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

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<u>APPELLANTS' REPLY BRIEF</u>

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PRELIMINARY STATEMENT

Defendants fail to rebut Plaintiffs' two independent grounds for reversal of the Trial Court's holding that Defendants satisfied *MFW*. Contested issues of fact prohibit *MFW* de-escalation before discovery.

Plaintiffs' allegations create a reasonable inference Brookfield coerced the Committee.[1] Brookfield provided the Committee the "No Growth Projections", which indisputably implied Brookfield would stop growing TERP absent a deal. Thereafter, the Committee's advisors consistently warned that Brookfield was positioned to starve TERP of growth, then later squeeze out the minority at a lower price. Brookfield's threat undermined the Committee's ability to definitively "say no."[2]

Defendants seek the same defense-friendly inference they received below, arguing that the No Growth Projections were not a threat because they were purportedly furnished in "diligence." Brookfield is not entitled to that dubious pleadings-stage inference. Creating a "diligence" exception would provide a roadmap for sophisticated controllers to coerce committees. Defendants' further assertion that preventing TERP's growth would maintain the *status quo* controverts

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[1] Appellants' Opening Brief ("POB") §I(C).

[2] *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 762 (Del. 2018).

the record evidence that the *status quo* entailed Brookfield continuing to grow TERP. And Defendants' assertion that it would be "illogical" for Brookfield to harm TERP ignores both contrary advice the Committee received from its advisors, and that there is no "logical" non-retributive rationale for the No Growth Projections.

Plaintiffs also adequately allege that multiple, independent material Proxy deficiencies rendered the stockholder vote uninformed.

First, the Proxy failed to disclose that Brookfield would realize tremendous benefits through the Merger: $130 million in incremental management fees and $1 billion from potential debt refinancing. The Trial Court indisputably erred in believing the fee increase was disclosed. Moreover, stockholders could not piece these benefits together, and were entitled to know the magnitude of the benefits (not just their existence) to assess the Merger price. Defendants' assertion—and the Trial Court's finding—that the benefits did not require disclosure because they were "uncertain" defies Delaware law requiring disclosure of ***reliable*** forward-looking information like management projections, which can never be certain.

Second, the Proxy also failed to disclose the Committee's advisors' potential conflicts. The Proxy omitted that (i) Morgan Stanley—which had an ongoing multi-hundred-million-dollar Brookfield relationship—held a nearly half billion-dollar Brookfield stake and (ii) Kirkland had concurrent and past Brookfield engagements.

Affirmance would upend longstanding Delaware precedent requiring full disclosure of advisors' potential conflicts.

Third, the Proxy also omitted the Committee's failure to apprise itself of its advisors' potential conflicts. The Committee's failure to investigate its advisors' conflicts—or even obtain conflict disclosures—goes directly to Committee process sufficiency and is material. And the advisors' conclusory, false conflict denials are no excuse. Further, the Trial Court's belief (inferred from an after-the-fact Proxy disclosure) that the Committee recognized and managed Morgan Stanley's conflicts during the process contradicts the pleadings and record evidence, including the advisors' false conflict denials.

Fourth, the Proxy also failed to disclose the Merger's dilution to TERP minority stockholders. Dividends were critical to TERP stockholders, who received no warning their dividends would diminish. Defendants' argument that stockholders should have intuited that they could hunt through the Proxy, multiplying numbers on separate pages and comparing them to numbers on a third page, contravenes Delaware's requirement of "clear and transparent" disclosure. The holding below that the dilution diminution was insufficiently "certain" again ignores that reliability, not absolute certainty, is Delaware's disclosure standard.

Fifth, the Proxy failed to disclose that Greentech warned the Committee it was not the optimal time to maximize stockholder value and a "robust market check" was a "must." Defendants do not dispute TERP's longtime advisor gave that advice and was best-positioned to do so. Defendants seek an improper defense-friendly inference granted below—*i.e.*, that Greentech's advice was preliminary and immaterial ***because*** Greentech later recommended the Merger. But the Trial Court was wrong: ***Greentech explicitly did not recommend the Merger***, and therefore did not inferably retract its advice.

The Transcript Ruling contains errors of fact, draws improper inferences, contravenes precedent without acknowledgment, and should be reversed.

ARGUMENT

I. ENTIRE FAIRNESS APPLIES BECAUSE PLAINTIFFS ADEQUATELY ALLEGED COERCION BY BROOKFIELD

Plaintiffs adequately plead that Brookfield threatened the Committee and undermined "the ability of the Committee effectively to negotiate at arm's length ...." *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1121 (Del. 1994). Brookfield—TERP's sponsor—provided the Committee the No Growth Projections implying that, absent a deal, Brookfield would stop growing TERP. POB 25-28. Thereafter, the Committee and its advisors understood Brookfield's message and capacity for retribution. POB 26 (citing *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *31 (Del. Ch. June 11, 2020)). The Committee's advisors repeatedly warned of TERP's reliance on Brookfield for its planned growth, TERP's limited ability to operate without Brookfield's support and the negative economic repercussions of Brookfield retribution. *Compare* POB 26-28 (cataloging advisors' warnings) *with Dell*, 2020 WL 3096748, at *31-32 (same). Morgan Stanley warned the Committee that "Turn[ing] Down [a Brookfield] Offer" could prompt Brookfield to starve TERP and squeeze out TERP minority stockholders at an even lower price, explaining:

> While any subsequent decrease in TERP's stock price resulting from Brookfield's actions would have a near-term impact on the value of Brookfield's stake in TERP, ***it could also give Brookfield an***

opportunity to re-bid for the outstanding Class A shares at a lower price at a later point in time.

A112-A113, ¶172.[3] Greentech later advised that accepting the Merger would alleviate potential concerns about Brookfield ceasing to grow TERP as a standalone entity. A111-A112, ¶171; A957. Thus, Brookfield's implicit threat undermined the Committee's ability to bargain at arm's length and definitively "say no." *Dell*, 2020 WL 3096748, at *16.

Defendants improperly ask this Court to consider Plaintiffs' allegations piecemeal[4] and demand the same defendant-friendly inferences the Trial Court erroneously made below, suggesting Plaintiffs' allegations should be disregarded because the No Growth Projections were purportedly furnished in diligence and falsely characterizing Plaintiffs' allegations as based upon "statements about assumptions in a model" rather than Brookfield's furnishing of the projections. *See* Appellees' Answering Brief ("DAB") 19-20.

Defendants' dismissal of the No Growth Projections as merely "sensitivities" or "assumptions in a model" is disingenuous. DAB 20. Defendants concede Greentech advised the Committee that Brookfield's furnished projections actually

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[3] Emphasis is added, and citations and quotations omitted.

[4] *Klein v. Wasserman*, 2019 WL 2296027, at *5 (Del. Ch. May 29, 2019).

differed from TERP's because they excluded future TERP-level growth. DAB 19; *see also* A699, A952. And, regardless of how Defendants label the No Growth Projections, they were Brookfield's concrete communication of TERP's future absent a buyout. The fact that Greentech separately presented sensitivity analyses showing implied exchange ratios that assumed TERP-level growth (based on TERP's model) and did not (based on the No Growth Projections) only supports Plaintiffs' claim. A955-956; *see also* A702-703. Greentech understood the threat and illustrated for the Committee the harm stockholders would suffer if—as Morgan Stanley advised at the same meeting—Brookfield cut off TERP-level growth and subsequently pursued TERP at a lower price.

Defendants further argue there was no coercion because, they claim, Brookfield's projections merely maintain the *status quo*. DAB 21. Wrong. The *status quo* as of the Merger was Brookfield sponsoring TERP's growth; the No Growth Projections thus threatened a *status quo* ***departure***. A110-A112; ¶¶170-71. Greentech's materials explicitly warned that Brookfield's projections did "not align" with "TERP management's 5-year forecast" because they "exclude[d] future growth at the TERP level." A1089; *see also* A699, A952.

And Defendants' argument that nothing guaranteed Brookfield would agree with or adhere to every assumption in TERP management's projections is nonsense.

DAB 21. Management's projections ***were*** Brookfield's ordinary course projections because Brookfield was TERP management. Brookfield provided TERP's management services under the Master Services Agreement, and TERP's CEO, CFO, and General Counsel were all Brookfield executives. A42-A43, ¶¶36-38. Other than those dual fiduciaries, Brookfield personnel working for TERP "[we]re not required to have as their primary responsibility the management and administration of [TERP] or to act exclusively for [TERP]," meaning TERP had "no in-house project development efforts and no / limited M&A staff." A110-A113, ¶¶170-72. The Committee's advisors warned that TERP was "nearly fully reliant on Brookfield for growth"[5] and had "a limited ability to operate [itself] without Brookfield's influence or support."[6] Thus, the No Growth Projections were an implicit and credible threat to abandon the *status quo*.

Defendants next assert it would be "illogical" for Brookfield to depart from the *status quo* to '"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%." DAB 24. But Morgan Stanley cautioned that Brookfield might do just that if the Committee rejected Brookfield's offer. *Supra* 5-6. Tellingly, Defendants did not

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[5] A110-A111, ¶170.

[6] A112-A113, ¶172.

proffer alternative explanations for Brookfield forecasting TERP's forced stagnation and it would be illogical for Brookfield to cease funding TERP's growth for any ***non***-retributive reason.

Finally, that Plaintiffs' allegations differ from those in *Dell* is irrelevant. *Dell* provides ***examples*** of coercion, not an exclusive list of coercive behavior. Indeed, the *Dell* court acknowledged that controllers can threaten in more subtle, indirect ways. *See* POB 29 (citing *In re Dell Tech. Class V S'holders Litig.* C.A. No. 2018-0816-JTL, Tr. at 40 (Del. Ch. Mar. 13, 2020) (TRANSCRIPT)). Also unavailing is Defendants' plea that the potential for retribution created by Brookfield's control could be "true of almost any sponsor-backed or controlled company (and, therefore, true in almost any *MFW* situation)[.]" DAB 20. Sponsors embedded into management are an extreme iteration of the "800-pound gorilla in the board room … [with] retributive capacities that lead [Delaware] courts to question whether independent directors … can freely exercise their judgment in approving [controller] transactions …." *See In re Tesla Motors, Inc. S'holder Litig.*, 2020 WL 553902, at *6 (Del. Ch. Feb. 4, 2020). *MFW* de-escalation was carefully circumscribed to protect against the controller's retributive capacity. Here, Brookfield intentionally—if implicitly—wielded that capacity. The Committee's cognizance of Brookfield's potential retribution underscores the coercive impact of Brookfield's threat.

II. ENTIRE FAIRNESS APPLIES BECAUSE THE PROXY WAS MATERIALLY MISLEADING

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

The Trial Court erred in excusing the nondisclosure of significant benefits Brookfield would receive through its increased management fee and post-close refinancing opportunity. POB § II.C.1. The Committee's advisors adjudged the benefits so significant as to warrant additional merger consideration. *See* POB 31. The benefits' value was material to stockholders in assessing the Merger consideration's fairness. *Id.* (citing, *inter alia*, *Ark. Tchr. Ret. Sys. v. Alon USA Energy, Inc.*, 2019 WL 2714331, at *26 (Del. Ch. June 28, 2019)).

1. Management Fees

The Trial Court erroneously held that the additional $130 million in net management fees Brookfield would receive post-Merger were immaterial to stockholders' decision on whether to accept the Merger consideration. POB 33-36.

First, the Trial Court mistakenly held that the Proxy sufficiently disclosed that Brookfield would receive ***some*** unspecified additional fees. Defendants do not dispute that the Proxy contained no such disclosure. POB 35-36. This inarguable, conceded mistake requires reversal.

Second, Plaintiffs showed the Trial Court misapprehended the management fee and therefore the related disclosure's sufficiency. The Trial Court described it simply as “an annual management fee of $20 million, plus 1.25 percent of the amount by which [BEP’s] market increased.” POB 34. However, calculating the market price increase entails a five-variable formula, and the Proxy did not provide the necessary numeric inputs to calculate the amount. POB 34-35.

Defendants do not contest that the Trial Court misapprehended the formula. DAB 28-29. Instead, Defendants baselessly mischaracterize the formula’s express components as “Plaintiffs’ proposed additional inputs,” but the components are stated in the formula, at the very Proxy page Defendants cite. *See* DAB 29 (citing A482). Defendants also dismiss the Trial Court’s confusion by bizarrely arguing the inputs are “only necessary to calculate ‘the market value of [BEP],’ which is then used to determine the base management fee.” DAB 29. ***That is no defense at all***: calculating that market value is the singularly critical step in determining Brookfield’s management fee.

Equally unavailing is Defendants’ legal rejoinder that stockholders, “assumed to be ‘skilled readers,’ did not need to calculate a projected base management fee in order to appreciate” Brookfield would receive higher fees. DAB 29. Defendants’ excerpting of *Appel v. Berkman* ignores that court’s finding “that although stockholders are assumed to be skilled readers, proxy statements are not intended to be mysteries to be solved by their audience.” 180 A.3d 1055, 1064 (Del. 2018). The

Proxy here was such a mystery. It nowhere suggested the Merger's impact on Brookfield's net management fees, and Defendants identify no disclosed information with which stockholders could "appreciate" that Brookfield's fees would increase. TERP stockholders were entitled to clear and fair disclosure, and the scavenger hunt to which they were instead subjected contravenes Delaware law. *See* POB 35 (citing *Salladay v. Lev*, 2020 WL 954032, at *16 (Del. Ch. Feb. 27, 2020); *Vento v. Curry*, 2017 WL 1076725, at *3-4 (Del. Ch. Mar. 22, 2017)).

Third, the Trial Court erroneously held that Defendants did not need to disclose the quantum of Brookfield's fee increase. *See* POB 35-36. Stockholders are entitled to information material to their consideration of the merger consideration's fairness,[7] and it is the vast magnitude of the fee increase rather than its mere existence that weighs on fairness.

Defendants assert that nondisclosure was excused because Delaware does not require "disclosure of a board's every thought or consideration." DAB 30. But the omitted information is not ancillary detail—it is a management fee increase so large Morgan Stanley deemed it a "Key Consideration" warranting a higher Merger premium. POB 33. Defendants also assert that Delaware does not require disclosure

[7] POB 33 (citing *Gilmartin v. Adobe Res. Corp.*, 1992 WL 71510, at *10 (Del. Ch. Apr. 6, 1992)).

of "information on hypothetical scenarios that are inherently speculative." DAB 30. But Brookfield's management fee is not a hypothetical scenario, and all forward-looking disclosures lack absolute certainty. The standard for forward-looking disclosure is ***reliability***, not ***certainty***. *See infra* 15. Defendants do not—and cannot—establish that Morgan Stanley's projection was ***unreliable***.

2. Debt Refinancing

The Trial Court also erroneously excused Defendants' failure to disclose that Brookfield could realize over $1 billion in benefits by refinancing TERP's debt post-Merger. POB 36-39.

Critical to the Trial Court's determination was its belief that diligent stockholders could use disparate disclosures regarding specific loans to piece together that "refinancing would be advantageous to Brookfield's bottom line." Tr. at 42-43. Even if stockholders were obligated to ferret that out (they were not), whether there was ***any*** benefit to Brookfield—without more—was insufficient. To adequately assess the Merger's fairness stockholders needed to know the benefit's massive ***magnitude***, which could not be gleaned from the Proxy. POB 38-39.

Defendants do not defend that reversible error, only the Trial Court's finding that the benefits were not "sufficiently certain to require disclosure." *See* DAB 30-31. They posit that anything "hypothetical" or "speculative" is "not required to be disclosed." DAB 28 (quoting *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *17 (Del. Ch. Dec. 11, 2017)). That is not the standard. Delaware courts routinely require disclosure of uncertain—but material—forward-looking information when it is reliable. *See, e.g.*, *Goldstein v. Denner*, 2022 WL 1671006, at *26 (Del. Ch. May 26, 2022). The standard does not, as Defendants suggest, give license to hide any information entailing some measure of uncertainty or projection. *See* DAB 30.

Brookfield's potential $1 billion benefit from debt refinancing fits squarely in Delaware's law covering forward-looking "soft information" such as management projections and *pro formas*. "[B]ecause of [its] essentially predictive nature," disclosure of that information is mandatory if "the circumstances of [its] preparation support the conclusion that [it is] reliable enough to aid the stockholders in making an informed judgment." *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006). "Reliable" does not require a level of certainty (as the Trial Court's holding contemplates) or prohibit any uncertainty or speculation (as Defendants' position contemplates). *See Kihm v. Mott*, 2021 WL 3883875, at *14 (Del. Ch. Aug. 31, 2021). For example, uncertain projections are deemed reliable if "made in the ordinary course of business[.]" *Chen v. Howard-Anderson*, 87 A.3d 648, 688 (Del. Ch. 2014).

Defendants do not address reliability, and their conclusory protest about the contingency of potential refinancing on "future interest rates" and unidentified "other market factors" (DAB 30) is irrelevant at the pleading stage. The bankers' analysis evaluating the impact of refinancing specific TERP borrowings (bearing interest rates of 4.25%-5.0%) at BEP's lower last rate of debt issue (3.38% interest)—which they presented to the Committee (A117)—is far more reliable than the multiyear business projections Delaware subjects to mandatory disclosure. At minimum, it raises fact questions regarding what reliable refinancing-related disclosure was possible. *See Chen*, 87 A.3d at 688-89 (refusing pre-trial to "weigh the conflicting evidence to determine the reliability" of projections).

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

A proxy must "full[y] disclos[e]" advisors' "potential conflicts." *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011). "[T]he relevant inquiry is not whether an actual conflict of interest exists, but rather whether full disclosure of potential conflicts of interest has been made." *See Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 15 (Del. Ch. 2002). The Trial Court erred by finding the Proxy adequately disclosed Morgan Stanley's and Kirkland's potential conflicts.

1. Morgan Stanley

The Proxy improperly failed to disclose Morgan Stanley's $470 million Brookfield investment. A148-A149, ¶235.

Defendants claim disclosure was unnecessary because Morgan Stanley's fairness opinion—the Proxy's Annex B—stated: "[Morgan Stanley] may have committed and may commit in the future to invest in private equity funds managed by BAM or its affiliates." DAB 35. Defendants contend that boilerplate disclaimer fairly alerted stockholders that Morgan Stanley had Brookfield investments, and stockholders should have then investigated to discover "the size of [Morgan Stanley]'s [Brookfield] position … in [Morgan Stanley]'s publicly-filed Form 13F." *Id.* That argument contravenes black-letter law requiring "clear and transparent" disclosure of material information. *Vento*, 2017 WL 1076725, at *3-4; *Voigt v. Metcalf*, 2020 WL 614999, at *24 (Del. Ch. Feb. 10, 2020) (stating material information should "appear[] in plain English" in a proxy). Stockholders were not required to "rummage through a company's prior public filings"—here, a 13F and the accompanying 22,495 entry table (including separate investments by numerous Brookfield subsidiaries) that Defendants ***failed*** to submit below[8]—to uncover Morgan Stanley's investments in Brookfield and its numerous subsidiaries, when

[8] A877 (excerpt of 13F omitting table with investments).

the Proxy could have plainly disclosed it. *Zalmanoff v. Hardy*, 2018 WL 5994762, at *5 (Del. Ch. Nov. 13, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (TABLE).

Defendants' argument also ignores that the boilerplate language was itself materially misleading, as it merely states Morgan Stanley "***may have committed*** ... to invest" in Brookfield, not that Morgan Stanley actually had any such investments (let alone $470 million worth). DAB 35.

Defendants also argue that Morgan Stanley's Brookfield investment "represents 0.1% of the value of Morgan Stanley's portfolio and is plainly immaterial." DAB 35. But the potential for self-interest created by a counterparty investment—not the investment's relative size—determines its materiality. *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) ("*Art* Tr."). Here, the enormous investment was part of a longstanding Morgan Stanley-Brookfield relationship that included concurrent and past financing engagements and recent advisory fees of $70-$105 million, and thus clearly indicated a "powerful incentive to maintain good will and not push too hard[.]" *See 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) (TABLE).

Defendants' reliance on *In re Micromet, Inc. Shareholders Litigation*[9] is

[9] 2012 WL 681785 (Del. Ch. Feb. 29, 2012).

misplaced. There, Goldman's counterparty ownership was not a conflict because Goldman had a "substantially larger stake in" both a competing bidder and another "potential acquirer[.]" *Micromet*, 2012 WL 681785, at *11-12. Goldman also (i) did not have the other conflicts present here (*i.e.*, Morgan Stanley's ongoing, multi-hundred-million-dollar Brookfield relationship); and (ii) held "most [of its counterparty interest] on behalf of its clients" (*id.*), whereas Morgan Stanley owns its Brookfield interest for its own benefit. A100, ¶150.

Finally, Defendants tout that Morgan Stanley's ***other*** Brookfield relationships were disclosed in the Proxy[10] but that merely confirms the Proxy fell short of the "full disclosure" required by *Del Monte* and amounted to an improper partial disclosure. *See Art* Tr. at 61 (requiring disclosure of counterparty fees reflecting "two-hundredths of one percent" of Morgan Stanley's revenue where its counterparty relationship was "already in the Proxy").

2. Kirkland

The Proxy also failed to disclose Kirkland's concurrent and past Brookfield engagements. A102-A103; ¶154. Longstanding Delaware precedent requires disclosure of those potential conflicts. POB 42-43 (citing, *inter alia*, *Tornetta v. Maffei*, C.A. No. 2019-0649-AGB, Tr. at 18 (Del. Ch. Feb. 23, 2021)

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[10] DAB 35 (citing Tr. at 30-31).

(TRANSCRIPT) ("*Pandora* Tr."); *Ortsman v. Green*, 2007 WL 702475, at *1 (Del. Ch. Feb. 28, 2007)).

Urging this Court to rewrite disclosure law, Defendants argue Kirkland's past and concurrent Brookfield engagements were immaterial because Kirkland did not simultaneously "represent[] Brookfield or its affiliates as counterparties to the [Merger.]" DAB 37 (citing Tr. at 31). Requiring disclosure only in that extreme circumstance would permit boards to conceal from stockholders critical information regarding advisors' self-interests.

Under ***current*** disclosure law, an advisor's prior engagements with a transaction counterparty—which necessarily do not involve the subject transaction—are highly probative of an advisor's self-interest and are potential conflicts requiring disclosure. POB 42-43 (citing, *inter alia*, *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *11 (Del. Ch. Mar. 31, 2017)). That self-interest is even more compelling—and potential conflict even more clear—when an advisor concurrently advises a transaction counterparty on other deals. POB 42 (citing, *inter alia*, *Pandora* Tr. at 18).

Unsurprisingly, Defendants' authorities do not support their extraordinary proposition. *In re Match Group, Inc. Derivative Litigation*[11] and *In re Tele-*

[11] 2022 WL 3970159 (Del. Ch. Sept. 1, 2022).

Communications, Inc. Shareholders Litigation[12] did not involve disputes over advisor conflict disclosures. *Match*, 2022 WL 3970159, at *24 n.213; *Tele-Communications*, 2005 WL 3642727, at *4-6. In *In re John Q. Hammons Hotels Inc. Shareholder Litigation*, the court allowed a conflict disclosure claim to proceed to trial, stating: "[I]t is imperative that stockholders be able to decide for themselves what weight to place on a[n] [advisor] conflict[.]" 2009 WL 3165613, at *16 (Del. Ch. Oct. 2, 2009). And, unlike the detailed allegations regarding Kirkland at issue here, *Harcum v. Lovoi* involved conclusory allegations regarding a legal advisor's supposed counterparty conflicts that the court found unsupported and partially incorrect. 2022 WL 29695, at *21 (Del. Ch. Jan. 3, 2022).

Misconstruing Plaintiffs' arguments, Defendants cite those cases for the irrelevant proposition that an advisor representing a committee and counterparty on the same deal has a conflict so severe that its hiring could amount to a fiduciary breach. DAB 37-38 n.176. The Trial Court suffered from the same misunderstanding, failing to examine the materiality of Kirkland's potential conflicts from stockholders' perspective, and instead referring back to its due care analyses where it found the Committee's hiring of Kirkland did not amount to a breach. Tr. at 35.

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[12] 2005 WL 3642727 (Del. Ch. Dec. 21, 2005).

Defendants likewise cite *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation*[13] and *In re Inergy L.P. Unitholder Litigation*[14]—which are not disclosure cases—for the unremarkable proposition that an advisor's past engagements, "standing alone," do not establish a care breach for a board's hiring of that advisor. DAB 38 n.177. But a board's right to hire an advisor with potential conflicts does not negate its duty to disclose them. Defendants seemingly understood that, as they disclosed precisely that information for Morgan Stanley. A99, ¶149.

Defendants' citation to *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc.*[15] (DAB 34 n.156) also highlights their misunderstanding of Plaintiffs' arguments. That decision is currently on appeal because the same jurist failed to examine materiality from stockholders' perspective, instead "rely[ing] … on its duty of care analysis[.]" DAB 39-40. There, the Trial Court ignored the prevailing precedent on disclosure of concurrent engagements as to one advisor (Evercore) and failed to address another advisor's (J.P. Morgan's) past and four

[13] 2017 WL 3568089 (Del. Ch. Aug 18, 2017).

[14] 2010 WL 4273197 (Del. Ch. Oct. 29, 2010).

[15] C.A. No. 2022-0698-KSJM, Tr. at 32 (Del. Ch. July 31, 2023) (TRANSCRIPT) (McCormick, C.).

separate concurrent engagements with the buyers. *Inovalon*, C.A. No. 2022-0698-KSJM, Tr. at 31-32.

Defendants' attempts to diminish *Pandora*, *PLX*, and *Ortsman* are unavailing. Those cases are not "rare" decisions where the Trial Court created exceptions to Delaware disclosure law based on "extreme facts" (DAB 38); they are straightforward applications of clear precedent.

In *Pandora*, the Trial Court relied on precedent (and common sense) to hold that LionTree's concurrent engagement with a counterparty affiliate implicated LionTree's self-interest and was an "extraordinary fact" that required disclosure. *Pandora* Tr. at 18. The court did not base its decision on the allegation (mentioned once) that the concurrent transaction was larger than the subject transaction. And Defendants' assertion that LionTree's "fees from the concurrent representation represented the largest source of [its] revenues" (DAB 38-39 n.178 (citing *Pandora* Tr. at 18-19)) is simply wrong.[16]

Likewise, Defendants baselessly argue that *PLX* supports that a concurrent engagement is a material potential conflict only where there is "a reasonable

[16] *See Pandora* Tr. at 19 (finding a *separate* disclosure violation because "Malone-related entities"—not the concurrent engagement—"collectively constituted LionTree's single largest source of revenue"); https://www.sec.gov/Archives/edgar/data/1570585/000157058519000313/ex991lgterminatesdiscu.htm (concurrent transaction terminated entitling LionTree to no fee).

inference of information leakage." DAB 39 n.179 (citing *PLX* Tr. at 20). *PLX* mentioned possible information leakage as an ***additional*** reason why that board's failure to manage the obvious conflict was a fiduciary breach. *PLX* Tr. at 31. The court then acknowledged an advisor's "buy-side relationships in a sell-side representation" are conflicts, which has long been Delaware law. *PLX* Tr. at 37 ("It goes back … to Prime Hospitality in 2005 and probably earlier.").

Defendants essentially concede that *Ortsman* supports Plaintiffs, admitting the court there found material an advisor's fees on "other recent transactions involving the members of the buyer group," where there were no allegations the advisor represented the group on the subject transaction. DAB 39 n.180; *Ortsman*, 2007 WL 702475, at *1.

Finally, Defendants incorrectly argue the Trial Court's statements that it "d[id] not love [Kirkland's] alleged conflicts" and "wish[ed] Kirkland had not concurrently represented Brookfield" somehow indicate it "drew all inferences in Plaintiffs' favor." DAB 40. Had stockholders known of Kirkland's alleged conflicts they would have logically shared the Trial Court's concerns, strongly supporting the inference that the undisclosed information was material.

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

The Proxy failed to disclose that (i) the Committee never requested or received conflict disclosures and instead accepted Morgan Stanley and Kirkland's conclusory statements that they lacked conflicts (A99, A103-A104; ¶¶149, 155) and (ii) Morgan Stanley concealed its conflicts from the Committee during the process (A100-A101, A103-A104; ¶¶151, 155).

Defendants argue that there was nothing to disclose ***because*** the "Committee accepted conclusory statements from Morgan Stanley and Kirkland regarding their supposed lack of conflicts." DAB 42. But the Committee's failure to obtain conflict disclosures is material information because it informs the sufficiency—or reveals the insufficiency—of the Committee's process. *See, e.g.*, *PLX* Tr. at 34 ("Part of providing active and direct oversight and acting reasonably is learning about [advisors'] actual and potential conflicts ….").

That is especially true because the Committee's advisors had material conflicts that required management. The Proxy disclosed that Morgan Stanley received significant fees in the prior two years from—and had concurrent financing engagements with—Brookfield (A99, A148-A149, A344; ¶¶149, 235, Proxy at 180), suggesting to stockholders that the Committee knew of and managed those conflicts. Indeed, even the Trial Court drew that false inference from the Proxy. Tr.

at 30. But the Committee was unaware of those engagements ***during*** the process because Morgan Stanley falsely stated in its engagement letter that it had no material engagements with Brookfield in the two years prior. A100-A101, A103-A104; ¶¶151, 155.

D. The Proxy Failed to Disclose the Merger's Dilution of Dividends Critical to TERP Stockholders

The Trial Court erroneously excused the Proxy's failure to disclose the Merger's dilution of stockholder dividends—critical information that investors expressly highlighted to the Committee's advisors. POB 47-48.

Defendants' argument that stockholders could theoretically have gathered the various inputs and calculated dilution like the Committee's expert bankers (DAB 43-45) fails because "plainly material information [must] be disclosed in a clear and transparent manner" (*Voigt*, 2020 WL 614999, at *24) and stockholders are not required to "piece [it] together" (*Vento*, 2017 WL 1076725, at *3). Defendants would have TERP stockholders intuit that they needed to find five inputs in the Proxy, multiply them by a number on a second page, and compare their product to five inputs located on a third page. That is not "clear and transparent" disclosure.

Defendants' authorities are unavailing. *In re PAETEC Holding Corp. Shareholders Litigation*, 2013 WL 1110811, at *8 (Del. Ch. Mar. 19, 2013) does not excuse disclosure of dilution analyses generally, as Defendants' parenthetical admits. *Kahn v. Roberts*, 679 A.2d 460, 467-68 (Del. 1996) excused a failure to disclose a share repurchase's cost because the proxy plainly disclosed the share price and number of shares. And Defendants' quotation of "fair summary" from *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 900-01 (Del. Ch. 2016) fails as that standard is not satisfied by disclosure of "a cornucopia of financial data" and Defendants provided no "summary" of dividend dilution.

Finally, Defendants argue that the dividend diminution was "uncertain" and thus excused from mandatory disclosure. DAB 45. As explained above (*supra* 15), reliability—not uncertainty—is the disclosure standard. Defendants do not explain why a dilution analysis based on the disclosed NAV model is unreliable. And Defendants' citation to a Morgan Stanley analysis showing the Merger could be DPS accretive is (at best) misleading. *See* DOB 46. Morgan Stanley's actual *pro forma* analysis shows dilution under existing BEP dividend policy. A1027 ("BEP Maintains Standalone 5% DPU Growth" model). Defendants instead cite a thought exercise "Sensitivity Case" (A1028), illustrating a hypothesized, borrowing-fueled BEP dividend policy. That a sensitivity analysis could show a different outcome does not undermine the reliability and materiality of *actual* modeled outcomes based on established policy.

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

The Trial Court erroneously excused Defendants' failure to disclose that longtime Committee advisor Greentech told the Committee it was "not the optimal time to realize maximum value for T[ERP]" and that "a robust market check" was "a must." POB 48-50; A34-A35, ¶11.

Defendants do not dispute that Greentech (i) gave that advice, and (ii) was uniquely positioned to deliver it at the process's outset given Greentech's longstanding relationship with—and recent work for—TERP. DAB 47-48. Rather, Defendants and the Trial Court erroneously draw the defense-friendly inference that Greentech's advice reflected only *preliminary* views because Greentech ultimately recommended the Merger and the Committee later forewent a market check. DAB 48, 50; Tr. at 34-35.

"If an advisor wants to unsay something, the only professional way to do that is to go in the boardroom and unsay it, and have the record reflect the original advice and the retraction." Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679, 695-96 (2015) ("*Documenting Deal*"). There is no evidence that Greentech retracted its advice. To the contrary, the Committee's advisors subsequently began to develop a third-party outreach strategy. A103-A104,

¶155. And, while Defendants suggest the Committee and its advisors considered but decided against a market check because it was inadvisable,[17] the better—and certainly equally reasonable—inference is that the Committee abandoned a market check because Brookfield refused to entertain alternative transactions and threatened the Committee with the No Growth Projections.[18]

Critically, Greentech did not retract its advice by "ultimately recommending in favor of the [Merger]." Tr. at 34-35. Rather, Greentech's fairness opinion explicitly stated it "*d[id] not constitute a recommendation*" to the Committee, Board or stockholders "as to how they should vote on the [Merger][.]" A345. Thus, the fairness opinion does not undermine Greentech's advice. *See* POB 49-50 (citing *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 773, 800-801 (Del. Ch. Oct. 14, 2011)); *Documenting Deal* at 695 n.23.

[17] DAB 49-50.

[18] A572.

CONCLUSION

This Court should reverse the Trial Court.

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CERTIFICATE OF SERVICE

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