

JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071.2452

TELEPHONE: +1.213.489.3939 • FACSIMILE: +1.213.243.2539

DIRECT NUMBER: (213) 243-2382
BBENNETT@JONESDAY.COM

October 29, 2021

Via CM/ECF

Peter R. Marksteiner
Circuit Executive & Clerk of Court
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: FRAP 28(j) Letter filed by Plaintiffs-appellants in No. 20-1934
Regarding *Brookfield Asset Mgmt., Inc. v. Martin Rosson*, No. 406, 2020
(Del. Sept. 20, 2021)

Dear Mr. Marksteiner:

Plaintiffs-appellants (“Shareholders”) write to advise the Court of the decision in *Brookfield v. Rosson*, 2021 WL 4260639 (Del. Sept. 20, 2021). *Brookfield* overruled *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), and reaffirmed the *Tooley* rule of Delaware law for distinguishing direct and derivative claims. Although the decision thus rejected the “dual-nature” doctrine in corporate-overpayment cases, it reaffirmed that claims unique to shareholders—to redress injuries “not dependent on an injury to the corporation”—are direct. 2021 WL 4260693, at *17.

The Shareholders have, throughout, advanced three primary arguments for their standing. *First*, as a matter of federal law (with which Delaware law agrees), the claims they raise are unique to them. The Shareholders allege the Sweep Amendment took property that they alone owned—rights to receive dividends and liquidation preferences—leaving them with only pieces of paper. Jt. Br. §I.A (citing, among other authority, *Citigroup v. AHW*, 140 A.3d 1125 (Del. 2016)); Jt. Reply §III.B; Supp. Br. §II, at 9-10.

Second, the Shareholders can establish this harm independently of any harm to the Companies, making their claims also direct under *Tooley*, as reaffirmed in *Brookfield*. Their claim is not, as in *Brookfield*, that their shares indirectly lost value

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due to a bad corporate deal. The Sweep Amendment determined where money that was already leaving the Companies (as dividends) went—all to Treasury. The Shareholders lost their property regardless of whether that determination helped or harmed the Companies (and thus whether that determination also supports a derivative claim), and the proper remedy is damages to the Shareholders. Jt. Br. §I.B; Jt. Reply §III.C; Supp. Br. §II, at 10-12.

Third, under controlling federal law, a reallocation of equity among existing shareholders—shifting rights from one class to another, which need not affect the company—gives the disadvantaged class a direct claim. Jt. Br. §I.C; Jt. Reply §III.A; Supp. Br. § II, at 12-13.

None of this depends on *Gentile*. Thus, *Brookfield* confirms that the Shareholders' claims do not have to satisfy *Gentile* to be direct, and are direct here. *See* Jt. Br. §I.D, at 46–57; Jt. Reply §III.D.

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Respectfully,

/s/ Bruce S. Bennett

Bruce S. Bennett

JONES DAY

555 South Flower Street Fiftieth Floor

Los Angeles, California 90071

Telephone: (213) 489-3939

Facsimile: (213) 243-2539

bbennett@jonesday.com

– and –

Lawrence D. Rosenberg

C. Kevin Marshall

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Telephone: (202) 879-3939

Facsimile: (202) 626-1700

ldrosenberg@jonesday.com

ckmarshall@jonesday.com

Counsel for Plaintiffs-Appellants *Owl Creek Asia I, L.P., Owl Creek Asia II, L.P., Owl Creek I, L.P., Owl Creek II, L.P., Owl Creek Asia Master Fund, Ltd., Owl Creek Credit Opportunities Master Fund, L.P., Owl Creek Overseas Master Fund, Ltd., Owl Creek SRI Master Fund, Ltd.; Mason Capital L.P., Mason Capital Master Fund L.P.; Akanthos Opportunity Fund, L.P.; Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd.; and CSS, LLC*

cc: Counsel of record (via CM/ECF)

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 20-1934; 20-1936; 20-1938; 20-1954; 20-1955

Short Case Caption: Owl Creek Asia I, L.P. v. U.S.

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Date: 10/29/2021

Signature: /s/ Bruce S. Bennett

Name: Bruce S. Bennett