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Case Number 241,2023

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,	)	No. 241, 2023
v.	)	Court Below:
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,	)	Court of Chancery of the State of Delaware, C.A. No. 2022-0097-KSJM
Defendants Below, Appellees.	)	

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs appeal the Court of Chancery's decision dismissing their Verified Amended Stockholder Class Action Complaint (the "Complaint"), which asserted claims of breach of fiduciary duty in connection with the 2020 acquisition by Brookfield Renewable Partners, L.P. ("BEP") and Brookfield Renewable Corporation ("BEPC") of the remaining 38.5% of TerraForm Power, Inc. ("TerraForm" or "TERP") common stock (the "Acquisition") not already owned by affiliates of Brookfield Asset Management, Inc. ("Brookfield").

The Acquisition was conditioned from the outset on the dual protections established in *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014) ("*MFW*"), to safeguard the interests of TerraForm's minority stockholders. An independent, fully informed special committee (the "Special Committee") of TerraForm's board of directors (the "Board"), advised by sophisticated, independent legal and financial advisors, negotiated the transaction. Brookfield, BEP, and BEPC made no retributive threats, played no role in the Special Committee's process and, over the course of the negotiations, agreed to four separate price increases and additional non-monetary consideration. An overwhelming majority of TerraForm's fully informed, unaffiliated stockholders—who stood to receive a 20% premium to the unaffected closing price of TerraForm common stock as of the date of signing—approved the Acquisition.

Despite these facts, Plaintiffs challenged the Acquisition and argued below that it should be subject to entire fairness. The Court of Chancery dismissed the Complaint in its entirety, holding that Plaintiffs "failed to adequately plead that any element of *MFW* has not been met" and, therefore, the Acquisition was "subject to business judgment review."[1]

On appeal, Plaintiffs do not dispute that: (i) Brookfield conditioned the Acquisition on *MFW*'s dual protections *ab initio*; (ii) the Special Committee was independent and disinterested; (iii) the Special Committee met its duty of care; and (iv) there was no coercion of the minority stockholders.[2] Rather, Plaintiffs seek reversal of the Court of Chancery's holdings that (i) the Special Committee was not subject to coercion; and (ii) the proxy statement filed in connection with the Acquisition (the "Proxy") was sufficient to render the stockholder vote fully informed.

The Court of Chancery's decision should be affirmed for the following reasons:

First, the Court of Chancery correctly held that the Special Committee was fully empowered and not coerced. Plaintiffs' theory that the Special Committee was

[1] Tr. of the Telephonic Rulings of the Ct. on Defs.' Mot. to Dismiss, June 9, 2023 (Del. Ch.) at 44. ("Tr.").

[2] *Id.* at 24.

implicitly coerced—based solely on the allegation that BEP's five-year management projections provided to the Special Committee's financial advisors excluded growth at the TerraForm level—is not reasonably conceivable.

Second, the Court of Chancery correctly held that the minority stockholders were fully informed. The Proxy was not required to disclose: (i) projected post-Acquisition management fee increases and hypothetical debt refinancing savings; (ii) non-existent alleged conflicts of the Special Committee's legal and financial advisors which, in any event, were immaterial; (iii) the Special Committee's alleged mismanagement of the non-existent advisor conflicts; (iv) a financial advisor's accretion and dilution analyses; or (v) pitch deck commentary from a later-retained financial advisor concerning the advisability of a market check and the Acquisition's timing.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that the Acquisition is subject to business judgment review because Plaintiffs failed to adequately plead coercion of the Special Committee.[3] Plaintiffs alleged that "Brookfield threatened the [Special] Committee by signaling that Brookfield would block TERP's future growth," but did not plead facts establishing that this alleged threat was reasonably conceivable.[4] The Court of Chancery correctly held that Plaintiffs' allegations fall short of "the type of coercion allegations that this [C]ourt has found to defeat this element of *MFW*,"[5] and that Plaintiffs' allegations rested on "attenuated" and "unreasonable" inferences.[6]

2. Denied. The Court of Chancery correctly held that Plaintiffs' "challenges to the information provided to stockholders [are] insufficient to undermine the presumption of *MFW*."[7] The Court of Chancery articulated and applied the correct standard for evaluating materiality: "A material fact is one that

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[3] *Id.* at 5.

[4] Defs.' Mot. to Dismiss ("Mot."). at 24-25.

[5] Tr. at 24.

[6] *Id.* at 26.

[7] *Id.* at 44.

a reasonable investor would view as significantly altering the 'total mix' of information made available."[8]

[8] *Id.* at 33; *see Smart Loc. Unions & Councils Pension Fund v. BridgeBio Pharma, Inc.*, 2022 WL 17986515, at *15 (Del. Ch. Dec. 29, 2022), *aff'd*, --- .3d ---, 2023 WL 5091086 (Del. Aug. 9, 2023) (TABLE).

STATEMENT OF FACTS[9]

A. The Parties And Relevant Non-Parties

Plaintiffs City of Dearborn Police and Fire Revised Retirement System (Chapter 23), Martin Rosson, and Noah Wright (together, "Plaintiffs") allege that, prior to the Acquisition, they were stockholders of non-party TerraForm, then a publicly-traded Delaware corporation that "acquire[d], own[ed] and operate[d] solar and wind assets in North America and Western Europe."[10]

Defendant Brookfield is a Canadian corporation with its principal executive offices in Toronto.[11] Brookfield is an alternative asset manager.[12]

Defendants Orion US GP LLC ("Orion), Orion US 1 Holdings L.P. ("Orion 1"), and Brookfield Infrastructure Fund III GP LLC ("BIF") are affiliates of Brookfield.[13] Orion and BIF are Delaware limited liability companies.[14] Orion 1 is

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[9] This Statement of Facts draws from the Complaint (A27-A163) and documents referenced and relied upon therein, including the Proxy (A243-551) and documents Plaintiffs obtained under Section 220 of the Delaware General Corporation Law (the "220 Documents"). *See Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013); A558 (Transmittal Aff. of Eric A. Veres, Esq. in Support of Defs.' Mot to Dismiss ("Veres Aff."), Ex. 3 ¶2); *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 796-98 (Del. Ch. 2016).

[10] A40 (Am. Compl. ¶28) (alteration in original).

[11] A37 (*Id.* ¶16).

[12] *Id.*; A256 (Veres Aff., Ex. 1 at 5).

[13] A37 (Am. Compl. ¶¶18-20).

[14] A37 (*Id.* ¶¶18-19).

a Delaware limited partnership.[15]

Defendant BEP is an exempted limited partnership formed under the laws of Bermuda and is an affiliate of Brookfield.[16]

Defendant BEPC is a corporation incorporated under the laws of British Columbia and is an affiliate of Brookfield.[17]

Defendant John Stinebaugh is Vice-Chair of Brookfield's Infrastructure Group and served, at all relevant times, as TerraForm's Chief Executive Officer pursuant to a 2017 Governance Agreement between TerraForm and Brookfield.[18]

Defendants Brian Lawson, Harry Goldgut, Richard Legault, and Sachin Shah were each, at all relevant times, senior executives of Brookfield and served on the Board.[19]

Non-parties Carolyn Burke, Christian S. Fong, and Mark McFarland served as outside, non-management directors on the Board, and constituted the Special

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[15] A37 (*Id.* ¶20).

[16] A38 (*Id.* ¶21).

[17] A38 (*Id.* ¶22).

[18] A39-40 (*Id.* ¶27).

[19] A38-39 (Am. Compl. ¶¶23-26).

Brookfield, BIF, Orion, Orion 1, Goldgut, Lawson, Legault, Shah, Stinebaugh, BEP, and BEPC are collectively referred to as "Defendants."

Committee that negotiated the Acquisition.[20] Plaintiffs concede their independence.[21]

B. The Private Placement

In 2017, Brookfield, Brookfield BRP Holdings Inc., and Orion 1 "became TERP's controlling stockholder and sponsor[,] . . . holding 51% of the outstanding shares of TERP's single class of common stock."[22]

In 2018, Brookfield purchased $650 million of TerraForm common stock (the "Private Placement") to help fund TERP's planned acquisition of Spanish yieldco Saeta Yield, S.A. ("Saeta").[23] The Private Placement increased Brookfield's equity and voting stake in TerraForm to approximately 65.3%.[24] At the time of the Acquisition, Brookfield and certain of its affiliates owned approximately 62% of TerraForm's common stock.[25]

C. The Acquisition Proposal

On January 11, 2020, BEP delivered an unsolicited, non-binding proposal to acquire all of TerraForm's outstanding shares not held by Brookfield and its

[20] A41 (Am. Compl. ¶¶29-31).

[21] Tr. at 23.

[22] A42 (Am. Compl. ¶¶34-35).

[23] A31-32, A81 (*Id.* ¶¶3, 107).

[24] A42, A80 (*Id.* ¶¶35, 105).

[25] A50 (*Id.* ¶49).

affiliates in a stock-for-stock transaction (the "Proposal").[26] The Proposal stated that "BEP has no interest in selling any of the shares of [TerraForm] Class A common stock it owns, nor would BEP support any alternative sale, merger or similar transaction involving [TerraForm]."[27] In exchange for TerraForm's shares, BEP offered BEPC exchangeable shares at a BEP-to-TerraForm exchange ratio of .36x, valuing TerraForm's stock at an approximately 11% premium to its unaffected closing price on the day before the Proposal (January 10, 2020).[28]

BEP requested that "TERP's Board of Directors promptly form a committee consisting solely of independent directors with full authority to evaluate and respond to the Proposal" and required that the closing of any resulting transaction be subject to the "approval of the independent committee and the approval of a majority of TERP's shareholders not affiliated with BEP."[29]

D. The Board Appoints A Special Committee To Review The Proposal

The day TerraForm received the Proposal, the Board discussed establishing a special committee and engaging independent advisors.[30] On January 12, 2020, the Board established the Special Committee consisting of Burke, Fong, and

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[26] A88-89 (*Id.* ¶127).

[27] A576-77 (Veres Aff., Ex. 4 at TERPBOD000006-7).

[28] A575-77 (*Id.* at TERPBOD000005-7); A315 (Veres Aff., Ex. 1 at 151).

[29] A576 (Veres Aff., Ex. 4 at TERPBOD000006); A315 (Veres Aff., Ex. 1 at 151).

[30] A92 (Am. Compl. ¶139); A580 (Veres Aff., Ex. 5 at TERPBOD001500).

McFarland.[31] The Board granted the Special Committee the exclusive power and authority to evaluate the proposed transaction, negotiate with BEP, determine whether the transaction was fair to the minority stockholders, and reject the transaction if necessary.[32] The Board also granted the Special Committee full authority to choose and retain independent legal and financial advisors.[33] The Special Committee immediately hired Richards, Layton & Finger, P.A. ("Richards Layton") as a legal advisor.[34]

Between January 12 and January 17, 2020, the Special Committee met four times, during which it interviewed Greentech Capital Advisors Securities, LLC ("Greentech") and Morgan Stanley & Co. LLC ("Morgan Stanley") as potential financial advisors.[35] As the Proxy disclosed, Morgan Stanley had been previously engaged by both TerraForm and Brookfield.[36] Greentech had previously served as financial advisor to the TerraForm conflicts committee in connection with the

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[31] A92 (Am. Compl. ¶139).

[32] A586 (Veres Aff., Ex. 7 at TERPBOD001503).

[33] *Id.*

[34] A91-92 (Am. Compl. ¶137).

[35] A590-94 (Veres Aff., Ex. 8); A595-600 (Veres Aff., Ex. 9); A601-606 (Veres Aff., Ex. 10); A581-83 (Veres Aff., Ex. 6); A316 (Veres Aff., Ex 1 at 152).

[36] A99 (Am. Compl. ¶149); A344 (Veres Aff., Ex. 1 at 180); A574 (Veres Aff., Ex. 4 at TERPBOD000004).

Private Placement, which also consisted of Burke, Fong and McFarland.[37] Both Greentech and Morgan Stanley confirmed that they had no "conflict[s] of interest that would affect [their] ability to serve as an independent financial advisor to the [Special] Committee in carrying out its mandate."[38] The Special Committee determined to retain both Greentech and Morgan Stanley as its financial advisors and later retained Kirkland & Ellis LLP ("Kirkland") as an additional legal advisor.[39] Kirkland also confirmed "that it did not have any conflicts of interest" that would impact its ability to advise the Special Committee.[40]

E. The Special Committee's Process

Between January 16, 2020 and February 4, 2020, the Special Committee met to consider potential "tactics and approach[es] for outreach to potentially interested third parties."[41] However, Morgan Stanley cautioned that there were "certain limitations on conducting an effective market check" because "Brookfield's

[37] A592 (Veres Aff., Ex. 8 at TERPBOD000009).

[38] A600 (Veres Aff., Ex. 9 at TERPBOD000059); *see also* A592 (Veres Aff., Ex. 8 at TERPBOD000009).

[39] A97-98, A102-03 (Am. Compl. ¶¶145, 154); A607-13 (Veres Aff., Ex. 11).

[40] A103 (Am. Compl. ¶155); A583 (Veres Aff., Ex. 6 at TERPBOD000087).

[41] A632 (Veres Aff., Ex. 14 at TERPBOD000068).

majority ownership of the Company and its ability to pay a premium" might have a negative effect "on a third party's willingness or ability to present an outside bid."[42]

On February 4, 2020, the Special Committee discussed with its advisors due diligence and potential valuation analyses.[43] The Special Committee also discussed alternatives to the Proposal, including what alternatives were, "as a practical matter, available to [TerraForm] at [the] time."[44] The Special Committee directed its financial advisors to exclude "hypothetical and unavailable alternatives" in their respective valuation analyses and determined not to contact third parties at that time.[45]

On February 6 and 7, 2020, the Special Committee met with its financial advisors to discuss BEP's management presentation concerning the Proposal.[46] The Special Committee discussed "the advisability of soliciting potential alternatives" to the Proposal.[47] The Special Committee decided against soliciting alternatives

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[42] A597 (Veres Aff., Ex. 9 at TERPBOD000056).

[43] A105-06 (Am. Compl. ¶¶159-60); A621 (Veres Aff., Ex. 13 at TERPBOD000128).

[44] A318 (Veres Aff., Ex. 1 at 154).

[45] A621 (Veres Aff., Ex. 13 at TERPBOD000128).

[46] A107 (Am. Compl. ¶163); A640 (Veres Aff., Ex. 16 at TERPBOD000150); A318 (Veres Aff., Ex. 1 at 154).

[47] A647 (Veres Aff., Ex. 16 at TERPBOD000157).

because of the "very low probability that a third party would have an interest in, and ability to, present a proposal that offered more value" to TERP's stockholders.[48]

On February 26, 2020, the Special Committee and its advisors met to discuss Morgan Stanley's and Greentech's independent analyses of the Proposal. The Special Committee determined that, while the proposed exchange ratio of 0.36x "was economically advantageous to the Company's stockholders, the [Special] Committee should make a counterproposal with an exchange ratio of 0.42x."[49]

The Special Committee negotiated vigorously against BEP. On February 28, 2020, the Special Committee countered with a 0.42x exchange ratio.[50] By March 6, 2020, BEP increased its proposal to 0.365x[51] and the Special Committee achieved concessions on non-economic terms.[52] During a March 10, 2020 meeting with its advisors, the Special Committee decided to reject this counter-proposal and agreed that an "exchange ratio between 0.370x and 0.375x would be economically advantageous to the minority stockholders."[53] By that evening, BEP's proposal was

[48] A647 (Veres Aff., Ex. 16 at TERPBOD000157); A107 (Am. Compl. ¶163).

[49] A659 (Veres Aff., Ex. 18 at TERPBOD000256); A117 (Am. Compl. ¶177).

[50] A662 (Veres Aff., Ex. 19 at TERPBOD000373).

[51] A117 (Am. Compl. ¶178).

[52] A662-64 (Veres Aff., Ex. 19 at TERPBOD000373-75).

[53] A675 (Veres Aff., Ex. 21 at TERPBOD000389).

up to 0.375x.[54] Following the Special Committee's counter-proposal of 0.39x on March 11, 2020, BEP again countered with 0.38x.[55] Despite BEP's representation that 0.38x was its best and final offer,[56] the Special Committee proposed on March 12, 2020 its fourth counter: a 0.381x ratio, which BEP accepted.[57]

F. The Special Committee Approves The Acquisition

On March 12, 2020, the Special Committee met with its advisors and "agreed that the 0.381x exchange ratio, as well as the other qualitative benefits to be conferred by the Proposed Transaction, [were] economically advantageous to the Company's minority stockholders."[58]

On March 16, 2020, Greentech and Morgan Stanley provided their final valuation analyses and their oral and written opinions that the 0.381x exchange ratio was financially fair to TerraForm's minority stockholders.[59] The Special Committee resolved to recommend that the Board approve the transaction.[60] Later that day, the Board voted to approve the Acquisition and the transaction was announced.[61]

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[54] A322 (Veres Aff., Ex. 1 at 158).

[55] A119 (Am. Compl. ¶181); A322 (Veres Aff., Ex. 1 at 158).

[56] A682-83 (Veres Aff., Ex. 23 at TERPBOD000407-08).

[57] A682-83 (Veres Aff., Ex. 23 at TERPBOD000407-08).

[58] A683 (Veres Aff., Ex. 23 at TERPBOD000408).

[59] A752-59 (Veres Aff., Ex. 25 at TERPBOD000410-17).

[60] A125 (Am. Compl. ¶191); A759 (Veres Aff., Ex. 25 at TERPBOD000417).

[61] A125 (Am. Compl. ¶191); A765-66 (Veres Aff., Ex. 26 at TERPBOD001549-50).

G. The Deal Closes

On June 29, 2020, TerraForm issued the Proxy, recommending that stockholders approve the Acquisition.[62] The Proxy disclosed that both TerraForm and Brookfield had previously engaged Morgan Stanley, and the fees earned from those engagements for the prior two years.[63] The Proxy further disclosed the "significant benefits" the Acquisition would likely yield Brookfield, including how Brookfield's management fees would be calculated, that management fees could increase based on the post-merger entity's market capitalization, and that the Acquisition was "expected to be accretive" to Brookfield Renewable Group's[64] cash flows.[65] The Proxy disclosed that the Acquisition's impact on the dividend was

[62] A244, A247 (Veres Aff., Ex. 1).

[63] A99 (Am. Compl. ¶149).

[64] "Brookfield Renewable Group" includes BEP, BEPC, and their respective subsidiaries.

[65] A151-52 (*Id.* ¶239); A330-31 (Veres Aff., Ex. 1 at 166-67).

inherently uncertain: "There can be no assurance that Brookfield Renewable or BEPC will make comparable distributions or dividends in the future."[66]

On July 29, 2020, TerraForm's minority stockholders voted overwhelmingly to approve the Acquisition.[67]

H. The Private Placement Action

Prior to the Proposal, in a separate action, Plaintiffs pursued direct and derivative claims challenging the Private Placement.[68] The closing of the Acquisition extinguished Plaintiffs' derivative claims in that case.[69] Plaintiffs never challenged the Proxy, the Special Committee process, or any aspect of the Acquisition until eighteen months following its closing—and only after they had lost standing to pursue their direct claims challenging the Private Placement.[70]

I. The Proceedings Below

On June 21, 2022, Plaintiffs filed the operative Complaint. Defendants moved to dismiss Plaintiffs' claims.[71] The motion was fully briefed on December 23,

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[66] A405 (Veres Aff., Ex. 1 at 241); A1182 (Defs.' Reply Br. to Mot. to Dismiss ("Reply") at 26); Tr. at 44.

[67] A780 (Veres Aff., Ex. 27 at 2). Of the 76,273,681 shares of TerraForm common stock held by the minority stockholders, 85.3% voted for, .5% voted against, .2% abstained, and 14% were classified as Broker Non-Votes. *Id.*

[68] A86-87 (Am. Compl. ¶¶121-22).

[69] A153 (Am. Compl. ¶243).

[70] A153-54 (*Id.* ¶¶244-46).

[71] A164-236 (Mot.).

2022,[72] and argued on February 14, 2023.[73] The Court of Chancery granted the motion via telephonic ruling on June 9, 2023,[74] issued a letter supplementing the ruling on June 21, 2023,[75] and issued an order dismissing the Complaint on June 23, 2023.[76] Plaintiffs filed a Notice of Appeal on July 6, 2023.[77]

[72] A1148-93 (Reply).

[73] A1194-242 (Oral Arg. Tr.).

[74] Tr.

[75] Op. Br. Ex B.

[76] Order Granting Defs.' Mot to Dismiss Am. Compl., Dkt. 45.

[77] Notice of Appeal from Order, Bench Ruling, and Letter Decision, C.A. No. 241, 2023, Dkt. 1.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS FAILED TO PLEAD COERCION

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiffs failed to plead coercion based on allegations that Brookfield "furnished" the Special Committee with projections that "excluded growth at the TERP level"?[78] The question was raised below (A227-A229; A1088-A1091; A1183-A1186) and was considered by the Court of Chancery.[79]

B. Scope Of Review

This Court reviews a decision granting a motion to dismiss *de novo*.[80] The Court will accept as true well-pled allegations but will not "accept 'conclusory allegations unsupported by specific facts, nor . . . draw unreasonable inferences in the plaintiff's favor.'"[81]

C. Merits Of The Argument

The Court of Chancery correctly rejected Plaintiffs' argument that the "[S]pecial [C]ommittee was subject to coercion," finding that "Plaintiffs' line of

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[78] Op. Br. at 25-26.

[79] Tr. at 24-27.

[80] *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 757 n.7 (Del. 2018).

[81] *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871 (Del. 2020) (citation omitted).

reasoning is . . . inconsistent with the type of coercion allegations that this court has found to defeat this element of *MFW*."[82] Plaintiffs concede that Brookfield made no explicit threats to the Special Committee.[83] Plaintiffs instead argue that the Complaint "plead[s] facts creating a reasonably conceivable inference" that Brookfield implicitly threatened the Special Committee "by signaling that Brookfield would block TERP's future growth if the [Special] Committee rejected the Merger."[84] Plaintiffs are wrong.

"Plaintiffs' argument that the [S]pecial [C]ommittee was coerced hinges on its contention that, in diligence, BEP's management provided" the Special Committee's financial advisors "with a financial model that did not include growth for TerraForm."[85] Plaintiffs base this contention on a note in a Greentech presentation: "Note: TERP management's 5-year forecast does not align with BEP management's 5-year forecast for TERP (BEP's model excludes future growth at the TERP level)."[86] The corresponding meeting minutes explain: "As TERP is dependent on Brookfield for future growth, Greentech . . . evaluated sensitivities

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[82] Tr. at 24; *See* Mot. at 53-55; Reply at 27-30.

[83] Op. Br. at 2, 7, 16, 20, 24, 25, 28, 29.

[84] *Id.* at 24-25.

[85] Tr. at 24.

[86] A111 (Am. Compl. ¶171); A952 (Veres Aff., Ex. 38 at TERPBOD000269).

assuming no future growth for TERP[.]"[87] These statements about assumptions in a model do not equate to a threat. As the Court of Chancery held, deducing a threat from these facts "requires inferring that Brookfield through BEP was trying to send a message by submitting its five-year financials exclusive of TerraForm's growth, and that the [S]pecial [C]ommittee perceived this as a threat, and . . . felt deprived of a meaningful choice as a result."[88]

Plaintiffs attempt to salvage their coercion allegation by pointing to certain statements made by the Special Committee's financial advisors—including statements never raised below—as indicative that the Special Committee and its advisors "fully appreciated Brookfield's threat" and "repeatedly warned of the potential negative consequences of rejecting a Brookfield deal."[89] But stripped of Plaintiffs' spin, the statements they highlight are innocuous statements true of almost any sponsor-backed or controlled company (and, therefore, true in almost any *MFW* situation). For example, in their presentations on valuation and due diligence, the Special Committee's advisors noted that "Brookfield has substantial influence over TERP as its majority shareholder and sponsor," that "TERP is nearly fully reliant on Brookfield for growth," that "TERP's ability to achieve standalone going concern

[87] A111 (Am. Compl. ¶171).

[88] Tr. at 26.

[89] Op. Br. at 26.

valuations . . . are subject to continued support by BAM/Brookfield," and that "TERP is fully dependent on Brookfield for future growth."[90]

Further, Plaintiffs' coercion claim fails because "a claim of coercion cannot be premised on the threat of simply maintaining the status quo."[91] Despite their conclusory statement that the projections contain "an implicit threat that . . . would change TERP's *status quo*," Plaintiffs have not explained why the *status quo* might change if the Special Committee rejected the Acquisition.[92] Under the *status quo*, there was no guarantee that Brookfield would agree with every assumption in the TerraForm management projections, and nothing prevented Brookfield from deviating from those assumptions. Likewise, the statement in Brookfield's offer that "it would not support transactions other than Brookfield's preferred deal" does not evince coercion.[93] Brookfield, as controlling stockholder, had the right to reject transactions other than the Acquisition.[94] "[A] controlling stockholder is not required to accept a sale to a third party or to give up its control, and its stated refusal

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[90] A703, A691 (Veres Aff., Ex. 24 at TERPBOD000792, 780); A946 (Veres Aff., Ex. 38 at TERPBOD000263); *see also* A1014 (Veres Aff., Ex. 39 at TERPBOD000856).

[91] *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634, at *3 (Del. Ch. Jan. 14, 2011).

[92] Op. Br. at 28.

[93] *Id.* at 25.

[94] *See MFW*, 88 A.3d at 651.

to do so does not preclude review under the *MFW* framework."[95] Plaintiffs' citation to *Books-A-Million* is inapposite: there was no coercion even alleged in that case.[96]

Plaintiffs' coercion allegations are particularly far-fetched given Plaintiffs' concession that the Special Committee was independent, disinterested, and fulfilled its duty of care. Plaintiffs do not dispute that the "[S]pecial [C]ommittee was facially empowered" to hire its own advisors and to say "no" to any proposal.[97] Against this backdrop, and having conceded that Brookfield made no explicit threats to the Special Committee, Plaintiffs attempt to shoehorn their facts into *Dell* by arguing that they have alleged at least "implicit threats" that rise to the level of coercion.[98] But the facts pled here do not suggest *any* threat, implicit or otherwise.

Plaintiffs' allegations stand in contrast to *Dell*, where the Court of Chancery found that the company implicitly signaled to the special committee that it would "'bypass' the formal [*MFW*] process if the special committee chose not to approve the transaction" through "a steady drumbeat of actions," including "leak[ing] to the press that it was *considering* taking action to exercise conversion, *reiterat[ing] its*

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[95] *BridgeBio*, 2022 WL 17986515, at *11.

[96] Op. Br. at 28; *In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *17, 19 (Del. Ch. Oct. 10, 2016).

[97] Tr. at 24.

[98] *See In re Dell Techs. Inc. Class V. S'holders Litig.*, 2020 WL 3096748, at * 29 (Del. Ch. June 11, 2020).

right to unilaterally exercise the conversion right, and *disclos[ing]* in its SEC filings that it had *explored* exercising the conversion right as a contingency plan if the redemption negotiations fell through."[99] In denying the motion to dismiss, the Court of Chancery held that it was "reasonably conceivable that the Company created a coercive situation by threatening a Forced Conversion. By doing so, the Company . . . undermined the Special Committee's ability to bargain effectively."[100]

Here, the Court of Chancery correctly held that, unlike in *Dell*, "[P]laintiffs do not allege that Brookfield indicated . . . that it intended to 'bypass' the formal process if the [S]pecial [C]ommittee chose not to approve the transaction, nor that it had a 'contingency plan' to do so."[101] Plaintiffs remain unable to point to any right that Brookfield retained that could have operated as a "bypass" of the formal *MFW* process "to force TerraForm's minority stockholders to relinquish their shares."[102] Nor have Plaintiffs pled any allegations supporting a reasonably conceivable inference that, implicitly or explicitly, "the [Special] Committee members were issued an ultimatum and told that they must accept the . . . share price or [Brookfield] would proceed with the transaction without their input."[103] And, Plaintiffs have not

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[99] Tr. at 25-26 (citing *Dell*, 2020 WL 3096748) (emphasis added).

[100] *Dell*, 2020 WL 3096748, at *31.

[101] Tr. at 26.

[102] *Id.*

[103] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1120 (Del. 1994).

pled a "steady drumbeat of actions" by Brookfield.[104] Rather, Plaintiffs point to one, nonthreatening action—the furnishing of projections to an independent financial advisor as part of diligence.[105] The "sword of Damocles" which "deprived" the *Dell* special committee "of the ability to negotiate" freely is glaringly absent here.[106] A Special Committee subject to such constraints could not have caused Brookfield to increase its bid four times and make important non-economic concessions.[107]

This Court need not "accept every strained interpretation of the allegations proposed by" Plaintiffs when those inferences do not "logically flow from the face of the [C]omplaint."[108] The Court of Chancery correctly held that "Plaintiffs' line of reasoning is a stretch."[109] Plaintiffs' allegations are also illogical: it is not reasonably conceivable that Brookfield would "punish" a company in which it owned 62% of the equity for an indefinite period of time simply to negotiate a better deal for the remaining 38%.

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[104] *Dell*, 2020 WL 3096748, at *31.

[105] Op. Br. at 25-26.

[106] *Dell*, 2020 WL 3096748, at *33.

[107] *Supra* pp. 12-14.

[108] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

[109] Tr. at 24.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS FAILED TO PLEAD THAT THE PROXY WAS MATERIALLY MISLEADING

A. Question Presented

Whether the Court of Chancery correctly held that Plaintiffs failed to plead a material misrepresentation or omission in the Proxy. The question was raised below at A1105-1123 and considered by the Court of Chancery. Tr. at 34-44.

B. Scope Of Review

This Court reviews a decision granting a motion to dismiss *de novo*.[110] Although well-pled allegations must be accepted as true, the Court will not "accept 'conclusory allegations unsupported by specific facts, nor . . . draw unreasonable inferences in the plaintiff's favor.'"[111]

C. Merits Of The Argument

As the Court of Chancery correctly held, "[t]o demonstrate that the cleansing effect of *MFW* does not apply due to . . . disclosure violations, Plaintiffs must show that the Proxy failed to disclose material facts."[112] When directors of a Delaware corporation seek stockholder action, they "are under a fiduciary duty to disclose fully

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[110] *Synutra*, 195 A.3d at 757 n.7.

[111] *Windsor I*, 238 A.3d at 871 (citation omitted).

[112] Tr. at 33; *Franchi v. Firestone*, 2021 WL 5991886, at *6 (Del. Ch. May 10, 2021)).

and fairly all material information within the board's control."[113] "A material fact is one *that a reasonable investor would view* as significantly altering the 'total mix' of information made available."[114]

The Court of Chancery correctly held that all nine of Plaintiffs' alleged disclosure deficiencies were "insufficient to undermine the presumption of *MFW*."[115] On appeal, Plaintiffs abandon four of those claims and press the remaining five.[116] But Plaintiffs' nitpicking is of the "'tell me more' variety . . . given the quantity and quality of the disclosure" provided in the Proxy.[117]

1. The Proxy Disclosed The Benefits Brookfield Stood To Receive

Plaintiffs contend that it was an error for the Court of Chancery to conclude that the Proxy did not need to disclose statements in a Morgan Stanley presentation suggesting that Brookfield (i) "could realize a $130 million value increase in its management fees . . . if the [Acquisition] succeeded," and (ii) "could reap benefits

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[113] *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992).

[114] Tr. at 33 (emphasis added); *Zaucha v. Brody*, 1997 WL 305841, at *5 (Del. Ch. June 3, 1997).

[115] Tr. at 44; *See id.*, at 34-44.

[116] *See* Op. Br. at 30-50; Mot. at 42-53; Reply at 17-25.

[117] *In re Delphi Fin. Gp. S'holder Litig*., 2012 WL 729232, at *18 (Del. Ch. Mar. 6, 2012); *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *13 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006) ("Delaware law does not require 'directors to bury the shareholders in an avalanche of trivial information.'").

amounting to $1 billion if Brookfield opted to refinance TerraForm's debt."[118] Plaintiffs say that these "extraordinary benefits" should have been disclosed because information "concerning value inuring to the acquiror is critical" for evaluating the fairness of the Acquisition.[119] But this information was disclosed. As the Court of Chancery recognized, "the [P]roxy disclosed that the TerraForm acquisition would 'likely provide a number of significant benefits' to Brookfield, including simplifying BEP's ownership structure, eliminating public company costs and generating increased cash flows," and additionally "disclosed the method for calculating Brookfield's management fees."[120] Plaintiffs seek more detail, but the Proxy provided all relevant information that TERP stockholders needed to evaluate the fairness of the Acquisition, including two fairness opinions from independent financial advisors.[121]

Management Fees. Plaintiffs argue that the Court of Chancery erred when it held that Morgan Stanley's projection that Brookfield's "five year gain in management fees," which would be "approximately $130 million," was "the kind of

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[118] Tr. at 36; Op. Br at 31-32.

[119] Op. Br. at 31-32.

[120] Tr. at 37; *see also* Op. Br. at 33.

[121] *See, e.g.*, A345-A356 (Veres Aff., Ex. 1 at 181-92); A332-A345 (Veres Aff., Ex. 1 at 168-81).

level of detail that doesn't have to be disclosed."[122] Plaintiffs claim that the Court of Chancery "conceded that . . . it was 'struggling' in determining whether to sustain or dismiss Plaintiffs' claim."[123] The Chancellor actually said: "I'm struggling a little bit on how the parties framed this issue, but, ultimately, I'm guided by the fact that I don't believe that the additional information that the [P]laintiffs seek to have disclosed on this issue really alters the total mix of information. I don't find [P]laintiffs' theories on the whole to be very compelling."[124]

The Proxy "disclose[d] the method for calculating Brookfield's management fees, an annual management fee of $20 million, plus 1.25 percent of the amount" by which Brookfield Renewable Group's market value exceeded an initial reference value.[125] Because the management fees were tied to market value, the specific amount of management fees Brookfield stood to gain would have been "hypothetical" and "speculative" and, therefore, were not required to be disclosed.[126]

Plaintiffs concede that the Proxy disclosed the formula used to calculate management fees, but now argue that the disclosure was "a complex formula," which

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[122] Tr. at 38.

[123] Op. Br. at 34 (citing Tr. at 38).

[124] Tr. at 38.

[125] *Id.* at 37; A482 (Veres Aff., Ex. 1 at 348).

[126] *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *17 (Del. Ch. Dec. 11, 2017).

did not clearly disclose "dollar amounts or inputs necessary to complete the formula."[127] But Plaintiffs' framing manufactures an artificial "scavenger hunt,"[128] because, as the Court of Chancery held, the additional information Plaintiffs seek would not alter the total mix of information. Plaintiffs' proposed additional inputs are only necessary to calculate "the market value of the Brookfield Renewable Group," which is then used to determine the base management fee.[129] Stockholders, assumed to be "skilled readers,"[130] did not need to calculate a projected base management fee in order to appreciate that Brookfield would receive increased management fees after the Acquisition.[131]

Plaintiffs argue that the Proxy should have disclosed Morgan Stanley's specific *projected* management fee because "the [Special] Committee and its advisors repeatedly addressed Brookfield's increased management fees during [Acquisition] negotiations" and because knowing the "magnitude" of such increased fees would have allowed stockholders to better evaluate the fairness of the merger

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[127] Op. Br. at 34.

[128] *Id.* at 35.

[129] A482 (Veres Aff., Ex. 1 at 348).

[130] *Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018).

[131] Tr. at 38 ("[T]he proxy lays out the precise formula for calculating [the management fee]. The formula inherently contemplates an increase in fees [i]f Brookfield's market value increases, which would be nearly certain following the [Acquisition].").

consideration.[132] But "Delaware law does not require . . . disclosure of a board's every thought or consideration."[133] Nor does Delaware law require "disclosure of all of the underlying data of an analysis" or information on hypothetical scenarios "that are inherently speculative."[134] As the Court of Chancery correctly noted, Plaintiffs "were not entitled to further detail in this case."[135]

Debt Refinancing. Plaintiffs contend that the Proxy should have disclosed that the Acquisition "afforded Brookfield the opportunity to realize over $1 billion by refinancing TERP's debt."[136] But the value of a possible future refinancing depends on future interest rates and a multitude of other market factors, as well as Brookfield's future decisions in light of those variables. Again, the law does not require disclosure of "hypothetical[s] that are inherently speculative."[137]

As the Court of Chancery correctly noted, "the [C]omplaint's own language belies [Plaintiffs'] position that these benefits were sufficiently certain to require

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[132] Op. Br. at 33, 35.

[133] *In re Match Gp., Inc. Deriv. Litig.*, 2022 WL 3970159, at *32 (Del. Ch. Sep. 1, 2022); *Crane*, 2017 WL 7053964, at *17; *City Pension Fund For Firefighters & Police Officers v. Trade Desk*, *Inc.*, 2022 WL 3009959, at *19 (Del. Ch. July 29, 2022) ("[P]roxy materials are not required to state 'opinions or possibilities.'").

[134] Tr. at 37.

[135] *Id.* at 39-40 (citing *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180 (Del. Ch. June 30, 2014).

[136] Op. Br. at 36.

[137] *Crane*, 2017 WL 7053964, at *17.

disclosure."[138] The Complaint itself alleged that "Morgan Stanley also determined that Brookfield *could* receive significant interest expense savings . . . from TERP refinancing its debt."[139] Plaintiffs' attempt now to reframe this benefit as non-hypothetical falls short. Plaintiffs point to the projections of what benefits Brookfield *could* obtain *if* it successfully refinanced TerraForm's debt after the Acquisition, but, in Plaintiffs' own words, these were "valuations relating to potential future events."[140]

Plaintiffs are wrong to suggest that reliance on *Crane* is misplaced, and that stockholders were entitled to know the magnitude of the hypothetical debt refinancing savings because that "clear analysis" was "known" and "shared" with the Special Committee.[141] Such a request amounts to suggesting that every presentation made to a board must be disclosed to stockholders. "That certainly is not the law."[142]

Plaintiffs' statement that "[a]ll corporate valuations depend on uncertain future events" and that the hypothetical debt refinancing savings are comparable to

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[138] Tr. at 40-41.

[139] A116-117 ¶176 (emphasis added); Tr. at 41.

[140] Op. Br. at 37.

[141] *Id.* at 38-39.

[142] *In re BEA Sys., Inc. S'holder Litig.*, C.A. No. 3298-VCL, at 100 (Del. Ch. Mar. 26, 2008) (TRANSCRIPT).

"corporate projections," which are "routinely required to be disclosed," is also unavailing.[143] "There is no per se duty under Delaware law to disclose to stockholders financial projections given to and relied on by a financial advisor."[144] Rather, the "essential question is whether there is a substantial likelihood that disclosure of the omitted fact 'would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'"[145] As the Court of Chancery held, "requiring a target to disclose their own calculations of hypothetical benefits to an acquirer, a decision over which the target itself has no control, would not necessarily assist stockholders in making an informed vote."[146]

Plaintiffs' authorities are inapposite. In *Gallagher*, defendants "failed to disclose key documents that showed the basis for and the methods underlying their determination of the [m]erger [c]onsideration."[147] In a post-trial ruling, the trial court found that the company's valuation was "haphazard," "stale," and "wildly understated the value of [the company.]"[148] Similarly, in *Voigt v. Metcalf*, plaintiff

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[143] Op. Br. at 37.

[144] *Dent*, 2014 WL 2931180, at *11.

[145] *BridgeBio*, 2022 WL 17986515, at *15.

[146] Tr. at 43.

[147] *Gallagher Indus. LLC v. Addy*, 2020 WL 2789702, at *11 (Del. Ch. May 29, 2020).

[148] *Id.*

alleged that the proxy omitted that defendants stood to receive a "$600 million windfall" based on their valuation of equity in the transaction—an omission that "directly addressed the fairness of the . . . [t]ransaction."[149] In *Arkansas Teacher Retirement System v. Alon USA Energy, Inc.*, the proxy omitted any mention of a planned post-merger acquisition of "the remaining 18.4% of the Partnership's publicly held limited partner interests" which were being "negotiated . . . contemporaneously with the merger."[150] And in *Crescent/Mach I Partners, L.P. v. Turner*, the proxy failed to disclose nearly a dozen "side-deal[]" contracts implementing the merger that, as the defendants themselves admitted, diverted consideration from stockholders to a director.[151] No similar allegations are advanced by Plaintiffs.

Finally, none of Plaintiffs' authorities support their suggestion that the Proxy should have disclosed these benefits because Brookfield would not consider a "sale to any third party and the [Special] Committee forewent a market check."[152] Indeed, the Court of Chancery dismissed Plaintiffs' claim that the Special Committee should have conducted a market check, holding that a reasoned decision not to conduct a

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[149] 2020 WL 614999, at *1, *24 (Del. Ch. Feb. 10, 2020).

[150] 2019 WL 2714331, at *26 (Del. Ch. June 28, 2019).

[151] 846 A.2d 963, 987-90 (Del. Ch. 2000).

[152] Op. Br. at 32.

market check does not breach the duty of care,[153] and *MFW* does not require that the controlling stockholder be amenable to alternative proposals.[154]

2. The Proxy Adequately Disclosed Advisors' Past And Concurrent Engagements

The Court of Chancery correctly held that "[P]laintiffs fail[ed] to plead that Morgan Stanley or Kirkland were meaningfully conflicted as to the [Acquisition], rendering these omissions immaterial."[155] "Although advisor conflicts should be disclosed, a plaintiff must provide sufficient facts to establish that the conflict or potential conflict was material."[156]

Morgan Stanley. Plaintiffs contend that the Proxy "fail[ed] to disclose Morgan Stanley's nearly *half-billion-dollar* equity interest in Brookfield" and that the "potential conflict is material, especially considering Morgan Stanley's other financial entanglements with Brookfield."[157]

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[153] Tr. at 27-29.

[154] *See supra* Section I.

[155] Tr. at 35.

[156] *Harcum v. Lovoi*, 2022 WL 29695, at *21 (Del. Ch. Jan. 3, 2022); *see also City of Sarasota Firefighters' Pension Fund v. Inovalon Hldgs., Inc.*, C.A. No. 2022-0698-KSJM, at 32 (Del. Ch. July 31, 2023) (TRANSCRIPT) (McCormick, C.) ("*Inovalon* Tr.") ("the [S]pecial [C]ommittee . . . layered on advisory services from multiple advisors in order to mitigate the possibility that any one immaterial conflict even could taint the process"), *appeal docketed*, No. 305, 2023 (Del. Aug. 25, 2023).

[157] Op. Br. at 39 (emphasis in original).

Morgan Stanley's equity interest in Brookfield was disclosed publicly, was not a conflict, and, in any event, was not material. The Proxy disclosed that "Morgan Stanley . . . may have committed and may commit in the future to invest in private equity funds managed by BAM or its affiliates."[158] "Given this notice, any investor who desired to know the size of [Morgan Stanley]'s position" in Brookfield "could find this information in [Morgan Stanley]'s publicly-filed Form 13F."[159] The Form 13F discloses that, at the time of the Acquisition, a Morgan Stanley-managed fund held $470 million of Brookfield stock.[160] This fact does not impugn Morgan Stanley's independence because it represents 0.1% of the value of Morgan Stanley's portfolio and is plainly immaterial.[161]

Morgan Stanley's other relationships with Brookfield were also "disclosed in the [P]roxy, demonstrating that the [S]pecial [C]ommittee" was aware of them.[162] The Proxy stated that "Morgan Stanley . . . received aggregate fees of approximately $65 to $90 million" from Brookfield and "aggregate fees of approximately $5 to $15

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[158] A344-45 (Veres Aff., Ex. 1 at 180-81).

[159] *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *12 (Del. Ch. Feb. 29, 2012).

[160] A877 (Veres Aff., Ex. 35).

[161] *Id.*; *see also* Mot. at 41; *Micromet*, 2012 WL 681785, at *11-12 ("Goldman's Amgen holdings equal approximately 0.16% of its overall investment holdings" and therefore were not "likely to impede its ability effectively and loyally" to advise Amgen's counterparty).

[162] Tr. at 30-31.

million" from services it provided to TERP.[163] Such "prior dealings with a counterparty to a transaction, standing alone, will not be adequate to plead a conflict of interest."[164] The Proxy also disclosed that Morgan Stanley served as "a lender and a participant in certain financings for certain affiliates of BAM."[165]

The Court of Chancery correctly recognized that "[P]laintiffs have failed to provide a compelling rationale as to why this case should come out differently" than *Micromet*.[166] Plaintiffs nowhere explain why Morgan Stanley's disclosed dealings with Brookfield render its portfolio holdings a conflict, let alone a material one.[167] Plaintiffs' reliance on *In re Art Technology Gp., Inc. S'holders Litig.* is misplaced.[168] There, the court held that "there need[ed] to be a supplemental disclosure" of an advisor's fees from a counterparty to a transaction "given the magnitude of the fees on the [counterparty's] side" and the fact that the advisor's work for the counterparty

[163] A344 (Veres Aff., Ex. 1 at 180).

[164] *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at *22 n.104 (Del. Ch. Aug 18, 2017).

[165] A100-101 (Am. Compl. ¶151) (quoting Proxy, A344 (Veres Aff., Ex. 1 at 180)).

[166] Tr. at 30.

[167] Op. Br. at 39.

[168] C.A. No. 5955-VCL (Del. Ch. Dec. 20, 2010) (TRANSCRIPT).

was "already in the proxy statement."[169] Here, by contrast, there is no dispute that Morgan Stanley's fees from prior Brookfield work were disclosed.[170]

Kirkland. Plaintiffs argue that "the Proxy failed to disclose (i) that '[a]t the same time as the [Acquisition] negotiations, Kirkland was advising Brookfield on another separate equity investment' and (ii) Kirkland's longstanding and lucrative prior relationship with Brookfield."[171] The Court of Chancery correctly rejected this argument: "[P]laintiffs fail[ed] to plead that . . . Kirkland [was] meaningfully conflicted as to the [Acquisition]."[172] Again, there were no conflicts to disclose—"Plaintiffs do not allege that Kirkland represented Brookfield or its affiliates as counterparties to the [Acquisition] or on any related transaction."[173]

Plaintiffs argue that the Court of Chancery erred by determining that Kirkland's alleged conflicts were immaterial.[174] But Plaintiffs again fail to explain how Kirkland's past and concurrent work with Brookfield on transactions *unrelated* to the Acquisition could be material.[175] Delaware courts routinely recognize a

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[169] *Id.* at 61, 80, 101-102.

[170] A99 (Am. Compl. ¶149); A344 (Veres Aff., Ex. 1 at 180).

[171] Op. Br. at 42 (citing Tr. at 12; A102-103 (Am. Compl. ¶154)).

[172] Tr. at 35.

[173] *Id.* at 31.

[174] Op. Br. at 43.

[175] *See, e.g.*, A103-04 (Am. Compl. ¶155); Pls.' Ans. Br. in Opp'n to Mot. to Dismiss ("Opp.") at 56-60; Op. Br. at 42-44.

distinction between an advisor's work for a counterparty on matters related to the transaction at issue and work on completely unrelated engagements.[176] And, an "advisor's prior dealings with a counterparty to a transaction, standing alone, will not be adequate to plead a conflict of interest."[177]

Plaintiffs' cited authorities are distinguishable and demonstrate that courts, on rare occasions and based on extreme facts not alleged here, have held that a past or concurrent representation on an unrelated transaction constitutes a material conflict. In *Tornetta v. Maffei*, the alleged concurrent representation was "twice the size" of the transaction at issue and the financial advisor's fees from the concurrent

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[176] *Compare Match*, 2022 WL 3970159, at *24-26 (finding that the special committee reasonably consented to an advisor who had advised a counterparty but "was not advising both sides of the deal"); *and Lovoi*, 2022 WL 29695, at *21 ("Plaintiff has not alleged that [an advisor]'s prior representation of [counterparties] *was related* at all to its representation of [a company] leading up the [m]erger." (emphasis added)); *with In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *16-17 (Del. Ch. Oct. 2, 2009) (denying defendants' motion for summary judgment as to an advisor conflict disclosure claim because the advisor concurrently advised an entity providing a counterparty's financing for the merger); *and In re Tele-Commc'ns, Inc. S'holders Litig*., 2005 WL 3642727, at *10 (Del. Ch. Dec. 21, 2005) (stating that the special committee's choice "to use the legal and financial advisors already advising" the company on the same transaction "alone raises questions regarding the quality and independence of the counsel and advice received").

[177] *See Martha Stewart Living*, 2017 WL 3568089, at *22 n.104; *In re Inergy L.P. Unitholder Litig.*, 2010 WL 4273197, at *15 (Del. Ch. Oct. 29, 2010) (finding that a decision to hire an advisor who engaged in past work for a counterparty "fail[s] to cast doubt on the reasonableness and good faith nature" of that decision).

representation "represented the largest source of [that advisor's] revenues."[178] In *PLX*, the well-pled allegations, including a financial advisor's purported conflicts, created "a reasonable inference of information leakage" between the buy and sell sides of a proposed transaction.[179] In *Ortsman v. Green*, the court permitted limited expedited discovery where the plaintiff alleged (i) that the company's lead financial advisor on the company's sale process had simultaneously advised the target and offered debt financing to potential acquirers on the *same acquisition*; and (ii) that the proxy failed to disclose the fees paid to that advisor and a second financial advisor in connection with both that acquisition and "other recent transactions involving the members of the buyer group."[180]

Here, Plaintiffs do not plead any comparable allegations. Rather, *Inovalon* is instructive. There, plaintiffs alleged that the two financial advisors previously and concurrently advised a counterparty on unrelated transactions.[181] As in this case, the Court of Chancery relied, in part, on its duty of care analysis to hold that the

[178] *Tornetta v. Maffei*, C.A. No. 2019-0649-AGB, at 18-19 (Del. Ch. Feb. 23, 2021) (TRANSCRIPT).

[179] *In re PLX Tech. Inc. S'holders Litig.*, C.A. No. 9880-VCL, at 20 (Del. Ch. Sept. 3, 2015) (TRANSCRIPT) ("*PLX* Tr.").

[180] *Ortsman v. Green*, 2007 WL 702475, at *1 (Del. Ch. Feb. 28, 2007).

[181] *Inovalon* Tr. at 29-31, 39.

disclosure of advisors' unrelated prior and concurrent relationships would not "have altered the total mix of information available to stockholders."[182]

* * *

In a last-ditch attempt to salvage their claims as to Morgan Stanley and Kirkland, Plaintiffs attempt to impugn the Court of Chancery's decision by focusing on the court's dicta that it does not "love the fact that Morgan Stanley has this level of financial ties to the controller"[183] and that "I wish Kirkland had not concurrently represented Brookfield in an unrelated equity transaction."[184] Plaintiffs suggest that these statements mean that the alleged conflicts would have been important to stockholders.[185] Not so. The Court of Chancery ultimately concluded that any alleged conflicts were immaterial. The quoted statements reinforce that the court "accept[ed] all [of Plaintiffs'] well pleaded factual allegations as true" and drew "all reasonable inferences in [Plaintiffs'] favor," as was required.[186]

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[182] *Id.* at 31, 39.

[183] Op. Br. at 41 (citing Tr. at 30).

[184] Op. Br. at 43 (citing Tr. at 31).

[185] *Id.* at 43.

[186] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011); Tr. at 35.

3. Information Concerning The Special Committee's Management Of Advisors Did Not Require Disclosure

Plaintiffs argue that the Court of Chancery "erred by failing to find that the Proxy omitted material facts regarding the [Special] Committee's failure to apprise itself of its advisors' potential conflicts."[187] As explained above, neither Morgan Stanley nor Kirkland had any material conflict to disclose.[188] As such, the Court of Chancery correctly held that alleged omissions concerning how the Special Committee managed Morgan Stanley and Kirkland's alleged conflicts were "immaterial."[189]

Plaintiffs nevertheless argue that "even if Morgan Stanley and Kirkland's potential conflicts were immaterial," the Proxy still should have disclosed "information regarding the [Special] Committee's mismanagement of its advisor's potential conflict."[190] But there was no "mismanagement" to disclose.[191] Plaintiffs

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[187] Op. Br. at 45.

[188] *See supra* Section II.C.2. That Morgan Stanley did not list its past work for certain *affiliates* of Brookfield in its engagement letter does not suggest that Morgan Stanley "concealed its conflicts" from the Special Committee, including because the Proxy included a broader disclosure encompassing work for BEP or its affiliates (broadly defined). Op. Br. at 45; A344 (Veres Aff., Ex. 1 at 180).

[189] Tr. at 36.

[190] Op. Br. at 46.

[191] *See Crane*, 2017 WL 7053964, at *21 ("[D]irectors do not have an obligation to disclose information about the *non-existence* of misaligned incentives.") (emphasis in original); *In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677, at *13 (Del. Ch.

argue that "the [Special] Committee accepted conclusory statements from Morgan Stanley and Kirkland regarding their supposed lack of conflicts."[192] According to Plaintiffs, Morgan Stanley "confirmed that it does not have any conflict of interest that would affect its ability" to advise the Special Committee.[193] And Kirkland told the Special Committee that it "did not have any conflicts of interest that would affect its ability to serve as legal counsel."[194] Plaintiffs, however, have never explained why the Special Committee was not entitled to rely on these representations.[195] Indeed, Plaintiffs have abandoned their claim that the Special Committee breached its duty of care in selecting advisors.[196]

Dec. 10, 2018) (Delaware law "does not require boards to engage in self-flagellation in their public disclosures.").

[192] Op. Br. at 45.

[193] A99 (Am. Compl. ¶149).

[194] A103 (*Id.* ¶155); A583 (Veres Aff., Ex 6 at TERPBOD000087); A186 (Mot. at 12).

[195] *Cf. PLX* Tr. at 36-40 (stating that "[i]f the committee had gotten in there at the outset and secured representations" that an advisor was not conflicted, the [c]ourt's conclusion that the [b]oard failed to oversee the advisor's conflicts "might have been different").

[196] Tr. at 29-31.

4. The Proxy Provided A Fair Summary Of Potential Dilution To Dividend Yield

The Court of Chancery correctly rejected Plaintiffs' claim that "the [P]roxy improperly omitted material information regarding the dilutive effect of the [Acquisition] to TerraForm's stockholder[s]."[197]

Plaintiffs nevertheless ask this Court to reverse that decision, pressing their argument that the Proxy should have disclosed that "Morgan Stanley and Greentech estimated approximately 5% DPS dilution to TERP stockholders through 2024."[198] This allegation boils down to an argument that "the [P]roxy did not provide a fair summary" of the financial advisors' "calculations of post-merger dividends per share."[199]

"[T]he [P]roxy discloses . . . both TerraForm and Brookfield's forecasted standalone dividends per share."[200] Under the sub-heading "Certain TerraForm Power Forecasts," the Proxy provides TERP's "Five-Year Business Plan Model," and explains that the model "reflects . . . TerraForm Power's existing portfolio of

[197] Tr. at 43-44.

[198] Op. Br. at 46.

[199] Tr. at 43.

[200] *Id.*; *see* Mot. at 52; Reply at 25-27.

assets."[201] The model clearly includes "[d]ividends per share."[202] Under the next sub-heading, "Certain BEP Forecasts," which begins on the page immediately following TERP's "Five-Year Business Plan Model," the Proxy provides "BEP Management Forecasts."[203] The forecast includes "[d]istributions per unit."[204] These disclosures provided a "fair summary" of the financial advisor's calculations of post-merger dividends per share.[205] Plaintiffs cite no authority establishing that the disclosure of a financial advisor's dilution analysis is required—because it is not.[206]

The Court of Chancery correctly held that "[a] stockholder could reach the same conclusion," concerning expected dilution, "on their own" by engaging in "simple multiplication"[207]—*i.e.*, multiplying the distributions per unit under BEP's Management Forecasts by the exchange ratio, which is repeated throughout the

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[201] A370, A374 (Veres Aff., Ex. 1 at 206, 210).

[202] A374 (*Id.* at 210).

[203] A374, A375, A377 (*Id.* at 210, 211, 213).

[204] *Id.*

[205] *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 900-01 (Del. Ch. 2016).

[206] *In re PAETEC Hldg. Corp. S'holders Litig.*, 2013 WL 1110811, at *8 (Del. Ch. Mar. 19, 2013) (disclosure of "how an accretion/dilution analysis would change" depending on synergies would "provide a level of detail beyond what the law of Delaware requires.").

[207] *Kahn ex. rel. DeKalb Genetics Corp. v. Roberts*, 679 A.2d 460, 467 (Del. 1996).

Proxy,[208] and comparing that figure to the dividends per share under TERP's Five-Year Business Plan Model. This is not a "scavenger hunt."[209] Nor does Plaintiffs' sole cited authority suggest otherwise. In *Vento*, stockholders had to scour through *multiple*, lengthy documents, filed *months* apart, to piece together material information regarding financial advisor conflicts.[210] Here, the Proxy clearly disclosed the relevant dividends and distributions three pages apart, in the same document, under plain-English headings, in consecutive sub-sections.

Finally, Plaintiffs ignore the Proxy's accurate disclosure that the Acquisition's impact on the dividend was uncertain. The Court of Chancery correctly recognized that the Proxy disclosed: "There can be no assurance that Brookfield Renewable or BEPC will make comparable distributions or dividends in the future."[211] Plaintiffs also argue that additional disclosure concerning the dividend was required because "TERP was a Yieldco," which is a "unique type of company whose 'business model is to own a portfolio of . . . assets from which dividends can be distributed to public

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[208] Tr. at 44; A255, A258, A261, A266, A314, A322-23, A325, A336, A337, A338-43, A345, A349, A352, A380-81 A433 (Veres Aff., Ex. 1 at 4, 7, 10, 83, 150, 158-59, 161, 172-79, 181, 185, 188, 216-17, 269).

[209] Op. Br. at 48.

[210] *Vento v. Curry*, 2017 WL 1076725, at *3 (Del. Ch. Mar. 22, 2017).

[211] A405 (Veres Aff., Ex. 1 at 241); A1028 (Veres Aff., Ex. 39 at TERPBOD000870); Tr. at 44.

stockholders.'"[212] But that argument is *non-sequitur*. There was no certain "reduction of dividends" to be disclosed.[213] Morgan Stanley's analysis expressly stated that the Acquisition would be *accretive* to TERP pro forma distributions per share *if* BEP maintained a "standalone FFO payout ratio"[214]— *i.e.*, accretion or dilution of the dividend would depend on strategic considerations not yet determined. Thus, the possibility of a small amount of dilution in one scenario or accretion in another was not a material fact requiring disclosure.

The Court of Chancery was correct to credit the Proxy for disclosing information that *was* "certain"—both TerraForm's and Brookfield's forecasted standalone dividends per share[215]—and not to fault the Proxy for failing to disclose analyses "too conjectural to significantly alter the total mix of information"[216]— Morgan Stanley's and Greentech's analyses estimating approximately 5% DPS dilution.

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[212] Op. Br. at 47 (quoting *Crane*, 2017 WL 7053964, at *1).

[213] *Id.* at 46-47.

[214] A1028 (Veres Aff., Ex. 39 at TERPBOD000870).

[215] Tr. at 43.

[216] *Crane,* 2017 WL 7053964, at *15; Tr. at 43-44; *see also In re Fam. Dollar Stores, Inc. S'holder Litig.*, 2014 WL 7246436, at *21 (Del. Ch. Dec. 19, 2014) ("[S]peculation . . . is not an appropriate subject for a proxy disclosure.").

5. Greentech's "Optimal Time" And "Market Check" Pitch Deck Remarks Were Not Material

Plaintiffs claim that the Proxy should have disclosed two statements in advisor decks presented to the Special Committee: (1) Greentech's statement that it was "not the optimal time to realize maximum value for [TERP]" and (2) "Greentech's advice to the Special Committee regarding the need to solicit alternative bids for TERP."[217] Plaintiffs contend that the Court of Chancery erred by "embrac[ing] Defendants' argument that Greentech's advice should be discredited . . . because (i) they appeared in 'Greentech's pitch before it had been engaged'" and "(ii) Greentech ultimately recommended the [Acquisition]."[218] Plaintiffs emphasize "that Greentech was uniquely positioned to give advice at the outset of the process because it was deeply familiar with TERP."[219] But that does not transform all of Greentech's statements early in the process into material statements that warrant disclosure.[220] Contrary to Plaintiffs' argument, the Court of Chancery did not "draw[] pleading-stage inferences in Defendants' favor."[221] The Court of Chancery appropriately reviewed the 220 Documents incorporated-by-reference into the Complaint to

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[217] A35-36, A147-48 (Am. Compl. ¶¶13, 232-33). *See* Tr. at 34-35.

[218] Op. Br. at 48-49.

[219] *Id.* at 50.

[220] *Id.*

[221] *Id.* at 48.

"'ensure that [Plaintiffs] [have] not misrepresented their contents and that any inference the [Plaintiffs] seek[] to have drawn is a reasonable one.'"[222]

Plaintiffs' allegation concerning Greentech's remark about the "optimal time" for a transaction rests on inferences wholly unsupported by the 220 Documents. The allegation is rooted in a single slide with the heading "Three Key Opening Questions," that states "Why Now? Now is not the optimal time to realize maximum value for TerraForm."[223] The slide is drawn from a pitch deck entitled "*Proposal* to Advise the Special Committee," presented on January 12, days before negotiations commenced with Brookfield, and months before Greentech ultimately recommended the Acquisition.[224] The corresponding meeting minutes provide further context, explaining that "the [Special] Committee should consider, among other things, *whether* now was the ideal time to pursue the Proposed Transaction."[225] Accordingly, the Court of Chancery held that Greentech's "[p]reliminary guidance," outlined on a "single . . . slide, containing generalized information" did not need to be disclosed in the Proxy.[226] But, even putting aside that the statement appeared in

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[222] *Trade Desk*, 2022 WL 3009959, at *9 (quoting *Voigt*, 2020 WL 614999, at *9); *see also Match*, 2022 WL 3970159, at *9, n.80.

[223] A147 (Am. Compl. ¶232); A836 (Veres Aff., Ex. 34 at TERPBOD000016).

[224] A833, A836 (Veres Aff., Ex. 34 at TERPBOD000013, TERPBOD000016) (emphasis added).

[225] A592 (Veres Aff, Ex. 8 at TERPBOD000009) (emphasis added).

[226] *Trade Desk*, 2022 WL 3009959, at *20.

a pitch deck, the Proxy was simply not required to provide a "play-by-play" of every comment provided to the Special Committee.[227]

Plaintiffs' allegation that TerraForm should have disclosed "Greentech's advice . . . regarding the need to solicit alternative bids"[228] comes from the same pitch deck and reflected Greentech's preliminary views.[229] In any event, Plaintiffs' allegations do not demonstrate that the statement was material. The Special Committee also received advice from Morgan Stanley that there were "limitations on conducting an effective market check under the current circumstances."[230] And, the Special Committee continued to discuss whether to conduct a market check throughout the negotiation process, observing that there was a "very low probability that a third party would have an interest in, and ability to, present a proposal that offered more value"[231] than Brookfield's proposal.[232] The Proxy fairly disclosed the Special Committee's ultimate determination "not to solicit alternative proposals or transactions."[233] The Court of Chancery thus held that this commentary did not

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[227] *Crane*, 2017 WL 7053964, at *13.

[228] A147-48 (Am. Compl. ¶233).

[229] A845 (Veres Aff., Ex. 34 at TERPBOD000025).

[230] A597 (Veres Aff., Ex. 9 at TERPBOD000056).

[231] A647 (Veres Aff., Ex. 16 at TERPBOD000157).

[232] *Supra* pp. 11-12; A605 (Veres Aff., Ex. 10 at TERPBOD000073); A647 (Veres Aff., Ex. 16 at TERPBOD000157); A659 (Veres Aff., Ex. 18 at TERPBOD000256).

[233] A321 (Veres Aff., Ex. 1 at 157).

require disclosure, reasoning that the "[S]pecial [C]ommittee later reasonably concluded that a market check was not necessary, making this disclosure [of Greentech's statement] immaterial."[234]

CONCLUSION

For all of these reasons, and those set forth in the Court of Chancery's well-reasoned decision below, this Court should affirm the dismissal of Plaintiffs' claims.

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[234] Tr. 34-35; *see also Crane*, 2017 WL 7053964, at *13; *Match*, 2022 WL 3970159, at *32; *In re Cogent, Inc. S'holder, Litig.*, 7 A.3d 487, 511-12 (Del. Ch. 2010); *see also Hughes*, 2005 WL 1089021, at *13.