COURT OF CHANCERY
OF THE
STATE OF DELAWARE

KATHALEEN ST. JUDE MCCORMICK
CHANCELLOR

LEONARD L. WILLIAMS JUSTICE CENTER
500 N. KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19801-3734

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Ned Weinberger
Mark Richardson
Derrick Farrell
Labaton Sucharow LLP
222 Delaware Avenue, Suite 1510
Wilmington, DE 19801

Kevin G. Abrams
Eric A. Veres
Stephen C. Childs
Abrams & Bayliss LLP
20 Montchanin Road, Suite 200
Wilmington, DE 19801

Peter B. Andrews
Craig J. Springer
David M. Sborz
Andrews & Springer LLC
4001 Kennett Pike, Suite 250
Wilmington, DE 19807

Re: *City of Dearborn Police and Fire Revised Retirement System (Chapter 23) et al. v. Brookfield Asset Management Inc. et al.*, C.A. No. 2022-0097-KSJM

Dear Counsel:

This letter supplements my June 9, 2023 bench ruling granting Defendants' motion to dismiss. It does not alter the outcome. I assume that the reader is familiar with the June 9 bench ruling, and I use the terms defined in that bench ruling in this supplemental decision.

In addition to their *MFW* arguments under Rule 12(b)(6), Defendants argued in the alternative that dismissal is appropriate pursuant to Rule 12(b)(1) under *In re Primedia Shareholders Litigation*.[1]

In briefing, Defendants stated that, "[s]hould the Court agree that the 2020 Acquisition satisfied the *MFW* framework, it need not address whether Plaintiffs have standing to assert a claim based upon the failure to value the Derivative Claims."[2] They cite to two cases for that proposition, neither of which dealt with the relationship between *MFW* and *Primedia*.[3] In the June 9 bench ruling, I treated the *Primedia* claim as a collateral attack on the sale process and, in that vein, addressed it as part of the *MFW* analysis. In finding that Plaintiffs failed to allege facts sufficient to impugn the Special Committee process, I effectively (and unartfully) rejected the *Primedia* argument.

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[1] 67 A.3d 455 (Del. Ch. 2013), *adopted by Morris v. Spectra Energy P'rs (DE) GP, LP*, 246 A.3d 121 (Del. 2021).

[2] C.A. No. 2022-0097-KSJM, Docket ("Dkt.") 28 ("Defs.' Opening Br.") at 55 (citing *Franchi v. Firestone*, 2021 WL 5991886, at *7 (Del. Ch. May 10, 2021) and *In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *8 (Del. Ch. Oct. 10, 2016)).

[3] My independent research revealed one case in which the relationship between *MFW* and *Primedia* was raised, although the court did not resolve the issue. In *In re AmTrust Financial Services, Inc. Stockholder Litigation*, Chancellor Bouchard held that *MFW*-prong two was not satisfied because special committee members had a material self-interest in a challenged transaction due to derivative claims against them that would be extinguished in a merger. 2020 WL 914563 (Del. Ch. Feb. 26, 2020). The defendants first raised their *Primedia* argument at oral argument on the motion to dismiss, contending that the plaintiffs lacked standing to the extent they relied on the special committee's valuation of the derivative claims, even if *MFW* did not result in dismissal. *See* C.A. No. 2018-0396-LWW, Dkt. 129. In his memorandum opinion, the Chancellor declined to address the *Primedia* argument because the defendants failed to fairly present it in briefing. *See Amtrust*, 2020 WL 914563, at *12 n.117.

It occurred to me while reviewing a transcript of my bench ruling that, for completeness, it would have been prudent to grapple with the *Primedia* argument more directly. I do so through this supplemental decision, concluding that Plaintiffs have failed to plead that the Private Placement Action was worth a material amount relative to the transaction.

Primedia provides a three-part test for evaluating a plaintiff's standing to bring direct claims challenging a merger based on a board's failure to obtain value for material derivative claims.[4] First, a plaintiff "must plead an underlying derivative claim that has survived a motion to dismiss or otherwise could state a claim on which relief could be granted."[5] Second, "the value of the derivative claim must be material in the context of the merger."[6] Third, "the complaint challenging the merger must support a pleadings-stage inference that the acquirer would not assert the underlying derivative claim and did not provide value for it."[7]

Defendants take aim at the second prong, arguing that Plaintiffs failed to adequately allege that the value of the Private Placement Action was material in the context of the Merger. "Where it is reasonably conceivable that the claim is material when compared to

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[4] Although "[t]he *Primedia* test . . . is an application of *Parnes* [*v. Bally Entertainment Corp.*, 722 A.2d 1243 (Del. 1999)]," *Goldstein v. Denner*, 2022 WL 1797224, at *3 (Del. Ch. June 2, 2022), I refer to it in this decision as the "*Primedia* test" as the parties did in briefing.

[5] *Primedia*, 67 A.3d at 477.

[6] *Id.*

[7] *Id.*

the merger consideration and could result in the damages pled in the complaint, the plaintiff has satisfied the materiality requirement at the motion to dismiss stage for standing purposes."[8] *Primedia* imposes a "stringent" standard "in light of the general rule that the derivative asset had transferred to the acquiror, and was not retained by the former stockholders."[9] Under *Primedia*, "[t]here is no bright-line figure for materiality."[10] This court can look to multiple guidelines to assess the materiality of a derivative claim in the context of a merger, including but not limited to the value of the derivative claim compared to the value of the deal.[11]

In an effort to plead facts sufficient to show materiality, Plaintiffs allege that the Private Placement Action challenging the $650 million Private Placement "could have resulted in a judgment exceeding $500 million," or 40% of the $1.25 billion in merger consideration.[12] Plaintiffs calculate the $500 million figure based on the difference between Terraform's stock price on the date of the Private Placement and the date of their January 29, 2020 and February 13, 2020 letters to the Board, which I discussed in the June

[8] *Morris*, 246 A.3d at 139.

[9] *In re Orbit/FR, Inc. S'holders Litig.*, 2023 WL 128530, at *3 (Del. Ch. Jan. 9, 2023).

[10] *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 164 (Del. Ch. 2023); *see also Morris*, 246 A.3d at 136 (Del. 2021) ("For example, a $10 million derivative claim could not reasonably be expected to be material to a $1 billion merger value. The same derivative claim would be material to a $20 million merger.").

[11] *See generally Goldstein*, 2022 WL 1797224, at *11 (describing measures of materiality, including the 5% figure as a "rough gage").

[12] Dkt. 24 (Am. Compl.) ¶ 220.

9 bench ruling. They argue that, since Brookfield relied on material nonpublic information in executing the Private Placement, disgorgement remedies might have been appropriate in the Private Placement Action.

Plaintiffs' disgorgement theory is not crazy. It is, however, woefully underdeveloped. Plaintiffs fail to say why the date of their letters to the Special Committee provide the right benchmarks for damages. Plaintiffs also fail to provide any further details on why the entirety of Terraform's stock price should be attributed to this alleged material nonpublic information. Plaintiffs seem to throw randomly large numbers onto the page and state "disgorgement," as if that is enough to meet the *Primedia* standard. It is not.

Other rough metrics of potential damages show that the value of the Private Placement Action was not material in the context of the Merger. Plaintiffs allege that the price that Brookfield paid for Terraform stock in the Private Placement was not the stock's fair value. Brookfield purchased 60,975,609 shares of Terraform stock for $10.66 per share in the Private Placement on June 11, 2018. That same day, Terraform's stock closed at $10.83. The difference in those figures with respect to the number of shares Brookfield purchased is around $10.37 million, or 0.8% of the merger consideration. It is even less if one factors in that the minority stockholders held only 38% of Terraform's outstanding stock.[13] I do not propose that this is the best method for valuing the Private Placement

[13] *See* Defs.' Opening Br. at 58, n.256.

Action; it is one method, which suggests that the value of the claims was not much in the context of the Merger.

Summing it up, Plaintiffs have failed to adequately plead materiality under *Primedia*'s second prong. As a result, they lack standing to bring direct claims challenging the fairness of the Merger based on the Special Committee's valuation of the Private Placement Action.

Sincerely,

/s/ Kathaleen St. Jude McCormick

Kathaleen St. Jude McCormick
Chancellor

cc: All counsel of record (by *File & ServeXpress*)