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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HORIZON KINETICS LLC, HORIZON KINETICS ASSET MANAGEMENT LLC, SOFTVEST ADVISORS LLC, SOFTVEST, L.P.,	§	
Defendants Below, Appellants,	§	No. 478, 2023
v.	§	Court Below – Court of Chancery of the State of Delaware
TEXAS PACIFIC LAND CORPORATION,	§	C.A. No. 2022-1066-JTL
Plaintiff Below, Appellee.	§	PUBLIC VERSION FILED FILED FEBRUARY 12, 2024

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NATURE OF PROCEEDINGS

Defendants Horizon Kinetics LLC and SoftVest Advisors LLC are sophisticated investment firms. Collectively, they have billions of dollars under management, including billions of dollars invested in Texas Pacific Land Corporation ("TPL"). In June 2020, Defendants entered into the Stockholders Agreement to resolve a proxy contest. Under that agreement, Defendants secured seats on TPL's Board of Directors for Murray Stahl (Horizon's CEO) and Eric Oliver (SoftVest's President) in exchange for a voting commitment and standstill obligations.

Defendants got their end of the bargain; Stahl and Oliver remain on the Board today. TPL did not. As the Court of Chancery correctly held, Defendants intentionally and repeatedly violated their contractual obligations. Defendants breached their obligation to vote for a Board-recommended share authorization proposal—Proposal Four—at TPL's 2022 annual stockholder meeting. Their breaching vote against the proposal was outcome-determinative. TPL sued to hold Defendants to their bargain.

TPL prevailed after a one-day trial. The Court of Chancery held that Defendants had breached their voting commitment by voting against Proposal Four. The Court rejected Defendants' argument that Proposal Four fell within

exceptions to the voting commitment for proposals "related to an Extraordinary Transaction" or "related to governance, environmental or social matters."

The Court also held that Defendants knowingly and repeatedly breached their standstill obligations, a matter about which Defendants are silent. In assessing extrinsic evidence related to both the voting commitment and the standstill breaches, the Court found that TPL's witnesses were credible and Defendants' witnesses were not.

Defendants now say that the Court of Chancery "overcomplicated" matters. OB 3. Their own use of 35 pages of argument to support their interpretation of one purportedly unambiguous sentence undermines that argument. The Court of Chancery worked through similarly dense arguments in its opinion, carefully parsed linguistics, grammar, and the contract as a whole, and concluded that (1) Defendants' voting commitment is unambiguous, and (2) on the exceptions, Defendants failed to prove that their interpretation was the only reasonable one.

Seeking a different outcome on appeal, Defendants misrepresent contract terms, invoke largely inapplicable policy considerations they never raised below, disregard the standard of review, and wholly ignore the equities.

Defendants characterize the result below as "disenfranchise[ment] by judicial fiat," contending that policies protecting the stockholder franchise mandate

reversal. OB 3. But no "judicial fiat" was involved here. Defendants—of whom there are effectively two, not "several," OB 1—traded their voting commitment for valuable consideration in a negotiated agreement.

Defendants never invoked any pro-franchise policy below. None applies here, and none would advance Defendants' position in any event. The Court of Chancery found that TPL demonstrated by clear and convincing evidence that Defendants agreed to limit their voting freedom. Op. 56-57. The burden then shifted to Defendants to prove that one of the two exceptions applied. *Id.* at 57. Defendants never disputed that they bore that burden, and they cannot lift it now.

After concluding that the two exceptions were ambiguous, the Court of Chancery appropriately exercised its fact-finding function by evaluating and weighing evidence, including the credibility of live witnesses. Unhappy with the result, Defendants invite this Court to disregard what the trier of fact judged to be the most significant extrinsic evidence: Stahl's and Oliver's pre-litigation statements against interest that they were bound to vote with the Board on a new share authorization. That evidence was admissible and highly probative, particularly as Stahl destroyed documents and neither Stahl nor Oliver testified credibly.

Defendants fault the Court of Chancery for concluding that the evidence weighed against them, but that is not a ground for reversal. The voting commitment required Defendants to vote "FOR" Proposal Four. Neither of the two exceptions Defendants invoke applied. This Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. Defendants agreed to an unambiguous voting restriction, subject to two exceptions. Defendants did not meet their burden of proving that Proposal Four falls within either exception. Proposal Four was related to a charter amendment increasing authorized shares. It was not "related to an Extraordinary Transaction." The Stockholders Agreement directly addresses charter amendments elsewhere, which confirms that their omission from the Extraordinary Transaction definition was intentional.

Proposal Four was not related to a "merger," an "acquisition," or a "business combination." Defendants could not identify any actual transaction to which Proposal Four related. Their reference on appeal to a *potential* transaction that post-dated both trial and post-trial argument is improper under Rule 9, and underscores Defendants' failure to tie Proposal Four to any actual transaction existing at the time of the vote. Proposal Four does not fall within this exception.

2. Denied. The share authorization contemplated by Proposal Four was not related to a "recapitalization" because it did not alter TPL's capital structure. An increase in the number of authorized shares may create the possibility for a *future* revision in capital structure, but that is a hypothetical event. Defendants argue that the Court of Chancery should have restricted its analysis to dictionary

definitions, but under controlling law—which Defendants persist in ignoring—"recapitalization" has no fixed meaning and requires context for interpretation.

3. Denied. The share authorization contemplated by Proposal Four was not related to an "other matter[] involving a corporate transaction that require[s] a stockholder vote." Again, Proposal Four was not related to any identifiable transaction. And contrary to Defendants' arguments, no Delaware decision holds that the term "corporate transaction" in a contract refers to a charter amendment.

4. Denied. Proposal Four was not "related to governance, environmental or social matters." These three words used together refer to the unitary concept of ESG, which is understood to concern the sustainability and ethical impact of a company or investment. Defendants wrongly divorce "governance" from the phrase in which it appears. Even if "governance" were understood as a standalone term, Proposal Four would not fall within the exception. Defendants seek to tie Proposal Four to executive compensation, but like an acquisition, executive compensation is only one of a number of hypothetical uses for authorized but unissued shares. Finally, if Defendants' interpretations of "related to" and "governance" were credited, Proposal Four would fall within a proviso to the exception—and hence within the Voting Commitment.

5. Denied. The Court of Chancery properly weighed the extrinsic evidence and concluded that it supported TPL's interpretation of the exceptions. The evidence included Stahl's and Oliver's damning pre-dispute statements to confidants that they were bound to vote for a share authorization. Defendants claim that these statements against interest were inadmissible and irrelevant, but courts routinely consider evidence showing a party's understanding of its contractual obligations. Such evidence is particularly probative where a party makes a statement against interest. Its value is heightened here. Stahl destroyed documents; the Court of Chancery found that both Stahl and Oliver lacked credibility; Defendants persuaded the Court to disregard drafting history. Defendants now contend that other extrinsic evidence cuts their way, but they failed to make that argument below, and weighing evidence is the province of the trial court.

STATEMENT OF FACTS

A. 2019: Defendants Launch a Proxy Fight and Enter a Temporary Settlement Agreement

TPL, one of the largest landowners in Texas, owns surface acreage and oil and gas royalty interests. B71. Its predecessor, the "Trust," was formed in 1888 and governed by three trustees. Op. 2.

After one trustee resigned in February 2019, Defendants launched a proxy contest over the empty seat and pressed to convert the Trust into a Delaware corporation. Litigation followed in federal court in Texas. *Id.* at 2-3. During the litigation, the two remaining trustees formed the Conversion Exploration Committee ("Conversion Committee") to explore reorganizing the Trust into a corporation. In settling the litigation, the parties agreed that Stahl and Oliver would join the Conversion Committee. Op. 3; B305.

B. Early 2020: The Conversion Committee Recommends Conversion and the Trustees Accept the Recommendation

At its ninth meeting, on January 21, 2020, the Conversion Committee unanimously recommended that the trustees reorganize the Trust into a Delaware corporation by means of a Plan of Conversion. Op. 4. One term of the plan was that Stahl and Oliver would become directors of the new corporation, "[s]ubject to negotiation of a shareholder agreement containing customary standstill provisions." *Id.*

The Trust could not legally issue new interests. A0145. It was effectively a liquidating trust, and its practice had been to repurchase and retire interests. As a corporation, however, TPL could create new equity. The Conversion Committee agreed that TPL would begin its corporate life with blank check preferred stock, Op. 5, and ultimately determined that 100% of TPL's common stock should be distributed. A0211. That meant that TPL would initially have no authorized but unissued common stock. On March 23, 2020, the trustees announced their approval of the reorganization. B138.

C. February-June 2020: Negotiation of the Stockholders Agreement

In February 2020, pursuant to the Plan of Conversion, the parties began negotiating the Stockholders Agreement. B51. Defendants were represented by Gibson Dunn, Vinson & Elkins, and Horizon's general counsel and corporate representative Jay Kesslen (also outside counsel to SoftVest). *E.g.*, B143; B1568-B1569; A3281 (Kesslen Tr. 168:18-24).

The contract that emerged is typical of agreements resolving proxy contests: Stockholders obtain board representation in exchange for voting commitments and standstill provisions. B1703 (Haas Rep.) ¶ 32. Section 1 requires TPL to appoint Stahl and Oliver to the Board, Section 2 contains Defendants' voting commitment, and Section 3 imposes standstill obligations.

Section 2: Defendants' Voting Commitment. Section 2(a) is a broad voting commitment:

> The Stockholders shall, or shall cause their Representatives to, appear in person or by proxy at each Stockholder Meeting and vote all shares of Common Stock beneficially owned by such Stockholder and over which such Stockholder has voting authority at each Stockholder Meeting in accordance with the Board's recommendations as such recommendations of the Board are set forth in the applicable definitive proxy statement filed with the SEC (the "Board Recommendations") ….

A2825 § 2(a) (the "Voting Commitment").

Section 2(b) is one sentence long and sets forth two exceptions, for "proposals (i) related to an Extraordinary Transaction or (ii) related to governance, environmental or social matters." *Id.* § 2(b) (respectively, the "Transaction Exception" and "Subject Matter Exception"). Section 16 defines "Extraordinary Transaction" as "any tender offer, exchange offer, share exchange, merger, consolidation, acquisition, business combination, sale, recapitalization, restructuring, or other matters involving a corporate transaction that require a stockholder vote." A2835 § 16(a)(v).

A proviso follows the Subject Matter Exception. The proviso re-captures certain matters excluded by the Subject Matter Exception, requiring Defendants to vote with the Board on "any proposal relating to any corporate governance terms

that would have the effect of changing any of the corporate governance terms set forth in the [Plan of Conversion]." A2825 § 2(b)(ii).

Section 3: The "Standstill." Under Section 3, Defendants and their designees "shall not," "directly or indirectly" take a range of actions concerning TPL. Among other things, Defendants "shall not" (1) "solicit[] … proxies in respect of any election contest or removal contest with respect to directors," or (2) participate in any "withhold" campaign. A2826-A2827 § 3(g). As the Court of Chancery found, Defendants repeatedly and intentionally breached these provisions. *Infra* at 21.

The drafting history of these provisions undercuts Defendants' litigation position.[1] First, each draft of the term sheet showed that when negotiating the Standstill, Defendants requested language addressing a possible increase in authorized shares. Defendants did *not* do so with respect to the Voting Commitment provisions—which appeared on the very same page of the term sheet drafts. *E.g.*, B64.

[1] TPL offers critical portions of drafting history for completeness. Defendants argued successfully below that the Court of Chancery should disregard drafting history under Section 17(g) of the Stockholders Agreement, which provides that disputes over interpretation "will be decided without regard to events of drafting or preparation." A2838; Op. 26-33. But on appeal, Defendants themselves invoke history. *Infra* at 32 n.9.

Second, Defendants proposed adding language to the definition of Extraordinary Transaction so that it would include "other transaction[s] … *outside the ordinary course of business*." B162 (italicized language added by Defendants). This would have "undermined the voting commitment significantly." A3200 (Liekefett Tr. 87:16-20); B195-B196. Including an ordinary course restriction would have frozen the business as it existed when the Stockholders Agreement was executed, at least for purposes of Defendants' Voting Commitment. The Trust rejected Defendants' proposed language.

D. January 2021: TPL Completes the Reorganization

On January 11, 2021, TPL filed its charter with the Delaware Secretary of State, completing the conversion process. Op. 8; A0249. TPL then had 7,756,156 authorized shares of common stock—the same as the number of previously existing Trust sub-share certificates. Op. 8. TPL distributed 100% of the shares of common stock to the certificate holders. *Id.*; A0200 at 12; B274. The charter also provided TPL—unlike the Trust—with one million authorized but unissued shares of preferred stock.

At this time, Defendants acknowledged their Voting Commitment obligations. On January 11, 2021, TPL stockholder Lawrence Goldstein, a

longtime friend of Stahl's, told Kesslen that he hoped Stahl would "line up replacements" for three TPL directors. B434. Kesslen responded:

> The settlement agreement (which has been filed publicly) states that both Eric [Oliver] and Murray [Stahl] will vote in accordance with the Board's recommendation.

Id. This admission undermines Defendants' position on appeal. *Infra* at 51.

Over the next year, Defendants continued to acknowledge the force of the Voting Commitment when communicating among themselves. *Infra* at 16-18. They also began breaching both the Voting Commitment and the Standstill.

E. 2021: The Board Begins To Discuss Increasing Authorized Shares, and Stahl and Oliver Acknowledge the Voting Commitment in Internal Communications

In meetings on February 17, May 3, and August 11, 2021, the Board discussed the possibility of splitting stock or authorizing new shares. Op. 9; B802; A0343; B978-B979. Credit Suisse advised that having no authorized but unissued shares of common stock was "unusual." A0343. On September 10, the Board again discussed a share authorization proposal. B1063. Stahl and Oliver were opposed, and the Board could not reach consensus. Op. 10.

Stahl and Oliver then turned to their confidants to discuss the matter. On September 13, three days after the Board's September 10 meeting, Oliver texted his son Kline Oliver, also a SoftVest executive. After outlining his plan to educate

the Board about "the risk of issuing stock," Oliver wrote: "We are also lobbying for our ability to vote against if the Board does move forward." Op. 10; A0401-A0402; *see also* A3375-A3376 (Oliver Tr. 262:19-263:4) (testimony that "we" means Oliver and Stahl, and "our" means Horizon and Softvest). Kline responded, "Right, I get that. It's an uphill battle." A0402. The Court of Chancery concluded that this demonstrated Oliver's understanding that the Voting Commitment bound Defendants "to vote in favor of a Board-endorsed proposal to increase the authorized shares." Op. 10.

Stahl had similar discussions. On October 7, Stahl discussed the Board's consideration of a share authorization with Lawrence Goldstein and Phillip Goldstein (another TPL stockholder and current Horizon portfolio manager; no relation to Lawrence). A2220-A2221 (Goldstein Dep. 151:25–154:6); A0407. Lawrence took detailed notes in an email to himself titled "MURRAT/PHIL?ME [sic] TPL CALL NOTES." The call notes stated in part:

> Next meeting… They wanted to increase shares outstanding and
>
> How did analyst report know the o [sic] was planning to increase shares
>
> As long as Murray isON [sic] THE BOARD HE Must vote with them
>
> …

> Plan was to spin off the water business. They can only sell more shares with Murray voting against that. Free to vote For [sic] spin of [sic].
>
> DOES NOT HAVE TO VOTE WITH THEM ON NON PEDESTRIAN THINGS HE CAN VOT [sic] ON BIG THINGS

A0407; *see also* A3342-A3343 (Stahl Tr. 229:22-230:1) (Goldstein video testimony confirming Goldstein wrote what he heard). The Court of Chancery concluded that this "reflect[ed] Stahl's contemporaneous understanding that Horizon had to comply with the Voting Commitment for purposes of a Board-endorsed proposal to increase the authorized shares." Op. 10. By contrast, on matters such as a spinoff, Horizon could vote as it wished, "presumably under the Transaction Exception." *Id.*

Stahl's conversation was a violation of confidentiality obligations as well as a key piece of interpretive evidence. *Infra* at 62. Likely because he knew he was in violation, Stahl testified that he never discussed TPL with anyone outside the company other than his counsel, and denied that his conversation with Goldstein "ever took place." A3330, A3341 (Stahl Tr. 217:6-13, 228:6-7). The Court of Chancery found his testimony "not credible." Op. 11 n.3.

F. November 2021: Defendants Lobby Against the Board in Violation of the Standstill

On November 9, Horizon's president, Steven Bregman, edited a document Goldstein had prepared for the TPLT blog (tpltblog.com) that disparaged the Board

and management. B1068. Bregman's November 9 redraft, under the heading "A Call to Arms," included:

> • Easiest, least-efforts action: Your Proxy Card
>
> Vote against all management recommendations that destroy shareholder value …

B1103; A3289 (Kesslen Tr. 176:10-15).

On November 11, Bregman purported to claw back his comments in an email drafted by Kesslen:

> Larry,
>
> As discussed and consistent with the Shareholder Agreement between Horizon and TPL, Horizon is prohibited from engaging in certain actions …. While any previous actions on my part were only deemed to assist you in editing your work, for the avoidance of any doubt, please do not use or republish any suggested edits previously made.

B1099. Bregman's acknowledgment came too late to mitigate the Standstill breach. Goldstein had already sent the message to multiple TPL stockholders. B1100; B1075-B1098; B1105-B1117.

G. December 2021: Defendants Breach Their Voting Commitment by Voting Against One of the Board's Director Nominees

No proposal to increase common shares appeared on the 2021 ballot. But Defendants voted against Board-recommended director Dana McGinnis. B1597, B1603. Again acknowledging the Voting Commitment, Kesslen predicted legal consequences: "Eric is also voting his shares against Dana, which I'm almost

certain will lead to us both being sued." B1120. TPL did not sue, but it notified Defendants of their breach and reserved its rights. B1193. McGinnis was not re-elected. B1238.

H. Early 2022: TPL Creates the Special Acquisitions Committee

On February 11, the Board—including Stahl and Oliver—unanimously resolved to form an ad hoc Strategic Acquisitions Committee ("SAC") to evaluate potential transactions. B1128; A3126-A3127 (Kurz Tr. 13:17-14:3). TPL and the SAC approached potential transactions conservatively. B1628-B1633. While TPL considered several opportunities in 2022, none resulted in a binding offer, let alone a signed agreement. Op. 11. The great majority contemplated cash consideration—not stock. B1623.

I. Spring 2022: Defendants Continue To Stir Up Opposition in Violation of the Standstill

In spring 2022, in violation of the Standstill, Bregman "prepared" an information sheet for Goldstein to use with other potential activists. B1240. The document included the representation that the stockholder "group" led by Horizon believed it had "20% 'soft' voting influence," beyond the group's own holdings (represented there to be 25%). B1224; B1240; A2247 (Goldstein Dep. 260:8-261:18). Goldstein provided the document to well-known activist investors. B1224; B1190; A3292 (Kesslen Tr. 179:1-20) (circulation to Third Point's Daniel

Loeb); B1186 (circulation to Carl Icahn); B1221 (discussing circulation to Pershing Square's Bill Ackman).

J. Summer-Fall 2022: The Board Resolves To Seek an Increase in Authorized Shares; Defendants Further Breach the Standstill by Lobbying Against It

In June 2022, stockholders connected with Defendants submitted multiple Rule 14a-8 proposals. One such proposal concerned majority voting in director elections, and Goldstein asked Kesslen on June 20, "Can [Stahl] vote FOR this proposal?" B1246. Kesslen responded "I doubt it makes it into the proxy but assuming it does, I believe we would need to vote with management." B1244. This admission undermines Defendants' position on appeal. *Infra* at 54.

On August 31, the Board resolved to submit to stockholders a proposal to increase authorized shares. Op. 12-13; A0751-A0752. Stahl and Oliver agreed "to support the shares necessary to effectuate [a] stock split," but otherwise opposed it. Op. 13; A0751; *cf.* A3320 (Stahl Tr. 207:14-20).

On September 16, TPL filed its Preliminary Proxy Statement. B1260. The Board recommended voting "FOR" Proposal Four, explaining that a share increase would permit TPL "to effect a potential 3-for-1 split," and to

> use its ability to issue additional Common Stock for other purposes in the future, including: the sales of securities to raise capital; payment of consideration for acquisitions; payment of stock dividends; grants

> made to employees under new or expanded existing compensation plans or arrangements; and other corporate purposes.

Id. at 26. Although these were all possible future uses, TPL had no "present intention to issue Common Stock in the immediate future." *Id.* at 27. The Board pursued Proposal Four to provide TPL with flexibility, consistent with its corporate form. A3121, A3138 (Kurz Tr. 8:7-18, 25:15-24).

Defendants immediately "mobilized against Proposal Four." Op. 15. Hours after TPL filed the Preliminary Proxy, Goldstein told Bregman, Kesslen, and Stahl's assistant (among others) "ALL SUBMITTED PROPOSA:LS [sic] ARE IN … NOW WE ALL MUST LOBBY SHAREHOLDERS." B1351.

On October 7, TPL filed its Definitive Proxy Statement, including Proposal Four, "to increase the authorized shares of common stock from 7,756,156 shares to 46,536,936 shares."[2] A0764. Ten days later, a post titled "My Ballot" appeared on the TPLT blog. The ballot laid out the "TPLT Blogger's" planned voting at the 2022 annual meeting, including a vote AGAINST Proposal Four (the "Recommended Ballot"). B1366; Op. 16.

[2] The effect of Proposal Four was to double the number of outstanding shares. As they did below, Defendants erroneously characterize this as a "massive" increase, by a "factor of six." *E.g.*, OB 1, 53. In reality, Defendants approved of a 3:1 stock split, and the Court of Chancery's relief is conditioned on it. *Infra* at 24. Accounting for the split, Proposal Four would double—not sextuple—authorized shares.

Oliver worked to ensure that the Recommended Ballot was distributed widely. He sent the ballot to stockholder Minor Alexander—among many others—with an unmistakable command: "Do this!" B1360.[3] At trial, Oliver agreed that he was "telling [Alexander] this is how he, Minor Alexander, should vote his TPL shares at the 2022 annual meeting." A3396-A3397 (Oliver Tr. 283:24-284:5).[4]

Alexander enthusiastically implemented Oliver's directive: "Will do! I've sent this out and spreading the word!" B1360. Alexander "spread the word" to at least seven others, telling each that Oliver had (1) alerted him to "another crucial TPL proxy vote coming up soon," and (2) "suggested voting as attached." B1371-B1375; A3398-A3400 (Oliver Tr. 285:7-287:12). The Court of Chancery found that the "recipients understood that Oliver was instructing them to vote against Proposal Four," and that Oliver's testimony about his interactions with stockholders was "not credible." Op. 16 & n.4.

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[3] *See also* B1356; B1378; B1391; A3393-A3395 (Oliver Tr. 280:2-282:8) (showing Oliver sending the Recommended Ballot to other TPL stockholders). The Court of Chancery also cited Oliver's interactions with Mark Clift of registered investment adviser firm Hilltop Securities; Clift wrote to Alexander that he had "talked to Eric" and "encouraged all my investor[s] to vote no on issuance of more shares and yes on all other." Op. 17; B1382.

[4] In deposition, Oliver implausibly fought this conclusion. A1447, A1451 (Oliver Dep. 263:6-21, 278:8-279:1).

More broadly, the Court stated:

> No one disputes that the clear language of the Standstill barred [Defendants] from opposing Proposal Four. Stahl and Oliver knew that. Yet as described … they violated the Standstill in multiple ways and over a prolonged period of time. Not only that, but they sought to conceal their conduct by avoiding a document trail. At trial, their witnesses did not come clean about their breaches but rather offered less than credible testimony on several points.

Op. 66.

In their appellate brief, Defendants never mention the Standstill, their egregious violations of it, or the Court of Chancery's condemnation of their conduct and their credibility on the subject.

K. November 2022: A Majority of Unaffiliated Stockholders Favor Proposal Four; Horizon Votes For It Before Voting Against It

On November 3, Horizon voted its ~21% stake "FOR" Proposal Four, but "AGAINST" two other Board-recommended proposals. A0986-A0987; B1532. Stahl testified that this was "an error." A3326-A3327 (Stahl Tr. 213:23-214:3). SoftVest voted its 1.69% stake "AGAINST" Proposal Four that day. A0986; B1532.

On November 8, TPL told Defendants they had breached the Stockholders Agreement by voting against Board recommendations. B1386-B1390. SoftVest did not change its vote. The same day, TPL published a pro-Proposal Four letter to

stockholders. A0969 ("Stockholder Letter"). Among other things, TPL quoted commentary from Glass Lewis and ISS.

On Friday, November 11, Horizon changed its vote to depart from the Board by voting "AGAINST" Proposal Four (but to align with the Board on two other proposals). A0987. As of November 11, Defendants had thus both voted against Proposal Four.

On Tuesday, November 15—two business days later—TPL filed a Form 8-K disclosing that Defendants had breached the Stockholders Agreement, and that TPL reserved all rights and remedies. B1393; Op. 18. Defendants suggest that TPL "inappropriate[ly]" delayed in disclosing their breaching votes, OB 17, conveniently ignoring that Horizon originally voted "FOR" Proposal Four, and that after Horizon switched its vote, TPL promptly disclosed it.[5]

On November 16—the day of the annual meeting—TPL announced that it would adjourn the meeting solely with respect to Proposal Four if it did not pass and if Defendants' votes were outcome-determinative. B1395. The proposal did

[5] Defendants fault TPL for disclosures relating to the SAC and to Board-level votes on Proposal Four, as well as for an accurate quotation from a Glass Lewis report in the Stockholder Letter. OB 16-18; Op. 17-21, 63-64. Defendants advanced an affirmative defense premised on their arguments about these matters, but the Court of Chancery rejected it. Op. 63-65. Defendants did not appeal that ruling.

not pass, Defendants' votes were outcome-determinative, and TPL adjourned the meeting as to Proposal Four but closed it as to other matters.

Contrary to Defendants' rhetoric about "the lack of stockholder support," unaffiliated TPL stockholders cast a majority of their shares *in favor* of Proposal Four.[6] But for Defendants' improper campaign against Proposal Four in flagrant violation of the Standstill, *supra* at 19, the number would have been higher.

On November 18, TPL asked Horizon whether the dispute could be resolved short of litigation. B1396. Horizon did not respond.

On November 22, 2022, TPL commenced this action and sought a trial in February 2023. B1399. Defendants agreed to a trial in April. B1466. TPL accordingly announced that the annual meeting would reconvene on May 18, 2023, and that voting remained open on Proposal Four only. B1594; Op. at 19.

On April 17, the Court of Chancery held a one-day trial. Eight witnesses testified live and one by videotaped deposition. On April 25, TPL issued supplemental disclosures addressing disclosure arguments Defendants made at trial. Op. 19-21; *supra* at 22 n.5. On May 18, the voting closed on Proposal Four.

[6] As of November 16, excluding Defendants' 1,587,902 shares, 2,718,500 shares were voted "FOR" and 2,303,385 shares were voted "AGAINST"—a 400,000 vote difference in TPL's favor. A1000 (confirming Defendants' voting shares); A3574.

Defendants' votes remained outcome determinative. On June 30, the Court of Chancery held post-trial argument, and the record closed.

L. The Court of Chancery's Ruling and Final Judgment

On December 1, 2023, the Court of Chancery held that TPL had proven by clear and convincing evidence that Defendants had agreed to limit their voting rights via the Voting Commitment. Op. 56-57.

As to the exceptions, the Court concluded that both parties had offered reasonable interpretations, but that no argument about plain meaning was dispositive. Op. 33-57. After assessing the extrinsic evidence, the Court concluded that Defendants had failed to carry their burden to prove that either of the exceptions applied. Stahl's and Oliver's pre-dispute statements about Defendants' voting obligations demonstrated that TPL's interpretation was correct. Op. 57-62.

The Court entered judgment on December 18, holding that (1) Defendants' votes were deemed voted "FOR" Proposal Four; (2) Proposal Four passed; and (3) TPL's use of newly authorized shares was contingent on completing the 3:1 stock split. Appellants' Corrected Opening Brief Ex. B.

ARGUMENT

I. DEFENDANTS AGREED TO EXERCISE THEIR VOTING POWER A CERTAIN WAY

A. Question Presented

Did the Court of Chancery correctly conclude that the Stockholders Agreement restricted Defendants' voting rights?

B. Scope of Review

"Contract interpretation is a question of law subject to *de novo* review by this Court." *Daniel v. Hawkins*, 289 A.3d 631, 645 (Del. 2023). When the trial court's interpretation depends on "factual findings," this Court "will not disturb those findings unless they are clearly erroneous and not supported by the record." *Id.* (cleaned up).

C. Merits of the Argument

The Court of Chancery correctly concluded that the Voting Commitment unambiguously restricts Defendants' voting rights by requiring them to "vote all shares … in accordance with the Board's recommendations." A2825 § 2(a); Op. 57 ("no one disputes that the Voting Agreement limits the Investor Group's voting rights.").

Extrinsic evidence illuminated the point. Voting commitments are common in agreements settling public-company proxy contests. B1703 (Haas Rep.) ¶ 32.

Drafters structure such commitments in one of two ways. A3189 (Liekefett Tr. 76:18-24). The more company-friendly approach creates a global commitment subject to exceptions, while the alternative binds stockholders to vote with the board on specified matters. B268 (company-friendly); B264 (activist-friendly). Defendants agreed to the former.

Defendants now argue that the Voting Commitment should be construed in their favor because it "adversely affects" both their franchise and the voting rights of "***all*** TPL stockholders." OB 38 (emphasis Defendants'); *see also* OB 64 ("important public policy interest against disenfranchisement") (quoting *Salamone v. Gorman*, 106 A.3d 354, 371 (Del. 2014)). Defendants are wrong on multiple counts.

First, Defendants did not raise any pro-franchise policy below and have thereby waived the issue.[7] "[I]t is not only unwise, but unfair and inefficient, to litigants and the development of the law itself, to allow parties to pop up new arguments on appeal." *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017). Defendants are serial violators of this rule, having "popped up" at least three new arguments beyond this one. *Infra* at 43, 46, 64.

[7] *TPL* raised *Salamone* in its opening pretrial brief and argued it was inapposite. A2681 n.10. Defendants did not respond.

Second, the presumption against disenfranchisement articulated in *Salamone* applies only where an ambiguous contract could be read to disenfranchise the holders of a majority of the corporation's stock. 106 A.3d at 360-61. For example, the disputed voting agreement in *Salamone* could be read to mandate per capita voting, in which case a minority of the shares (held by a majority of the stockholders) could defeat the will of a majority stockholder. *Id*. The Court described "the presumption against disenfranchising majority stockholders," but explained that, in the "case of a contract that was the subject of negotiation … *the presumption applies differently*." *Id.* at 371 (emphasis added). Specifically:

> If the trial court finds by clear and convincing evidence *that the contract was intended to restrict the normal default rule* that a majority of the relevant shares can elect a board member, it can rule for the party arguing for the restriction. When, however, the parol evidence does not rise to that level and leaves the trial court without the requisite level of certainty, the presumption against disenfranchisement requires reading the contract consistent with the default rule.

Id. (emphasis added).

Here, unlike in *Salamone*, there is no majority stockholder, there is no purported departure from the one-share/one-vote default rule, and the agreement does not deprive Defendants of any voting power. The Voting Commitment is a standard arrangement for resolving proxy contests, in which Defendants

unambiguously agreed to exercise their voting power consistent with the Board's recommendations, subject to certain exceptions. B1703 (Haas Rep.) ¶ 32.

In any event, the Court of Chancery *gave* Defendants the benefit of *Salamone*'s presumptions. The Court assigned TPL the burden of establishing a voting restriction by clear and convincing evidence. Op. 57. TPL carried that burden, at which point the Court appropriately shifted to Defendants the burden of establishing that an exception applied. *Id.*; *see also, e.g., AB Stable VIII v. Maps Hotels & Resorts One*, 2020 WL 7024929, at *51 (Del. Ch. Nov. 30, 2020) ("As a matter of hornbook law, a party seeking to take advantage of an exception to a contract is charged with the burden….") (cleaned up), *aff'd*, 268 A.3d 198 (Del. 2021). Defendants have never disputed that they bear the burden when invoking exceptions, and conceded the point at post-trial oral argument. A3868.

Finally, Defendants' suggestion that a pro-franchise policy favors them contravenes equity. Defendants are adjudicated wrongdoers. They interfered with the vote on Proposal Four by breaching the Standstill, intentionally and repeatedly. *Supra* at 15-21. Defendants have not appealed the Court of Chancery's findings on the matter; they simply ignore it. Defendants now purport to champion the rights of "***all*** TPL stockholders," but they themselves tainted the stockholder vote

with their wrongful campaign against Proposal Four. Neither law, policy, nor equity can relieve Defendants of their broad Voting Commitment.

II. PROPOSAL FOUR DID NOT FALL WITHIN THE TRANSACTION EXCEPTION

A. Question Presented

Did the Court of Chancery correctly conclude that Defendants failed to prove that the Transaction Exception applied to Proposal Four?

B. Scope of Review

This Court reviews *de novo* whether a particular interpretation of a contract is reasonable, and it reviews a trial court's associated factual findings for clear error. *Supra* at 25.

C. Merits of the Argument

1. The Court of Chancery correctly determined that no part of the Transaction Exception applies to Proposal Four

Defendants failed to carry their burden of proving that Proposal Four falls within the Transaction Exception. The Court of Chancery correctly concluded that TPL argued reasonably—at a minimum—that a charter amendment to increase authorized shares is not related to an Extraordinary Transaction. The list of itemized terms in the Extraordinary Transaction definition does not include charter amendments. By contrast, other provisions of the Stockholders Agreement *do* include explicit references to charter amendments, thereby confirming that when the parties intended to address charter amendments, they did so explicitly.

The Standstill prohibits Defendants from "directly or indirectly" seeking "to amend any provision of the Governance Documents," defined to include TPL's Charter. A2827, A2825 §§ 3(e), 1(d). The Standstill *also* separately prohibits Defendants from taking various actions "with respect to … any Extraordinary Transaction." A2827, A2828 § 3(g), (h). The parties' inclusion of separate Standstill provisions addressing charter amendments and an Extraordinary Transaction shows that the parties believed the two to be distinct.

This Court has made clear that express provisions like Section 3(e) show that parties "knew how to" refer to a matter explicitly, and it has declined to interpret *other* contractual provisions to extend to such matters indirectly. *E.g.*, *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 578 (Del. 2019) ("referring to the common law elsewhere in the policy demonstrates that the parties knew how to expressly provide for coverage of common law claims when that was intended."). Defendants cannot overcome the basic problem that the parties knew how to refer to charter amendments but did not include them in either of the two exceptions to the Voting Commitment.

The extrinsic evidence further supports the Court of Chancery's ruling. Both of Defendants' law firms have drafted voting agreements with explicit carveouts for charter amendments; they knew how to create and could have sought

such a provision here. B43 (agreement drafted by Gibson Dunn); B1495 (agreement drafted by Vinson & Elkins). A survey conducted by TPL's expert, "respected transactional attorney" Steven Haas, revealed similar agreements. Op. 58; B1700-B1701, B1707-B1708 (Haas Rep.) ¶¶ 28-29, 40.[8]

Defendants' conduct also defeats their contention that a share authorization comes within the Transaction Exception. Most importantly, Defendants "acknowledged that they were bound to vote in favor of a proposal to increase the number of authorized shares." Op. 61. Defendants fight that factual finding hard, *infra* at 61-69, but it fatally undermines their position.

[8] The drafting history also shows that Defendants were aware of possible future share increases—even adding terms addressing share increases to draft Standstill provisions—but were unable to secure terms addressing share increases in the exceptions to their Voting Commitment. *Supra* at 11-12. The Court can consider this history notwithstanding Section 17(g) of the Stockholders Agreement. *Id.* n.1. TPL offers it not to resolve a dispute over interpretation but to refute the historical presentation in Defendants' brief. Defendants cite the Trust's historical practice of retiring shares, as well as their own vigorous opposition to any departure from that practice during their work on the Conversion Committee. OB 9-10. Defendants further claim that the "manifest, objective intent" of the Transaction Exception was to "preserve their right to vote against" any proposal involving a new share authorization, and that in light of their historical opposition, "it is not reasonable to believe" that they "intentionally relinquished any right to vote against a new share authorization when the Stockholders' Agreement was negotiated." OB 28, 63. The drafting history shows that Defendants' narrative, along with the positions they and their witnesses have consistently advanced, is not credible. The history shows that Defendants *tried* to preserve their ability to oppose any proposal that enabled TPL to depart from the Trust's past practices. *Supra* at 12. But the Trust rejected Defendants' terms, and they were never incorporated into the exceptions to the Voting Commitment. *Id.*

Defendants' deposition testimony further undermines their position. Kesslen, Defendants' attorney, testified that Defendants "should be allowed to vote as [they] see fit" on any matter that "ha[s] to go to the stockholders." B1776 (Kesslen Dep. 145:16-18). That is not plausible. It would leave nothing of the Voting Commitment.

On appeal, Defendants argue that a charter amendment to increase authorized shares is related to five of the enumerated transactions in the Extraordinary Transaction definition. But Defendants cannot overcome the fatal problem that the parties knew how to refer to charter amendments explicitly and did not do so in the Transaction Exception.

2. The Court of Chancery correctly concluded that Proposal Four is not related to an acquisition, merger, or business combination

Defendants first argue that Proposal Four is related to an acquisition, merger, and business combination. OB 21-30. The argument fails.

a. An Extraordinary Transaction must be actual, not hypothetical

When TPL presented Proposal Four to its stockholders, no transaction was in play. The potential Oxy and Brigham deals Defendants emphasize were no longer on the table. OB 13-14; Op. 11-12. TPL stated in the Preliminary Proxy

that it had no "present intention to issue Common Stock in the immediate future." B1278. Defendants do not dispute this.

In an effort to identify a specific transaction to which Proposal Four might be "related," Defendants repeatedly refer to events that post-date not only Proposal Four but even the trial and post-trial briefing. OB 5, 18-19, 23-24. On December 20, 2023, Defendants moved the trial court to stay its judgment pending appeal. B2150. After TPL opposed the stay motion, Defendants withdrew it. A3922; B2167. [redacted]

This is improper. Rule 9(a) forecloses consideration of documents not considered by the trial court. *E.g.*, *Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1207 (Del. 1997). A brief opposing a withdrawn motion that post-dates trial and even the trial court's *ruling* is not properly before this Court.

At the same time, Defendants' use of material outside the record underscores the fundamental defect in their interpretation. [redacted] Defendants insist that the term "related to" is "paradigmatically broad," but it does not extend to hypothetical future events. *E.g.*, *Green Isle Partners, Ltd. v. Ritz-Carlton Hotel Co., L.L.C.*, 2000 WL

1788655 (Del. Ch. Nov. 29, 2000). If Defendants were correct that "related to" extends the Transaction Exception to such events, their Voting Commitment would be destroyed. Any proposal can be linked in some way to hypothetical future events.

Here again, moreover, the parties knew how to identify explicitly the terms Defendants argue are included indirectly. When the parties wished to address possible future transactions, they did so expressly. A2845 (imposing confidentiality obligations related to "non-public information concerning *possible transactions* with other companies") (emphasis added). Defendants may not read such a term into the contract indirectly.

Defendants' framing of their argument further reveals the defect in their interpretation. Defendants do not specify whether Proposal Four is related to an "acquisition," a "merger," or a "business combination." Instead, they lump the three terms together. According to Defendants, the Transaction Exception applies to the *concept* of transactions—unenumerated future deals of unspecified kinds. But the Transaction Exception requires something different: "*an* Extraordinary Transaction." The exception applies to a proposal related to a specific, identifiable

transaction, not one that may lead through a series of steps to unidentified, unenumerated transactions in the future.[9]

Defendants argue that the Court of Chancery wrongly "seemed to credit" TPL's discussion of New York Stock Exchange Rule 452. OB 26. That rule permits brokers who have not received voting instructions from their clients—the beneficial owners—to vote on "routine" transactions. OB 26. By contrast, uninstructed brokers may *not* vote on matters that "may affect substantially the rights and privileges" of stock. Op. 34-35; B1976 (Rule 452); B3. Under Rule 452, an acquisition subject to a stockholder vote is not routine. Op. 25. By contrast, an increase in authorized shares *is* routine. B3.

On October 10, 2022, Kesslen lobbied the NYSE for a determination that Proposal Four was non-routine. B1353; A3276-A3277 (Kesslen Tr. 163:15-164:13). The NYSE responded:

> We have reviewed proposal four on TPL's annual proxy statement and agree that the proposal is routine. If there was a definitive agreement for an M&A transaction (that required shareholder approval) and they needed the shares to fund that transaction, we

[9] To tie Proposal Four to actual transactions, Defendants rely on deposition snippets from three TPL witnesses. OB 22, 24, 27-29. But the witnesses did not identify any specific transaction related to Proposal Four. Their testimony shows that TPL was interested in flexibility—including using stock to fund possible future transactions—but had no immediate plans to issue stock, just as the Proxy stated. *Supra* at 18-19.

> would then deem it non-routine but just providing indications of interest would not cause the proposal to be non-routine.

B1353.

The distinction the NYSE drew is instructive—between (1) a proposal to increase authorized shares standing alone, and (2) a proposal to increase shares to fund a specific M&A transaction with a definitive agreement. The same distinction undercuts the application of the Transaction Exception to Proposal Four. Increasing the number of *authorized* shares is distinct from *issuing* shares. And it is one step further removed from issuing shares in connection with a particular acquisition put to a stockholder vote. The NYSE's analysis highlights the multiple steps and contingencies between Proposal Four and any specific, identifiable deal. Meanwhile, the Court of Chancery did not blindly adopt the Rule 452 analogy. The Court noted its limitations when assessing both sides' arguments. Op. 35.

b. The Court of Chancery's interpretation does not "eviscerate" the Transaction Exception by a "technicality"

Defendants contend that the trial court's interpretation would "eviscerate" the Transaction Exception by a "technicality" because TPL could purportedly achieve in two steps what it could not accomplish in one—"first seeking a large

share authorization for the purpose of obtaining shares; and then using the newly-authorized shares as currency for acquisitions." OB 28-29.

Defendants' hypothetical is inconsistent with both governing rules and the Stockholders Agreement itself. Under New York Stock Exchange rules, TPL needs stockholder approval for issuances of 20% or more of outstanding common stock. *See* NYSE Listed Company Manual § 312.03(c); B2148. If TPL proposed a transaction requiring such an issuance to stockholders, the Transaction Exception would apply.

Defendants now acknowledge this protection, but argue that it does them little good because 20% equates to a large raw dollar amount. OB 29. That is sophistry. The significance of a deal *for TPL* can reasonably be measured only by reference to the size *of TPL*. For a large company, 20% equates to a large number. That is a reality driven by math. It is not a basis for reversal.

c. The Court of Chancery's holding does not insert the term "approve" into the Transaction Exception

Defendants contend that the Court of Chancery's holding improperly "restricts the … acquisitions clause to only proposals ***to approve*** a specific acquisition." OB 25 (emphasis Defendants'). This is wrong. The Board can recommend voting (1) *for* its own proposals, or (2) *for or against* third-party proposals. An "Extraordinary Transaction" includes "any tender offer," which may well be a third-party proposal. The Court of Chancery's holding does not insert an "approval" term into the contract.

d. The "relative strength" of Defendants' arguments does not bring Proposal Four within the Transaction Exception

Defendants quote, repeatedly and out of context, the emphasized words in one sentence of the Court of Chancery's ruling: "I personally think the Investor Group has the *relatively stronger* reading of 'related to,' but I cannot conclude that the Company's interpretation is unreasonable." Op. 38. The "relatively stronger" comment does not mean that Defendants "win," or that TPL's interpretation is unreasonable. The Court of Chancery said the opposite: On this one issue, Defendants' interpretation is relatively stronger *and* TPL's interpretation is reasonable. On other issues, the Court stated that TPL's position was stronger. Op. 44 ("On this aspect I am inclined to favor the Company's interpretation, but I

cannot conclude that the Investor Group's interpretation is unreasonable"); Op. 46 ("This time I am inclined to favor the Company's position").

None of this means that Defendants' interpretation wins the day. "Contractual ambiguity exists when the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings." *Energy Transfer, LP v. Williams Cos., Inc.*, – A.3d –, 2023 WL 6561767, at *18 (Del. 2023) (cleaned up). This Court regularly determines that contract terms are ambiguous where competing interpretations have both strengths and weaknesses. In *Nederlander*, for example, the Court concluded that one interpretation of a disputed provision created surplus; likewise, the competing interpretation rendered "some of the language … unnecessary." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 57 (Del. 2019). The upshot was that the provision was ambiguous. *Id.*

Relative strength does not change the analysis. This Court held in *Daniel* that a contract was ambiguous even though one interpretation was "more persuasive" than the other; the relatively stronger argument was still only "one possible interpretation." 289 A.3d at 660. In *Fox*, the Court found ambiguity even where one party advanced "a good plain-meaning argument"; this did not foreclose the other party's reasonable interpretation. *In re Fox Corp./Snap Inc.*, – A.3d –,

2024 WL 176575, at *1 (Del. 2024) (statutory interpretation). The fact that the Court of Chancery found Defendants' interpretation "relatively stronger" in one instance does not show that the Court erred in ultimately ruling for TPL.

3. The Court of Chancery correctly determined that Proposal Four is not related to a recapitalization

Proposal Four is not related to a "recapitalization" because increasing the number of authorized shares does not revise a company's capital structure. New shares are inert until issued. An increase in authorized shares may enable a *later* revision in capital structure, but that is a hypothetical future event. Defendants conflate (1) the issuance of stock, which may in some instances be related to an Extraordinary Transaction, with (2) the authorization of stock.

Defendants say the trial court should have begun and ended its analysis with dictionary definitions. OB 32 ("This should have ended things"). Defendants are wrong under controlling law they decline to cite. "'[R]ecapitalization' has no generally accepted meaning in law or accounting," and must accordingly be interpreted within the context of a particular contract. *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 939 (Del. 1979); *see also Matheson v. Kaiser Aluminum Corp.*, 1996 WL 33167234, at *5 (Del. Ch. Apr. 8, 1996) (under *Wood*, "[w]hat we have to do is to decide whether it's the kind of recapitalization that was meant by the use of the term in these designations."), *aff'd*, 681 A.2d 392 (Del. 1996). The

Court of Chancery cited *Wood*, Op. 38-39, and TPL discussed it extensively below. Defendants ignore it.

That is fatal. Because "recapitalization" has "no fixed meaning," dictionaries are not helpful. Even as a general matter, this Court has recently recognized that dictionaries have limitations. "[D]efinitions can help discern the meaning of words in a statute, [but] they can also be inconclusive and subject to selection bias." *Fox*, 2024 WL 176575, at *9. The *Fox* Court cited judges and scholars who have likened dictionaries to "word museums" and "word zoos," *id.* n. 54—the same authorities the Court of Chancery cited in this case. Op. 41. "[D]ictionary definitions are not a be all and end all." *Id.* With respect to "recapitalization" in particular, dictionaries have nothing to contribute under *Wood*.

Instead, the contract itself is the primary interpretive guide. And that favors TPL's interpretation. A recapitalization must be a "corporate transaction"; indeed, it must be "an Extraordinary Transaction." Proposal Four does not relate to a transaction. No consideration and no counterparty are involved.

Defendants next fault the Court of Chancery for observing that under the Standstill, "recapitalization" is distinct from "change in the capitalization." Op. 41-44. Defendants argue that "change in capitalization" is best understood to

mean "change in capitalization *policy*." OB 32-34. Defendants' point appears to be that a "recapitalization" could equate to a "change in capitalization" without any contractual redundancy.

Because Defendants raise this argument for the first time on appeal, the Court should not consider it. *Supra* at 26. The argument is largely beside the point in any event. "Recapitalization" and "change in the capitalization" are facially distinct terms. And most critically, a recapitalization must be both a "corporate transaction" and "an Extraordinary Transaction." Proposal Four is not and does not relate to any identifiable transaction.

Defendants finally fault the Court of Chancery for applying its "gut" sense that a recapitalization "generally involves bringing in new capital," and hence that simply increasing the number of authorized shares is not a recapitalization. Op. 43. Defendants complain that this "subjective" understanding of recapitalization is narrower than the term's "ordinary meaning as elucidated by dictionaries," to which they say they are "entitled." OB 35.

Defendants are wrong. First, "recapitalization" plainly does *not* have a single "ordinary meaning as elucidated by dictionaries." *Wood* holds the opposite. Even *Black's Law Dictionary*, which Defendants select, produces a definition they like only when they string together three distinct terms—"recapitalization,"

"capital structure," and "capital stock." OB 32. When Defendants turn to a dictionary the Court of Chancery used—the *Oxford Learner's Dictionary*—they are able to devise a formulation that purportedly supports their interpretation only by defining "money" as stock. OB 35-36 & n.7. That shows how very far Defendants fall from demonstrating—as they must—that "recapitalization" has a single reasonable meaning (theirs).

Second, the Vice Chancellor did not deviate from accepted principles of contract interpretation by referring to his "admittedly subjective" view. The Court's candor about qualities inherent in judicial decision-making does not suggest error—particularly as the Court buttressed this view with linguistic analysis, noting that the "re" in "recapitalization" indicates an infusion of new capital. Op. 43. Notably, the Court of Chancery used similarly subjective language when stating conclusions Defendants like: "*I personally think* the Investor Group has the relatively stronger reading." Op. 38 (emphasis added). None of this suggests that the Court elevated an idiosyncratic understanding of a disputed term over its objective meaning.

4. The Court of Chancery correctly determined that Proposal Four is not related to "other matters involving a corporate transaction that require a stockholder vote"

The final clause of the Extraordinary Transaction definition applies to proposals related to "other matters involving a corporate transaction that require a stockholder vote." The Court of Chancery was "inclined to favor the Company's position" on this clause. Op. 46-47. The Stockholders Agreement makes clear that when the parties intended to address charter amendments, they did so expressly. *Supra* at 30-31. As applied to the "other matters" clause, the Court of Chancery addressed this point through the *expressio unius* canon of construction, concluding that this gave TPL a "strong argument" (although not a "dispositive" one). Op. 46. Defendants ignore the Court's discussion.

The extrinsic evidence underscores the necessarily limiting function of "corporate transaction." Defendants' witnesses claimed that *all* proposals relate to a "transaction" between a corporation and its stockholders. B1776 (Kesslen Dep. 145:16-18) ("[I]f we have to go to shareholders on it, then we should be allowed to vote how we see fit."). That cannot be right. Unless "corporate transaction" screens out certain proposals, nothing is left of the Voting Commitment. Proposal Four does not pass through the "corporate transaction" screen. A standalone share

authorization is an intra-corporate matter. No counterparty is involved, and the newly-authorized shares are not exchanged for consideration.

Defendants argue that a charter amendment is a "corporate transaction" as a matter of law. OB 37-38. But the decisions they cite contain only passing references to charter amendments. The reference in their lead case appears in a parenthetical in a footnote identifying an evidentiary issue on which this Court expressed no opinion. *SI Management, LP v. Wininger*, 707 A.2d 37, 43 n.14 (Del. 1998). The Court did not interpret "corporate transaction" as a contract term, much less in a context in which the *expressio unius* canon applies. The same is true of Defendants' other authorities. The Court of Chancery—which authored most of the decisions Defendants cite—correctly concluded that they do not resolve the issue here. Op. 45 & n.24.

Defendants argue that unless Proposal Four falls within the "other matters" clause, their Voting Commitment violates Section 242(b)(2), under which charter amendments must be passed by a majority vote. OB 38-39. Defendants' theory is that if their commitment is enforced, the approval threshold would be 29%, as they held approximately 21% of TPL's voting power at the time. *Id.*

This is another argument raised for the first time on appeal. The Court should decline to reach it. *Supra* at 26. The argument fails in any event. Voting

thresholds for *every* matter put before stockholders are set by statute, charter, or bylaw.[10] That cannot mean that all voting agreements are unenforceable.

As a factual matter, moreover, Defendants' Voting Commitment does not change the 50% threshold. A majority of shares must still vote to amend TPL's charter, and Defendants' shares still count in both the numerator and the denominator. For valuable consideration, Defendants agreed to vote their shares with the Board's recommendations. That does not alter or imperil statutory voting thresholds.

Finally, Defendants argue that the Transaction Exception should be construed in their favor because "TPL's Board never informed stockholders that it purportedly obtained a blocking right against opposition to potential charter amendments." OB 39. "Blocking right" is plainly inaccurate; a majority of shares must still vote in favor of a charter amendment. As to disclosure, TPL filed a Form 8-K disclosing and appending the Stockholders Agreement in January 2021. B434.

This Court should affirm the Court of Chancery's ruling that Proposal Four does not fall within the Transaction Exception.

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[10] *E.g.*, 8 *Del. C.* § 216(2-3) (setting default voting standards for (1) director elections and (2) "all matters other than the election of directors").

III. PROPOSAL FOUR DID NOT FALL WITHIN THE SUBJECT MATTER EXCEPTION

A. Question Presented

Did the Court of Chancery correctly conclude that Defendants failed to prove that the Subject Matter Exception applied to Proposal Four?

B. Scope of Review

This Court reviews *de novo* whether a particular interpretation of a contract is reasonable, and it reviews a trial court's associated factual findings for clear error. *Supra* at 25.

C. Merits of the Argument

1. Proposal Four is not related to ESG matters

The Court of Chancery correctly held that Proposal Four does not fall within the Subject Matter Exception, which applies to proposals "related to governance, environmental or social matters." A2825 § 2(b). The Court appropriately analyzed the term "governance" in context. Op. 50-55. "Governance" is part of the phrase "governance, environmental or social matters." These are the *only* uses of the terms "environmental" or "social" in the Stockholders' Agreement.

The grouping of these three words is not happenstance. "[S]pecific words limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words

or clause relate." *In re IAC/InterActive Corp.*, 948 A.2d 471, 496 (Del. Ch. 2008) (cleaned up). Here, the "specific words" "environmental" and "social" limit the "general word" on which Defendants rely—"governance." When "governance" appears alongside "environmental" and "social," the collective term—"ESG"—is understood to refer to "a subcategory of [corporate social responsibility] with a metrics-driven format to measure a company's commitment to social responsibilities." 6 Fletcher Cyc. Corp. § 2490. Outside of this litigation, Defendants' counsel has explained that ESG "refer(s) to the three central factors typically used in evaluating the sustainability and ethical impact of a company or an investment." B1548.[11]

Below, Defendants argued that "governance, environmental or social" cannot reasonably be understood to refer to ESG because the words appear in a different order and are linked by the disjunctive "or." The Court of Chancery rejected these arguments. Both the order of the terms as they appear in the Subject Matter Exception and the use of the disjunctive are common. They appear in statutes, academic works, investor publications, and Horizon's own prospectus. Op. 51 & nn. 28-33. The Court correctly concluded that the Subject Matter

[11] Also outside of this litigation, Stahl has expressed concerns about ESG, calling it "a real impediment" for energy companies. A3322-A3323 (Stahl Tr. 209:18-210:8); B1253. Oliver testified that he would not allow ESG to be "foisted on TPL." A3377-A3378 (Oliver Tr. 264:24-265:7).

Exception can reasonably be read to refer to ESG matters, and that it is also reasonable to conclude that Proposal Four is not related to such matters. Op. 55.

Defendants now argue that Proposal Four comes within the Subject Matter Exception because it "relates to governance." They fault the Vice Chancellor for purportedly overlooking the "ordinary meaning" of "governance," and agreeing that "'governance' should basically be read out of this provision." OB 40-45.

Defendants badly misstate the ruling below and ignore the prior question. "Ordinary meaning" cannot be discerned without context, and when the three terms in the exception are used together, they have a specific meaning different from and narrower than they would if used separately. The Court of Chancery noted that scholars and commentators in this area have given the phrase a range of meanings, *id.* 48-52, but in each usage the three terms are understood to refer to a unitary concept.

Defendants next argue that even if "governance" is understood to refer to ESG matters, Proposal Four comes within the Subject Matter Exception. But Defendants failed below to identify a single instance in which ESG has been considered to encompass charter amendments, and their own expert said repeatedly that any such usage would be "bizarre." B2041-B2042 (Subramanian Dep. 237:25-238:3, 241:9-13).

Defendants contend that executive compensation is part of ESG, and that TPL stated in the Proxy that it "*could* … use its ability to issue additional common stock" for employee stock grants. OB 51 (quoting Proxy; emphasis added). That argument is self-refuting. Using additional shares in this way was a *possibility*, just as using shares to fund an acquisition was. But the exceptions to the Voting Commitment cannot be read to extend to potential future events. *Supra* at 34-35. That reading would destroy the commitment. Virtually any proposal could be linked with some hypothetical future "governance"-related occurrence, just as it could be linked with a hypothetical "acquisition."

2. Proposal Four does not fall within the Subject Matter Exclusion even if "governance" is read as a standalone term

The Court of Chancery's holding was correct even if "related to governance" is interpreted as a standalone term. Defendants contend that the Subject Matter Exception permits them to vote as they wish on director elections. Op. 55 n.35; OB 50. Below, Defendants went further. Their corporate representatives declined to identify a single proposal to stockholders that does *not* relate to governance, with the exception—but only possibly—of auditor ratification. A1397 (Oliver Dep. 63:25–65:2); B1794-B1795 (Kesslen Dep. 217:7–219:2).

Defendants now try to avoid the absurd result they embraced below. Remaining within the commitment, they say, are proposals for auditor ratification,

"to enter a new business line," and "to invest corporate cash in a certain way," among "many" unidentified "others." OB 53. Not only is this undermined by their testimony, Defendants never explain why the decision to enter a new business line or invest cash would require a stockholder vote at all. Their expert opined that boards of directors have exclusive authority over such business decisions. A1038 ¶ 36.

Nor do Defendants grapple with the fact that if "governance matters" is a standalone term, then so are "environmental matters" and "social matters." TPL's entire business "relates to" "environmental matters." TPL is a landowner that derives revenue from oil and gas royalties. B71. It cannot be the case that any proposal relating to TPL's business falls outside the Voting Commitment.

Defendants' interpretation of "governance" is not reasonable. Among other things, it would exempt director elections from the Voting Commitment. But "[i]t seems obvious that if the Voting Commitment means anything, it forces the Investor Group to vote with the Board on director elections." Op. 55.

Defendants do not question that logic. Instead, they fault the Court of Chancery for considering director elections at all. Defendants say the Court "needlessly explored the outer limits of the Subject Matter Exception instead of focusing on the question actually being litigated." OB 53.

Defendants are wrong. The "question actually being litigated" required the Court of Chancery to evaluate competing interpretations. In doing so, the Court appropriately considered the Stockholders Agreement "as a whole." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). This included the central bargain: Defendants gained Board seats in exchange for the Voting Commitment and Standstill. TPL would never have agreed to settle a proxy contest over a board seat with a voting agreement that excluded votes on board seats. And Delaware law rejects "unreasonable" contract interpretations that lead to an "absurd result." *Manti Hldgs., LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1211 (Del. 2021).

Defendants next complain that the Court's "only articulated basis" for finding TPL's interpretation reasonable was that Defendants' interpretation would swallow the Voting Commitment. OB 52. But no particular number of "articulated bases" is required to make an interpretation reasonable, and the fact that Defendants' competing interpretation leads to absurd results is plainly sufficient here.

Defendants also quarrel with the Court of Chancery's reference to "governance professionals." OB 50. But they provide nothing suggesting this is improper. The Court cited a range of academic writings on ESG. Op. 48-49.

Defendants themselves presented as an expert witness a professor specializing in governance matters. A1037-A1055.[12]

Finally, the extrinsic evidence buttressed the conclusion that Proposal Four does not come within the Subject Matter Exception. Defendants' litigation position is that all or virtually all proposals—including director elections—are "related to governance," and that Defendants accordingly need not vote with the Board on them. *Supra* at 51. But among themselves in real time, they said the opposite. In January 2021, Kesslen told Goldstein that the Stockholders Agreement required "a vote in accordance with the Board's recommendation" on director elections. *Supra* at 12-13. In December 2021, Kesslen wrote that Defendants' vote against a Board-endorsed director candidate "will lead to us both being sued." *Supra* at 16-17. Beyond director elections, Kesslen acknowledged in June 2022 that Defendants would "need to vote with management" on a stockholder proposal concerning majority voting. *Supra* at 12-13. These contemporaneous, pre-dispute acknowledgements wholly undermine Defendants' litigation position.

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[12] Defendants argue that rather than invoking governance professionals, the Court of Chancery should have relied on dictionaries. OB 45-46. As discussed, this Court has recognized the limitations of dictionaries, and several of the definitions Defendants cite are particularly unhelpful for present purposes—for example, defining "governance" as "the activity of governing." *Id.*

3. If Defendants' out-of-context reading of "governance" were credited, Proposal Four would come within the Conversion Plan Exclusion

The Conversion Plan Exclusion removes from the Subject Matter Exception—and hence puts back into the Voting Commitment—"any proposal relating to any corporate governance terms that would have the effect of changing any of the corporate governance terms set forth in the plan of conversion recommended by the Conversion Exploration Committee of the Trust on January 21, 2020." A2825 § 2(b)(ii). The exclusion applies only if Defendants satisfy their burden on the Subject Matter Exception.

The exclusion addresses the possibility that a stockholder or the Board itself makes a proposal altering the corporate governance terms set forth in the Conversion Plan, which the parties had agreed on shortly before negotiating the Stockholders Agreement. The exclusion ensures that Defendants vote in accordance with the Board's recommendation on such a proposal.

If Defendants had proven that their broad interpretation of "related to governance" was correct, then Proposal Four would come within the Conversion Plan Exclusion. That is, if Proposal Four is "related to governance" for purposes of the Subject Matter Exception, it is equally a proposal "relating to corporate governance terms" for purposes of the Conversion Plan Exclusion.

Defendants note that the Conversion Plan Exclusion does not extend to *all* corporate governance terms, but only to those that "have the effect of changing any of the corporate governance terms set forth in the plan of conversion." That is correct—but the corporate governance terms that Proposal Four has the effect of changing *are* "set forth in the plan of conversion." Annex A to the plan states that after reorganization, the newly-created corporation will distribute "*all* shares of its common stock" to the holders of the Trust's sub-share certificates. A0208 (emphasis added). A graphic illustrating the creation of the new entity similarly shows that the "TPL Sub-share certificate holders receive *100% of common stock* of TPL Corp as a distribution in liquidation of TPL." A0211 (emphasis added). Under the Conversion Plan, TPL began life with no authorized but unissued common stock. Proposal Four alters that corporate governance term.[13]

On this subject, the Court of Chancery rejected TPL's interpretation. The Court stated that Annex A is "an accurate description of what happened" but did not "memorialize an agreement" on the subject of additional equity. Op. 4, 56. But the Conversion Plan Exclusion does not require *agreement*. It requires only that the corporate governance term changed by a proposal be "*set forth in* the plan

[13] Defendants argued below that Annex A consists only of "steps," while Annex B contains the corporate governance "terms" referred to in the Conversion Plan Exclusion. But *both* Annexes are defined as part of the Conversion Plan. A0206.

of conversion." And that term—the absence of authorized but unissued common stock—is set forth in Annex A, regardless of whether the annex is an "agreement" or a "description." Proposal Four accordingly comes within the Conversion Plan Exclusion if one credits Defendants' broad interpretation of "governance."

Defendants argue that the Conversion Plan Exclusion instead shows that their interpretation is "right." According to Defendants, "[i]f the Subject Matter Exception covered only environmental and social justice matters and the like, then the Conversion Plan Exclusion would be pointless." OB 52.

Defendants are wrong. Their position depends on the premise that the Stockholder Agreement contains no surplus, but both they and the Court of Chancery observed that contracts often *do* include surplus. OB 34; Op. 42. And TPL's interpretation does not create surplus in any event. Imagine a stockholder makes a proposal to add three directors with environmental expertise. This proposal is squarely within the generally understood meaning of ESG, and therefore comes within the Subject Matter Exception. But it also comes within the Conversion Plan Exclusion because the Conversion Plan caps the number of directors. A0214. This illustrates the problem the exclusion solves. The hypothetical stockholder proposal would change one of the corporate governance

terms the parties had just agreed on. The Conversion Plan Exclusion ensures that the parties will be aligned on the proposed change, whether for or against it.

IV. THE COURT OF CHANCERY PROPERLY WEIGHED THE EXTRINSIC EVIDENCE

A. Question Presented

Did the Court of Chancery properly weigh the extrinsic evidence in concluding that neither the Transaction Exception nor the Subject Matter Exception encompassed Proposal Four?

B. Scope of Review

When the "trial court's interpretation of contract language rests on findings concerning extrinsic evidence … this Court must accept those findings unless they are unsupported by the record and are not the product of an orderly and logical deductive process." *Energy Transfer*, 2023 WL 6561767, at *16. In addition, the Court of Chancery is the "sole judge of the credibility of live witness testimony." *Hudak v. Procek*, 806 A.2d 140, 151 n.28 (Del. 2002).

C. Merits of the Argument

1. Overview

The Court of Chancery appropriately considered and weighed the extrinsic evidence. Permissible sources of extrinsic evidence include "overt statements and acts of the parties, the business context, prior dealings between the parties, [and] business custom and usage in the industry." *Energy Transfer*, 2023 WL 6561767, at *19. The "construction given to [the contract] by the acts and conduct of the

parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight." *Radio Corp. of Am. v. Philadelphia Storage Battery Co.*, 6 A.2d 329, 340 (1939). Such evidence is particularly probative where a party acts contrary to interest. *S'holder Representative Servs. LLC v. Gilead Scis., Inc.*, 2017 WL 1015621, at *23–24 (Del. Ch. Mar. 15, 2017), *aff'd*, 177 A.3d 610 (Del. 2017).[14]

The Court of Chancery's analysis hews to these interpretive principles. The Court gave great weight to Defendants' pre-controversy statements against interest about their contractual obligations. The Court correctly found that Stahl conceded to his friend Goldstein that he was bound to vote for a Board-endorsed share authorization, and that Oliver made an equivalent concession to his son. Op. 61-62; *supra* at 13-14.

Defendants try to shunt aside this damning evidence, but they come nowhere close to showing clear error.

[14] Defendants suggest without citation that *Radio Corp.* has been superseded by the definition of "Course of Performance" in the Restatement (Second) of Contracts. OB 58 n.14. Even if that were possible as a doctrinal matter, Defendants are wrong. Courts continue to cite the quoted portion of *Radio Corp.* with approval. *E.g.*, *Dweck v. Nasser*, 2012 WL 161590, at *16-17 (Del. Ch. Jan. 18, 2012); *Gilead*, 2017 WL 1015621, at *23-24.

2. Defendants' factual attack on the extrinsic evidence is baseless

a. Horizon's party admission

Defendants seek to minimize Stahl's admission by repeatedly referring to Goldstein as a "third party" or a "non-party." OB 3, 57, 60, 63. But Defendants stop short of arguing that Goldstein's notes memorializing Stahl's statements are inadmissible—and for good reason. Stahl's statements, as memorialized by Goldstein, are party admissions, while Goldstein's email is a recorded recollection. Op. 62; D.R.E. 801(d), 803(5).[15]

The circumstances underscore the significance of Goldstein's notes. Stahl does not use email. A3319-A3320 (Stahl Tr. 206:17-207:13). Stahl destroys hard-copy documents within 24 hours of receipt, a practice he improperly continued through trial. *Id.* Stahl was found to lack credibility in testifying about the very subject of his memorialized conversation with Goldstein. Op. 11 n.3. Stahl's document practices and spoliation vastly reduced the universe of relevant documentary evidence. His lack of candor meant that credible testimonial evidence was also in scarce supply.

[15] Defendants' contention that Goldstein had "no role with Defendants" is misleading. OB 60. Goldstein is a longtime friend of Stahl and a director of FRMO, Inc., a public company controlled by Horizon executives; Stahl is its CEO. A3328 (Stahl Tr. at 215:7-19); B1636. FRMO is a TPL stockholder, like Horizon, Stahl, and Goldstein himself. A3328 (Stahl Tr. 215:20-22).

Stahl's credibility lapses are striking. He insisted at deposition and repeated at trial that he does not discuss TPL with anyone outside TPL, save his counsel. A3330 (Stahl Tr. 217:6-13). When asked if he would discuss Board deliberations or decisions with a third party, his answer was "[o]f course not." *Id.* (217:14-20). This was exculpatory testimony. Stahl is a public company director who simultaneously serves as Chief Investment Officer of an entity with a multi-billion dollar position in TPL. Stahl was not free to discuss TPL's confidential information with others, let alone with selected TPL stockholders, who might choose to trade on it or use it in ways adverse to TPL's interests.

Stahl's exculpatory testimony was false. Goldstein's notes reveal that Stahl discussed sensitive Board matters with TPL stockholders, who could exploit the information as they chose. When confronted with Goldstein's notes for the first time at trial, Stahl denied that the conversation with Goldstein "ever took place." A3341 (Stahl Tr. 228:6-7). The trial court stated bluntly that this was "not credible." Op. 11 n.3.

Goldstein's recorded recollection of the inculpatory statements Stahl made provides a rare view into Horizon's understanding of the Stockholders Agreement. The fact that Stahl relayed his understanding to a long-time friend and business associate makes the evidence particularly probative. *Cf. Del. Cty. Emps. Ret. Fund*

v. Sanchez, 124 A.3d 1017, 1022-23 (Del. 2015) ("Close friendships of [a half century] are likely considered precious by many people, and are rare").

Defendants argue that Goldstein's memorialization of Stahl's admission is "hard to comprehend, to put it charitably." OB 61. But Stahl made it fully comprehensible when confronted with it at trial. Walking line by line through Goldstein's notes, he confirmed that the people named sat on TPL's Board: Dana McGinnis; [Dave] Barry; Tyler Glover; Donna Epps; Barbara [Duganier]; Gen[eral Cook]. A3334-A3336 (Stahl Tr. 221:10-223:12). Stahl relayed, and Goldstein memorialized, how directors voted. A0407 ("Donna voted w"; "Barbara voted against"). Stahl agreed that director voting information is not publicly available. A3336-A3337 (Stahl Tr. 223:23-224:2).

Stahl's trial testimony further confirmed that Goldstein's notes reflect events at the Board's February, May and August board meetings, as well as September analyst commentary on a potential share authorization. A3337-A3339 (Stahl Tr. 224:12-226:21). After memorializing what Stahl told him about the Board's deliberations, Goldstein recorded Stahl's overall assessment: "As long as Murray isON THE BOARD HE Must vote with them." A0407; *supra* at 14-15.

Defendants made no attempt to rehabilitate Stahl on these matters at trial. Stahl simply denied that the meeting "ever took place." A3341 (Stahl Tr. 228:6-7).

The Vice Chancellor, again, found that this was "not credible," and that Goldstein's notes reflect Stahl's pre-conflict acknowledgement that he was "bound to vote in favor of a proposal to increase the number of authorized shares." Op. 61.

Defendants now contend that the Court of Chancery failed to consider evidence cutting the other way. They cite *Oliver's* testimony that Stahl purportedly stated at the August 2021 Board meeting that Defendants would not vote for a share authorization, which was "a recapitalization of the company." OB 63-64. According to Defendants, the trial court "ignored this evidence." *Id.* That is disingenuous. Defendants never argued below that Oliver's testimony constitutes relevant extrinsic evidence about Stahl's understanding of his voting obligations. The Court should disregard this new argument. *Supra* at 26.

As to the merits, the probative value of Oliver's testimony about Stahl's out-of-court statement is low, to the extent it is admissible at all. The trial court found that Oliver offered "less than credible testimony on several points." Op. 16 n.4, 67 n.40. Oliver's self-serving testimony that Stahl made the comment about recapitalization at the August 2021 Board meeting is thus questionable at best. The meeting minutes do not reflect it. B990. And unlike Stahl's statement to Goldstein, Stahl's purported statement to the Board was self-serving—not a statement against interest. 17A C.J.S. *Contracts* § 427 ("A party's conduct may be

evidence of its intent ... so long as that conduct evinces an interpretation contrary to that party's interest."). If Stahl made the statement at all, he did so in a formal, adversarial setting, to promote his position with a counterparty. That is very different from a private conversation with a long-time friend. And in contrast with Stahl's statement to Goldstein—and Oliver's own similar statement to his son—there is no contemporaneous recording of Stahl's purported statement to the Board.

Comparing the latter alleged statement with Stahl's memorialized statement to Goldstein also reveals a deeper problem with Defendants' argument. Weighing evidence and assessing witness credibility are distinctly matters for the trial court; deference on appeal is at its height. *Supra* at 59. The Court of Chancery concluded that "the extrinsic evidence regarding what Stahl and Oliver believed before litigation is persuasive," and that "[t]he Investor Group has not offered any contrary extrinsic evidence that is more persuasive." Op. 62. Defendants have not demonstrated that this was clear error.

b. SoftVest's party admission

In discussing share authorization with his son, Oliver texted "[w]e are also lobbying for our ability to vote against if the Board does move forward." *Supra* at 13-14. As the Court of Chancery found, "Oliver would not have needed to lobby

in favor of the Investor Group's ability to vote against Proposal Four if the Voting Commitment did not apply." Op. 61.[16]

Defendants now offer as a counterweight Oliver's testimony about a January 2020 meeting of the Conversion Committee, claiming that it cuts the other way. OB 62-63. But the Stockholders Agreement did not even exist at that time; negotiations did not begin until February 2020. *Supra* at 9. At the Conversion Committee meeting, the parties discussed whether additional shares should be authorized *as part of the conversion*. A0201. They were not discussing whether Defendants would be bound to vote for a share authorization under a non-existent contract.

Stahl's and Oliver's statements against interest are remarkable pieces of evidence. Defendants argue that these "were not even communications with TPL," OB 58, but that is the point. The evidence reflects what Defendants' principals believed and said in private, unguarded conversations about their contractual obligations. The two pieces of evidence are as close to smoking guns as one could hope for in a dispute about the meaning of contract terms. The Court of Chancery did not commit clear error by according them significant weight.

[16] Defendants argue that Oliver's views should not be imputed to Horizon. OB 60. But Stahl's views obviously should be, and Stahl's views, as just discussed, were the same.

3. Defendants' legal attack on the extrinsic evidence is baseless

Defendants argue that the Court "deviat[ed]" from the "objective theory" of contracts by considering evidence of what Defendants believed their contractual obligations were. OB 8, 56-58 & n.14. That is wrong. The Court cited and applied the objective standard. Op. 23-24. Under that standard, Delaware courts regularly evaluate communications that reflect a party's individualized understanding of its obligations. *Radio Corp.*, 6 A.2d at 340; *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 849 (Del. 2019) ("CITGO's internal understanding of the Term Agreement's terms, while it was in place, supports Sunline's textual argument…."); *Gilead*, 2017 WL 1015621, at *23–24 (internal emails showed that "both parties understood that the milestones could only be triggered by a disease-level regulatory approval.").[17]

Defendants next argue that in considering Oliver's text and Goldstein's email, the Court of Chancery failed to follow *Nederlander*'s edict that courts should disregard "witnesses' opinions about various legal questions." OB 57, 64 n.16. But *Nederlander* addressed witness *testimony*, not parties' pre-litigation

[17] Defendants oddly argue that Oliver's texts and Goldstein's email are not admissible as course of performance evidence. OB 57-58. As the decisions cited in text show, the evidence is admissible whether or not it could be characterized as course of performance. And contrary to Defendants' argument, the Court of Chancery did not characterize it that way. The Court referred to course of performance in a legal overview of extrinsic evidence. Op. 61.

statements about their contractual obligations. 213 A.3d at 60-61.[18] Indeed, the *Nederlander* Court considered exactly the kind of evidence Defendants claim is inadmissible: "conduct of [parties] indicat[ing] that they considered themselves to be bound" by a disputed provision. 213 A.3d at 58. Defendants cannot demonstrate that the Court of Chancery committed clear error by considering and weighing exactly the same kind of evidence here.

Defendants finally contend that extrinsic evidence and textual factors must be "weighed together." OB 59. But Defendants have not shown that the Court of Chancery failed to consider all factors together. The Court considered extrinsic evidence in the course of determining "the most reasonable meaning of the words used." Op 25 (cleaned up). In asking this Court to determine that a "proper weighing of the evidence" would have led to victory for them, OB 59, Defendants disregard the clear-error standard of review and the deference accorded to the finder of fact. *E.g.*, *Honeywell Int'l Inc. v. Air Prod. & Chemicals, Inc.*, 872 A.2d 944, 950 (Del. 2005) (deference required where "the trial court's interpretation of the contract rests upon findings extrinsic to the contract, or upon inferences drawn from those findings"); *supra* at 59. Defendants have not established clear error

[18] In this case, it is Defendants who rely most heavily on deposition testimony, purportedly to illuminate the plain meaning of the two exceptions. OB 22, 24, 27-28, 29, 31, 38, 46, 48, 51. *Nederlander* is a critique of Defendants' method of argument, not the Court of Chancery's consideration of extrinsic evidence.

with the self-serving contention that a "proper weighing" would have given them the win.

Finally, if this Court concludes that the Court of Chancery committed clear error in weighing the evidence, or erred in determining that the Transaction Exception and Subject Matter Exception are ambiguous, it should affirm on alternative grounds. The Court of Chancery found that Defendants "violated the Standstill in multiple ways and over a prolonged period of time."

- They interfered with the vote on Proposal Four itself through the "Do this!" campaign and other outreach designed to spread widely through the stockholder base. *Supra* at 20-21 & n.3.
- They collaborated with Goldstein on a "call to arms," rallying stockholders to oppose the Board and management. *Supra* at 15-16.
- They further collaborated with Goldstein in an effort to enlist powerful activists to work with them against the Board and management. *Supra* at 17-18.
- They sought to conceal their breaches in real time by avoiding a document trail, and then testified untruthfully about them at trial. *Supra* at 21.

Defendants have not appealed the Court of Chancery's finding that they breached the Standstill "in multiple ways." An appropriate remedy for their breaches is to convert Defendants' votes against Proposal Four to votes for it.

This would be equitable. Ascertaining the precise number of votes Defendants tainted is likely not possible, particularly within the limited context of a Section 225 proceeding. But because Defendants are wrongdoers (and spoliators of evidence), the Court should resolve the uncertainty against them. *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1111 (Del. 2015)

The remedy would be proportional. Evidence showed that Defendants had "soft" power over 20% of the vote, roughly equal to the 21% they themselves voted against Proposal Four. *Supra* at 17.

The Court of Chancery did not reach this issue, having properly concluded that Defendants breached the Voting Commitment. But it provides alternative grounds for affirmance. *See, e.g.*, *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012) ("this Court may affirm the judgment of the Court of Chancery on the basis of a different rationale").

CONCLUSION

The Court should affirm the Court of Chancery's judgment.

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CERTIFICATE OF SERVICE

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