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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HORIZON KINETICS LLC, HORIZON KINETICS ASSET MANAGEMENT LLC, SOFTVEST ADVISORS, LLC, AND SOFTVEST, L.P.,	No. 478, 2023
Defendants-Below/Appellants,	Court Below: Court of Chancery
v.	C.A. No. 2022-1066-JTL
TEXAS PACIFIC LAND CORPORATION,	**PUBLIC VERSION FILED - FEBRUARY 15, 2024**
Plaintiff-Below/Appellee.	

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

The thrust of TPL's Answering Brief is that Proposal Four is not "related to" the purposes for which it was proposed—buying new assets and companies with equity, raising capital, and paying employees with stock.

TPL does not dispute that the main purpose of Proposal Four was to enable TPL to make acquisitions with newly authorized stock. Yet it argues that Proposal Four is not "related to" an acquisition at all because TPL has not yet decided on a specific acquisition target.

TPL also does not dispute that another purpose of Proposal Four was to facilitate a capital raise by selling newly authorized stock, or that such a capital raise would be a "recapitalization." But TPL argues that because the anticipated capital raise would require additional corporate steps to complete, Proposal Four is not sufficiently "related to" a recapitalization.

TPL likewise does not dispute that using newly authorized stock to pay executives would be related to "governance, environmental, or social matters," or that Proposal Four was proposed to enable more of that kind of compensation. Executive compensation is a governance matter even under TPL's narrow view of what "governance" means in the Stockholders' Agreement. Yet TPL still argues that Proposal Four is not related to governance matters, because it would have to

take additional steps after the passage of Proposal Four before making the anticipated stock payments—even though it admits that it had a present intention of doing so when Proposal Four was sent to stockholders.

None of TPL's interpretations of the Stockholders' Agreement are reasonable, and the Court of Chancery erred by crediting them. The phrase "related to" is a "paradigmatically broad" phrase meant to capture the "broadest possible universe" of potentially connected items. Op. 36. With this broad meaning in place, TPL cites no authority holding that the purposes for which a proposal is made are not "related to" the proposal itself. But that is essentially what TPL asks this Court to affirm.

Had the parties wished to constrict the exceptions to the Voting Commitment only to proposals to approve or disapprove a ***particular*** already-announced acquisition, recapitalization, or executive compensation issuance, they could have said so in their contract. But they did not. And for good reason: such language would allow TPL to sidestep the protections the exceptions are meant to provide, simply by breaking its pursuit of such goals into multiple steps. Defendants contracted to give teeth to these protections by linking the reservation of their voting discretion to broad "related to" language.

Because TPL relies on unreasonable readings of the contract language, this Court need not reach the Opinion's assessment of the extrinsic evidence. But if it

does, it will find clear legal error, and not an orderly and logical deductive process. Most significantly, the Opinion expressly based its outcome on two communications purportedly evidencing Defendants' subjective interpretations of contractual meaning. The documents on their face offer no such interpretations, but even if they did, they would be legally irrelevant. That is because Delaware courts have adopted an objective theory of interpretation, under which subjective understandings of contract language are not appropriate interpretive tools.

The Opinion acknowledged that standard, but nonetheless relied on the two communications after erroneously characterizing them as "course of performance" evidence. This was another component of the Opinion's clear legal error, since one-off private communications tapped into an iPhone are not a "course of performance" of a voting commitment. The Court of Chancery should not have relied on them at all, and yet it relied on them ***exclusively*** as the "dispositive" means of deciding this highly consequential litigation. Op. 61. The extrinsic evidence that ***is*** relevant and admissible supports Defendants' interpretation, not TPL's.

The Court should enforce the plain language of the contract in favor of Defendants, construe the extrinsic evidence in Defendants' favor if the Court needs to reach it, hold that Defendants could vote "no" on Proposal Four, and reverse the judgment below.

ARGUMENT

I. The Transaction Exception grants Defendants the freedom to vote "no" on Proposal Four.

In response to Defendants' arguments on the Transaction Exception, TPL argues that the Stockholders' Agreement's voting exceptions supposedly cannot extend to proposed charter amendments, because the Extraordinary Transaction definition does not include the words "charter amendments." AB 30–33.

There is a simple reason for this. The scope of the Extraordinary Transaction definition extends beyond just charter amendments. And there is no basis to find that it excludes them. The definition captures any proposal "involving a corporate transaction that requires a stockholder vote," whether or not that "corporate transaction" is a charter amendment. Likewise, by including "acquisition," "merger" and "recapitalization" in the definition of Extraordinary Transaction, the parties demonstrated an intent to carve-out "any" proposal "related to" these events from the Voting Commitment—whether the proposals involve a charter amendment or not.

A. Proposal Four is "related to" an "acquisition."

Proposal Four is plainly "related to" an acquisition. It grew out of frustrated attempts by TPL's Board to advance a strategy of growth by acquisitions, OB 12–15; was proposed to stockholders for the "primary purpose" of facilitating such an

acquisition, *id.* 24; was described by TPL witnesses as "related to" acquisitions, *id.*; and was intended to lead to numerous specific acquisitions, had it passed at TPL's 2022 annual meeting, *id.* 18–19, 24.

TPL's Answering Brief does not dispute any of this. Instead, it argues that a prohibition on divulging non-public information covering "mergers and acquisitions" ***as well as*** "possible transactions" (contained in an exhibit to the Stockholders' Agreement) means that the Transaction Exception should not apply to "possible future transactions." AB 35–36. TPL made this argument below and the Court of Chancery eschewed it. It was right to do so because the "possible transactions" clause simply expands the confidentiality agreement to include restrictions against sharing non-public information regarding possible "transactions" that would not be mergers and acquisitions—*e.g.*, asset sales, share exchanges or spin-offs.

TPL also suggests that Proposal Four is not "related to" an acquisition because it was deemed "routine" by the New York Stock Exchange under NYSE Rule 452. AB 36–37. This is another non-sequitur. Rule 452 is not mentioned in the Stockholders' Agreement, and in any event it employs an entirely different standard than the "related to" standard of the Transaction Exception. Op. 34–35. It is inapposite here.

TPL also argues that the Court should ignore TPL's post-trial conduct and admissions that underscore the close and inextricable relationship between Proposal Four and acquisitions. AB 34. Shortly after trial, [redacted] OB 23–24.[1]

TPL's argument that the Court must close its eyes to this admission is wrong. In fact, the only case cited by TPL confirms that "motions and supporting documents;...docket entries; [and] affidavits"—exactly what Defendants cited—may be submitted under Rule 9(a). *Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1206–07 (Del. 1997). Defendants should not be faulted for presenting this information when they did, because TPL did not reveal it until after the Opinion issued. In the interest of justice and fairness, TPL controlled the timing of its admission and should not be rewarded for not disclosing these material facts until after the trial court had ruled.

[1] Defendants withdrew their stay motion after TPL threatened them with a [redacted] bond request. TPL, however, still has not amended its charter or authorized any new shares.

To be clear, Defendants' argument does not in any way depend on these new post-trial concessions, as they confirmed what was already established in the trial record. David Barry—TPL's then co-Chairman and a signatory of the Stockholders' Agreement—conceded under oath that the "primary purpose" of Proposal Four was "to do acquisitions" with stock. A3427:10–22. And TPL's CEO testified that Proposal Four's delayed implementation inflicted damage on TPL by preventing it from consummating specific transactions between November 2022 and his March 2023 deposition. OB 27–28.

B. Proposal Four is "related to" a "recapitalization."

TPL agrees that a "recapitalization" is "a revision of the capital structure of a corporation." A2687 (citing Merriam-Webster.com); OB 31 (referencing the same definition). On appeal, TPL is left to argue that Proposal Four is not "related to" a "revision in capital structure" because authorized shares "are inert until issued." AB 41. Beyond its invention of the concept of "inert shares," TPL's argument has two major flaws.

First, TPL offers no support for its position that a massive share authorization is not a "revision of the capital structure" of TPL. It ignores the definition of "capital structure" from Merriam-Webster, the source that supplies TPL's definition of "recapitalization." That dictionary defines "capital structure" as "the makeup of the

capitalization of a business in terms of the ***amounts*** and kinds of equity and debt securities." A4019 (emphasis added). By this definition, an increase in the amount of TPL's stock is a "revision" to TPL's "capital structure."

Second, even if a recapitalization did require the issuance of stock, Proposal Four would still be "related to" a recapitalization. TPL admits it would like to use the shares Proposal Four would authorize to "raise capital" via a share issuance. OB 36. Thus, Proposal Four is, at a minimum, "related to" a recapitalization. Op. 36 (discussing broad meaning of "related to").

TPL also seeks to invent additional requirements for a transaction to constitute a recapitalization. AB 42. Specifically, TPL argues that a "recapitalization must be a 'corporate transaction'; indeed, it must be 'an Extraordinary Transaction.'" *Id.* The Opinion rightly rejected that argument. Op. 33–34 ("The court's task does not involve asking in the abstract whether a particular transaction is 'extraordinary.'"). This Court should reject it too, for the same reasons.

In any event, Proposal Four meets both of TPL's proposed criteria. After all, Proposal Four seeks to have TPL enter into a new, amended charter with a counterparty—its stockholders. Entry into such a contract is a paradigmatic example of a corporate "transaction." A0129 (giving as examples "esp., the formation…of a contract"). Likewise, TPL's proposed new share authorization is "extraordinary" in

every sense of that word's ordinary meaning. It is undisputed that TPL has never once authorized new shares in its entire 135-year history. Op. 39; A0145. Indeed, as TPL's CEO testified, "the passage of Proposal 4" would be "a transformative moment for the company." A1273 (Glover Dep. 121:14–18).

TPL next argues that because a separate provision of the Stockholders' Agreement—Section 3(g)—simultaneously prohibits Defendants from advising others about any "change in the capitalization" of TPL, while also prohibiting advice about any "Extraordinary Transaction," these two concepts supposedly must be viewed as non-overlapping. AB 42–43. This argument does not withstand scrutiny.

First, the "change in the capitalization" clause refers to any change in the capitalization ***policy*** of TPL—which is different from a change in capital structure, avoiding any purported surplusage. OB 32.[2] In addition, the notion that the parties intended to avoid all surplusage in Section 3(g) is not compatible with the language and structure of the Stockholders' Agreement. OB 32–33. This is because, directly before the clause on statements related to an Extraordinary Transaction, Section

[2] TPL argues that the Court should not consider this argument because, while Defendants disputed TPL's surplusage argument, it did not highlight the "policy" language below. AB 43. TPL is wrong. *See N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382–83 (Del. 2014) (rejecting Rule 8 challenge and allowing additional reasoning to be presented in support of a "broader issue" that had been raised below).

3(g)(C) prohibits statements about "***any***" change in TPL's "business." A0222. As a result of the breadth of this prohibition, Section 3(g)(D)'s prohibition against statements about an Extraordinary Transaction—which would, of course, also involve a change in TPL's business—is superfluous under any reading of the contract. OB 32–33. Because TPL's preferred interpretation does not—and cannot—eliminate this surplusage, the canon against surplusage is inapplicable. *See Paul v. Rockpoint Grp., LLC*, 2024 WL 89643, at *13 n.12 (Del. Ch. Jan. 9, 2024) ("[T]he canon against surplusage merely favors that interpretation which avoids surplusage[.]" (quoting *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012)); OB 32–34. The Answering Brief offers no response to this point.

TPL also embraces the trial court's subjective "gut" sense that a recapitalization "generally involves bringing in new capital." AB 43 (quoting Op. 43). But as noted above, a primary purpose of Proposal Four is to enable TPL to "***raise capital***." OB 36. Thus, even if a recapitalization requires "bringing in new capital," Proposal Four would still be "related to" a recapitalization.

TPL therefore cannot escape the Transaction Exception's recapitalization clause by arguing that recapitalization "has no generally accepted meaning in law" and must be "interpreted within the context of a particular contract." AB 41 (quoting *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 939 (Del. 1979)). In the context

of this case, Proposal Four is "related to" a recapitalization regardless of whether recapitalization is defined according to its dictionary definition, or based on the Vice Chancellor's narrower subjective sense of its meaning.

C. Proposal Four is "related to" "a corporate transaction that requires a stockholder vote."

The Answering Brief offers little in response to Defendants' argument that Proposal Four falls within the "other matters involving a corporate transaction" clause of the Transaction Exception. TPL ignores dictionary definitions altogether and does not offer any affirmative interpretation. AB 45–47. The Court should enforce the only definition put forward—Defendants' proposed definition derived from dictionaries and Delaware decisions.[3]

TPL's criticisms of Defendants' interpretation are unfounded. TPL's lead argument is that the parties knew how to "address charter amendments…expressly." AB 45. TPL contends that, because charter amendments are not enumerated "expressly," they must be excluded from the Transaction Exception under the *expresio unius* canon of construction. *Id.*

[3] TPL dismisses these decisions as containing mere "passing references." AB 46. While it is true that the references are not the core holdings of the cited cases, they nevertheless show that Delaware lawyers and jurists understand charter amendments to be corporate transactions. TPL cites nothing to suggest a contrary conclusion.

This misunderstands *expresio unius*. Under that canon, "the sign outside a veterinary clinic saying 'Open for treatment of dogs, cats, horses, and all other farm and domestic animals' does suggest (by its detail) that the circus lion with a health problem is out of luck." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 99 (2012). But the hypothetical veterinary clinic sign does not mean that "other farm and domestic animals" are excluded. To the contrary, they are included. Applied here, the canon means that the "corporate transaction" clause necessarily includes charter amendments. To hold otherwise would vastly overcomplicate contracting under Delaware law. It would require drafters to list every conceivable instance rather than relying on the ordinary meaning of broad terms. There is no support for such an inefficient outcome.

In an attempt to avoid Defendants' interpretation, TPL seeks help from "extrinsic evidence." AB 45. Here, resorting to extrinsic evidence is improper because TPL's narrow reading of the "corporate transactions" clause is not reasonable. In an effort to find fault with Defendants' interpretation, TPL claims that Defendants' interpretation of the Stockholders' Agreement is so broad that it "cannot be right," because Kesslen testified that "if we have to go to shareholders on it, then we should be allowed to vote how we see fit." AB 33, 45. This is grossly misleading. The Kesslen testimony cited by TPL was about the meaning of a ***draft***

term sheet of the Stockholders' Agreement showed to him at his deposition—a draft that expressly ***did not limit*** the "other matters" in the Extraordinary Transaction definition to "transactions." B1775–76 (Kesslen Dep. 141:13–145:18); AR0006.

Finally, TPL takes issue with Defendants' citation to 8 *Del. C.* § 242(b)(2). AB 46–47. But Defendants raised Section 242 not to argue that the Stockholders' Agreement violates it, but to highlight that TPL's interpretation would create tension with important corporate law values and policy considerations reflected in that statute. OB 38–39. The Court should weigh those values and considerations in evaluating whether TPL's Board secured for itself what amounts to a partial blocking right against opposition to proposed charter amendments. *Id.*

II. The Subject Matter Exception grants Defendants the freedom to vote "no" on Proposal Four.

A. Even under TPL's interpretation of the Subject Matter Exception, Proposal Four plainly falls within it.

In arguing that it presented the trial court with a reasonable interpretation of the Subject Matter Exception, TPL focuses on the acronym "ESG"—which does not appear in the Stockholders' Agreement. But even if this exception is limited to "ESG" matters, Proposal Four still unambiguously falls within it.

ESG consists of three categories—environmental, social, and governance. TPL asserts that "in each usage the three terms are understood to refer to a ***unitary concept***." AB 50 (emphasis added). This is incorrect. Indeed, the first scholarly source on ESG quoted in the Opinion recognizes that it "is often broken into component parts of E, S, and G." Op. 48 (quoting Elizabeth Pollman, *The Making and Meaning of ESG* 21 (Oct. 31, 2022), working paper available at https://ssrn.com/abstract=4219857). So, if TPL is correct that the Subject Matter Exception refers to ESG, then the Court's task is to determine whether Proposal Four falls within the "G" portion.

TPL posits a nonsensical way to undertake that task. It contends that governance is a "general" term whose meaning is limited by the "specific" terms that appear near it in the Stockholders' Agreement—*i.e.*, environmental and social.

It points out that *In re IAC/InterActive Corp.*, 948 A.2d 471 (Del. Ch. 2008), teaches that "specific words" should be construed to limit the meaning of "general words" that appear near them in a contract. *Id.* at 496. But there is no general/specific dichotomy across the Subject Matter Exception's use of "governance, environmental or social." Rather, as explained by a source cited in the Opinion, the three terms are the "component parts" of ESG. Op. 48. TPL offers no principled basis to treat one of them as "general" and the other two as "specific," and none exists.

TPL's brief does not offer any definition of governance, either as a component part of ESG or as a standalone term. The closest it comes is to cite a treatise that says that "[e]nvironmental, social, and governance principles (ESG) developed as a subcategory of CSR [corporate social responsibility] with a metrics-driven format to measure a company's commitment to social responsibilities." AB 49. That is the only reference to ESG in the treatise section, although it does refer back to an article—not mentioned in TPL's brief—that discusses ESG at great length.

That article is devastating to TPL's arguments. It mentions poison pills and classified boards as "G" factors, and states that "[c]orporate governance (i.e., G) factors have straightforward theoretical relationships to firm performance. **The entrenchment of management, executive compensation arrangements, and whether a firm has a controlling shareholder are familiar governance factors**

routinely considered by active investors." Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 381, 434 (2020) (emphasis added).[4] TPL's lack of authorized-but-unissued shares is directly "related to" these "governance" factors. For instance, without authorized-but-unissued shares TPL cannot entrench management with a poison pill plan and can only grant stock-based executive compensation if it first buys back from stockholders the stock it would issue. In other words, TPL's lack of authorized-but-unissued shares creates a governance structure under which TPL's shareholders keep its Board on a "short leash." OB 47.

The Opinion acknowledged that, even if the Subject Matter Exception invokes ESG, then subjects like "declassifying the Board" and "board refreshment" would fall within it, because those are "core ESG issues" even under TPL's interpretation.

[4] In the trial court, TPL offered tortured definitions of ESG. Its witness who oversaw the negotiation of the Stockholders' Agreement testified that ESG means "the governance of overseeing environmental and social matters," and that governance within ESG refers only to "[g]overnance in the context of environmental and social matters." A3226:6–10; AR0066 (Liekefett Dep. 87:24–88:3). But that same witness had authored an article, introduced at trial, that referenced "corporate governance reform" as being the "'G' in ESG," and listed "the elimination of poison pills" as a "[c]ommon governance topic[]." AR0013–14. The witness admitted that he ordered the deletion of the article from his law firm's website a few days before trial and only after it was cited by Defendants. A3230:9–3232:9.

Op. 49. The Opinion went on to say that, because of TPL's unique history of having no authorized-but-unissued shares, "**increasing the authorized shares will give the board the freedom to take action without seeking stockholder approval beyond anything the Company could have done before**." Op. 50 (emphasis added). But it erroneously stopped short of concluding that a share increase would be an ESG issue for TPL, and failed to properly consider that one of the key objectives of Proposal Four was to issue more stock to directors and employees—something at the core of any understanding of ESG. OB 50–51.

Moreover, the scholarly sources cited in the Opinion consistently consider executive compensation to be a core part of ESG. Op. 49 n.27 (citing a "chart providing examples of relevant ESG criteria" appearing in an article by Jennifer O'Hare, which lists "Executive compensation" under "Governance" column); *id.* (quoting an article by Amanda M. Rose that lists "executive compensation practices" as an aspect of ESG). Even TPL does not actually dispute that "executive compensation is part of ESG." AB 51. But it tries to distance Proposal Four from executive compensation by claiming that using newly authorized shares for incentive plans was only "potential," "hypothetical," or "a *possibility*, just as using shares to fund an acquisition was." AB 51 (emphasis TPL's).

This gravely misstates the record. In its Proxy, TPL made the following disclosure in the "Proposal Four" section of its solicitation:

> **Other than** with respect to the Stock Split and **under the Incentive Plans**, the Company does not have any **present intention to issue Common Stock** in the immediate future.

A0786 (emphasis added).[5]

Thus, the undisputed record shows that when Proposal Four was proposed to stockholders, TPL had a **"present intention"** to issue newly authorized common stock under its "Incentive Plans" in the "immediate future" if it was approved. Shortly after trial, TPL issued a supplemental proxy solicitation confirming this. It clarified that an earlier proxy solicitation was intended to communicate that TPL did not "have sufficient shares available for issuance to meet its potential obligations with respect to all awards that could potentially be issued under its stockholder-approved incentive plans." AR0175. In other words, TPL needed more authorized shares in order to make full use of its pre-existing stock incentive plans.[6]

[5] The Proxy showed that when Proposal Four was made, TPL's Incentive Plans had room to award 81,670 additional shares of common stock, but that TPL had only 34,824 shares available in treasury, net of those that were already reserved for prior awards. A0785; A0839.

[6] *See* n.5 above.

Thus, TPL's proxy solicitations show expressly and unmistakably that Proposal Four's relationship to executive compensation was not a mere "possibility," but a "present intention" to issue newly authorized common stock in the "immediate future" if Proposal Four was approved. Thus, Proposal Four is related to ESG, and falls within TPL's reading of the Subject Matter Exception even if its scope is limited to ESG matters.

B. Proposal Four also falls within the ordinary meaning of governance.

TPL criticizes Defendants for arguing that "the Court of Chancery should have relied on dictionaries" to define what governance means. AB 54.[7] TPL argues that reading "governance" as a "standalone term" is "not reasonable" because it would eliminate the entire Voting Commitment. AB 51, 52–53. But Defendants have already provided examples of stockholder proposals that would not fall within the Subject Matter Exception. OB 53. TPL belittles two of those examples because they supposedly would not require a stockholder vote in the ordinary course. But companies regularly put proposals to a stockholder vote even where the law would not require it.

[7] TPL criticizes one dictionary definition cited by Defendants as circularly "defining 'governance' as 'the activity of governing.'" AB 54 n.12. But as quoted by Defendants, the actual definition is "the activity of governing a country ***or controlling a company or an organization***." OB 46 (emphasis added).

TPL next argues that if "'governance matters' is a standalone term, then so are 'environmental matters' and 'social matters.'" AB 52. As a result, TPL claims that "TPL's entire business 'relates to' 'environmental matters.'" *Id.* This is spurious. Just because TPL is a "landowner that derives revenue from oil and gas royalties" does not mean that every stockholder proposal would be an environmental matter. TPL's strained hypothetical once again needlessly explores the outer limits of the Subject Matter Exception instead of focusing on the question being litigated. OB 53.

TPL claims it is necessary to decide whether a director nomination proposal would require Defendants to vote with the Board's recommendation, because "TPL would never have agreed to settle a proxy contest over a board seat with a voting agreement that excluded votes on board seats." AB 53. TPL cites no record evidence to support this conjecture. Additionally, the vast majority of the more than 250 so-called "precedent agreements" that TPL expert Steven Haas compiled explicitly require the stockholder(s) to vote with the Board on director elections. AR0015–43. The Stockholders' Agreement has no such explicit reference, and, as explained in the Opening Brief, Defendants voted against a Board-recommended director at the first election after the execution of the Stockholders' Agreement. Op. 55 & n.35. TPL's failure to pursue claims against Defendants for voting against the

Board's recommendation in that director election indicates that TPL had serious doubts about the strength of the same "governance" argument that it has advanced in this litigation.

Finally, TPL points to various unreliable or inapplicable sources of extrinsic evidence. AB 54. TPL references a message from Jay Kesslen saying that a vote against a director candidate "will lead to us both being sued." AB 16–17. Identifying the risk that TPL might sue is not an admission that TPL's presumptive position was correct. TPL also references a statement by Kesslen that "Defendants would 'need to vote with management' on a stockholder proposal concerning majority voting." AB 18. Kesslen was exactly right, because majority voting is one of the fifteen corporate governance terms expressly set forth in the Conversion Plan, and thus falls within the Conversion Plan Exclusion. A0214. TPL overlooks this in its baseless effort to rely on Kesslen's statement.

C. Proposal Four does not fit within the Conversion Plan Exclusion.

As TPL acknowledges, "the Court of Chancery rejected TPL's interpretation" of the Conversion Plan Exclusion. AB 56. The Opinion found that "the record demonstrates that the Conversion Committee and the Trustees did not agree on whether the Company would have authority to issue additional shares and tabled that issue." Op. 56. This factual finding is supported by the uncontradicted testimony

of Oliver; the fact that "debate continued after the conversion was complete"; and other evidence at trial. *See* OB 62–63 (discussing Oliver testimony); Op. 56 ("debate continued…"); A3359:6–12; A3360:9–A3361:6; AR0001; A0960–67. There was no clear error on this point, and TPL does not seriously contend otherwise.

Instead, TPL makes a new argument that the Conversion Plan Exclusion extends to potential governance matters that are merely referenced in the Conversion Plan, even in passing, regardless of whether they were agreed terms. But TPL's argument violates the plain text of the Conversion Plan. The Conversion Plan is attached to a set of minutes that reference "governance terms proposed to be given effect through the certificate of incorporation and bylaws," defined as the "Charter and Bylaws Provisions." A0201. The resolutions attached to those minutes use the same defined term—"Charter and Bylaws Provisions"—to refer solely to Annex B to those resolutions. A0205. Annex B lists the fifteen agreed "'key governance terms' for the Company" that would apply going forward, and says nothing about the number of authorized shares of common stock. A0213. The Conversion Plan Exclusion applies only to proposals that would "have the effect of **changing** any of the **corporate governance terms** set forth in the [Conversion Plan]." Op. 6. As the Opinion correctly held, Proposal Four would not do so.

A final point on the Conversion Plan Exclusion: As the Opening Brief explained, the Conversion Plan Exclusion applied to corporate governance terms that have nothing to do with environmental or social issues. Its placement within the Subject Matter Exception shows that the Subject Matter Exception also must be read to include corporate governance terms such as a common stock authorization. TPL fails to account for this crucial architecture of the Subject Matter Exception, dismissing its importance as being permissible surplusage. AB 57. In doing so, TPL fails entirely to address Defendants' citation to this Court's opinion in *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 387 (Del. 2012), which rejected an interpretation of a corporate charter that would remove all meaning from a "provided, however" clause. For the same reason as in *Alta Berkeley*, this Court should reject TPL's interpretation of the Subject Matter Exception.

III. The extrinsic evidence does not support TPL.

After finding ambiguity, the trial court rested its decision on two communications that it characterized as evidence of Stahl and Oliver's subjective interpretation of the Stockholders' Agreement.[8] OB 55–64. Placing weight on these communications was clear legal error for several reasons.

Most fundamentally, "Delaware law adheres to the objective theory of contracts." *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014). This means that the meaning of a contract is not governed by "what the parties[] subjectively believed," but rather by how the contractual language would be "understood by an objective, reasonable third party." Op. 23 (quoting *Salamone*). As a result, "the private, subjective feelings of the negotiators are irrelevant and unhelpful to the Court's consideration of a contract's meaning." Op. 25 (quoting *United Rentals*).

[8] The Court of Chancery rightly held that the No Drafting History Clause bars consideration of contract negotiation history in this action. Op. 27–33. TPL does not contest this holding, and has therefore waived its right to contest it. Nonetheless, TPL seeks to insert its own tendentious account of the events of the Stockholders' Agreement's drafting history. AB 32 n.8. TPL suggests that Defendants opened the door for this by referencing the historical context from which the Stockholders' Agreement arose. *Id*. But historical context is not drafting history, and is not barred by Section 17(g). TPL also takes issue with Defendants' reference to the "manifest, objective intent" of the Transaction Exception. But again, this is not a reference to drafting history.

Recognizing this, the Opinion categorized the Stahl and Oliver communications as "course of performance" evidence. Op. 61. But as explained in the Opening Brief, it was clear legal error to classify one-off comments on potential future disputes as "course of performance" of a voting commitment. OB 54–55. TPL implicitly concedes as much by not arguing that the communications constitute a course of performance. *Cf.* AB 67 n.17. And it does not identify a single opinion of this Court interpreting a contract based on the internal, subjective interpretations of the parties—and as explained below, these communications were not even that.

TPL's lead case refers to an interpretation informed "by the acts and conduct of the parties." AB 59–60; OB 58 n.14. This does not support TPL's argument. For starters, *Radio Corp.*'s reference to "acts and conduct" was dictum that described an argument that the Court ***rejected***. OB 58 n.14. Moreover, the "acts and conduct" discussed there were "royalty reports and payments" and the sale of certain products—not subjective statements of what the contract supposedly meant. *Radio Corp. of Am. v. Phila. Storage Battery Co.*, 6 A.2d 329, 340 (Del. 1939). At most then, *Radio Corp.* describes the possibility of course of performance evidence. It is

thus irrelevant here, where the communications at issue clearly do not fall into that category.[9]

TPL also cites *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836 (Del. 2019). *Sunline* found that a contract was ambiguous, and reversed and remanded because "this Court[] cannot weigh evidence at the summary judgment stage." *Id.* at 852. The Court's reference to "CITGO's internal understanding" as one of the sources of parol evidence that the trial court might consider on remand does not justify a departure from this Court's well-settled adherence to the objective theory of contracts. In fact, *Sunline* noted that the parties had both argued that the contract was unambiguous, and thus had not had an opportunity to challenge the evidence as irrelevant under the objective theory of contracts. *See id.* at 847 n.68.[10]

[9] TPL later makes the same mistake again when referencing *In re Shorenstein Hays-Nederlander Theatres LLC*, 213 A.3d 39 (Del. 2019). AB 68. That is, TPL mistakes a passing reference to course of performance evidence as endorsement of its theory that private, subjective interpretations are relevant. *See Nederlander*, 213 A.3d at 58 (discussing the relevance of one party's history of "offers" to its counterparty).

[10] TPL's lone trial court-level citation on this point is to dictum concerning subjective interpretations. *See S'holder Representative Servs. LLC v. Gilead Scis., Inc.*, 2017 WL 1015621 (Del. Ch. Mar. 15, 2017) (observing that proffered subjective interpretations "make no difference" to the court's analysis and are "merely corroborative").

At bottom, TPL contends that lay opinions about legal questions are probative extrinsic evidence. OB 57. But as this Court explained in *Nederlander*, 213 A.3d at 60 n.102, courts should "not allocate weight" to fact witnesses' interpretations of legal instruments. TPL tries to distinguish *Nederlander* by arguing that it concerned witness testimony as distinct from pre-litigation discovery material. AB 67–68. But *Nederlander* draws no such distinction. Its point was that lay interpretations of legal instruments are irrelevant. They certainly are not entitled to the "dispositive" weight that the Opinion gave them.

The Court of Chancery committed additional legal error by failing to account for Defendants' "relatively stronger" reading that Proposal Four is "related to" an "acquisition" when it evaluated extrinsic evidence. OB 59. Instead, after finding ambiguity, the Court relied on the relative weight of ***only*** the two pieces of extrinsic evidence that it found to be "dispositive." *Id.* TPL suggests the Court of Chancery is entitled to discretion on this. But the notion that a "relatively stronger" reading of a contract's objective terms must be overcome by the extrinsic evidence is a question of the correct legal standard, subject to *de novo* review. *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 450 (Del. 2000) ("Whether the [trial court] applied the correct standard…is a question of law which is reviewed *de novo*.").

If the correct standard is applied, it is clear that the extrinsic evidence the Court of Chancery relied upon cannot overcome Defendants' stronger interpretation of certain key objective terms. OB 57–61. TPL's theory is that the communications reveal that Defendants knowingly relinquished their right to vote against any share authorization proposal from TPL. That is far-fetched. Defendants vigorously opposed giving TPL the ability to authorize additional shares before and after the Stockholders' Agreement was signed. *Id.* TPL suggests that the Opening Brief relies on "self-serving" testimony to make this point. AB 64. But this testimony was not contradicted by any witness, and the Court of Chancery's factfinding (which TPL does not challenge) supported it.[11] In particular, the Opinion found that, in the run-up to the Stockholders' Agreement, Stahl and Oliver "opposed the issuance of additional shares" and "wanted the corporation to operate as the Trust had historically by not issuing additional equity." Op. 3.[12] TPL's own witnesses admitted the same thing. *See, e.g.*, A2082 (Barry Dep. 226:18–227:5).

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[11] TPL argues that the Court should ignore Stahl's undisputed statement at the August 2021 Board meeting because Oliver testified to it. AB 64. But TPL did not object to the admission of the testimony at trial. Moreover, Stahl testified about the same event at his deposition. A1660–61 (Stahl Dep. 193:12–194:13).

[12] Because TPL does not challenge this factfinding, its attempt to attack the credibility of Stahl and Oliver is irrelevant. The attack is also misguided. For instance, TPL makes an ad hominem attack on Stahl for allegedly destroying documents. All Stahl did is discard **copies** of documents that existed elsewhere. A1632–33 (Stahl Dep. 80:7–83:18). This is reinforced by the fact that there was no

Against that backdrop, it is inconceivable that Defendants knowingly waived their right to oppose any share authorization just a few months later, particularly where no evidence exists within TPL's files on what would have been a major turning point. *Harrah's Ent., Inc. v. JCC Holding Co.*, 802 A.2d 294, 317 (Del. Ch. 2002) ("A limitation of such importance would have been material and worthy of note—indeed, of emphasis. Likewise, one would think that the Noteholders' supposed bargaining victory would have been described unambiguously in some contemporaneous writing…but there is no writing of this kind in the record.").

The two communications on which the Opinion hinged cannot reasonably be construed as saying so. OB 59–61.[13] For instance, the Goldstein iPhone notes simply do not say what TPL suggests. And TPL offers no response to this line of the Goldstein notes: "DOES NOT HAVE TO VOTE WITH THEM ON NON PEDESTRIAN THINGS HE CAN VOT [sic] ON BIG THINGS." A0407. Giving

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spoliation motion made in this case, and no discussion in the Opinion of any purported spoliation. TPL itself had a practice of discarding copies of Board materials at the conclusion of Board meetings, a practice it continued during this litigation. A2073 (Barry Dep. 190:11–192:2); A2077 (Barry Dep. 206:18–207:13); A1815 (Dobbs Dep. 96:9–97:14).

[13] TPL suggests that because Defendants did not frame their argument in precisely the same way below, the Court should "disregard" it. AB 64. But Defendants raised all these facts to the trial court so that it could evaluate the evidence in context. *See Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002) (finding issue was fairly presented when it was "implicitly raised below").

TPL's Board millions of new common shares to use as equity currency to pay employees and make acquisitions without further stockholder approval is certainly a "non-pedestrian thing." By not addressing this argument, TPL implicitly conceded the point. The Answering Brief likewise concedes through silence that the Court of Chancery erred in attributing the Oliver communication to Horizon Kinetics. OB 57–58. Thus, Oliver's communication cannot affect the outcome of this case. *Id.*

TPL calls these documents "smoking guns" in their favor. AB 66. Far from it. What they do demonstrate is that TPL turned up nothing showing that Defendants understood the Voting Commitment to work the way that TPL now says it should—even after TPL used corporate funds to hire private investigators to monitor whether Oliver and Stahl were speaking with other stockholders; embarked on a multi-month multi-million dollar litigation review of thousands of emails and text messages; and deposed the witnesses of its choosing.

Finally, TPL suggests that Defendants "waived" arguments regarding Delaware's public policy against disenfranchisement. AB 26. Not so. The Court of Chancery raised this policy in the Opinion. Op. 26. It was thus "fairly presented" below. *Lawson v. Preston L. McIlvaine Const. Co., Inc.*, 552 A.2d 858 (Del. 1988) (issue raised in trial court opinion fairly presented even if not previously addressed by the parties). As Defendants explained in the Opening Brief, in the context of this

case, where TPL seeks to deprive Defendants of their inherent right to vote their shares freely on Proposal Four, it is appropriate to consider the policy as part of the Court's analysis.

IV. Confidentiality breaches have no bearing on stockholder voting rights.

In a final effort to distract from the issues on appeal, TPL shifts its focus to the Stockholders' Agreement's "standstill" provision. AB 69–70. TPL asks the Court to strip Defendants of the right to vote their shares on Proposal Four based on purported violations of this provision. *Id.* This is wrong as both a factual and a legal matter.

For starters, there are no grounds for TPL's contention that Defendants "tainted" the vote on Proposal Four. As Defendants explained, it was TPL that tainted the vote by engaging in disclosure violations that the Opinion characterized as material breaches of the duty of care. OB 16–18; Op. 67. By contrast, SoftVest (but not Horizon) is alleged to have communicated with personal and business acquaintances who owned TPL stock and lacked information that they would have had if not for TPL's disclosure violations. There is no allegation that Oliver provided any false or misleading information in these conversations. TPL never explains how truthful conversations could "taint" an election.

To be sure, the Opinion found that the alleged breaches of a private contractual obligation to TPL were somehow "more serious than the Company's." Op. 66. That is, the Opinion found that dialogue about the company among stockholders was a more serious problem than the company's misstatement and concealment of material

information about an important stockholder proposal. This has it backwards, and fails to account for TPL's prior improper concealment from its stockholders of Oliver and Stahl's views about Proposal Four.[14]

Ultimately, the relative weighing of the seriousness of any contractual or fiduciary obligations is irrelevant. TPL makes no attempt to carry its burden that Defendants' smattering of conversations with small stockholders had any effect on the outcome of the vote. *See* A3643–45. The record contains no evidence that any stockholder changed any vote based on communications with Defendants.

Most crucially, the notion that a court can strip a party of its voting rights based upon confidentiality violations is wrong as a matter of law. In Delaware, "shareholder voting rights are sacrosanct." *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012). If Defendants' Voting Commitment does not extend to Proposal Four—and it does not—then they are free to vote their shares as they please. Nothing in the Stockholders' Agreement or Delaware law suggests that wholesale disenfranchisement—the stripping of a valuable property right—would be a proper remedy for alleged violations of a standstill. The only case TPL cites in

[14] The Opinion wrongfully conflates SoftVest and Horizon in discussing alleged violations of the standstill. Its discussion of those allegations are exclusively directed at actions by Oliver, the head of SoftVest, who was never alleged to have been speaking on Horizon's behalf in any of the materials cited in the Opinion. Op. 66–67 & nn.39–40.

purported support of this proposition is not even about stockholder voting. AB 70 (citing *SIGA Techs., Inc. v. Pharmathene, Inc.*, 132 A.3d 1108, 1111 (Del. 2015)). The relevant decisions categorically ***reject*** the proposition that stockholders may be subject to judicial expropriation of their sacrosanct voting rights based on contractual breaches. *See Carballal v. PMBC Corp.*, 1999 WL 342341, at *3 (Del. Ch. May 14, 1999) ("PMBC cites no authority, and offers no explanation, of how the remedy of sterilizing plaintiffs' shares would flow from that contractual breach").

This makes sense. Eliminating voting rights based on purported violations of unrelated contractual provisions would strip from every stockholder the statutory right to require "the affirmative vote of a majority of the outstanding stock" for a charter amendment to pass, *see* 8 *Del. C.* § 242(b)(2), and thereby "sacrifice[] critical corporate law values" by upsetting the balance of power between the Company and its stockholders. *See Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1241 (Del. 2021) (Valihura, J., dissenting) (citation omitted). The Court should reject TPL's attempt to use alleged confidentiality breaches by SoftVest to disenfranchise Defendants.

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CERTIFICATE OF SERVICE

I, Michael A. Carbonara, Jr., Esquire, hereby certify that on February 15, 2024, a copy of the foregoing document was served on the following counsel in the manner indicated below:

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