MERGER IS SUBJECT TO ENTIRE FAIRNESS BECAUSE PLAINTIFFS ADEQUATELY ALLEGED COERCION BY BROOKFIELD

A. Question Presented

Whether the Trial Court erred in finding that Plaintiffs did not plead facts creating a reasonably conceivable inference that Brookfield wrongfully coerced the Special Committee by threatening implicitly to derail TERP's pre-existing growth plans. The question was raised below (A1088-A1091) and considered by the Trial Court. Tr. at 26-27.

B. Scope of Review

This Court reviews the application of *MFW* on a motion to dismiss *de novo*. *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019).

C. Merits of Argument

MFW requires that a special committee be fully empowered to "say no." *Dell*, 2020 WL 3096748, at *16. "[A] controller's explicit or implicit threats can prevent a committee from fulfilling its function and having a concomitant effect on the standard of review." *Id.* at *29.

Here, the Complaint alleges that the Special Committee was not fully-empowered because Brookfield threatened the Committee by signaling that

Brookfield would block TERP's future growth if the Committee rejected the Merger. Thus, the Trial Court erred in dismissing the Complaint under *MFW*.

Delaware law has long recognized the problem of overbearing controlling stockholders. *See In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 436 (Del. Ch. 2002). Here, Brookfield dominated TERP: Brookfield owned a majority of TERP's outstanding stock, Brookfield executives held a majority of TERP's Board and senior management positions, and Brookfield was TERP's contractual sponsor and exclusive provider of growth opportunities. *Supra* at 8-9. As Greentech advised the Committee: "TERP is *fully dependent* on Brookfield for future growth." A120, ¶185 (emphasis added).

The Complaint pleads facts creating a reasonably conceivable inference that Brookfield exploited TERP's dependency by implicitly threatening to starve TERP of growth—including overriding existing management growth plans—if the Special Committee rejected the Merger. Brookfield told the Committee it would not support transactions other than Brookfield's preferred deal (*i.e.*, the Merger). A183, A1070. Nevertheless, the Committee's advisors determined a market check was critical, and by mid-January were developing a "third party outreach strategy." A102, ¶153. Thereafter, Brookfield strategically furnished revised projections to the Committee, which, unlike the ordinary course projections prepared by TERP's Brookfield-

affiliated management before the takeover bid, "exclude[d] future growth at the TERP level." A111 ¶171; A317.

A reasonable inference is that Brookfield was issuing a threat: the Committee should only consider a deal with Brookfield and if the Committee refused that deal, Brookfield would starve TERP of growth—which Morgan Stanley advised could allow Brookfield to buy TERP at a discount later.

It is also reasonable to infer that the Committee fully appreciated Brookfield's threat. Thus, "the Special Committee and its advisors were mindful at all times of [Brookfield's] ability to [starve TERP of growth opportunities]." *See Dell*, 2020 WL 3096748, at *31. Indeed, the pled facts show the Committee and its advisors immediately got the message. In the meetings after the Committee first received Brookfield's projections on February 3, the Committee's advisors repeatedly warned of the potential negative consequences of rejecting a Brookfield deal:

- The day after receiving Brookfield's projections, the Committee discussed with its financial advisors how "Brookfield's role as [TERP]'s controlling stockholder and sponsor" impacted "the Company's prospects as a standalone entity";[9]
- On February 26, when the financial advisors presented their TERP valuations to the Committee and it considered a counteroffer to Brookfield's initial proposal, Greentech told the Committee that (i) Brookfield's projections excluded TERP-level growth (and thus did not align with TERP's management model), (ii) Brookfield's growth plans

[9] *Supra* at 15.

for TERP were a "material factor" in determining TERP's fair value, (iii) "TERP [wa]s nearly fully reliant on Brookfield for growth," and (iv) TERP's ability to achieve Greentech's standalone valuations was "subject to continued support by [Brookfield] to deliver such growth absent a Transaction";[10]

- That same day, Greentech presented valuations showing that TERP's value would plummet without Brookfield growth opportunities if Brookfield imposed its no-growth plan[11] and Morgan Stanley told the Committee that TERP only had a "limited ability to operate TERP without Brookfield's influence and support," warning that Brookfield could punish TERP's minority stockholders by taking the stock and rebidding if the Committee were to "Turn Down [a Brookfield] Offer";[12]

- On March 10, when considering a Brookfield counteroffer, both advisors again reiterated that their standalone TERP valuations required Brookfield to act like a "supportive sponsor";[13]

- During the Committee's March 16 meeting when it recommended the Merger, Greentech advised the Committee that "TERP [wa]s fully dependent on Brookfield for future growth" and again presented valuations showing that excluding growth from TERP's projections—like Brookfield had done—would significantly reduce Greentech's TERP value;[14] and

- That same day, Morgan Stanley reiterated the risk of retaliation, explaining that Brookfield "could significantly impact TERP's ability

[10] *Supra* at 15-16.

[11] *Supra* at 16.

[12] *Supra* at 16-17.

[13] *Supra* at 18.

[14] *Supra* at 20-21.

> to execute on its business plan," which "depend[ed] on Brookfield's ability to identify and present acquisition opportunities to TERP."[15]

Even if there could be an innocent explanation for Brookfield's no-growth projections and subsequent persistent drumbeat from the Committee's advisors about TERP's total dependence on Brookfield and the risks of Brookfield withholding support, Defendants were not entitled to that inference on their motion to dismiss. *See Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002). Instead, those allegations, considered holistically, establish a reasonably conceivable inference that Brookfield furnished the no-growth projections as an implicit threat that it would change TERP's *status quo* to minority stockholders' detriment if rebuffed, which "undermined the [Committee's] ability to judge the matter on its merits" (*see In re Books-A-Million, Inc. Stockholders Litigation*, 2016 WL 5874974, at *32 (Del. Ch. Oct. 10, 2016)), and prevented the Committee from "exercis[ing] real bargaining power at an arms-length" (*MFW*, 88 A.3d at 646 (internal quotations omitted)).

The Trial Court also failed to apply the correct coercion standard. The court dismissed the Complaint on the basis that Plaintiffs failed to allege extreme facts

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[15] *Supra* at 21.

similar to those in *Dell*, where the controller *explicitly* threatened to bypass the committee absent a negotiated deal:

> Unlike in *Dell*, plaintiffs do not allege that Brookfield indicated publicly and privately that it intended to "bypass" the formal process if the special committee chose not to approve the transaction, nor that it had a "contingency plan" to do so. Plaintiffs' allegations fail to carry the day on *MFW*'s third prong.

Tr. at 26-27.

But *Dell* itself recognizes that a plaintiff need not plead explicit threats to establish coercion because "a controller's explicit *or implicit* threats can prevent a committee from fulfilling its function." 2020 WL 3096748, at *29 (emphasis added). That court made clear that a controller can coerce a committee even through subtle conduct: "The stereotypical mobster is more subtly caring by saying, 'You be careful on your way home. I'd hate for something bad to happen to you.' That's subtle, that's indirect, but fairly communicative." *In re Dell Tech. Class V S'holders Litig.*, C.A. No. 2018-0816-JTL, Tr. at 40 (Del. Ch. Mar. 13, 2020) (TRANSCRIPT).

Thus, the Trial Court failed to credit the Complaint's well-pled allegations that Brookfield's "implicit threats" to block TERP's future growth effectively prevented the Committee from saying "no." *Dell*, 2020 WL 3096748, at *29-33.

II. THE MERGER IS SUBJECT TO ENTIRE FAIRNESS BECAUSE THE PROXY WAS MATERIALLY MISLEADING

A. Question Presented

Whether the Trial Court erred in finding that Plaintiffs failed to plead a material misrepresentation or omission in the Proxy. The question was raised below (A1105-A1123) and considered by the Trial Court. Tr. at 34-44.

B. Scope of Review

This Court reviews the application of *MFW* on a motion to dismiss *de novo*. *Olenik*, 208 A.3d at 714.

C. Merits of Argument

Judicial cleansing under *MFW* is unavailable if a plaintiff alleges facts which "support[] a rational inference that material facts were not disclosed or that the disclosed information was otherwise materially misleading." *Morrison*, 191 A.3d at 282. Information is material if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote[.]" *Id.* The "materiality test does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote," only that it would have "altered the total mix of information made available." *Id.* at 283 (citation and quotations omitted).

It is reasonably conceivable that a stockholder would find that material facts were omitted from the Proxy, including: (i) the extent to which Brookfield would benefit economically from the Merger; (ii) Morgan Stanley and Kirkland's potential conflicts; (iii) the Committee's failure to apprise itself of those potential conflicts; (iv) that the Merger would be dilutive to TERP's stockholders; and (v) Greentech's advice to the Committee that it was not the right time to sell and a market check was imperative.[16]

1. The Proxy Failed to Disclose the Extraordinary Benefits Brookfield Would Receive from the Merger

The Trial Court erred in ruling that information concerning the extraordinary benefits Brookfield would receive through the Merger was immaterial. *See* Tr. at 36-43. Information concerning value inuring to the acquiror is critical to stockholders' evaluation of whether the merger consideration obtained was fair. *See Ark. Tchr. Ret. Sys. v. Alon USA Energy, Inc.*, 2019 WL 2714331, at *26 (Del. Ch. June 28, 2019) ("It is reasonably conceivable that a plan to build upon that asset for the benefit of the post-merger entity would be material to a stockholder deciding how to vote on the merger."); *Gallagher Indus., LLC v. Addy*, 2020 WL 2789702, at *10 (Del. Ch. May 29, 2020) ("In the merger context, the company must disclose

[16] Defendants also failed to disclose Brookfield's coercion as discussed herein and that provides an independent basis to deny judicial cleansing under *MFW*.

sufficient information for a stockholder to understand the value of the interest for which she is asked to accept cash or pursue appraisal.”).

Here, because Brookfield blocked a TERP sale to any third party and the Committee forewent a market check of TERP or the minority stake, the Merger negotiations were effectively a value apportionment between Brookfield and TERP’s minority stockholders. Morgan Stanley recognized that dynamic and advised the Committee that there would be “[c]ertain limitations on conducting an effective market check under the current circumstances,” “a traditional football field analysis would not accurately reflect how Brookfield values the Proposed Transaction” and “the potential value that Brookfield would derive from the Proposed Transaction” would “justif[y] a premium to TERP stockholders.” A98-A99, A150, ¶¶146-47, 238 n.31.

The Proxy nevertheless omitted material information concerning the extraordinary value Brookfield stood to derive from the Merger, *i.e.*, (i) significantly increased management fees and (ii) more than $1 billion from refinancing TERP’s debt. A reasonable investor would want to know the full value of the Merger to Brookfield—information the Special Committee received—to determine whether the consideration was fair. *See, e.g.*, *Voigt v. Metcalf*, 2020 WL 614999, at *24 (Del. Ch. Feb. 10, 2020) (finding information regarding a controller’s unique merger

profits "material because it directly addressed the fairness of the Challenged Transaction"); *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 987-988 (Del. Ch. 2000) (finding information regarding a controller's side deal material).

Management Fees. Because of BEP's management fee structure, the Merger presented Brookfield the opportunity to obtain significantly higher management fees—an additional $130 million over five years. Morgan Stanley described the management fee increase as "a Key Consideration for the Special Committee" that would warrant a higher premium in any transaction. A98-99, ¶147. Accordingly, the Committee and its advisors repeatedly addressed Brookfield's increased management fees during Merger negotiations, in Committee discussions and materials, and even in oral and written questions from Committee members to BEP management. A98-A99, A106, A107; ¶¶146-47, 161, 164; A318-A319.

But the Proxy omitted that Brookfield stood to generate those extraordinary additional fees from the Merger, which was material to determine whether the Merger consideration was fair. *See Gilmartin v. Adobe Res. Corp.*, 1992 WL 71510, at *10 (Del. Ch. Apr. 6, 1992). Moreover, because the Proxy affirmatively and expressly addressed Brookfield's benefits from the Merger,[17] the Board was obligated to provide a full and fair description of those benefits—including that

[17] A330-A331.

Brookfield would earn $130 million in additional management fees. *See Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1279, 1280 (Del. 1994).

The Trial Court conceded that the facts alleged presented "a close call" and that it was "struggling" in determining whether to sustain or dismiss Plaintiffs' claim. Tr. at 38. The court nevertheless found that Plaintiffs failed to establish a material disclosure issue because the "[t]he management fees were fully described[,]" and that, in any event, only the *fact* of Brookfield's increased fees (rather than the dollar amount of the increase) was material. *Id.*

The Trial Court incorrectly described the management fees as merely "an annual management fee of $20 million, plus 1.25 percent of the amount by which [BEP's] market increased." *Id.* at 37. In fact, Brookfield's post-Merger management fee is calculated under a complex formula that no reasonable stockholder reviewing the Proxy could solve. While the Proxy contained the multivariate formula, it did not disclose dollar amounts or inputs necessary to complete the formula or even where to find that information. *See* A482.

Indeed, to determine Brookfield's management fee increase, stockholders would need to know (i) the increase in BEP's market value for BEP (fully appreciating BEP's byzantine capital structure), (ii) "the initial reference value" mentioned in the formula, (iii) "the outstanding third party debt with recourse to a

Service Recipient," (iv) the amount of cash held by the vaguely-described "such entities"; and (v) the unexplained payments to BRP Bermuda GP Limited L.P. *See id.* (disclosing formula and describing the foregoing inputs but providing no information on inputs).

That effort goes beyond what is expected of stockholders, who were entitled to a clear and fair disclosure and were not required to undergo a fact-finding expedition to fill in the gaps. *Salladay v. Lev*, 2020 WL 954032, at *16 (Del. Ch. Feb. 27, 2020) (finding disclosure insufficient because "[e]ither the stockholder would be unable to follow the necessary steps to conduct her analysis" or would be "required to undergo the sort of fact-finding expedition ... that our case law discourages"); *Vento v. Curry*, 2017 WL 1076725, at *3-4 (Del. Ch. Mar. 22, 2017) (finding material information must be disclosed in "clear and transparent manner," and stockholders are not required to "go on a scavenger hunt").

Equally erroneous was the Trial Court's holding that only the *fact* of Brookfield's increased fees—rather than the magnitude of the increase—was material. *See* Tr. at 40 ("Stockholders had enough information to ascertain that Brookfield would receive an increased management fee following the merger. They were not entitled to further detail …."). *First*, there was no disclosure that Brookfield's fees would increase. The Proxy disclosed only the (complex) formula

for calculating Brookfield's fees. *Second*, even had the Proxy disclosed that Brookfield would receive some additional fees without disclosing the magnitude of the increase, the disclosure would have been insufficient because it would not aid stockholders in determining whether the Merger consideration was fair. Knowing that Brookfield stood to make an additional $130 million (as the Committee did) would have allowed stockholders to evaluate whether Brookfield paid them a fair price for that opportunity and whether the Committee appropriately leveraged TERP's value; but merely knowing that Brookfield would make unknown amounts of additional fees prevented stockholders from conducting that evaluation.

And because the Proxy's management fees disclosure was functionally useless to stockholders, disclosing the material, usable representation of the dollar value of the fees—which the Committee knew and considered—would be categorically unlike the 'tell me *more*' disclosure case the Trial Court addressed. *See* Tr. at 39-40.

Debt Refinancing. The Proxy also did not disclose that, due to Brookfield's meaningfully lower borrowing costs, the Merger afforded Brookfield the opportunity to realize over $1 billion by refinancing TERP's debt. A116-A117, ¶176.

Plaintiffs did not conjure those savings, as the Trial Court essentially found. Tr. at 40 (characterizing savings as "hypothetical"). Rather, the Committee's advisors repeatedly told it that refinancing would decrease interest expenses and increase Brookfield's management fees. A116-A117, A149-A150, A150-A152; ¶¶176, 237, 238-39. Morgan Stanley calculated the refinancing value lever to be worth $2.96 per share, upside that it told the Committee "should be shared with TERP shareholders." A116-A117, A150; ¶¶176, 238. That information goes directly to the Merger consideration's fairness and is therefore "axiomatic[ally] … material to a [TERP] shareholder considering whether to vote" for the Merger. *Gilmartin*, 1992 WL 71510, at *10.

The Trial Court erroneously held that the potential benefits of refinancing were not "sufficiently certain to require disclosure" because Brookfield could (illogically) decide to eschew $1 billion. Tr. at 40-41. All corporate valuations depend on uncertain future events. Savings attributable to lower prevailing interest rates are far more reliable than 5-year and 10-year corporate projections, yet such projections are routinely required to be disclosed where they are deemed reliable. *Goldstein v. Denner*, 2022 WL 1671006, at *26 (Del. Ch. May 26, 2022). There is no requirement that valuations relating to potential future events rise to a level approaching certainty.

IRA Trust FBO Bobbie Ahmed v. Crane, 2017 WL 7053964 (Del. Ch. Dec. 11, 2017), which the Trial Court addressed,[18] is not contrary. The *Crane* plaintiff sought disclosure that it was hypothetically possible that the controller could be diluted out of control within a specific period, which was deemed immaterial given that the proxy already disclosed the number of shares needed to dilute absolute control, and because, *inter alia*, the company was actively managing dilution, which rendered the ultimate control loss date mere guesswork. *Id.* at *17. Here, the magnitude of potential savings was known to the Committee's financial advisors and shared with the Committee in real time to support TERP's value in negotiations with Brookfield.

Thus, the Trial Court's determination that it was sufficient that stockholders could determine that "refinancing would be advantageous to Brookfield's bottom line" because the Proxy disclosed "Brookfield's outstanding debt, their respective maturity dates, their respective interest rates" misses the point. Tr. at 42-43. It is also factually wrong. While the Proxy contained various disclosures regarding Brookfield's debt that might permit a stockholder to piece together that refinancing would be generally beneficial to Brookfield, nothing in the Proxy suggests the magnitude of the refinancing benefit, which is the information that would be material

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[18] Tr. at 42-43.

to a stockholder considering the Merger consideration's fairness. Stockholders were entitled to the same clear analysis the Special Committee received regarding the upside of refinancing TERP's debt, particularly given that the benefit's $1 billion size comprised approximately 30% of TERP's $3.3 billion valuation implied by the Merger. *See* A126-A127, ¶194.

2. The Proxy Omitted Material Facts Concerning Morgan Stanley's and Kirkland's Potential Conflicts of Interest

Under established law, an advisor's potential conflicts are material "[b]ecause of the central role played by" advisors in a special committee's process. *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011); *see also David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *8 (Del. Ch. June 27, 2008) ("[I]t is imperative for the stockholders to be able to understand what factors might influence the ... advisor's analytical efforts."). Here, the Proxy omitted material facts concerning Morgan Stanley's and Kirkland's potential conflicts.

First, the Proxy contained only partial, incomplete disclosure of Morgan Stanley's conflicts, failing to disclose Morgan Stanley's nearly *half-billion-dollar* equity interest in Brookfield. A148, ¶235. That potential conflict is material, especially considering Morgan Stanley's other financial entanglements with Brookfield (*i.e.*, that it received approximately $100 million in fees from Brookfield/TERP pre-Merger and had concurrent financing engagements with

Brookfield). *See Del Monte*, 25 A.3d at 832 ("Because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts."); *Arnold*, 650 A.2d at 1280 (finding once defendants "travel[] down the road of partial disclosure" they must "provide the stockholders with an accurate, full, and fair characterization").

In dismissing this claim, the Trial Court failed to undertake any analysis of the materiality of Morgan Stanley's conflicts from the perspective of *stockholders*. Instead, it referred to its earlier finding that the Committee had purportedly met its duty of care when it retained Morgan Stanley. Tr. at 35. Thus, the Trial Court never addressed the critical question: whether a financial advisor's half-billion-dollar financial interest in a transaction counterparty must be disclosed to stockholders, particularly where that advisor has received approximately $100 million dollars in fees from, and has concurrent financing relationships with, that counterparty.

Here, the Proxy included a mere subset of Morgan Stanley's potential conflicts, omitting Morgan Stanley's *$470 million* interest in Brookfield and thus falling well short of "full disclosure of [Morgan Stanley's] compensation and potential conflicts." *Del Monte*, 25 A.3d at 832. Indeed, the Trial Court acknowledged the significance of Morgan Stanley's potential conflicts by stating:

"I'll be honest, I don't love the fact that Morgan Stanley has this level of financial ties to the controller." Tr. at 30. That statement cannot be squared with the court's ruling that information permitting stockholders the same understanding of the "level of financial ties" that gave the court concern is immaterial.

In an apparent reference to *In re Micromet Inc. Shareholders Litigation*, 2012 WL 681785 (Del. Ch. Feb. 29, 2012), the Trial Court stated: "This court has found that an investment bank's holdings in a counterparty amounting to .16 percent of its overall portfolio was insufficient to create a material conflict." Tr. at 30. But *Micromet* did not involve the significant other conflicts present here (such as Morgan Stanley's longstanding and ongoing, multi-hundred-million-dollar relationship with Brookfield) and the relevant advisor there, Goldman, presented countervailing considerations such as a "substantially larger stake in [a competing bidder] and a similar stake in another company that was contacted by Goldman as a potential acquirer during the market check." 2012 WL 681785, at *11-12. Further, the percentage of an advisor's investment in a counterparty does not determine materiality under Delaware law. *See In re Art Tech. Grp., Inc. S'holders Litig.*, Consol. C.A. No. 5955-VCL, Tr. at 61 (Del. Ch. Dec. 20, 2010) (TRANSCRIPT) (holding fees paid by acquirer to target bank worth "something like two-hundredths

of one percent of their revenue" were material because banks could weigh relative fees against one another).

Second, the Court's rejection of Plaintiffs' claims regarding Kirkland's potential conflicts was erroneous. The Proxy failed to disclose (i) that "[a]t the same time as the merger negotiations, Kirkland was advising Brookfield on another separate equity investment" and (ii) Kirkland's longstanding and lucrative prior relationship with Brookfield. Tr. at 12; A102-A103; ¶154. That information is material under Delaware law.

Indeed, an advisor's *concurrent* engagement with a transaction counterparty is an "extraordinary fact" and its omission a "glaring deficiency" that renders a stockholder vote uninformed. *See, e.g.*, *Tornetta v. Maffei*, C.A. No. 2019-0649-AGB, Tr. at 18 (Del. Ch. Feb. 23, 2021) (TRANSCRIPT) ("*Pandora* Tr."); *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *43 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (finding advisor's "ongoing relationship with [transaction counterparty] gave [advisor] a powerful incentive to maintain good will and not push too hard during the negotiations.").

Moreover, Delaware courts have also long acknowledged the materiality of an advisor's past engagements with—and fees received from—a transaction counterparty. *See, e.g.*, *Ortsman v. Green*, 2007 WL 702475, at *1 (Del. Ch. Feb.

28, 2007) (finding proxy statement was "deficien[t]" where it failed to disclose engagements and "fees paid to [advisors] in ... recent transactions involving the members of the buyer group."); *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *11 (Del. Ch. Mar. 31, 2017) ("What was material, and disclosed, was [an advisor's] prior working relationship [with affiliates of the counterparty] and the amount of fees."). And there is no basis to hold Kirkland to a lesser standard merely because Kirkland was the Committee's legal—rather than financial—advisor. *Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997) (treating legal and financial advisor conflicts same because both "have the ability to influence directors who are anxious to make the right decision but who are often in terra cognito").

Notably, the Trial Court acknowledged the significance of Kirkland's undisclosed conflicts, stating: "Again, I do not love these alleged conflicts. I wish Kirkland had not concurrently represented Brookfield in an unrelated equity transaction." Tr. at 31. Stockholders might have logically had the same concerns as the Trial Court, thus those potential conflicts could have "altered the 'total mix' of information made available" and were material. *Morrison*, 191 A.3d at 282.

However, like with Plaintiffs' Morgan Stanley-based disclosure claims, the Trial Court dismissed Plaintiffs' claim without undertaking any analysis of the materiality of Kirkland's conflicts to *stockholders*. Tr. at 35. The court again merely

referred back to its *MFW* due care analysis. However, that analysis did not find that Kirkland's potential conflicts were immaterial, but rather that "the [conflict] allegations fail to cast doubt on the reasonableness and the good faith nature of the special committee's decision to hire Kirkland following its own diligence." *Id.* at 31.

The Trial Court also indicated that Kirkland's concurrent engagement was immaterial because "Plaintiffs d[id] not allege that Kirkland represented Brookfield or its affiliates as counterparties to the merger or on any related transaction." Tr. at 31. There is no basis for that distinction in Delaware law, and the Court of Chancery has routinely held that concurrent engagements on unrelated transactions must be disclosed. *See, e.g.*, *Pandora* Tr. at 18 (involving concurrent engagement with affiliate of counterparty on unrelated transaction); *In re PLX Tech. Inc. S'holders Litig.*, C.A. 9880-VCL, Tr. at 31 (Del. Ch. Sep. 3, 2015) (TRANSCRIPT) ("*PLX* Tr.") ("The second conflict affects Deutsche Bank. The most significant aspect of Deutsche Bank's role was its status as an advisor to Avago, the buyer, on a different deal in the same space.").

3. The Proxy Omitted the Special Committee's Failure to Apprise itself of Kirkland and Morgan Stanley's Potential Conflicts

The Trial Court erred by failing to find that the Proxy omitted material facts regarding the Committee's failure to apprise itself of its advisors' potential conflicts.

Specifically, the Proxy failed to disclose that the Committee accepted conclusory statements from Morgan Stanley and Kirkland regarding their supposed lack of conflicts and never requested or received conflict disclosures from them, and thus the Committee was not even aware of the full extent of those conflicts when it approved the Merger. A99, A103-A104; ¶¶149, 155. The Proxy also failed to disclose that Morgan Stanley concealed its conflicts from the Committee during the Merger process, stating that it had no "material engagements" with Brookfield. A100-A101, A103-A104; ¶¶151, 155. That was material information to stockholders. *See PLX* Tr. at 34 ("Part of providing active and direct oversight and acting reasonably is learning about actual and potential conflicts faced by directors, management and advisors."); *Margolis*, 2008 WL 5048692, at *12 ("[W]hen fiduciaries choose to provide the history of a transaction, they have an obligation to provide shareholders with 'an accurate, full, and fair characterization of those historic events.'").

The Trial Court did not directly address this disclosure argument. Instead, after mistakenly ruling that the Committee knew of the potential conflicts in real time because they were disclosed in the Proxy (which issued well-after Merger negotiations),[19] the court ruled: "[S]imilar to disclosures regarding the alleged conflict[s], the omission was immaterial." Tr. at 36. But even if Morgan Stanley and Kirkland's potential conflicts were immaterial (they were not), that would still not render information regarding the Committee's mismanagement of its advisor's potential conflicts immaterial. Rather, that information goes directly to the sufficiency of the Committee's oversight and process and is material. *See PLX* Tr. at 34; *Margolis*, 2008 WL 5048692, at *12.

4. The Proxy Failed to Disclose That the Merger Would Dilute the Dividends That Were Critical to TERP Stockholders

The Proxy misleadingly omitted that the Merger would dilute TERP stockholders' dividend yield. A151, ¶239. Specifically, Morgan Stanley and Greentech estimated approximately 5% DPS dilution to TERP stockholders through 2024. *Id*. The reduction of dividends was critical information for stockholders that

[19] Tr. at 30 ("Moreover, the fees Morgan Stanley had accrued from both Brookfield and TerraForm were disclosed in the proxy, demonstrating that the special committee knew of these payments."); *see id.* at 31 (stating "Plaintiffs' argument similarly fails as to Kirkland" and referring to the "special committee's decision to hire Kirkland following its own diligence").

went directly to the value of the Merger consideration and investors' decision on how to vote. TERP was a Yieldco—a unique type of company whose "business model is to own a portfolio of income-producing energy generation and infrastructure assets from which dividends can be distributed to public stockholders." *Crane*, 2017 WL 7053964, at *1. "[T]he *main attractiveness* for investors in [TERP and its Yieldco competitors] is in the regular cash flow in the form of dividends." Pisarenk, Zhanna V., et al., *Yieldco As A Perspective Investment Vehicle* (2021), at 334 (emphasis added), available at http://cibmee.vgtu.lt/index.php/verslas/2021/paper/viewFile/638/254. Disclosing that the Merger would reduce dividends would therefore alter the total mix of information for stockholders. Indeed, there is direct evidence of it: Morgan Stanley and Greentech specifically advised the Committee that they "ha[d] received feedback from investors highlighting the importance of the dividend as they evaluate[d] the merits of the deal." A118, ¶180.

The Trial Court held that stockholders were not entitled to a "clear and transparent"[20] disclosure that their dividends would be diminished, explaining that the Proxy disclosed the standalone DPS for TERP and BEP and that "[a] stockholder

[20] *Vento*, 2017 WL 1076725, at *4.

could reach the same conclusion [as Morgan Stanley] on their own." Tr. at 43-44. That was error. To divine this information, a stockholder would have to:

- compare DPS by searching for TERP's and BEP's respective 5-year forecasts;
- understand that TERP's "existing portfolio of assets" assumes no 2020 acquisition; and
- identify and then use the exchange ratio to multiply the distributions per unit under "BEP's Management Forecasts."

See A226-A227 at n.239. That is precisely the type of "scavenger hunt" and analysis Delaware law does not require of stockholders. *Vento*, 2017 WL 1076725, at *4.

5. The Proxy Failed to Disclose Greentech's Advice to the Committee Regarding Timing and Process

Finally, the Proxy failed to disclose Greentech's warnings to the Special Committee that it was "not the optimal time to realize maximum value for T[ERP]" and that "a robust market check" was "a must." A34-A35, ¶11. That information was material because it "would have alerted stockholders to the possibility that a fair price might not have been obtainable at the time of the transaction …." *See Appel v. Berkman*, 180 A.3d 1055, 1063 (Del. 2018).

In dismissing those arguments, the Trial Court erred by discrediting Plaintiffs' well-pled allegations and drawing pleading-stage inferences in Defendants' favor. Indeed, the Court embraced Defendants' argument that Greentech's advice should

be discredited because it appeared in a "preliminary pitch deck,"[21] ruling that the statements were immaterial because (i) they appeared in "Greentech's pitch before it had been engaged," which rendered them "*less* informative," and (ii) Greentech ultimately recommended the Merger. Tr. at 34-35 (emphasis added). At the pleading stage, it was improper for the Trial Court to weigh evidence and decide which advice was more or less informative or reflective of Greentech's best advice. *See In re HomeFed Corp. S'holder Litig.*, 2020 WL 3960335, at *10 n.104 (Del. Ch. July 13, 2020) ("The court may not weigh evidence on a motion to dismiss to resolve a factual dispute.") (citing *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011)).

There was also no factual basis to conclusively dismiss Greentech's advice. Indeed, it is reasonably inferable that Greentech's initial advice was informed, reliable and untainted, and nothing in the record suggests that Greentech's advice changed during the Committee's process. *See In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 773, 800-801 (Del. Ch. Oct. 14, 2011) (finding in post-trial decision that "give-get" valuation was omitted from later advisor presentations not because analysis was "preliminary," but because "the Special Committee was

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[21] A1161 ("The statements regarding timing and a market check were not 'advice' but, rather, introductory process considerations presented prior to Greentech's retention.").

trapped in the controlled mindset, where the only options to be considered [were] those proposed by the controlling stockholder").

Moreover, even if it were sometimes appropriate to draw negative inferences concerning initial presentations (it is not), Plaintiffs pled that Greentech was uniquely positioned to give advice at the outset of the process because it was deeply familiar with TERP and had been consistently advising it for years prior. Indeed, Greentech was exclusive financial advisor to the Conflicts Committee, which was comprised of the same individuals on the Special Committee, in connection with the Private Placement and "had a thorough understanding of the Company and its assets." A93, ¶140. Greentech had also provided quarterly market briefings or earnings reviews to the Board and/or the Conflicts Committee for the preceding six quarters. A93-95, ¶141. Thus, atypically, Greentech's advice was based on extensive TERP-specific knowledge and experience, including its "Expert Knowledge of [TERP's] Situation and Assets[,]" differentiating it from typical advisors seeking business with uninformed, generic pitch decks. *See id.*

CONCLUSION

For the foregoing reasons, this Court should reverse the Trial Court's ruling and remand the Action for further proceedings.

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CERTIFICATE OF SERVICE

I, Ned Weinberger, hereby certify that, on September 6, 2023, I caused a true and correct copy of the foregoing to be served on the following counsel by File and ServeXpress:

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