UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TEXAS PACIFIC LAND TRUST and, solely in their respective capacities as trustees for Texas Pacific Land Trust, DAVID E. BARRY and JOHN R. NORRIS III, Plaintiffs, v. ERIC L. OLIVER, Defendant. and ERIC L. OLIVER, SOFTVEST, L.P., HORIZON KINETICS LLC, and ART-FGT FAMILY PARTNERS LIMITED, Counterclaim Plaintiffs, v. DAVID E. BARRY and JOHN A. NORRIS III, in their individual capacities and in their capacities as trustees for the Texas Pacific Land Trust, Counterclaim Defendants.	Case No. 3:19-CV-01224-B

COUNTERCLAIM PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A DECLARATORY JUDGMENT AND PRELIMINARY INJUNCTION

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June 25, 2019

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TABLE OF ABBREVIATIONS

AC	Plaintiffs' Amended Complaint, dated May 22, 2019 (Dkt. 15)
Broadridge	Broadridge Financial Solutions, Inc.
DoT	Declaration of Trust, dated February 1, 1888 (Dkt. 15, Ex. A)
EM Decl.	Declaration of Ed McCarthy, dated June 24, 2019
EO Decl.	Declaration of Eric L. Oliver, dated June 25, 2019
Horizon	Horizon Kinetics LLC
Incumbents	David E. Barry and John R. Norris III
JK Decl.	Declaration of Jay Kesslen, dated June 24, 2019
Kelley Drye	Kelley Drye & Warren LLP
NYSE	New York Stock Exchange
PSLRA	Private Securities Litigation Reform Act of 1995, as amended
RJN	Defendant Eric L. Oliver's Request for Judicial Notice, dated June 17, 2019 (Dkt. 21)
SEC	U.S. Securities and Exchange Commission
SoftVest	SoftVest, L.P. and SoftVest Advisors, LLC
Tessler LPs	ART-FGT Family Partners Limited and Tessler Family Limited Partnership
TPL or Trust	Texas Pacific Land Trust
TPR	Texas Pacific Railway Co.

INTRODUCTION

On March 4, 2019, John Norris III, a TPL trustee, and David Barry, a purported TPL trustee ("Incumbents"), announced their nomination of 39-year-old Preston Young to a lifetime appointment as TPL's third trustee. On March 15, a group of TPL shareholders ("Investor Group") announced an agreement to support the election of 60-year-old Eric Oliver. In response, Incumbents assembled a team of professional advisors to orchestrate what their counsel tweeted would be a "#proxycontest defense against a group of dissident shareholders."

On April 8, Incumbents formally commenced their "proxy contest defense" by filing a definitive proxy statement with the SEC, dropping Mr. Young, proffering General Donald Cook as their new nominee, and noticing a May 22, 2019 special meeting for TPL shareholders to cast their votes in person or by proxy. As proxy management firm Broadridge provided interim summaries of proxy votes to each side, however, it soon became clear that TPL's shareholders overwhelmingly preferred Mr. Oliver. So Incumbents inundated TPL's shareholders with at least 49 solicitation materials attacking Mr. Oliver, including press releases, letters, tweets, presentations, and a video. Even worse, Incumbents instructed Broadridge not to release an official vote to the Investor Group in advance of the May 22 meeting. Broadridge rejected Incumbents' instruction and delivered proxy vote counts to each side on May 21 showing that Mr. Oliver had an insurmountable electoral lead.

To prevent anyone but their handpicked nominee from being recognized as a trustee, Incumbents filed this lawsuit on the afternoon of May 21, less than 24 hours before the scheduled special shareholder meeting at 10:00 a.m. on May 22, and announced minutes later they were postponing the meeting "until further notice." Incumbents then had an agent personally serve Mr. Oliver's wife four hours after the papers had been emailed to Mr. Oliver.

Incumbents had no authority to unilaterally postpone the May 22 meeting. Under TPL's constitution, its Declaration of Trust, once a special meeting to elect a trustee has been noticed, incumbent trustees are not empowered to adjourn, postpone, or otherwise delay the meeting without prior approval from shareholders or a court. The Incumbents had neither. In fact, despite claims of irreparable harm arising out of alleged misstatements dating back to March 25, Incumbents did not file suit until May 21, the eve of the scheduled shareholder vote, and, to this day, have not moved for injunctive relief.

On May 22, after Incumbents' counsel at Sidley Austin LLP refused TPL shareholders access to the elevator bank leading to its offices and posted uniformed police officers in the building lobby, TPL's shareholders met in a conference room on a different floor of the same building. With Incumbents' counsel in attendance, the May 22 special meeting was held. Before a duly sworn inspector of election, the Investor Group's proxy holder voted 3,660,812 shares (47.2% of all outstanding shares) in favor of Mr. Oliver's election. Even though their legal representative was present at the meeting, Incumbents did not vote their proxies, but the outcome would not have been any different if they had. On Incumbents' card, only 1,994,267 shares (25.7% of all outstanding shares) voted in favor of General Cook's election, and 222,411 shares (2.9%) voted against it. Between the 47.2% of shareholders who voted for Mr. Oliver on the Investor Group's card and the 2.9% who voted against General Cook on Incumbents' card, a majority (50.1%) of all outstanding shares had affirmatively rejected General Cook's candidacy.

Rather than recognize Mr. Oliver as a new trustee, Incumbents continue their strategy of delay, stating in June press releases that they were "obliged to remind shareholders that the proxy solicitation is suspended while the litigation is pending," but that "shareholders may revoke any previously-submitted proxies at any time." And on June 21 Incumbents made clear they want to

delay a trial on the merits until at least August 31, 2020. All the while, absent the Court's intervention, Incumbents will have prevented shareholders from seeing their votes effectuated.

To add insult to injury, after repeatedly rejecting calls by the Investor Group to consider various changes to TPL's corporate governance, Incumbents announced on June 24, 2019 the formation of a "Conversion Exploration Committee" to evaluate, on a non-binding basis, whether TPL "should be converted into a C-corp," as the Investor Group has been advocating, or instead "should remain a business trust," as Incumbents desire, and that the committee would hold its first meeting three days later on June 27. To stack the deck in Incumbents' favor, the committee will be comprised of Incumbents, General Cook, and Dana McGinnis, who has already rejected as "nonsensical" any suggestion that TPL convert into a Delaware corporation. TPL invited Horizon Kinetics, TPL's largest shareholder and member of the Investor Group, to designate a fifth member of the Committee, but insisted that the offer be accepted within 48 hours, and that Horizon accept terms that would publicly silence its voice and irreparably undermine the Investor Group's effort to confirm Mr. Oliver's election as trustee.

In addition, the Investor Group has now learned that one of the Incumbents, Mr. Barry, was never even duly elected a trustee. In a June 12, 2019 email, a New York Stock Exchange representative disclosed information showing that many of the shares voted in favor of Mr. Barry's election at a January 12, 2017 special meeting were improperly cast by retail brokers—through which more than 60% of TPL's shares are held—acting without authorization from the holders of those shares due to the erroneous classification of Mr. Barry's election as a "routine" proposal. The error should have been apparent to TPL and its proxy solicitor in 2017, but has never been reported to TPL's shareholders.

"[T]he right of shareholders to vote for the trustees of a business trust is one of the most important rights arising from stock ownership." *Brigade Leveraged Cap. Structures Fund Ltd. v. PIMCO Income Strategy Fund*, 995 N.E.2d 64, 72-73 (Mass. 2013). Here, Incumbents have trampled all over that right with actions that far exceed their authority under TPL's DoT and that breach their fiduciary duties to TPL's shareholders.

Mr. Oliver has already moved for dismissal of Incumbents' contrived federal securities claims, and the Investor Group now seeks a declaratory judgment and preliminary injunction to vindicate TPL shareholders' rights. As explained in the Investor Group's accompanying request for a hearing in August 2019, the disputes between Incumbents and TPL's shareholders are ripe for a prompt resolution because the key facts underlying the disputes are uncontroverted.

To restore and confirm TPL shareholders' rights, the Investor Group requests a declaratory judgment that (i) TPL was required to hold a special meeting to elect a successor trustee after one of its trustees resigned in February 2019; (ii) Incumbents had no authority to unilaterally postpone the special meeting they had noticed; (iii) Incumbents have no authority to "disqualify" Mr. Oliver from election; (iv) the vote at the May 22, 2019 special meeting was valid and Mr. Oliver has been duly elected a TPL trustee; and (v) the vote at the January 12, 2017 special meeting was invalid and Mr. Barry has never been duly elected a TPL trustee.

To prevent any further abrogation of TPL shareholders' rights, the Investor Group requests a preliminary injunction (i) prohibiting Incumbents from (a) taking any action on TPL's behalf without Mr. Oliver's participation as a fully empowered trustee; or (b) any further unauthorized postponement of the election; and (ii) prohibiting Mr. Barry from taking any action on TPL's behalf until a new election can be held.

For all of the reasons we offer below, the Court should grant declaratory and injunctive relief. Incumbents' strategy of delay—waiting until the eve of the shareholder vote to file suit as a pretext for indefinitely postponing the special meeting (and vote), and requesting that a trial not be held until at least August 31, 2020—should not be rewarded by allowing Incumbents to do as they please with TPL in the intervening 15 months. It would set a precedent that upends basic principles of trust law and fiduciary duties and that future corporate bad actors would follow. The shareholders have elected Mr. Oliver a TPL trustee. Their vote should be honored.

FACTUAL BACKGROUND

I. Texas Pacific Land Trust

In 1871, Texas Pacific Railway Co. was granted land under federal charter. ¶ 17.[1] When TPR went bankrupt, TPR's bondholders were awarded 4 million acres of land and, in 1888, created TPL to liquidate these assets. *Id.* Today, TPL's assets include 900,000 acres in West Texas, from which TPL derives income. ¶¶ 18, 20. TPL is publicly traded on the NYSE. ¶ 10.

TPL is "governed by [a] Declaration of Trust dated February 1, 1888." ¶ 18; AC Ex. A.[2] The DoT "requires three Trustees," ¶ 19, and "[u]pon election, trustees serve until 'death, resignation or disqualification.'" ¶ 18, AC Ex. A, § 3.

II. After One Of TPL's Trustees Resigns, Incumbents Acknowledge That Mr. Oliver Is A Qualified Candidate, But Nominate Preston Young Instead

On February 25, 2019, Maurice Meyer III resigned from TPL's Board, leaving John R. Norris III and David E. Barry as the purported remaining trustees. ¶ 19; AC Ex. C. Under TPL's DoT, upon a trustee's resignation, the remaining trustees are required to call and notice a

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1 "¶ __" refers to paragraphs of Incumbents' Amended Complaint. "Factual assertions in pleadings are judicial admissions conclusively binding on the party that made them." *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 108 (5th Cir. 1987) (alteration, quotation, and citation omitted).

2 "AC Ex. __" refers to exhibits of the Amended Complaint; "RJN Ex. __" refers to exhibits of Mr. Oliver's Request for Judicial Notice; "EO Ex. __" refers to exhibits of the Eric Oliver Declaration; "EM Ex. __" refers to exhibits of the Ed McCarthy Declaration; "JK Ex. __" refers to exhibits of the Jay Kesslen Declaration.

special meeting of TPL's shareholders, at which "a successor shall be elected . . . by a majority in the amount of the certificate holders present in person or by proxy." AC Ex. A, § 3.

Following Mr. Meyer's resignation, Allan Tessler, a beneficial owner of TPL shares through the Tessler LPs, asked Mr. Barry to consider Eric L. Oliver as a nominee to succeed Mr. Meyer. ¶ 25. Mr. Oliver is 60 years old and the President of SoftVest Advisors, LLC, a registered investment adviser that provides services to clients with investments in oil and gas minerals and royalties. SoftVest L.P., a SoftVest Advisors client, is TPL's fourth-largest investor. ¶ 13; AC Ex. D at 10. Messrs. Barry and Norris requested that Mr. Oliver provide a short bio, which Mr. Oliver delivered on February 28, 2019. ¶ 26; AC Ex. C at 5.

On March 4, Incumbents announced their nomination of 39-year-old Preston Young to a lifetime appointment as trustee, but did not disclose that Mr. Young is the regional managing partner of a company that manages buildings owned by Sidra Real Estate, Inc., where Mr. Barry is President. RJN Ex. 1 at 2-3, 13; AC Ex. C at 3-4. Incumbents stated that "the Trust will call a special meeting . . . to be held in Dallas, Texas, on May 8, 2019." ¶¶ 26, 37; RJN Ex. 1 at 2.

There is no evidence that, prior to nominating Mr. Young, Incumbents required Mr. Young to complete the 66-page questionnaire attached to their Amended Complaint. Incumbents likewise did not send Mr. Oliver any questionnaire or request that he complete one so that they could ascertain if he was qualified to be a trustee. Instead, Incumbents acknowledged in an email to Mr. Oliver that he was one of several "qualified candidates." EO Ex. B.

III. On March 15, 2019, Owners Of More Than 25% Of TPL's Shares Publicly Disclose An Agreement To Support The Election Of Mr. Oliver As Trustee

On March 15, 2019, SoftVest publicly disclosed in a Schedule 13D filing its nomination of Mr. Oliver for trustee, ¶ 27, and its intent to "solicit proxies from beneficial owners of Shares to vote for the election of Mr. Oliver." RJN Ex. 55 at 9. SoftVest further disclosed that it had

entered into a "Cooperation Agreement" with the Tessler LPs and Horizon, TPL's largest shareholder, to support the election of Mr. Oliver (collectively, the "Investor Group"). *Id.* Horizon has owned TPL shares since 1994, SoftVest since 2004, and the Tessler LPs since 2015. As disclosed in the March 15 filing, Horizon owns approximately 23.2% of TPL's shares, and Mr. Oliver, SoftVest, and the Tessler LPs own approximately 2% of TPL's shares. *Id.*

IV. Incumbents Assemble A Team Of Professional Advisors To Wage A Proxy Contest Against Mr. Oliver

Although TPL's DoT limits incumbent trustees' role in an election to calling and noticing a special shareholder meeting, AC Ex. 1, § 3, and contains no provision authorizing incumbent trustees to impose their preferred candidate on TPL's shareholders, Incumbents promptly assembled a team of professional advisors to defeat Mr. Oliver, including two law firms (Kelley Drye and Sidley Austin), an investment bank (Stifel), a proxy solicitation firm (MacKenzie Partners), and a public relations firm (Abernathy MacGregor). EO Decl. ¶ 13.

On March 25, TPL announced it was postponing the special shareholder meeting, which had not yet been formally called and noticed, from May 8 to May 22. ¶ 37. Although TPL's March 25 press release claimed the postponement was needed to "provide the Trustees with sufficient time to consider [Mr. Oliver's] nomination," RJN Ex. 2 at 4, Sidley Austin sent out a tweet the next morning announcing that the firm had been hired to represent TPL "in its #proxycontest defense against a group of dissident shareholders." EO Ex. E.

On March 25, SoftVest filed with the SEC a 31-page preliminary proxy statement. RJN Ex. 56. Line item disclosures in the filing included, *inter alia*, information about the members of the Investor Group and other participants in the solicitation, TPL securities owned by Investor Group members, itemized trades for the last two years, potential conflicts of interest, the Investor Group's solicitation of proxies, and any relationships with TPL. *Id.* The information disclosed

in the filing was the product of extensive discussions between Investor Group members and their securities counsel, as well as Mr. Oliver's completion of a 42-page questionnaire prepared by securities counsel. EO Decl. ¶¶ 14–15. The SEC's Division of Corporation Finance reviewed the filing and afforded Incumbents and their counsel the opportunity to provide complaints and criticisms of the disclosures in the filing. Indeed, Sidley Austin touts that its "Shareholder Activism Defense Team" routinely prepares "SEC poison pen letters in respect of [alleged] violations of securities laws" by shareholders. EO Ex. F at 5. Following the review period, the SEC provided SoftVest written comments to the preliminary filing to facilitate the filing of a definitive proxy statement for Mr. Oliver's candidacy that would be responsive to, and compliant with, the extensive disclosure requirements under SEC Regulation 14A. EO Decl. ¶ 16.

At 11:00 p.m. on March 27, 2019, Sidley Austin and Kelley Drye emailed Mr. Oliver a 66-page "Trustee Questionnaire." ¶ 41; AC Ex. F; EO Ex. G. Although Sidley Austin announced on March 26 that it had been hired to represent TPL in a proxy contest *against* Mr. EO Ex. E, the questionnaire stated that its purpose was to collect information for "preparation of [TPL's] Proxy Statement," as if Incumbents were considering filing a proxy statement to support Mr. Oliver's candidacy. AC Ex. F at 1. The next day, however, March 28, TPL filed a preliminary proxy statement stating that "[t]he Trustees do not endorse Mr. Oliver" and "strongly recommend" that shareholders elect Mr. Young. RJN Ex. 3 at 3. TPL's preliminary proxy statement did not mention Mr. Young's business relationships with Mr. Barry. *Id.*

In a March 28 letter, Mr. Oliver called out Incumbents for attempting to impose an onerous new burden as part of their proxy campaign against him:

> I am confused as to why you would now — after previously summarily rejecting my candidacy in less than four days — want to try to re-write history by having your lawyers send to me the attached questionnaire. You already made a decision regarding my nomination and your intent to oppose it. . . .

> I hope we can have a measured dialogue in which both sides can explain their view as to who will make for a better trustee and the substantive ideas underlying our respective platforms. I also invite that we continue a direct dialogue, as we have in the past, instead of having to go through your multiple outside advisors.

RJN Ex. 57 at 4; ¶¶ 41, 80. Incumbents did not respond to Mr. Oliver's letter. EO Decl. ¶ 25.

V. Incumbents File A Definitive Proxy Statement, Provide Notice Of A May 22, 2019 Special Meeting To Elect A Successor Trustee, And Solicit Proxies To Vote For Their New Nominee, Donald G. Cook

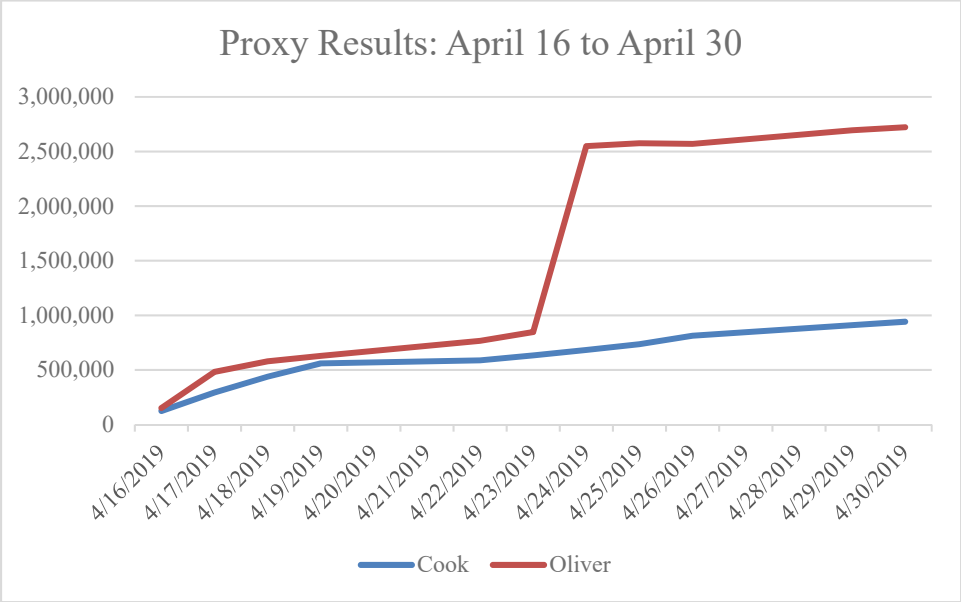
On April 8, 2019, Incumbents filed a definitive proxy statement and provided notice that a special meeting of shareholders would be held "on May 22, 2019 at 10:00 a.m. Central Time in Room 20502 of the offices of Sidley Austin LLP at 2021 McKinney Avenue, Suite 2000, Dallas, TX 75201." RJN Ex. 4 at 2. The proxy statement did not mention Mr. Young, and instead identified retired General Donald G. Cook as their nominee. *Id.*

Although Incumbents' 40-page proxy statement purported to detail all interactions between TPL and the Investor Group going back to 2016 and all the reasons for Incumbents' recommendation that TPL's shareholders reject Mr. Oliver, it made no reference to the 66-page "Trustee Questionnaire" sent to Mr. Oliver and did not so much as suggest that Mr. Oliver would be "disqualified" as a candidate if he did not complete the questionnaire. *Id.*

Instead, between April 8 and May 22, Incumbents filed at least 49 different proxy solicitation materials that attacked Mr. Oliver's character directly and through innuendo, RJN Exs. 4-52, including press releases, letters, tweets, presentations, and a video. *See*, *e.g.*, RJN Ex. 32 at 6 ("DID YOU KNOW that Eric Oliver refused to provide any answers to his . . . criminal history, and bankruptcies?"); Ex. 36 at 3 ("Mr. Oliver has displayed a worrying lack of concern for proper governance, transparency and legal compliance"); Ex. 29 at 3 ("HERE ARE JUST A FEW OF THE THINGS MR. OLIVER HAS NOT TOLD YOU ABOUT HIMSELF").

VI. Incumbents Attempt To Postpone The May 22 Special Meeting To June 6 To Buy More Time For Their Proxy Campaign Against Mr. Oliver

During a contested proxy solicitation, most beneficial owners of a security cast their votes by providing their preferred voting form to Broadridge, which, in turn, provides each side interim voting results. EM Decl. ¶¶ 12–13. As proxy votes for the election were submitted to, collected, and tabulated by Broadridge, it quickly became clear that TPL's shareholders overwhelmingly preferred the Investor Group's nominee, *id.* ¶¶ 14–15:



On May 1, 2019, the Investor Group issued an open letter that prophetically stated:

> **[W]e now strongly believe that if it becomes clear that Eric Oliver will receive the most votes, the incumbent Trustees and their advisors will concoct one or more excuses to adjourn or even postpone (again) the special meeting scheduled for later this month.** After all, any prolonged election contest will continue the wasteful spending of money in lawyers, bankers, proxy solicitors, social media ads, web designers and press agents that comes out of shareholders pockets, not management's.
>
> **We call on the incumbent Trustees to immediately commit to hold a vote on May 22, 2019, consistent with the notice of meeting previously published.**

EO Ex. I at 4.

Receiving no response, the Investor Group made a follow up request on May 6, 2019:

> [W]e did not see an answer to the simple question we posed to the incumbent Trustees last week: **Will the incumbents publicly commit today to bring the Trustee election to a vote of shareholders on May 22, 2019 regardless of whether General Cook is at that time ahead in the vote count?**
>
> Many shareholders are making travel plans to attend the scheduled meeting. They – and every other shareholder – deserve to know that the incumbents are committed to holding a vote, as scheduled, at 10:00am on May 22nd regardless of who is ahead in the vote count at that time. **We are asking the incumbents to publicly commit today to bring this matter to a vote on May 22.**

EO Ex. J at 4.

On May 8, Incumbents announced they would convene the May 22 special meeting as noticed, but would not allow TPL's shareholders to cast their votes on May 22; instead, the meeting would immediately be adjourned until June 6, 2019. RJN Ex. 39 at 2. Incumbents claimed the adjournment was needed because the SEC had "required" them to supplement their proxy statement, *id.*, but two days later, Incumbents admitted that the filing of their supplement was voluntary and made "out of an abundance of caution." RJN Ex. 42 at 4. The real reason for this "convene and adjourn" gambit was obvious: Incumbents were trying to postpone the inevitable. But under TPL's DoT, once a shareholder meeting to elect a successor trustee has been noticed, incumbent trustees are not empowered to adjourn, postpone, or otherwise delay the meeting without shareholder approval. AC Ex. A. To do so would require prior Court approval, which Incumbents never sought, much less received.

On May 8, shortly after announcing the "convene and adjourn" gambit, Mr. Barry sent representatives of the Investor Group an email indicating that Incumbents would veto any initiative that Mr. Oliver might bring until either of them died and a new trustee could be elected:

> [E]ven if you'd prevail in the election contest, you could not achieve any of your ultimate goals without our cooperation until another vacancy opens up (and it may be another decade until that happens).

JK Ex. A.

On May 10, the Investor Group publicly announced that (i) Incumbents lacked authority to "unilaterally postpone or cancel the Special Meeting, as it has already been properly called and noticed"; and (ii) it intended to "submit the Election Proposal to a vote of the holders of Shares present in person or by proxy at the Special Meeting on May 22, 2019." RJN Ex. 64 at 4.

VII. Incumbents Attempt To Interfere With Administration Of The Proxy Contest

In a contested proxy solicitation, Broadridge typically delivers to each side an official vote prior to the scheduled shareholder meeting. EM Decl. ¶ 17. On May 16, the Investor Group learned that Incumbents had instructed Broadridge not to release an official vote to the Investor Group in advance of the May 22 meeting. *Id.* ¶¶ 19–20. If followed, Incumbents' instructions would have prevented the Investor Group from having available at the meeting any of the proxies that had been solicited, including those opposing any motion to adjourn the meeting. *Id.* ¶ 21. On May 20, after investigating and extensive discussions with both sides, Broadridge indicated it would deliver the formal totaled proxy vote before the May 22 meeting. *Id.* ¶ 22. Because Incumbents were running out of options to delay the vote, they determined to employ even more extreme improper measures.

VIII. Less Than A Week Before The May 22 Special Meeting, Incumbents Claim For The First Time That They Can Disqualify Mr. Oliver From Election

On the evening of Thursday, May 16, Incumbents abruptly declared in a public letter that Mr. Oliver's failure to respond to Incumbents' 66-page "Trustee Questionnaire" would "disqualify [him] from serving as a trustee." RJN Ex. 46 at 3. Incumbents' May 16 letter also demanded that Mr. Oliver provide by Monday, May 20, answers to various questions about Mr. Oliver's professional and family background. *Id.* at 5.

Neither the preliminary proxy statement Incumbents filed for SEC review and comment, Incumbents' definitive proxy statement, nor any of the more than 40 proxy materials filed by

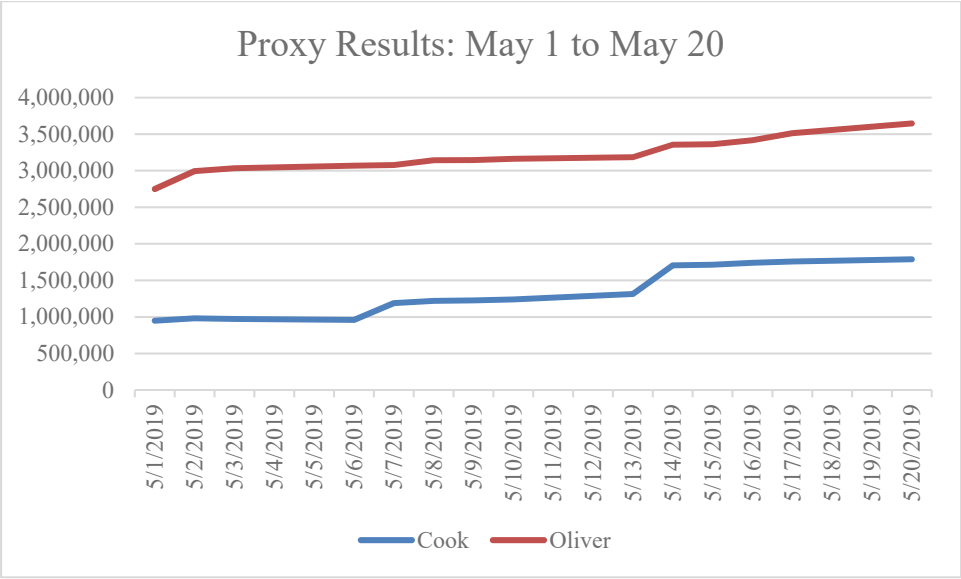
Incumbents in the six weeks prior to the May 16 letter suggested that Incumbents could simply veto a candidate they deemed "disqualified." RJN Exs. 3-45.

On May 20, Mr. Oliver provided a response to each of the questions in Incumbents' letter regarding his professional and family background. RJN Ex. 65. With respect to Incumbents' suddenly rekindled interest in the "Trustee Questionnaire," Mr. Oliver stated:

> Your May 16, 2019 letter very vaguely implies that completion of your questionnaire is a pre-requisite to serve as trustee of TPL. This is not a position you had previously stated, and is certainly nowhere disclosed in your public filings, which raises a host of historical disclosure and fiduciary issues for you and your predecessor trustees and their estates. . . .
>
> **If you indeed currently take the position that you must demand a [response to the] questionnaire, I assume your legal counsel has conducted extensive legal research in support of such claim. In order to expedite this dialogue and reduce costs to TPL, I respectfully request that you provide me and all shareholders with legal authority, such as case law or treatises, APPLICABLE TO TPL, that support such claim.**

RJN Ex. 65 at 7 (emphasis added).

Neither Incumbents nor their counsel provided any legal authority or other feedback in response. On the night of May 20, Broadridge provided a voting summary showing Mr. Oliver still had an insurmountable lead over Incumbents' nominee, EM Decl. ¶ 16:



IX. On The Eve Of The May 22 Special Meeting, Plaintiffs File This Lawsuit And Attempt To Indefinitely Postpone The Meeting

On the afternoon of May 21, less than 24 hours before the noticed special meeting at 10:00 a.m. CT on May 22, Incumbents filed this lawsuit. Although the Complaint asserted disclosure claims under the Securities Exchange Act of 1934, its allegations were not based on new discoveries in the days just before the meeting. Incumbents had publicly raised their unfounded allegations—about "hidden" group members and supposedly misleading disclosures—almost a month before in a presentation they filed with the SEC on April 29, RJN Ex. 27, and recycled many of them in later press releases and talking points. *E.g.*, RJN Exs. 53, 54. With the material allegations in the Complaint having previously been disclosed and used against the Investor Group in public SEC filings, TPL's shareholders had full knowledge of Incumbents' allegations and were fully capable of considering them when deciding how to vote.

Minutes after filing suit, Incumbents announced—after a number of TPL shareholders had already left their homes to travel to Dallas for the May 22 meeting—that they had postponed the meeting "until further notice." RJN Ex. 50. And in a cynical attempt to intimidate Mr. Oliver, Incumbents had an agent personally serve Mr. Oliver's wife at her residence four hours after the papers had been emailed to Mr. Oliver. EO Decl. ¶ 48.

Although Incumbents' May 21 press release claimed that "in no way" was it their "goal to prevent shareholders from having their say" about whether Mr. Oliver should be elected as trustee, RJN Ex. 51, the Complaint professed Incumbents not only had the power, but also a duty, to veto Mr. Oliver's candidacy if they deemed him "disqualified." Compl. ¶¶ 114–15.

On May 21, the Investor Group "publicly filed with the SEC a copy of the Trustees' disclosure complaint so shareholders c[ould] review it on their own." AC Ex. I; RJN Ex. 66. The

Investor Group also reiterated that Incumbents had no authority to adjourn the May 22 special meeting, and that they would move forward with the election as scheduled. AC Ex. I; ¶ 47.

X. At The May 22 Special Meeting, TPL's Shareholders Overwhelmingly Vote To Elect Mr. Oliver As Trustee

On the morning of May 22, Incumbents' legal counsel sent Mr. Oliver an email stating that it would be "unlawful" if he were to "attempt to enter Sidley's offices" for the scheduled special meeting. EO Ex. L. After Sidley Austin refused to allow any TPL shareholders into the elevator bank for its offices, the building owner directed that Mr. Oliver and other TPL shareholders be allowed to meet at a conference room on the fifth floor of the building. *Id.* ¶ 53. As dozens of shareholders arrived, building security and Sidley Austin's office manager directed them to the conference room in an orderly and open manner. *Id.* ¶ 54.

The May 22 special meeting was convened at 10:00 a.m. CT, and video recorded. *Id.* ¶ 55. Several of Incumbents' attorneys attended the meeting. *Id.* ¶ 57. As reflected in the video recording, Incumbents' attorneys provided shareholders copies of the Complaint in this lawsuit and asked shareholders dozens of questions in an attempt to dissuade them from voting for Mr. Oliver. *E.g.*, EO Ex. M at 3:30–5:10, 9:10–9:32; 12:50–13:27; 17:13-19:05. Incumbents' attorneys also claimed that shareholders and proxies representing 5.5 million of TPL's 7,756,156 outstanding shares would be required for a quorum, *id.* at 22:50, but, when asked, were unable to identify any purported quorum requirement in TPL's DoT. *Id.* at 52:45–53:00.

As also reflected in the video recording, a motion was made, seconded, and approved for Mr. Oliver to chair the meeting. *Id.* at 1:45–2:25; 9:34-9:45. Mr. Oliver then commenced the process for electing a successor trustee. *Id.* at 9:50-10:06. Mr. Oliver solicited nominations for additional candidates other than General Cook and himself; no such nominations were made. *Id.* at 10:25 – 10:50. Then, after a duly sworn inspector of election was appointed, shareholders cast

their votes. *Id.* at 13:35–13:58; 20:57–21:08; 22:05–22:22.[3] The Investor Group's proxy holder, Ed McCarthy of D.F. King & Co., Inc., acted as proxy on behalf of the holders of 3,731,756 shares (48.1% of all outstanding shares). EM Decl. ¶ 23. Per shareholders' instructions, Mr. McCarthy voted 3,660,812 shares (47.2% of all outstanding shares) in favor of Mr. Oliver's election, 57,725 shares (0.7%) against, and 13,219 shares (0.2%) as abstaining. *Id.*.

Although Broadridge had delivered a final proxy card to Incumbents the night before the May 22 meeting, Incumbents chose not to vote their proxies at the meeting. *Id.* ¶ 25. As a result, Mr. Oliver received 98.1% of the votes cast by shareholders present in person or by proxy at the meeting. *Id.*. The outcome would not have been any different if Incumbents had voted their proxies. Per standard protocol, Broadridge delivered to Mr. McCarthy a copy of the official proxy card it had delivered to Incumbents, which showed that only 1,994,267 shares (25.7% of all outstanding shares) had been voted in favor of General Cook's election. *Id.* ¶ 21; AC Ex. K. An additional 222,411 shares (2.9%) had been voted against General Cook's election on Incumbents' card, and 8,513 shares (0.1%) had abstained from voting. EM Decl. ¶ 21. Between the 47.2% of shareholders who voted for Mr. Oliver on the Investor Group's card and the 2.9% who voted against General Cook on Incumbents' card, a majority (50.1%) of all outstanding shares had affirmatively rejected General Cook's candidacy. *See id.* ¶¶ 23, 26.

XI. Plaintiffs File An Amended Complaint To Invalidate The Shareholder Vote And Purport To Indefinitely Suspend The Proxy Solicitation

Following the May 22 meeting, Incumbents filed an Amended Complaint, seeking to have the votes cast at the May 22 meeting deemed "invalid, null, and void." ¶ 117. Moreover, to press the fiction that there was never any vote, notwithstanding that Incumbents solicited proxies

[3] Further underscoring that Incumbents never intended to have an election, TPL never hired an inspector of elections for the noticed May 22 meeting; as a result, the Investor Group was required to provide for one.

for more than six weeks and had their legal counsel attend the May 22 special meeting, Incumbents have issued press releases to "remind shareholders that the proxy solicitation is suspended while the litigation is pending," RJN Ex. 54 at 5, but that "shareholders may revoke any previously-submitted proxies at any time by delivering a written notice." EO Ex. N at 18.

XII. In June 2019, The Investor Group Learns That Mr. Barry Was Never Duly Elected A TPL Trustee

On June 12, 2019, the Investor Group learned that Mr. Barry was never duly elected a TPL trustee. Here is the background. At a January 12, 2017 special meeting, Mr. Barry was the only candidate for a vacant trustee position. According to TPL, 6,905,319 shares were present in person or by proxy at the meeting, of which 4,421,776 voted for Mr. Barry and 2,483,543 voted against him. EO Ex. O. Because it appeared he had received votes from a majority of "holders present in person or by proxy," AC Ex. A, § 3, Mr. Barry was declared to be a new TPL trustee.

The Investor Group learned through a June 12 email from an NYSE representative that the shares voted in favor of Mr. Barry's election were *not* all lawfully cast by "holders present in person or by proxy" at the January 2017 meeting; instead, many were improperly cast by retail brokers—through which more than 60%, or nearly 5,000,000, of TPL's shares are held, EM Decl. ¶¶ 27–28—acting without authorization from the holders of those shares. NYSE Rule 452 permits brokers to cast votes on "routine" proposals without direction from the beneficial owners of the shares, but brokers are not permitted to vote without shareholder instruction on "non-routine" matters, such as the election of a trustee. In a June 12 email, a NYSE representative confirmed that the January 2017 election was, at the time, erroneously classified as a "routine" proposal. JK Ex. B. This is an error that should have been apparent to TPL and its proxy solicitor in 2017, but was never reported to shareholders or, apparently, the NYSE. As a result, many votes for which shareholders had provided no proxies were improperly cast for Mr. Barry.

XIII. Incumbents Form An "Exploratory Committee" Comprised Of Mr. Norris And Three Individuals Who Were Never Elected By TPL's Shareholders

On June 24, 2019, Incumbents announced that they had formed a "Conversion Exploration Committee" to provide them a non-binding advisory recommendation on whether TPL "should be converted into a C-corp," as the Investor Group has been advocating, or instead "should remain a business trust," as Incumbents desire. EO Ex. N. The advisory committee is comprised of Mr. Norris and three individuals who were never elected by TPL's shareholders—(i) Mr. Barry; (ii) General Cook, whose proposed election as trustee was affirmatively rejected by holders of a majority of TPL's shares; and (iii) Dana McGinnis, who, in an April 25 press release publicly denounced Mr. Oliver as "incompetent" and rejected as "nonsensical" any suggestion that TPL consider "converting the Trust into a Delaware Corporation." RJN Ex. 72.

ARGUMENT

"[T]he right of shareholders to vote for the trustees of a business trust is one of the most important rights arising from stock ownership." *Brigade*, 995 N.E.2d at 72. Here, Incumbents have vested Mr. Barry, an individual who was not duly elected, with all the powers of a trustee, and deprived TPL's shareholders of a duly elected trustee, Mr. Oliver. As explained below, Incumbents have taken actions that far exceed their authority under TPL's DoT and breached their fiduciary duties to TPL's shareholders. The Court should (i) enter a declaratory judgment to restore and confirm TPL shareholders' rights; and (ii) grant a preliminary injunction to prevent Incumbents from further abrogating TPL shareholders' rights.

I. Incumbents Breached Their Duties And Violated TPL Shareholders' Rights In Connection With The May 2019 Election Of A Successor Trustee

The powers of TPL's trustees are limited to those specified in TPL's DoT. Indeed, "[i]t is a principle in the law of trusts that the directions contained within the trust agreement are the sole guide to the conduct of the trustee. It is to the trust agreement and to that only to which he

must look for his orders and which orders, in the absence of conferred discretionary powers, he must strictly follow without question or hesitation." *Bryson v. Bryson*, 62 Cal. App. 170, 175, 216 P. 391, 393 (Cal. Ct. App. 1923). Thus, courts do not, and should not, "add to, subtract from, amend, reform, revise, or rewrite" trust agreement provisions. *Archer v. Moody*, 544 S.W.3d 413, 417 (Tex. App. 2017).[4]

Moreover, "[h]igh fiduciary standards are imposed upon trustees, who must handle trust property solely for the beneficiaries' benefit." *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009); *see also Wallace v. Malooly*, 122 N.E.2d 275, 279 (Ill. 1954) (explaining that trust managers of a business trust were obligated to act with the "highest degree of fidelity and with utmost good faith toward the beneficiaries"). Trustees owe a duty of loyalty—meaning trustees cannot allow their personal interests to prevail over the interests of shareholders. *See Pinnacle Data Servs., Inc. v. Gillen*, 104 S.W.3d 188, 198–99 (Tex. App. 2003).

Here, in connection with the May 2019 election, Incumbents took actions that are unauthorized under TPL's DoT and breached their fiduciary duties to TPL's shareholders.

A. Incumbents Have No Authority To Indefinitely Adjourn And Postpone A Special Meeting Of Shareholders To Elect A Successor Trustee

TPL's DoT provides that, when a trustee resigns, "a successor shall be elected at a special meeting of the certificate holders by a majority in the amount of the certificate holders present in person or by proxy at such meeting . . ." AC Ex, A, § 3. On April 8, 2019, Incumbents provided notice that a special meeting of TPL shareholders to elect a successor to Mr. Meyer would be held in Dallas "on May 22, 2019 at 10:00 a.m. Central Time." RJN Ex. 4. But on the afternoon

[4] *See also In re Trimble's Estate*, 119 A.2d 51, 52 (Pa. 1956) (courts should "strictly construe[]" trust provisions related to the "appointment [of a trustee's] successor"); BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 532 ("Any power to appoint conferred by the trust instrument must be exercised strictly according to its terms."); REST. (SECOND) OF TRUSTS § 108 cmt. f ("A power to appoint trustees conferred by the terms of the trust can be exercised only under the circumstances and in the manner provided by the terms of the trust.").

of May 21, less than 24 hours before the special meeting was scheduled to begin, Incumbents issued a press release purporting to indefinitely postpone the meeting. RJN Ex. 50.

Incumbents had no authority to indefinitely adjourn and postpone the May 22 meeting. TPL's DoT mandates a "special meeting of the certificate holders" where "a successor shall be elected." AC Ex. A, § 3. Once this meeting is noticed, it must be held. The DoT expressly grants the trustees certain limited powers,[5] but does not authorize the trustees to unilaterally postpone or cancel a special meeting to elect a successor trustee. Similarly, the DoT expressly confers the trustees with discretion as to certain matters,[6] but does not confer the trustees with discretion to unilaterally postpone or cancel a special meeting to elect a successor trustee. *See Archer*, 544 S.W.3d at 417 (courts cannot "add to" the terms of a trust instrument).

Moreover, Incumbents' attempt to indefinitely postpone the May 22 special meeting should be recognized for what it is—a ploy to prevent the TPL shareholders' preferred candidate from being recognized as a TPL trustee. That is flatly inconsistent with Incumbents' fiduciary duties to TPL's shareholders. Because "the right of shareholders to vote for the trustees of a business trust is one of the most important rights arising from stock ownership," any "[d]elay in holding a shareholder election diminishes [those] electoral rights." *Brigade*, 995 N.E.2d at 72–73. Here, by purporting to indefinitely postpone the May 22 special meeting to elect a successor trustee, Incumbents are trampling on the electoral rights of TPL's shareholders.[7] *See Silverman*

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5 *See*, *e.g.*, AC Ex. A, § 1 (authorizing trustees "to borrow . . . money as they shall deem necessary" for certain activities and "to employ such agents, attorneys, and servants as they may think necessary"); *id.* § 6 (authorizing trustees to call "[m]eetings of the certificate holders . . . whenever said trustees shall deem it necessary").

6 *E.g.*, AC Ex. A, § 7 (dividends "shall be paid by the trustees in their discretion" when funds are available); *id.* § 9 (trustees "may in their discretion take such action as they may deem advisable . . . to form a corporation").

7 For an emergency, Incumbents could have sought court approval to temporarily postpone the special meeting. Or they might have asked the shareholders to act to do so. But they did not because their desire to avoid recognizing Mr. Oliver as the TPL shareholders' preferred candidate does not constitute an "emergency" that justifies suspending the shareholders' electoral rights.

v. Gibert, 185 So. 2d 373, 376 (La. Ct. App. 1966) ("[T]he board of directors possessed no authority to perpetuate themselves in office by an indefinite postponement of the meeting without the consent of the shareholders.").

B. Incumbents Have No Authority To Disregard The May 22 Shareholder Vote Electing Mr. Oliver A TPL Trustee By A Nearly 2-To-1 Margin

TPL's DoT states that a successor trustee must be elected at a "special meeting," and the election must be by "a majority in the amount of the certificate holders present in person or by proxy at such meeting." AC Ex. A, § 3. When those conditions are met, the DoT requires the remaining trustees to recognize the valid election of a successor trustee. *Id.*

Here, Mr. Oliver was duly elected a successor trustee. On April 8, 2019, Incumbents provided notice to TPL shareholders that they had "called a special meeting of holders of Sub-share Certificates of Proprietary Interest . . . of Texas Pacific Land Trust" to be held in Dallas on May 22, 2019 "to elect a Trustee to fill the vacancy left by Mr. Maurice Meyer III." RJN Ex. 4. At the May 22 special meeting, a duly-sworn inspector of election was appointed; polls were opened; and votes were cast. EO Ex. M at 13:35–13:58; 20:57–21:08; 22:05–22:22. Mr. Oliver received a majority of the votes cast by shareholders present in person or by proxy at the meeting. EM Decl. ¶ 25. In addition, a majority of all of TPL's outstanding shares rejected General Cook's candidacy. *See id.* ¶¶ 23, 26.

Rather than recognize Mr. Oliver as a trustee, Incumbents claim the May 22 special meeting "failed to meet the quorum requirement." ¶ 52. But Incumbents fail to identify any "quorum requirement" in the DoT. *Id.* At the May 22 meeting, Incumbents' counsel likewise could not identify any quorum requirement in the DoT. EO Ex. M at 52:45. The DoT imposes a single voting-related requirement for trustee elections: a candidate must receive "a majority in the amount of the certificate holders present in person or by proxy." AC Ex. A, § 3. There is no

quorum requirement. *Id.* The DoT contains implied quorum requirements for other matters,[8] but not for trustee elections. Incumbents thus had no authority to impose a "quorum requirement." *See PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 708 (Tex. App. 2011) ("The use of different language in different parts of a contract generally means that the parties intended different things."); *Poole v. W. 111th St. Rehab Assocs.*, 995 N.Y.S.2d 550, 551 (N.Y. App. Div. 2014) ("Nor did the absence of an express quorum requirement . . . in the partnership agreement preclude proxy votes from being cast on a resolution at a partnership meeting.").

Moreover, the only reason Incumbents' illusory "quorum requirement" was not met was because Incumbents deliberately withheld voting their proxies at the meeting. *Compare* ¶ 52, *with* McCarthy Decl. ¶¶ 25–26. Incumbents' sham within a sham—a deliberate effort to create a pretext for avoiding the election of a trustee nominated by TPL's shareholders—reflects their utter contempt for both the electoral rights of TPL's shareholders and their fiduciary duties to TPL's shareholders. *See Brigade*, 995 N.E.2d at 72–73; *Ditta*, 298 S.W.3d at 191.

Following an election, the DoT requires the "remaining trustees" to "make, execute, and deliver to the successor so elected such proper deeds or instruments of conveyance as shall be necessary in order to vest in him the same title which his predecessor had. . . ." AC Ex. A, § 3. Although Mr. Oliver was properly elected under the procedures set forth in the DoT, Incumbents have not "deliver[ed]" anything to Mr. Oliver other than a frivolous lawsuit.

C. Incumbents Have No Authority To "Disqualify" Mr. Oliver From Election

On May 16, 2019, just four business days before the May 22 special meeting, Incumbents abruptly declared that Mr. Oliver's failure to respond to the "Trustee Questionnaire" they sent

[8] *See*, *e.g.*, AC Ex. A, § 8 (sale or winding up of the Trust "must be authorized by a vote recorded in writing of at least three-fourths in amount of all the registered certificate holders"). By teeing this vote off the number of registered shares, the DoT implicitly mandates a minimum quorum of 75% of the outstanding shares.

more than seven weeks earlier on March 27, would "disqualify [him] from serving as a trustee." RJN Ex. 46. As already discussed, the DoT expressly grants trustees certain limited powers;[9] the power to disqualify a candidate is not one of them. Nor does the DoT impose on trustees a duty to review candidate qualifications. Instead, the DoT reserves for TPL's shareholders, through their vote, the power to determine which candidates are most qualified. AC Ex. A, § 3.

Incumbents purport to rely on the word "disqualification" in the DoT, but the sentence in which the word "disqualification" appears makes clear that it applies only to sitting trustees, not candidates: "In the event of the death, resignation or disqualification of any of the trustees a successor shall be elected at a special meeting . . ." AC Ex. A, § 3. That is why Incumbents' Amended Complaint and definitive proxy statement both refer to "disqualification" as something that may occur to a sitting trustee. ¶ 18 ("Upon election, trustees serve until 'death, resignation or disqualification.'"); RJN Ex. 3 at 12 ("The Declaration of Trust provides for three Trustees . . . They hold office until death, resignation or disqualification."). TPL's historical SEC filings likewise reflect that "disqualification" means a sitting trustees' "removal for cause." EO Exs. O at 3, P at 3, Q at 2, R at 2.[10]

The DoT does not grant incumbent trustees the power to "disqualify" candidates for a vacant trustee position. And with good reason; if such power were granted, incumbent trustees could perpetually veto the election of any candidate they do not support and disenfranchise TPL's shareholders. That kind of naked power grab would eviscerate Section 3 of the DoT,

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[9] *See*, *e.g.*, AC Ex. A, § 3 ("The trustees shall choose one of their number as chairman" and they "shall also choose a secretary"); *id.* § 4 ("The Trustees shall cause books to be kept . . ."); *id.* § 5 ("The trustees shall in the month of February in each year" file an annual report); *id.* § 6 ("The chairman of the trustees shall, if present, preside at all meetings of the certificate holders").

[10] Any attempted reliance by Incumbents on the Nominating, Compensation, and Governance Committee's charter would be misguided because the charter's provisions are "subject to the provisions of the Declaration of Trust," AC Ex. B at 1, which do not authorize incumbent trustees to determine for shareholders whether a candidate is qualified or otherwise disqualify a candidate from election.

which gives shareholders—and only shareholders—the right to choose a new trustee. *See also Brigade*, 995 N.E.2d at 72–73 ("The ability to nominate and elect different trustees is a crucial means for shareholders to prevent the entrenchment of poorly performing trustees.").

II. Although The Election Of Mr. Barry Was Based On A Significantly Tainted Vote, Incumbents Have Taken No Corrective Action And Improperly Continue To Vest Mr. Barry With All The Powers Of A Duly Elected Trustee

Elections must be "conducted with scrupulous fairness and without any advantage being conferred . . . to any candidate or slate of candidates." *van der Gracht de Rommerswael on Behalf of Rent-A-Ctr., Inc. v. Speese*, 2017 WL 9280071, at *28 (E.D. Tex. Aug. 11, 2017), *R&R adopted*, 2017 WL 4545929 (E.D. Tex. Oct. 12, 2017).

A unfair advantage was conferred to Mr. Barry in the January 2017 election of a successor trustee. Under NYSE Rule 452, a trustee's election is a "non-routine" proposal for which brokers may not vote without instructions from shareholders holding the voting rights. The election of Mr. Barry was erroneously classified a "routine" proposal, JK Ex. B, for which brokers may cast votes without shareholder instructions. As a result, retail brokers who hold more than 60% of TPL's shares, EM Decl. ¶ 28, routinely vote in favor of management proposals, *id*., and whom have no right to elect a trustee, cast votes for Mr. Barry's election without requisite shareholder instructions. "[T]he election was invalid and should be set aside." *Heffner v. Union Nat. Bank & Tr. Co.*, 639 F.2d 1011, 1018 (3d Cir. 1981); *see also Parshalle v. Roy*, 567 A.2d 19, 27 (Del. Ch. 1989) ("[T]he integrity of the entire proxy voting procedure necessarily and implicitly rests upon the premise that the agency relationship is genuine and, correlatively, that the proxy instrument accurately and reliably evidences that relationship.").

Heffner is instructive. There, proxies were voted for the election of board members in a manner not authorized by the holder of the shares. 639 F.2d at 1018. Because "the results of [a]

hypothetical election" that did not include the unauthorized voting of proxies were "impossible to ascertain," the Third Circuit "declare[d] the election invalid." *Id*. Similarly, in *Parshalle*, the court found that, where proxy votes were improperly included in determining the election of directors, "the appropriate remedy [was] a new election." 567 A.2d at 29.

Here, TPL accepted and counted the votes of retail brokers who simply had no authority from the beneficial owners of the shares to vote in favor of Mr. Barry's election. But rather than take any corrective action, such as a new election, Incumbents continue to vest Mr. Barry with all the powers of a duly elected trustee, in disregard of TPL shareholders' voting rights.

III. The Court Should Enter A Declaratory Judgment To Restore And Confirm TPL Shareholders' Rights

"Under the Declaratory Judgement Act, this Court has discretion to declare the rights and other legal relations of any interested party seeking such declaration." *Peck v. Asset Mgmt. Assocs., LLC*, 2018 WL 6573116, at *2 (N.D. Tex. Oct. 12, 2018) (citing 28 U.S.C. § 2201). A declaratory judgment procedure "is remedial and is to be liberally construed to achieve its wholesome and salutary purpose, which is to provid[e] [a] speedy and inexpensive method of adjudicating legal disputes without invoking coercive remedies." *Va. Sur. Co. v. Wright*, 2006 WL 8449559, at *3 (S.D. Tex. Nov. 9, 2006) (quotations omitted) (alterations in original).

Here, the disputes between Incumbents and TPL's shareholders are ripe for prompt resolution by declaratory judgment because the key facts underlying the disputes are uncontroverted and resolution of the legal issues underlying the disputes are fundamental to the governance of TPL and the rights of TPL's shareholders.

Following a "speedy hearing" pursuant to Fed. R. Civ. P. 57, the Court should enter a declaratory judgment to restore and confirm TPL shareholders' rights. The Investor Group requests a declaratory judgment that (i) TPL was required to hold a special meeting to elect a

trustee to succeed Mr. Meyer; (ii) Incumbents had no authority to unilaterally and indefinitely postpone the special meeting they had noticed; (iii) Incumbents have no authority to "disqualify" Mr. Oliver from election; (iv) the vote conducted at the May 22, 2019 special meeting was valid and Mr. Oliver has been duly elected a TPL trustee; and (v) the vote conducted at the January 12, 2017 special meeting was invalid and Mr. Barry has never been duly elected a TPL trustee.

IV. The Court Should Grant A Preliminary Injunction To Prevent Any Further Abrogation Of TPL Shareholders' Rights

The Investor Group also requests that the Court grant a preliminary injunction pursuant to Fed. R. Civ. P. 65 to prevent any further erosion of TPL shareholders' rights. In connection with the May 2019 election of a successor trustee, the Court should (i) prohibit Incumbents from taking any action on TPL's behalf without Mr. Oliver's participation as a fully empowered trustee; or (ii) prohibit Incumbents from any further unauthorized postponement of the election by requiring the previously scheduled May 22, 2019 special meeting of shareholders be reconvened within five days of entry of the injunction to allow any additional votes to be cast and the official results be confirmed and announced by TPL via press release or securities filing. In connection with the January 2017 election of a successor trustee, the Court should prohibit Mr. Barry from directly or indirectly taking any action on TPL's behalf until a new election can be held pursuant to the requirements of TPL's DoT.

In considering a motion for a preliminary injunction, a court must examine whether (i) there is a substantial likelihood the movant will prevail on the merits; (ii) there is a substantial threat of irreparable harm if no injunction is issued; (iii) the threatened injury if no injunction is issued outweighs the harm that would result if the injunction is granted; and (iv) the injunction will disserve the public interest. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

Here, all of the relevant factors weigh heavily in favor of injunctive relief.

A. Likelihood Of Success On The Merits

To demonstrate a "substantial likelihood of success on the merits," a movant "needs only to present a *prima facie* case, but not demonstrate that he is certain to win." *Allied Home Mortg. Corp. v. Donovan*, 830 F. Supp. 2d 223, 227 (S.D. Tex. 2011); *see also Janvey*, 647 F.3d at 595-96 (movant need not meet summary judgment standard). Where a movant asserts multiple claims, it need only present a *prima facie* case as to one of its claims. *See Texas v. U.S.*, 95 F. Supp. 3d 965, 981 (N.D. Tex. 2015) ("[B]ecause Plaintiffs have presented at least one claim on which they are likely to succeed, the Court concludes that Plaintiffs have met their burden . . .").

As discussed in Section I above, Incumbents have no authority to unilaterally and indefinitely postpone a special meeting to elect a successor trustee and no authority to disregard the shareholder vote at the May 22, 2019 special meeting electing Mr. Oliver a TPL trustee. Accordingly, the Investor Group is likely to prevail on its claims for breaches of the DoT and breaches of fiduciary duties in relation to the May 2019 election (Counts II and V of the Amended Counterclaims), as well as its claim for declaratory judgment that Incumbents were required to notice a special meeting to elect a trustee to succeed Mr. Meyer, that Incumbents' attempt to indefinitely postpone the May 2019 election was unlawful, and that Mr. Oliver was duly elected a trustee at the May 22 special meeting (Count I of the Amended Counterclaims).

As discussed in Section II above, the January 2017 election of Mr. Barry is irredeemably tainted by votes from brokers who had no authority to vote shares in Mr. Barry's favor. Accordingly, the Investor Group is likely to prevail on its claims for breaches of the DoT and breaches of fiduciary duties in relation to the January 2017 election (Counts II and V of the Amended Counterclaims), as well as its claim for declaratory judgment that the vote conducted at the January 12, 2017 shareholder meeting was invalid and that Mr. Barry has never been duly elected a TPL trustee (Count VII of the Amended Counterclaims).

B. Irreparable Harm

Incumbents have effectively disenfranchised TPL's shareholders by refusing to recognize their election of Mr. Oliver as a trustee, on the one hand, and vesting Mr. Barry, who was not duly elected, with all the powers of a trustee, on the other. "[C]orporate management subjects shareholders to irreparable harm by denying them the right to vote their shares and to exercise their rightful control over the corporation." *Danaher Corp. v. Chicago Pneumatic Tool Co.*, 1986 WL 7001, at *14 (S.D.N.Y. June 19, 1986). Moreover, Incumbents' refusal to recognize Mr. Oliver as a trustee also irreparably harms Mr. Oliver's "right to participate in [the] management" of TPL, a right that "has value in and of itself." *Wisdom Imp. Sales Co., L.L.C. v. Labatt Brewing Co., Ltd.*, 339 F.3d 101, 114–15 (2d Cir. 2003); *see also Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552, 563 (S.D.N.Y. 2006) ("Conduct that unnecessarily frustrates efforts to obtain or preserve the right to participate in the management of a company' may constitute irreparable harm") (citation omitted).

Courts have also had little trouble finding irreparable harm where, as here, "incumbent directors, having designated the date for [a shareholder] meeting and having solicited proxies on their behalf, on the eve of the meeting, . . . [attempted to] postpone[] the meeting." *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1208 (Del. Ch. 1987); *Wisdom Imp. Sales*, 339 F.3d at 114–15 ("Conduct that unnecessarily frustrates efforts to obtain or preserve the right to participate in the management of a company may also constitute irreparable harm."); *Int'l Banknote Co., Inc. v. Muller*, 713 F. Supp. 612, 623 (S.D.N.Y. 1989) ("[C]orporate management subjects shareholders to irreparable harm by denying them the right to vote their shares or unnecessarily frustrating them in their attempt to obtain representation on the board of directors."); *Pell v. Kill*, 135 A.3d 764 (Del. Ch. 2016) ("loss of voting power constitutes irreparable injury").

C. Balance Of Equities

"[T]he interests of corporate democracy," which would be served by the requested preliminary injunction, "have the greatest effect on the balance of the equities." *Pell*, 135 A.3d at 794. There would be no harm to Incumbents from honoring TPL shareholders' votes.

If a preliminary injunction is entered recognizing Mr. Oliver's valid election, Mr. Oliver "will only be able to assert influence equal to that of the other individual [trustees]." *Perelman v. Champion Parts Rebuilders, Inc.*, 1988 WL 67409, at *4 (N.D. Ill. June 17, 1988) (finding that the balance of harms weighed in plaintiff's favor where plaintiff sought to compel company to count votes in favor of his election to the board). Because Mr. Oliver cannot take any unilateral action, he "will not be able to unduly influence the direction of" TPL and his service as a trustee would not subject TPL to irreparable harm. *Id.*

Thus, even if the Court were to eventually determine that Mr. Oliver was not duly elected, and in the even more unlikely event that following such a determination a vote is held in which shareholders reverse course and do not elect Mr. Oliver, no harm will have been inflicted upon Incumbents. *Perelman*, 1988 WL 67409, at *4 (holding that a subsequent trial could render the plaintiff's election to the Board ineffective "without significant harm to defendants").

While Incumbents can claim no "hardship" or equities in their favor, TPL's shareholders, including the Investor Group, have critical franchise rights that will be trampled without judicial protection. *Aprahamian*, 531 A.2d at 1208 ("If the will of the stockholders is thwarted . . . there may be considerable hardship to the stockholders and their corporation."). Although Incumbents may feel threatened by Mr. Oliver's election, the "risk that stockholders may elect [a trustee] whom the incumbents disfavor is no harm at all." *Pell*, 135 A.3d at 794. Where, as here, the non-movants would suffer *no* harm at all, and the movant faces irreparable harm, the balance of

harms weighs decidedly in favor of a preliminary injunction. *Id*. ("Even when the incumbents themselves could be voted out of office, that fact does not support a claim of hardship.").

D. Public Interest

A preliminary injunction honoring the TPL shareholders' vote "will further the interests of corporate democracy and shareholder participation in the management of" TPL. *AHI Metnall, L.P. by AHI Kansas, Inc. v. J.C. Nichols Co.*, 891 F. Supp. 1352, 1360 (W.D. Mo. 1995) (public interest favored preventing enforcement of bylaw provisions requiring minimum shareholder interest before allowing nomination of director). A preliminary injunction would also end the ongoing delay Incumbents have caused and therefore serves the public interest by "enforc[ing] better business ethics by depriving the alleged wrongdoers of the benefit of their wrongdoing." *SPBS, Inc. v. Mobley*, 2018 WL 4185522, at *14 (E.D. Tex. Aug. 31, 2018). Indeed, the absence of an injunction would only undermine the will of TPL's shareholders, a result contrary to the public interest. *See Perelman*, 1988 WL 67409, at *5 (public interest is "well-served by an injunction which seeks to protect [shareholders'] rights to 'fair corporate suffrage' by ordering a recount of the votes tendered at the meeting").

CONCLUSION

For the foregoing reasons, Counterclaim Plaintiffs respectfully request that the Court grant their motion for a declaratory judgment and preliminary injunction. A proposed order is attached to the motion.

Dated: June 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2019, a true and correct copy of the foregoing document was served through the Court's CM/ECF System on all counsel of record.

/s/ Robert C. Walters
Robert C. Walters