EFiled: Jul 06 2023 10:19AM EDT
Transaction ID 70314269
Case No. 2022-0097-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF DEARBORN POLICE AND FIRE REVISED RETIREMENT SYSTEM (CHAPTER 23) MARTIN ROSSON, and NOAH WRIGHT, on behalf of themselves and all other similarly situated former stockholders of TERRAFORM POWER, INC.,

Plaintiffs,

v

BROOKFIELD ASSET MANAGEMENT, INC., BROOKFIELD INFRASTRUCTURE FUND III GP LLC, ORION US GP LLC, ORION US HOLDINGS 1 LP, HARRY GOLDGUT, BRIAN LAWSON, RICHARD LEGAULT, SACHIN SHAH, JOHN STINEBAUGH, BROOKFIELD RENEWABLE PARTNERS, L.P., and BROOKFIELD RENEWABLE CORPORATION,

Defendants.

C. A. No. 2022-0097-KSJM

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, June 9, 2023
3:15 p.m.

- - -

BEFORE: HON. KATHALEEN St.J. McCORMICK, Chancellor

- - -

TELEPHONIC RULINGS OF THE COURT ON DEFENDANTS' MOTION TO DISMISS

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

2 NED C. WEINBERGER, ESQ.
Labaton Sucharow LLP
3 -and-
PETER ANDREWS, ESQ.
4 DAVID SBORZ, ESQ.
Andrews & Springer LLC
5 -and-
LINDSAY LA MARCA, ESQ.
6 JEREMY FRIEDMAN, ESQ.
of the New York Bar
7 Friedman Oster & Tejtel PLLC
-and-
8 DOUGLAS E. JULIE, ESQ.
of the New York Bar
9 Julie & Holleman LLP
for Plaintiffs
10

11 STEPHEN C. CHILDS, ESQ.
Abrams & Bayliss LLP
12 -and-
JOHN NEUWIRTH, ESQ.
13 STEFANIA VENEZIA, ESQ.
ELIZABETH SYTSMA, ESQ.
14 of the New York Bar
Weil, Gotshal & Manges, LLP
15 for Defendants

16

17 - - -

18

19

20

21

22

23

24

1 THE COURT: Good afternoon, everyone.
2 This is Kathaleen McCormick.
3 Let's have appearances for the record.
4 ATTORNEY WEINBERGER: Good afternoon,
5 Your Honor. Ned Weinberger from Labaton Sucharow on
6 behalf of the plaintiff. Several other people are on
7 the line as well: Lindsay La Marca from Friedman
8 Oster & Tejtel; Doug Julie from Julie & Holleman;
9 Jeremy Friedman from Friedman Oster & Tejtel; and
10 Pete Andrews and David Sborz from Andrews & Springer.
11 ATTORNEY CHILDS: Good afternoon,
12 Your Honor. This is Stephen Childs of
13 Abrams & Bayliss for the defendants. I'm joined by my
14 co-counsel, John Neuwirth, Stefania Venezia, and
15 Elizabeth Sytsma from Weil Gotshal.
16 THE COURT: Is that all? I didn't
17 want to cut anybody off.
18 (No response.)
19 THE COURT: Okay. Well, thank you all
20 for getting on the line. I wanted to apologize for
21 being late to get you this decision. As you know, we
22 try to get decisions out to the world in the months
23 that the 90-day deadline requires, but I failed to do
24 that here, so my apologies. But I do have a bench

1 ruling for you, so I'll begin.
2 In this case, the plaintiffs challenge
3 a controller squeeze-out transaction. The controller
4 was Brookfield Asset Management and its subsidiaries,
5 and I will refer to that group collectively as
6 "Brookfield." In the transaction, Brookfield acquired
7 TerraForm Power, Inc., which I'll call TerraForm or
8 the "Company," and I'll refer to the transaction as
9 the "Merger."
10 Brookfield conditioned its proposal
11 from the outset on the *MFW* protections -- the approval
12 of an independent special committee and a majority of
13 unaffiliated stockholders. Both conditions were met,
14 and the merger closed on July 31st, 2020. TerraForm's
15 stockholders received stock in Brookfield-affiliated
16 entities at an exchange ratio of .381 per share of
17 TerraForm stock.
18 The plaintiffs claim that the
19 defendant-directors and Brookfield breached their
20 fiduciary duties in connection with the merger, which
21 resulted in an unfair price. The defendants moved to
22 dismiss, arguing that the *MFW* protections restored the
23 business judgment rule, and that the plaintiffs failed
24 to state a claim under that standard. This is my

1 bench ruling resolving the defendants' motion to
2 dismiss.
3 I find that the *MFW* elements were
4 satisfied and that, as a result, the merger is subject
5 to business judgment review. And the plaintiffs have
6 failed to state a claim under that standard, so the
7 defendants' motion to dismiss is granted for reasons
8 I'll explain next.
9 I'll start with the factual
10 background, which I draw from the verified amended
11 stockholder class action complaint and documents it
12 incorporates by reference.
13 TerraForm was a Delaware corporation
14 with its principal place of business in New York City.
15 TerraForm acquired, owned, and operated solar and wind
16 energy facilities in North America and Western Europe.
17 TerraForm completed its IPO on July 23rd, 2014.
18 On March 6, 2017, Brookfield acquired
19 a controlling interest in TerraForm pursuant to a
20 merger and sponsorship transaction agreement. That
21 transaction closed on October 16, 2017, at which point
22 Brookfield became TerraForm's controller. TerraForm's
23 subsequent SEC filings disclosed that it was a
24 "controlled company" and that Brookfield's interests

1 may diverge from those of the public stockholders.
2 TerraForm and Brookfield entered into
3 ancillary agreements granting Brookfield rights to
4 control aspects of TerraForm's governance and
5 management, including the exclusive power to appoint
6 TerraForm's CEO, CFO, and general counsel. Brookfield
7 appointed Defendant John Stinebaugh as TerraForm's
8 CEO.
9 Brookfield also obtained the right to
10 designate four of the seven members of TerraForm's
11 board. Brookfield designated Defendants Harry
12 Goldgut, Brian Lawson, Richard Legault, and Sachin
13 Shah, and I'll refer to those collectively as the
14 "Director Defendants," and together with Brookfield
15 and Stinebaugh, the "Defendants."
16 All of the director defendants had
17 prior ties to Brookfield. TerraForm's charter
18 required that the remaining three directors qualify as
19 "independent" under SEC and Nasdaq rules. Under
20 TerraForm's charter, these three directors formed the
21 conflicts committee, which was tasked with reviewing
22 and approving material transactions where a conflict
23 of interest may arise between Brookfield and
24 TerraForm. Nonparties Mark McFarland, Carolyn Burke,

1 and Christian Fong served as the conflicts committee.
2 Together with the director defendants, I'll refer to
3 them as the "Board."
4 In January 2018, Brookfield presented
5 TerraForm with the opportunity to acquire Saeta Yield,
6 S.A., or "Saeta," a publicly traded Spanish yieldco
7 with onshore wind and solar assets. The proposed
8 purchase was for $1.2 billion. Saeta was an
9 attractive target for TerraForm, and TerraForm's
10 management predicted that the Saeta acquisition would
11 drive an increase in average dividend per share of
12 6.5 percent over the first five years, which would
13 create more than $100 million in incremental value to
14 its stockholders.
15 Initially, TerraForm's management
16 predicted that the company could fund the entire Saeta
17 acquisition with its existing liquidity. As
18 negotiations progressed, however, Brookfield and
19 TerraForm's management presented a proposal to the
20 conflicts committee that envisioned raising $600 to
21 $700 million through an equity issuance. On
22 February 6, 2018, the conflicts committee approved a
23 financing plan that included using $800 million of
24 TerraForm's available funds and $400 million in equity

1 issuances.
2 TerraForm publicly announced the Saeta
3 acquisition on February 7, 2018, and filed a Form 8-K
4 with details of the financing proposal on February 8.
5 TerraForm stockholders approved the equity issuance at
6 the company's annual meeting on May 23rd.
7 During a TerraForm board meeting held
8 immediately after the stockholder vote on May 23, CEO
9 Stinebaugh proposed that TerraForm increase the equity
10 issuance to $650 million. During a subsequent
11 conflicts committee meeting, Brookfield expressed its
12 preference that the entire $650 million equity
13 issuance be a private backstopped placement with
14 Brookfield itself. The conflicts committee approved
15 this proposal on June 4, issuing $650 million in
16 private placements to Brookfield at a per-share price
17 of $10.66. I'll refer to that as the "Private
18 Placement." Upon completion of the private placement,
19 Brookfield held 65.3 percent of TerraForm's
20 outstanding common stock.
21 With the private placement funding,
22 TerraForm executed the tender offer for shares of
23 Saeta and then acquired Saeta through a short form
24 merger on July 2nd, 2018.

1 On September 19, 2019, TerraForm
2 stockholder Martin Rosson filed a derivative and class
3 action complaint in this court challenging the private
4 placement as unfair to TerraForm's stockholders.
5 Another stockholder, Plaintiff City of Dearborn Police
6 and Fire Revised Retirement System, Chapter 23, or
7 "Dearborn," filed its own class action and derivative
8 complaint in this court challenging the private
9 placement on January 27, 2020. The Court consolidated
10 the actions on February 13, 2020, and I will refer to
11 that consolidated case as the "Private Placement
12 Action."
13 Meanwhile, on January 11, 2020,
14 Brookfield's subsidiary BEP made an all-stock proposal
15 to acquire the remaining outstanding shares of
16 TerraForm not already held by Brookfield. BEP's
17 proposal contemplated an exchange ratio of 0.36 for
18 each share of TerraForm stock. BEP's proposal stated
19 that it had no interest in selling any of its shares
20 or participating in any alternative merger involving a
21 third party.
22 BEP's proposal was conditioned on the
23 approval of an independent board-level committee and a
24 majority of the non-Brookfield public stockholders.

1 At the time, Brookfield and its affiliates owned
2 approximately 62 percent of TerraForm's common stock.
3 TerraForm's board convened to discuss
4 the proposal the same day. After the board meeting,
5 the conflicts committee convened to discuss forming a
6 special committee, and the board executed a unanimous
7 written consent on January 12, 2020, to form a special
8 committee consisting of Burke, Fong, and McFarland as
9 chairmen. The board granted the special committee the
10 exclusive power and authority to evaluate the proposed
11 transaction, negotiate with BEP, determine whether the
12 transaction was fair to the minority stockholders, and
13 reject the transaction if necessary. The board also
14 granted the special committee authority to retain
15 their own legal and financial advisors.
16 The special committee convened for its
17 first meeting on January 12, for the purpose of
18 retaining a financial advisor. The special committee
19 received a presentation from Greentech, which stated
20 that it might not be the optimal time to realize
21 maximum value for TerraForm and that a robust market
22 check was necessary to ensure maximum value for
23 TerraForm's public stockholders.
24 TerraForm signed an engagement letter

1 that same day with Greentech. Under this agreement,
2 Greentech's $6 million flat fee was contingent on
3 providing a fairness opinion recommending a
4 transaction and upon closing of a transaction.
5 The special committee convened again
6 on January 13 to hear a presentation from
7 Morgan Stanley. Both TerraForm and Brookfield had
8 previously engaged Morgan Stanley to advise on
9 unrelated matters. Morgan Stanley had received $65 to
10 $90 million in fees from Brookfield in the past two
11 years and had received $5 to $15 million in fees from
12 TerraForm in the same period. Morgan Stanley and its
13 affiliates also held a collective stake in
14 Brookfield-related entities worth about $470 million.
15 Morgan Stanley was serving concurrently as a lender
16 and a participant in certain financings for Brookfield
17 affiliates.
18 In its presentation, Morgan Stanley
19 noted that Brookfield would realize significantly
20 increased management services fees by consolidating
21 TerraForm into BEP. Morgan Stanley stated that a
22 market check may be impracticable because Brookfield's
23 majority ownership may have a negative effect on a
24 third party's willingness to introduce an outside bid.

1 The special committee met with both
2 Greentech and Morgan Stanley on January 16 to discuss
3 the diligence necessary to evaluate a potential
4 transaction with Brookfield. Greentech and
5 Morgan Stanley represented that potential Canadian
6 third parties may be interested in bidding to acquire
7 the minority stockholders' shares and that they would
8 begin to develop a third-party outreach strategy.
9 TerraForm signed an engagement letter
10 with Morgan Stanley on January 17. Like TerraForm's
11 agreement with Greentech, Morgan Stanley's flat fee --
12 here, in the amount of $13 million -- was contingent
13 on providing a fairness opinion recommending a
14 transaction and upon closing.
15 Also on January 17, the special
16 committee retained Kirkland & Ellis LLP as its legal
17 counsel. Kirkland had advised Brookfield affiliates
18 on prior unrelated transactions. At the same time as
19 the merger negotiations, Kirkland was advising
20 Brookfield on another separate equity investment.
21 On January 29th, the special committee
22 met with Greentech and Morgan Stanley to discuss their
23 progress on due diligence. Greentech and
24 Morgan Stanley presented on a Barclays research report

1 that predicted the positive effect on BEP from an
2 acquisition of TerraForm at Brookfield's proposed .36
3 exchange ratio. Greentech and Morgan Stanley
4 attributed at least part of the accretion to a
5 35-basis point improvement from refinancing BEP's
6 investment grade balance sheet and removing
7 TerraForm's existing management services fees.
8 At its meeting on February 4, the
9 special committee advised Greentech and Morgan Stanley
10 that they should not consider transactions with
11 alternative third parties because Brookfield had
12 stated in its initial offer that it would not consider
13 alternative transactions.
14 The committee met again on
15 February 6th, 7th, 11th, and 18th to discuss Greentech
16 and Morgan Stanley's other diligence findings. The
17 special committee again decided against soliciting
18 alternatives due to the very low probability that a
19 third party would have an interest in, and ability to,
20 present a proposal that offered more value to
21 TerraForm's stockholders in view of Brookfield's
22 position.
23 In the background of the deal process,
24 several of the plaintiffs attempted to contact

1 TerraForm's board regarding the private placement
2 action.
3 On January 29th, Dearborn submitted a
4 letter to the board demanding that the special
5 committee ensure that the derivative claims of the
6 private placement action were given adequate weight in
7 negotiations. Dearborn's January 29th letter claimed
8 that potential damages from the private placement
9 action could exceed $400 million based on TerraForm's
10 then-trading stock price. Dearborn also requested an
11 in-person meeting with the special committee to
12 discuss the value of these claims and ensure they were
13 factored into the purchase price.
14 When the special committee did not
15 respond to this initial outreach, Rosson and Dearborn
16 sent another letter on February 13. The letter
17 expressed concerns that the special committee did not
18 intend to obtain fair value for the claims in
19 negotiating a potential merger. Rosson and Dearborn
20 claimed that the total damages could now exceed
21 $576 million because of increases to TerraForm's stock
22 price. As with the earlier letter, Rosson and
23 Dearborn requested an in-person conference with the
24 special committee. The special committee's counsel

1 forwarded both letters to the special committee.
2 The special committee requested that
3 its counsel consider the effect of the private
4 placement action on negotiations and discussed
5 counsel's analysis at its meeting on February 19.
6 After meeting for 35 minutes, the special committee
7 concluded that the claims had at most *de minimis* value
8 and were not sufficiently material to factor into the
9 negotiation of economic terms of the proposed
10 transaction. The special committee declined to meet
11 with Dearborn and Rosson.
12 The special committee met again on
13 February 26 to discuss its advisors' independent
14 analysis of the .36 exchange ratio offered by
15 Brookfield. Both advisors discussed the implications
16 of rejecting the offer. Greentech presented that
17 TerraForm depended on Brookfield for growth but noted
18 that BEP's five-year forecasts for TerraForm excluded
19 future growth at the TerraForm level. Morgan Stanley
20 presented that rejecting Brookfield's offer could sour
21 the relationship and reduce the likelihood that
22 Brookfield would invest in growing TerraForm.
23 Morgan Stanley's presentation also
24 relayed that Brookfield was incentivized to purchase

1 TerraForm to reduce its interest expense and increase
2 its management fees from TerraForm by refinancing its
3 debt after the merger. Morgan Stanley calculated the
4 net present values to Brookfield from this refinancing
5 at over $1 billion.
6 After these presentations, the special
7 committee decided to maintain its course and not
8 solicit any third-party interest in a transaction but
9 agreed to re-raise the issue if negotiations with BEP
10 faltered. The special committee proposed a
11 counteroffer to Brookfield of a .42 exchange ratio and
12 a list of noneconomic terms. Brookfield agreed to
13 most of the noneconomic terms, including that
14 TerraForm's minority stockholders would have the
15 option to receive stock in either a limited
16 partnership entity or a corporation under the
17 Brookfield umbrella.
18 The parties then went back and forth
19 on the exchange ratio. On March 6, Brookfield
20 countered with a ratio of .365, which Morgan Stanley
21 and Greentech estimated would be dilutive to
22 TerraForm's stockholders' dividends per share. The
23 special committee met with its advisors to discuss the
24 offer and determined that an exchange ratio of over

1 .37 would be economically advantageous to minority
2 stockholders.
3 The special committee countered with a
4 .41 exchange ratio on March 10th. On March 11th,
5 Brookfield countered with a .37 exchange ratio. The
6 same day, the special committee countered with a .39
7 exchange ratio and determined that it would accept any
8 counter from Brookfield of at least a .38 ratio. BEP
9 refused the .39 offer. On March 12th, after the
10 meeting with its advisors, the special committee
11 countered at .381 and BEP accepted.
12 The special committee met with
13 Greentech and Morgan Stanley on March 16 to obtain
14 their opinions on a transaction at a .381 exchange
15 ratio. Both advisors delivered their opinions that
16 the transaction was financially fair to TerraForm's
17 minority stockholders. Using BEP's closing price on
18 March 13, this exchange ratio yielded an implied
19 purchase price for TerraForm's stock of $16.34 per
20 share. Greentech and Morgan Stanley presented a host
21 of valuations for TerraForm's stock under different
22 conditions and assumptions. The mid-point of
23 Greentech's valuations pegged TerraForm's per-share
24 value at $15.375 per share. The mid-point in

1 Morgan Stanley's valuations priced TerraForm at $18
2 per share.
3 After receiving these presentations,
4 the special committee recommended that the board
5 approve Brookfield's offer at an exchange ratio of
6 .381.
7 Later on March 12, the board convened
8 to consider the offer. All directors present voted to
9 approve the merger and the board instructed authorized
10 officers, including Stinebaugh, to prepare and file a
11 proxy statement regarding the proposed merger.
12 TerraForm filed its proxy soliciting a
13 stockholder vote on the merger on June 29th, 2020.
14 The proxy was light on details regarding the special
15 committee advisors' diligence throughout the process
16 and omitted specifics about potential third-party
17 interests. The proxy disclosed that "the [TerraForm]
18 acquisition will likely provide a number of
19 significant benefits to the Brookfield Renewable
20 group." The disclosed benefits included that the
21 acquisitions would simplify BEP's ownership structure
22 and eliminate public company costs, expand
23 Brookfield's portfolio in North America and
24 Western Europe, and increase Brookfield's annual

1 $20 million management fee by 1.25 percent of
2 Brookfield's increased post-merger market value.
3 The proxy also disclosed that the
4 merger would be accretive to Brookfield's cash flows.
5 The proxy disclosed the existence of the private
6 placement action, but it stated that the action had
7 *de minimus* value. TerraForm's non-Brookfield
8 stockholders approved the merger on July 29, 2020.
9 Pursuant to the terms of the merger agreement,
10 Brookfield acquired each share of TerraForm's common
11 stock for .381 of the BEP unit.
12 The private placement action was
13 ongoing parallel to the merger developments. The
14 defendants moved to dismiss the direct claims in the
15 private placement action on March 26, 2020. They did
16 not move to dismiss the derivative claims. As a
17 result of the merger, however, plaintiffs ceased to be
18 stockholders of TerraForm and therefore lost standing
19 to prosecute the derivative claims. The parties
20 submitted a stipulation of dismissal as to Dearborn
21 and Rosson, which the Court granted on September 15,
22 2020.
23 On October 30, 2020, the Court ruled
24 on the motion to dismiss the direct claims. It

granted the motion to dismiss for lack of standing as to the plaintiffs' entrenchment claims, and denied the defendants' motion to dismiss the *Gentile* claims. The defendants sought interlocutory appeal, which the Delaware Supreme Court accepted.

On September 21st, 2021, the Delaware Supreme Court affirmed in part and reversed in part, overruling *Gentile*. The Supreme Court affirmed this Court's dismissal of the entrenchment claims. In overruling *Gentile*, the Supreme Court concluded that Dearborn's and Rosson's remaining so-called direct claims were actually derivative in nature, and that they had lost standing to pursue derivative claims following the merger. As a result, Dearborn and Rosson's remaining claims were dismissed.

Plaintiffs filed their original complaint in this action on January 28, 2022. After Defendants filed their initial motions to dismiss, the parties submitted a proposed voluntary dismissal of Defendants Burke, Fong, and McFarland, dismissing them without prejudice, which I granted on June 15th, 2020. On June 21st, plaintiffs filed the amended complaint, seeking damages for defendants' alleged breaches of fiduciary duty in connection with the merger.

1 The complaint asserts three counts.
2 In Count I, plaintiffs allege that the
3 Brookfield entities breached their fiduciary duties in
4 their capacity as controller.
5 In Count II, plaintiffs allege that
6 the director defendants breached their fiduciary
7 duties in approving the merger and issuing a
8 misleading proxy.
9 In Count III, plaintiffs allege that
10 Stinebaugh, in his capacity as CEO, breached his
11 fiduciary duties by participating in, preparing, and
12 disseminating the misleading proxy.
13 Defendants moved to dismiss the
14 complaint on August 26, 2022, pursuant to
15 Rules 12(b)(1) and 12(b)(6). The motion was fully
16 briefed and I heard oral argument on Valentine's Day.
17 My decision primarily turns on the
18 defendants' Rule 12(b)(6) motion, so I'll turn to
19 that. The governing pleading standard on a
20 Rule 12(b)(6) motion is reasonable conceivability.
21 Defendants argue that plaintiffs' claims must be
22 dismissed because the transaction satisfied the
23 elements of *Kahn v. M&F Worldwide Corp.*, which we
24 refer to as "*MFW*," entitling the board's actions to

1 business judgment review.
2 The merger was a conflicted controller
3 transaction presumptively reviewed under the entire
4 fairness standard unless the deal was subject to the
5 procedural protections of *MFW*. Under *MFW*, the
6 business judgment rule applies to a merger proposed by
7 a controlling stockholder conditioned before the start
8 of negotiations on both "the approval of an
9 independent, adequately-empowered Special Committee
10 that fulfills its duty of care" and "the uncoerced,
11 informed vote of a majority of the minority
12 stockholders."
13 Where the "defendants have described
14 their adherence to the elements identified in *[MFW]*
15 'in a public way suitable for judicial notice, such as
16 board resolutions and a proxy statement,' then the
17 court will apply the business judgment rule at the
18 motion to dismiss stage unless the plaintiff has 'pled
19 facts sufficient to call into question the existence
20 of those elements.'"
21 The two *MFW* requirements have been
22 broken down into six issues. A transaction will be
23 subject to business judgment review if the plaintiffs
24 have not pled facts sufficient to call into question:

1 (i) that the controller conditioned
2 the procession of the transaction on the approval of
3 both a special committee and a majority of the
4 minority stockholders; (ii) the special committee was
5 independent; (iii) the special committee was empowered
6 to freely select its own advisors and to say no
7 definitively; (iv) the special committee met its duty
8 of care in negotiating a fair price; (v) the vote of
9 the minority was informed; and (vi) there was no
10 coercion of the minority.
11 Defendants argue that the merger was
12 subject to the *MFW* conditions and that, because
13 plaintiffs have not pled waste, the complaint should
14 be dismissed. Of these six factors, plaintiffs do not
15 contest three: That Brookfield conditioned the
16 transaction *ab initio* on approval of the special
17 committee and a majority of the minority stockholders;
18 that the special committee was independent; and that
19 there was no coercion of the minority. Plaintiffs
20 argue that the third, fourth, and fifth elements were
21 not satisfied, because the special committee was not
22 fully empowered, the special committee failed to meet
23 its duty of care, and the stockholder vote was not
24 informed.

1 I'll start with the third prong. To
2 satisfy that prong, the special committee must have
3 been empowered to select its own advisors and to
4 definitively reject a proposed transaction.
5 Plaintiffs do not dispute that the special committee
6 was facially empowered to complete these tasks by the
7 board's unanimous written consent. Instead,
8 plaintiffs argue that the special committee was
9 subject to coercion and not able to definitively say
10 no.
11 Plaintiffs' argument that the special
12 committee was coerced hinges on its contention that,
13 in diligence, BEP's management provided TerraForm with
14 a financial model that did not include growth for
15 TerraForm. Plaintiffs argue that this was an
16 "implicit threat" from Brookfield that, if the special
17 committee recommended against the transaction,
18 Brookfield would let TerraForm wither on the vine.
19 Plaintiffs' line of reasoning is a
20 stretch, in my view, and inconsistent with the type of
21 coercion allegations that this court has found to
22 defeat this element of *MFW*. In *Dell*, a company had
23 financed a partial acquisition by issuing new shares
24 of Class V stock. The company retained the option to

1 force a conversion of the Class V shares to Class C
2 stock that was disadvantageous to the Class V holders.
3 When the company later sought to
4 consolidate its holdings in the target, its board
5 charged the special committee with negotiating a
6 redemption of the Class V shares, conditioned upon the
7 *MFW* requirements. The redemption would have been more
8 favorable to the Class V stockholders, but looming in
9 the back of the process, the company wielded its less
10 advantageous forced conversion right.
11 Vice Chancellor Laster found that the
12 special committee was subject to coercion based on the
13 plaintiff's allegations that there was "a steady
14 drumbeat of actions by which the Company signaled its
15 intent to exercise the Conversion right in the absence
16 of negotiated redemption." For instance, during the
17 negotiation period, the company had leaked to the
18 press that it was considering taking action to
19 exercise conversion, reiterated its right to
20 unilaterally exercise the conversion right, and
21 disclosed in its SEC filings that it had explored
22 exercising the conversion right as a contingency plan
23 if the redemption negotiations fell through. Based on
24 these allegations, it was reasonably conceivable that,

1 by reserving the right to bypass the special committee
2 and engage in a forced conversion, the company created
3 a coercive environment that undermined the special
4 committee's ability to bargain effectively and
5 effectively disempowered the committee.
6 Here, plaintiffs' allegations of
7 supposed coercion involve far more subtle behavior.
8 Plaintiffs do not allege that Brookfield had some kind
9 of "bypass" to force TerraForm's minority stockholders
10 to relinquish their shares. Rather, plaintiffs'
11 argument requires inferring that Brookfield through
12 BEP was trying to send a message by submitting its
13 five-year financials exclusive of TerraForm's growth,
14 that the special committee perceived this as a threat,
15 and that the special committee felt deprived of a
16 meaningful choice as a result.
17 Plaintiffs' narrative, however,
18 requires attenuated and, in my view, unreasonable
19 inferences. Unlike in *Dell*, plaintiffs do not allege
20 that Brookfield indicated publicly and privately that
21 it intended to "bypass" the formal process if the
22 special committee chose not to approve the
23 transaction, nor that it had a "contingency plan" to
24 do so. Plaintiffs' allegations fail to carry the day

1 on *MFW*'s third prong.
2 I'll turn to the fourth prong. To
3 undermine that prong, the plaintiff must plead facts
4 sufficient to support a finding that it is reasonably
5 conceivable that the special committee failed to
6 exercise its duty of care. Our law holds that such a
7 showing requires allegations that the special
8 committee acted with gross negligence. "Gross
9 negligence involves more than simple carelessness. To
10 plead gross negligence, a [party] must allege 'conduct
11 that constitutes reckless indifference or actions that
12 are without the bounds of reason.'" Disagreeing with
13 a special committee's strategy is not a duty of care
14 violation, nor is "questioning the sufficiency of the
15 price."
16 Plaintiffs argue that the special
17 committee failed to meet its duty of care in three
18 ways: by failing to conduct a market check, by
19 selecting conflicted advisors, and by assigning
20 *de minimis* value to the derivative private placement
21 action claims. In my view, none of these arguments
22 are persuasive.
23 A failure to conduct a presigning
24 market check is not a *per se* violation of the duty of

1 care. *BridgeBio Pharma* is illustrative. There, a
2 company established a special committee to consider
3 its controller's offer to buy out the remaining
4 minority stockholders, and the plaintiff challenged
5 the special committee's decision not to solicit
6 third-party interest. The Court disagreed with the
7 plaintiff's argument, noting that the special
8 committee and its advisors considered whether it
9 should contact potential strategic buyers and decided
10 not to after the controller confirmed that it was not
11 interested in selling to a third party. This
12 consideration was inconsistent with a reasonably
13 conceivable finding of gross negligence. The Court
14 reached the same result in *Franchi v. Firestone*,
15 noting that the special committee came to a reasoned
16 decision to negotiate a transaction with the
17 controller, which negated a reasonably conceivable
18 basis for gross negligence.
19 In search of a different outcome here,
20 plaintiffs point to Greentech's initial pitch deck
21 presentation in which Greentech stated that a robust
22 market check was necessary to ensure maximum value for
23 TerraForm's public stockholders. This fact,
24 plaintiffs argue, distinguishes this case from cases

1 like *BridgeBio Pharma* and *Firestone*. But the fact
2 that this piece of information appeared in a pitch
3 book does not suggest gross negligence. Such a rule
4 would create a dangerous game where the Court
5 second-guesses a committee's decision not to pursue
6 every recommendation in a pitch. There are good
7 reasons why fiduciaries might not pursue a market
8 check in circumstances like these. It bears noting
9 that Morgan Stanley gave the opposite advice,
10 observing that there were certain limitations on
11 conducting an effective market check under the
12 circumstances. A failure to conduct a market check
13 can be a factor supporting a claim challenging a sale
14 process; in this case, standing alone, it does not
15 suffice to impugn the special committee's exercise of
16 its duty of care.
17 Plaintiffs' second duty of care theory
18 is that Morgan Stanley and Kirkland were conflicted
19 and that the special committee failed to adequately
20 manage these conflicts.
21 Starting with Morgan Stanley, our
22 Court has stated that where a plaintiff challenges
23 financial advisors' independence based on its holdings
24 in the counterparty, whether the advisor's interest in

1 the transaction is material can inform the analysis.
2 Here, plaintiff takes issue with Morgan Stanley's
3 $470 million stake in Brookfield entities and its
4 concurrent representation of Brookfield in an
5 unrelated financing matter.
6 I'll be honest, I don't love the fact
7 that Morgan Stanley has this level of financial ties
8 to the controller. But plaintiffs have not pled facts
9 sufficient for this to give rise to a duty of care
10 violation by the special committee. Morgan Stanley
11 was one of two financial advisors to the special
12 committee. Its ownership stake was small relative to
13 its overall holdings, constituting only .1 percent of
14 its portfolio value. This court has found that an
15 investment bank's holdings in a counterparty amounting
16 to .16 percent of its overall portfolio was
17 insufficient to create a material conflict. The
18 plaintiffs have failed to provide a compelling
19 rationale as to why this case should come out
20 differently. Moreover, the fees Morgan Stanley had
21 accrued from both Brookfield and TerraForm were
22 disclosed in the proxy, demonstrating that the special
23 committee knew of these payments.
24 Plaintiffs are not entitled to an

1 inference of gross negligence simply because the
2 special committee, knowing of this issue, still
3 retained Morgan Stanley.
4 Plaintiffs' argument similarly fails
5 as to Kirkland. Plaintiffs point to Kirkland's prior
6 representation of Brookfield affiliates and its
7 concurrent work for Brookfield on an unrelated equity
8 transaction as a basic carbon copy. Again, I do not
9 love these alleged conflicts. I wish Kirkland had not
10 concurrently represented Brookfield in an unrelated
11 equity transaction. But the allegations fail to cast
12 doubt on the reasonableness and the good faith nature
13 of the special committee's decision to hire Kirkland
14 following its own diligence. Plaintiffs do not allege
15 that Kirkland represented Brookfield or its affiliates
16 as counterparties to the merger or on any related
17 transaction. Plaintiffs have not alleged any facts
18 suggesting that the special committee was grossly
19 negligent in hiring Kirkland.
20 As a third argument on the duty of
21 care prong, plaintiffs argue that the special
22 committee committed gross negligence by failing to
23 consider the value of the derivative private placement
24 action claims in negotiating the merger.

1 Specifically, plaintiffs allege that the special
2 committee was particularly incentivized to ignore the
3 value of the derivative claims because the claims
4 implicated their own misconduct and because it only
5 considered the claims for 35 minutes.
6 This argument overlaps with the
7 parties' *Primedia* argument.
8 Neither allegation rises to the level
9 of gross negligence, in my view. The special
10 committee members were not named as defendants in the
11 private placement action. The special committee made
12 its determination of the claims' value after reviewing
13 memorandum prepared by their counsel, which had been
14 prepared after counsel's own investigation.
15 As to the length of the meeting,
16 plaintiffs' arguments ignore that the special
17 committee members were already well-acquainted with
18 the factual basis underlying the claims. The fact
19 that the special committee considered the value of the
20 derivative claims for 35 minutes therefore says a lot
21 about their familiarity with the claims and efforts to
22 value them. Plaintiffs' position boils down to a
23 disagreement over the special committee's negotiation
24 of price, which quintessentially falls outside the

1 reach of gross negligence.
2 Taken separately and in the aggregate,
3 plaintiffs' allegations fail to impugn the special
4 committee's exercise of duty of care. The special
5 committee convened at least 19 times between February
6 and March 2020 and engaged in feedback with advisors.
7 It successfully bid up the deal price from the initial
8 proposed .36 ratio to a .381 ratio with favorable
9 noneconomic terms. Plaintiffs failed to plead a
10 reasonably conceivable basis to find that the special
11 committee acted with gross negligence.
12 I'll turn now to the disclosure claim.
13 To demonstrate that the cleansing effect of *MFW* does
14 not apply due to the disclosure violations, plaintiffs
15 must show that the proxy failed to disclose material
16 facts. The materiality standard requires that
17 fiduciaries disclose facts which, "under [] the
18 circumstances[,] ... would have assumed actual
19 significance in the deliberations of the reasonable
20 stockholder." "A material fact is one that a
21 reasonable investor would view as significantly
22 altering the 'total mix' of information made
23 available."
24 Plaintiffs challenge the proxy as

materially deficient in nine categories. This decision has already addressed seven of the categories. Since this decision has largely mooted those seven categories, this section addresses them summarily before dedicating deeper analysis to the final two.

First, plaintiffs allege that the proxy's omission of the statement in Greentech's pitch that a robust market check was necessary to ensure maximum value for TerraForm's public stockholders was material. As I've already discussed, however, this statement was raised before the special committee retained Greentech and before the parties began diligence in earnest. The special committee later reasonably concluded that a market check was not necessary, making this disclosure immaterial.

Second, plaintiffs allege in a similar vein that the proxy's omission of the statements of Greentech's pitch deck that it was not an optimal time to realize maximum value for TerraForm was a material omission. Again, the fact that this statement was made as part of Greentech's pitch before it had been engaged to evaluate the transaction renders it less informative. Greentech ultimately recommended in

1 favor of the transaction at the merger's .381 exchange
2 ratio. As a result, this was not a material omission.
3 Third, plaintiffs allege that the
4 proxy improperly omitted Brookfield's coercion of the
5 special committee. I've already rejected the theories
6 of coercion rendering this disclosure immaterial.
7 Fourth, plaintiffs argue that the
8 proxy improperly omitted any means for stockholders to
9 assess the derivative private placement claims' value
10 and only stated that the special committee's
11 determination of that value was that it was
12 *de minimis*. Having found that the special committee's
13 determination was within the range of reasonableness,
14 I do not find this omission material.
15 Fifth and sixth, plaintiffs contend
16 that the proxy improperly omitted relevant information
17 as to Morgan Stanley and Kirkland's conflicts. I have
18 already found that plaintiffs fail to plead that
19 Morgan Stanley or Kirkland were meaningfully
20 conflicted as to the merger, rendering these omissions
21 immaterial.
22 Seventh, plaintiffs argue that the
23 proxy failed to disclose how the special committee
24 managed Morgan Stanley's and Kirkland's conflicts.

1 Again, similar to disclosures regarding the alleged
2 conflict, the omission was immaterial.
3 The final two categories warrant
4 closer examination: that the proxy failed to disclose
5 nonratable benefits Brookfield received from the
6 acquisition of TerraForm, and the likely dilutive
7 effect of the merger on dividend yields for TerraForm
8 stockholders.
9 Morgan Stanley presented to the
10 special committee that Brookfield could realize a
11 $130 million value increase in its management fees
12 over the next five years if the merger succeeded.
13 Further, Morgan Stanley presented that Brookfield
14 could reap benefits amounting to $1 billion if
15 Brookfield opted to refinance TerraForm's debt under
16 BEP's more favorable lending terms.
17 It is true that, under this court's
18 precedent, a "reasonable stockholder could very well
19 consider a valuable, nonratable benefits paid to the
20 controller when deciding how to vote." Plaintiffs do
21 not strictly allege, however, that the merger
22 presented an opportunity for Brookfield to be "paid"
23 some sort of unique benefit as a controller. Rather,
24 plaintiffs allege that the merger presented a business

1 opportunity to Brookfield to reduce costs and increase
2 value. The special committee only knew about these
3 potential benefits from Morgan Stanley's presentation.
4 The question is whether TerraForm had an obligation to
5 disclose these potential benefits or whether, given
6 the total list of information, the stockholders were
7 well apprised of that.
8 Delaware law does not require
9 disclosure of all of the underlying data of an
10 advisor's analysis so that a stockholder can make an
11 independent determination of value. A proxy also need
12 not disclose information when a "scenario is a
13 hypothetical that is inherently speculative."
14 Here, the proxy disclosed that the
15 TerraForm acquisition would "likely provide a number
16 of significant benefits" to Brookfield, including
17 simplifying BEP's ownership structure, eliminating
18 public company costs and generating increased cash
19 flows. The proxy disclosed the method for calculating
20 Brookfield's management fees, an annual management fee
21 of $20 million, plus 1.25 percent of the amount by
22 which the market increased. The issue is whether the
23 omissions altered the total information received by
24 the stockholders.

1 The management fees were fully
2 described. Defendants do not argue that they were
3 hypothetical or unknowable. Even the proxy lays out
4 the precise formula for calculating that. The formula
5 inherently contemplates an increase in fees of
6 Brookfield's market value increases, which would be
7 nearly certain following the merger. Instead, the
8 question is whether the proxy adequately disclosed
9 Morgan Stanley's presentation that Brookfield's
10 five-year gain in management fees would be
11 approximately $130 million.
12 I think it's a close call, and I pause
13 because I'm struggling a little bit on how the parties
14 framed this issue, but, ultimately, I'm guided by the
15 fact that I don't believe that the additional
16 information that the plaintiffs seek to have disclosed
17 on this issue really alters the total mix of
18 information. I don't find plaintiffs' theories on the
19 whole to be very compelling.
20 So in the context of this case, it
21 seems to be the kind of level of detail that doesn't
22 have to be disclosed. I recognize that the sort of
23 information and other factual circumstances might be
24 more a compelling way to undermine *MFW*, but here, I

1 just don't see it.

2 In *Dent v. Ramtron International*

3 *Corporation*, the plaintiff stockholder identified

4 several categories of allegedly deficient disclosures

5 regarding the financial advisor's fairness opinion on

6 a proposed merger: failure to provide multiples for

7 each comparable company, comparable precedent

8 transaction, and comparable price premiums; failure to

9 disclose the advisors' methodology as to executive

10 compensation and net operating losses; and failure to

11 disclose the financial advisors' reasons for deciding

12 on a range of discount rates.

13 At the motion-to-dismiss stage,

14 Chancellor Bouchard found that none of these

15 categories sufficiently pled a disclosure breach. The

16 Chancellor noted that the plaintiff's requests

17 essentially amounted to a "tell me more" request. In

18 rejecting the plaintiff's attempt to repackage an

19 argument that disclosures must contain enough

20 information to enable a stockholder to make an

21 independent determination of fair value, the

22 Chancellor granted the motion to dismiss.

23 Here, the proxy provided TerraForm's

24 stockholders with the exact formula that would be used

1 to calculate Brookfield's management fee.
2 Stockholders knew that Brookfield's market value would
3 increase following the acquisition of TerraForm.
4 Plaintiffs argue that this disclosure fails to state
5 the benefit to Brookfield in "plain English," and I
6 disagree. The disclosure states the exact same
7 methodology that Morgan Stanley used to calculate its
8 $130 million five-year projection.
9 Further, the proxy also discloses
10 BEP's management fees for the preceding year. Again,
11 we don't usually make plaintiffs go through a
12 scavenger hunt. We don't require them to take inputs
13 and apply it to a formula. I don't view that as
14 what's happening here. Stockholders had enough
15 information to ascertain that Brookfield would receive
16 an increased management fee following the merger.
17 They were not entitled to further detail in this case.
18 Plaintiffs' issues with omission of
19 the benefits of the debt refinancing fall into the
20 category of hypothetical information. Plaintiffs
21 allege that over $1 billion in benefit would inure to
22 Brookfield following the merger from debt refinancing.
23 But the complaint's own language belies their position
24 that these benefits were sufficiently certain to

1 require disclosure. The complaint twice states that
2 Morgan Stanley determined that "Brookfield could
3 receive significant interest expense savings and
4 incremental management fees from refinancing its
5 debt." In another portion, the complaint restates
6 Morgan Stanley's analysis that Brookfield "could"
7 increase its return by refinancing TerraForm's debt.
8 Plaintiffs rely on Morgan Stanley's presentation,
9 which in turn state that there was a potential future
10 upside to Brookfield from refinancing TerraForm's
11 debt.
12 Even in briefing, plaintiffs state
13 their position that Brookfield "had the potential" or
14 "could" realize over $1 billion to refinance
15 TerraForm's debt after the merger. So as cast in the
16 complaint itself, this category of information falls
17 into the category of hypotheticals.
18 In *Crane*, the Court applied the *MFW*
19 framework to a reclassification proposal put to a
20 stockholder vote that would allow the controller to
21 maintain its majority voting power. The proxy
22 disclosed the controller's current holdings, that the
23 controller would lose majority voting power if the
24 company issued more than 8 million shares, and that

1 the board had several means at its disposal to manage
2 voting dilution. The plaintiffs argue that the
3 proxy's failure to disclose that the controller could
4 lose its majority power by the end of the year was
5 material.
6 The *Crane* court disagreed, finding
7 that this was merely hypothetical. Meanwhile, the
8 proxy had disclosed "the certain, known information"
9 concerning the status of the controller's ownership of
10 the stockholder vote. Since the proxy disclosed how
11 close the controller was to losing majority control
12 and the specific amount of additional equity issuances
13 that would cause this result, a hypothetical timeline
14 of when the controller might lose control would not
15 have significantly altered the "total mix" of
16 information already available to stockholders, and
17 thus is immaterial.
18 In my view, the proxy disclosed what
19 was certain at the time, and disclosed sufficient
20 information to demonstrate the value of this
21 acquisition to the controller: Brookfield's
22 outstanding debt, their respective maturity dates,
23 their respective interest rates. A reasonable
24 investor could view this information and determine

1 that refinancing would be advantageous to Brookfield's
2 bottom line. The refinancing was not a term of the
3 merger, however, and Brookfield could choose to
4 refinance TerraForm's debt after the merger or could
5 decline to do so. Requiring a target to disclose
6 their own calculations of hypothetical benefits to an
7 acquirer, a decision over which the target itself has
8 no control, would not necessarily assist stockholders
9 in making an informed vote.
10 Finally, plaintiffs contend that the
11 proxy improperly omitted material information
12 regarding the dilutive effect of the merger to
13 TerraForm's stockholder. Plaintiffs argue that the
14 proxy's characterization of the merger as accretive to
15 Brookfield's cash flows, without stating the potential
16 dilutive effect to TerraForm's stockholders, was
17 materially misleading. The argument boils down to a
18 position that the proxy did not provide a fair summary
19 of Morgan Stanley's calculations of post-merger
20 dividends per share.
21 Again, as in *Crane*, the proxy
22 discloses the known, certain information by disclosing
23 both TerraForm and Brookfield's forecasted standalone
24 dividends per share. Morgan Stanley relied on these

1 forecasts to calculate the expected dilution to
2 TerraForm's stockholders following the merger. A
3 stockholder could reach the same conclusion on their
4 own. Further, the proxy disclosed that "there can be
5 no assurance that [Brookfield] will make comparable
6 distributions or dividends in the future."
7 On the whole, I view the challenges to
8 the information provided to stockholders as
9 insufficient to undermine the presumption of *MFW*.
10 Plaintiffs have failed to adequately
11 plead that any element of *MFW* has not been met. As a
12 result, the merger is subject to business judgment
13 review. Plaintiffs effectively concede that, if the
14 business judgment standard applies, the complaint
15 fails to state a claim. The defendants' motion to
16 dismiss as to Counts I and II is granted.
17 As far as that, Count III, too, is
18 dismissed because plaintiffs failed to adequately
19 allege a predicate breach of fiduciary duties on which
20 to support an aiding and abetting claim. So
21 defendants' motion to dismiss is granted.
22 Are there any questions?
23 ATTORNEY WEINBERGER: None from
24 plaintiff, Your Honor. Thank you for your time. Have

1 a nice weekend.
2 ATTORNEY CHILDS: Thank you,
3 Your Honor. None from defendants either.
4 THE COURT: Well, thank you for
5 getting on the line on a Friday afternoon, folks. I
6 realize this is rough justice and a little rough
7 around the edges, but hopefully it helps you to have
8 resolution. We are adjourned.
9 (Proceedings concluded at 4:03 p.m.)
10 - - -
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE

I, DOUGLAS J. ZWEIZIG, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 45 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 21st day of June, 2023.

/s/ Douglas J. Zweizig

Douglas J. Zweizig
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter