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Transaction ID 67257991
Case No. 2021-1094-SG

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| JB AND MARGARET BLAUGRUND FOUNDATION,<br><br>Plaintiff,<br><br>v.<br><br>GUGGENHEIM FUNDS INVESTMENT ADVISORS, LLC, TORTOISE CAPITAL ADVISORS, L.L.C., RANDALL C. BARNES, ANGELA BROCK-KYLE, DONALD A. CHUBB, JR., JERRY B. FARLEY, ROMAN FRIEDRICH III, THOMAS F. LYDON, JR., RONALD A. NYBERG, SANDRA G. SPONEM, RONALD E. TOUPIN, JR., and AMY J. LEE,<br><br>Defendants,<br>-and-<br><br>FIDUCIARY/CLAYMORE ENERGY INFRASTRUCTURE FUND,<br><br>Nominal Defendant. | C.A. No. 2021-1094-SG<br><br>**PUBLIC [REDACTED] VERSION AS FILED ON JANUARY 24, 2022** |

**VERIFIED AMENDED DERIVATIVE AND CLASS ACTION COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MONETARY RELIEF**

Plaintiff JB and Margaret Blaugrund Foundation ("Plaintiff") alleges the following upon knowledge as to itself and its own actions, and upon information and belief as to all other matters, based upon an investigation conducted by counsel, which included, among other things, review of materials obtained through (i) expedited discovery ordered by the Court in this action in connection with Plaintiff's motion for a preliminary injunction; (ii) three books and records demands pursuant to § 3819 of the Delaware Statutory Trust Act; (iii) public filings with the United States Securities and Exchange Commission ("SEC"); and (iv) publicly available sources, including press releases.

## I. INTRODUCTION

1. The Fiduciary/Claymore Energy Infrastructure Fund ("FMO" or the "Fund") is a closed-end fund that invests in master limited partnerships ("MLPs") in the energy infrastructure industry. It is overseen by its Board of Trustees (the "Board") and managed by its investment advisers—Guggenheim Funds Investment Advisors, LLC ("Guggenheim") and Tortoise Capital Advisors L.L.C., ("Tortoise") (together, the "Managers").

2. In early 2020, the Fund was leveraged beyond its historical maximum and more than virtually all other MLP funds with no effective liquidity controls and virtually no downside protection. When volatility began to increase modestly in February 2020—*i.e.*, before the so-called "double black swan" that would hit the oil markets in March—the Fund began to receive margin calls and the Managers began dumping securities into a declining market.

3. Between late February and March 2020, the Fund would sell most of its remaining portfolio and by the end of the first quarter would report losses of 81% of the Fund's net assets, roughly $185 million, while its benchmark declined only 24% during the period.

4. While the crisis unfolded, records show that the Board was oblivious to the Fund's meltdown. Indeed, while panic in the energy industry became more obvious in March, the Board did not ask how the Fund was getting by, despite holding a regular meeting.

5. The Board's conduct is shocking both on its own but also because some of the trustees had already overseen the collapse of a highly leveraged closed-end fund in 2008 when the Fiduciary/Claymore Dynamic Equity Fund ("HCE") lost 72% of its net assets in a two-month period (history repeats itself for Defendants Toupin, Nyberg and Barnes, who were trustees at the time).

6. HCE, like FMO, had "leveraged exposure" and "magnified downside exposure" to "massive potential losses if [its benchmark] declined rapidly or became very volatile," according to an SEC order requiring the adviser to pay $45 million to investors. Thus, Defendants Toupin, Nyberg and Barnes should have known first-hand the risks of carelessly managing the Fund's leverage and liquidity.

7. But even after learning that FMO's liquidity crisis was largely attributable to the excessive leverage that the Fund had been utilizing in comparison

to others, the Board took no remedial action. Rather, at the end of April 2020, the Board asked Guggenheim to present "strategic alternatives" to deal with the now-crippled Fund, which did not include recovering any losses incurred by shareholders.

8. After considering various options, Guggenheim concluded that liquidation was in the "best interests" of shareholders because the Fund was "persistently trading at a wide discount to its net asset value per share ("NAV") . . . and liquidation of the Fund would allow shareholders to realize NAV (less costs related to the liquidation)."

9. Guggenheim calculated that realizing the Fund's trading discount would provide a "net benefit" to shareholders even after costs, [redacted]

10. However, the night before the October 12, 2020 meeting at which the Board was to approve a liquidation, Guggenheim and its tax advisors at Ernst & Young ("EY") discovered an enormous oversight: the Fund's fire sale earlier in the year had resulted in millions of dollars of unaccrued taxes that had not been disclosed to investors.

11. Guggenheim immediately shut down the liquidation proposal and informed the Board that it would need to significantly restate the Fund's published NAV (although Guggenheim at the time still did not know by how much). Its tax

advisers would eventually determine that the unaccrued expenses were as high as "29 million to $34 million," and on November 13, 2020, the Fund announced that it was adjusting its NAV downward by 42%, resulting in a sell off of the Fund's shares.

12. The Fund ultimately paid more than $22 million in tax expenses in 2020 using its limited remaining assets, but still the Board took no remedial action.

13. By the end of 2020, the Fund had lost roughly $220 million in net assets because of the liquidity crisis and related tax expenses.

14. In early 2021, as the tax fiasco began to clear, Guggenheim returned to evaluating "strategic options" and was still prepared to recommend liquidation, until the extent of its liability exposure began to emerge.

15. In February 2020, Guggenheim hired Cornerstone Research ("Cornerstone") to assess its liability for the tax errors, and Cornerstone concluded that [redacted]. In addition, in early January, Guggenheim received an inspection demand from Plaintiff's counsel, which set forth a basis for claims relating to the NAV errors and deficient tax controls.

16. At this point, Guggenheim pivoted away from liquidation in favor of a transaction that would merge the Fund away, despite its prior analysis and

recommendation in support of a liquidation and its knowledge that the Board was "[redacted]."

17. This was because liquidation, as Guggenheim had informed the Board in October 2020, would entail [redacted] to reconcile the Fund's assets [redacted] and liabilities (including for the NAV error), and [redacted].

18. After the pivot to a merger transaction, no discussion of the "net benefits" of liquidation to shareholders—which had justified a liquidation as recently as October 2020—can be found in any of the minutes, memoranda, presentations or other Board records obtained in this action.

19. At the end of March, Guggenheim received a proposal from [redacted] to merge FMO into one of [redacted] funds, but that proposal acknowledged that through the transaction shareholders would be giving away the value of a liquidation. Thus, [redacted] proposed an accompanying tender offer that would permit shareholders who wanted to exit to sell shares back to the Fund at NAV.

20. Guggenheim rejected that proposal without consulting the Board because [redacted].

21. The next day, Guggenheim received a proposal from Kayne Anderson Capital Advisors, L.P. and its subsidiary KA Fund Advisors, LLC (together, "Kayne Anderson"), for a merger between FMO and the Kayne Anderson Energy Infrastructure Fund, Inc. ("KYN"), a comparable closed-end MLP fund (the "Merger").

22. That proposal expressly rejected the inclusion of a tender offer, but agreed to take the assets off of Guggenheim's hands for essentially the costs of doing the proxy solicitation for shareholder approval.

23. In late May 2021, Guggenheim brought the Kayne Anderson proposal to the Board. The Board did not retain outside advisers to evaluate the deal, but rather relied exclusively on Guggenheim, Guggenheim's counsel, and the Board's regular outside counsel.

24. Guggenheim set forth in a memorandum a range of justifications for the Merger, which ignored the potential "net benefits" of a liquidation for shareholders, despite that the trading discount continued to exceed 10%. At best, the memorandum presented a one-sided argument against liquidation by citing "certain tax liability (*i.e.* 751 recapture)" that Guggenheim had not even quantified.

25. Guggenheim also touted "synergies" of around $620,000, [redacted]

[redacted].

26. In any event, none of the estimates of "synergies" were material given the magnitude of the expected increase in overall expenses (millions of dollars in the years to come), which the Board also had not quantified. The Board does not appear to have seen even the final pro forma projected expenses.

27. Guggenheim would also tout KYN's superior performance in comparison to FMO, and a rosy outlook for KYN, despite [redacted].

28. Guggenheim likewise buried the "optionality" to shareholders of a liquidation that it had recognized in October 2020—*i.e.*, that if KYN was such a great investment option, then investors could take their cash from the liquidation and buy KYN at a discount.

29. At bottom, the proposed Merger is simply a self-interested mechanism—and one that is less profitable to shareholders—for offloading the Fund's assets into KYN and extinguishing the Fund's ability to pursue claims against Defendants. The economics of the deal reflect this: Kayne Anderson is receiving more than $90 million in fee-producing assets in exchange for *no merger consideration.*

30. In connection with the Merger, the Board failed entirely to consider whether the Fund's claims should be assigned material value or otherwise whether shareholders might be entitled to merger consideration. Rather, it well knew about the nature of the claims, knew the claims were being assigned zero value, conducted no analysis to support that valuation, and approved the Merger anyway.

31. Indeed, the only advice the Board received regarding its legal duties in connection with the Merger was from [redacted]—the law firm that represents Guggenheim in this action. [redacted]

32. The Board was even aware of early negotiations with Kayne Anderson that [redacted], but the Board never considered whether it could obtain consideration for shareholders on the basis of the Fund's claims, trading discount, or otherwise.

33. The only material element of the merger that the Board appears to have negotiated was [redacted].

34. Now, in an effort to finalize their scheme, the Board and Guggenheim are soliciting shareholder approval based on a proxy statement that materially misstates or fails to disclose numerous facts about the Board's process for considering the Merger, the potential value of liquidation in comparison to the Merger, and the decision to assign zero value to the Fund's claims.

35. This action seeks to (a) enjoin the shareholder vote and closing of the Merger until further disclosures are made on the material topics above; and (b) recover from the Defendants the staggering losses caused by their self-interested, grossly negligent and reckless actions in connection with the Fund's liquidity crisis. None of the liability in this action is exculpated under the Fund's trust document, and Defendants are personally liable for the misconduct set forth herein.

## II. THE PARTIES

### A. The Fund

36. The Fund is a Delaware statutory trust governed by the Delaware Statutory Trust Act, 12 *Del. C.* §§ 3801 *et seq.*, and registered with the SEC as a closed-end investment company.

37. A closed-end fund is a type of investment company registered under the Investment Company Act of 1940 (the "1940 Act"). Closed-end funds generally issue a fixed number of shares to shareholders in a public offering, which are then traded in the market. The assets of a closed-end fund are managed by a registered investment adviser and may be invested in stocks, bonds, and other assets.

38. The Fund commenced operations on October 4, 2004. Its investment objective is to provide a high level of after-tax total return through investments in publicly traded securities of MLPs and other energy infrastructure companies. It is taxed as a C corporation for federal income tax purposes.

39. As is typical of closed-end funds, the Fund has no employees or infrastructure of its own and depends entirely on service providers, primarily Guggenheim and Tortoise, to provide the people and systems necessary to operate, subject to the management and oversight of the Board.

## B. <u>Plaintiff</u>

40. Plaintiff JB and Margaret Blaugrund Foundation (the "Foundation") is a shareholder of the Fund and has continuously held shares since at least 2012.

41. The Foundation is a tax-exempt nonprofit organization that supports a range of charitable causes, primarily in El Paso, Texas. In recent years, the Foundation's charitable giving has focused on poverty and hunger, especially among children. For example, it provided significant support to local food banks during the

COVID-19 pandemic, as well as the preceding humanitarian crisis at the Texas border. The Foundation also supports the arts in the El Paso community and has underwritten numerous local music and speaking events. It also donates to national causes, such as the St. Jude Children's Research Hospital.

42. The Foundation holds 1,672 shares and has lost over $140,000 as a result of the Fund's collapse.

### C. <u>The Fund's Board of Trustees</u>

43. The Board consists of ten members: (1) Randall C. Barnes; (2) Angela Brock-Kyle; (3) Donald A. Chubb, Jr.; (4) Jerry B. Farley; (5) Roman Friedrich III; (6) Thomas F. Lydon, Jr.; (7) Ronald A. Nyberg; (8) Sandra G. Sponem; (9) Ronald E. Toupin, Jr.; and (10) Amy J. Lee.

44. In addition to managing the Fund's business and affairs, the trustees simultaneously sit on numerous other boards within the Guggenheim fund complex and oversee at least 156 other investment portfolios managed by Guggenheim, including seven closed-end funds and 150 open-end funds advised or serviced by Guggenheim.

45. Mr. Barnes has served as a trustee since 2004. He is a retired officer of PepsiCo, Inc. and now describes himself as a "private investor." He simultaneously oversees 157 investment portfolios managed by Guggenheim.

46. Ms. Brock-Kyle has served as a trustee since 2019. She also serves as a director of Hunt Companies, Inc. She simultaneously oversees 156 investment portfolios managed by Guggenheim.

47. Mr. Chubb has served as a trustee since 2014. He is retired and formerly was a real estate broker at Griffith & Blair, Inc. He simultaneously oversees 156 investment portfolios managed by Guggenheim.

48. Mr. Farley has served as a trustee since 2014. He is the President of Washburn University, a public university in Topeka, Kansas. Mr. Farley simultaneously oversees 156 investment portfolios managed by Guggenheim.

49. Mr. Friedrich has served as a trustee since 2011. He is the founder and managing partner of Roman Friedrich & Company, a boutique investment banking firm serving the mining industry. Mr. Friedrich simultaneously oversees 156 investment portfolios managed by Guggenheim.

50. Mr. Lydon has served as a trustee since 2019. He is the President of Global Trends Investments, a money management firm, and co-CEO of ETF Trends, which publishes various analyses of ETF investments. He simultaneously oversees 156 investment portfolios managed by Guggenheim.

51. Mr. Nyberg has served as a trustee since 2004. He is an attorney at Momkus LLC, a business law firm, and was formerly the President and General

Counsel of Van Kampen Investments, Inc. Mr. Nyberg simultaneously oversees 157 investment portfolios managed by Guggenheim.

52. Ms. Sponem has served as a trustee since 2019. She is currently retired and formerly worked as a Senior Vice President and Chief Financial Officer at Mortenson Construction. She simultaneously oversees 156 investment portfolios managed by Guggenheim.

53. Mr. Toupin has served as a trustee since 2004. He currently serves in various roles with the Investment Company Institute, an industry organization for mutual fund advisors and trustees. He simultaneously oversees 156 investment portfolios managed by Guggenheim.

54. Ms. Lee has served as a trustee since 2018. She is a Vice President and the Chief Legal Officer of the Fund, and a senior managing director at Guggenheim. Guggenheim has designated her as an "interested trustee."

55. Together, the individual defendants listed in this section are referred to as to the "Trustee Defendants."

### D. Guggenheim, The Fund's Investment Adviser

56. Guggenheim is an SEC-registered investment advisory firm organized as a Delaware limited liability company. It is a wholly owned subsidiary of Guggenheim Partners, LLC, a diversified financial services firm with wealth

management, capital markets, investment management and proprietary investing businesses.

57. Guggenheim serves as the Fund's investment adviser pursuant to an Investment Advisory Agreement (the "IAA"), which provides that Guggenheim is responsible for the Fund's "day-to-day operations," ostensibly "subject to the direction and control of the . . . Board of Trustees." Guggenheim employees serve as officers of the Fund.

58. Guggenheim collects a management fee under the IAA of 1.00% of the Fund's total assets, which includes assets obtained through borrowing and other forms of leverage. Thus, Guggenheim has a financial incentive to increase the Fund's total assets through borrowing and other forms of leverage so as to increase its management fee.

59. Under the IAA, Guggenheim assumed contractual responsibility to, among other things, "supervise the investment program of the [Fund] and the composition of its investment portfolio," although it is expressly permitted to make use of a "sub-investment adviser" to assist in managing the Fund's portfolio.

60. Guggenheim also is responsible for administration of the Fund, including "[o]versee[ing] the preparation and filing of the [Fund's] federal, state and local income tax returns and any other required tax returns," "oversee[ing] the preparation . . . of the [Fund's] financial information for the [Fund's] semi-annual

and annual reports," and "[c]onsult[ing] with the [Fund's] officers, independent accountants, legal counsel, [and other service providers] in establishing the accounting policies of the [Fund] and monitor financial and shareholder accounting services."

## E. **Tortoise, The Fund's Subadviser**

61. Tortoise is an SEC-registered investment advisory firm organized as a Delaware limited liability company. It offers MLP and energy infrastructure investment strategies for open and closed-end mutual funds, pension plans and individuals.

62. As the Fund's subadviser, Tortoise is responsible for the day-to-day investment management of the Fund's portfolio, pursuant to an Investment Sub-Advisory Agreement (the "Subadvisory Agreement") with Guggenheim and the Fund.

63. Tortoise is compensated by Guggenheim under the Subadvisory Agreement at a rate of 0.50% of the Fund's total assets (*i.e.*, 50% of Guggenheim's investment advisory fee). Like Guggenheim, Tortoise has a financial incentive to increase the Fund's total assets through leverage.

64. Under the Subadvisory Agreement, Tortoise is responsible for, among other things, "the investment and reinvestment of the [Fund's] Assets in accordance with the investment policies of the [Fund]"; "arranging . . . for the purchase and sale

of securities and other assets"; "providing investment research and credit analysis"; and "monitoring on a daily basis the investment activities and portfolio holdings relating to the Trust."

65. In addition, Tortoise agreed to "consult with [Guggenheim] as to the overall management of the [Fund's] Assets and the investment policies and practices of the [Fund]," including "the use by the [Fund] of financial leverage and elements (e.g., form, amount and costs) relating to such financial leverage and the utilization by the [Fund] of any interest rate or other hedging or risk management transactions in connection therewith."

66. Like Guggenheim, Tortoise ostensibly provides services to the Fund at all times "subject to the direction and control of the . . . Board of Trustees."

## III. JURISDICTION

67. This Court has subject matter jurisdiction pursuant to 12 *Del. C. §* 3804 because this matter relates to a Delaware statutory trust and seeks, among other things, equitable relief.

68. This Court has jurisdiction over the Trustee Defendants because each is a trustee of a Delaware statutory trust and agreed, pursuant to 12 *Del. C. §* 3804(b), to accept process in Delaware.

69. This Court has jurisdiction over Guggenheim because it is a Delaware limited liability company.

70. This Court has jurisdiction over Tortoise because it is a Delaware limited liability company.

## IV. THE BOARD'S DUTIES AND LIABILITIES

### A. The Board's Unexculpated Duties Of Care And Loyalty

71. The Board owes fiduciary duties of care and loyalty to the Fund under Delaware law. The Fund's Agreement and Declaration of Trust provides that the "Trustees shall owe to the Trust and its Shareholders the same fiduciary duties as owed by directors of corporations to such corporations and their stockholders under the Delaware General Corporation Law."

72. The Fund's Agreement and Declaration of Trust, consistent with § 17(h) of the 1940 Act, does not exculpate the trustees for breaches of the duties of care or loyalty, but rather expressly provides that the trustees are liable for their own "bad faith, willful misfeasance, gross negligence or reckless disregard for his duty."

73. Thus, while the Trustee Defendants owe duties identical to those owed by corporate directors, unlike most corporate directors, they enjoy no exculpation for grossly negligent conduct and are personally liable for losses caused by such misconduct.

74. In light of the externalized management structure of investment funds, the 1940 Act charges the Trustees of investment funds with a host of oversight

responsibilities, including monitoring conflicts of interest between the fund and its service providers and establishing a fund's policies and procedures.

75. Fund boards are required to identify the material risks associated with operating a fund, assess the effectiveness of the fund's risk controls, and continuously evaluate whether the fund's policies, procedures and controls are working effectively to mitigate known risks.

76. Fund boards generally develop risk management programs to address material risks and coordinate personnel within business functions as well as management, internal audit, compliance, legal and other personnel with risk management responsibilities.

## B. <u>Duties With Respect To Liquidity And Leverage Risks</u>

77. For closed-end funds, such as the Fund, the use of financial leverage creates investment risks that must be managed and addressed by the fund's board.

78. As applied to closed-end funds, the term "leverage" refers to the difference in the value of a fund's total investment portfolio ("managed assets") over the value of capital contributed by investors ("net assets").

79. A fund can obtain leverage by issuing debt, by issuing preferred shares, or by investing in complex financial instruments that have the economic effect of borrowing, such as futures, forwards, swaps, and options (so called "portfolio leverage").

80. Leverage increases the risk of investment loss because a fund may be forced to liquidate holdings in a down market to meet the requirements of its loan agreement (for example, asset coverage ratios imposed by the lender). In such cases, the fund may be forced to sell its securities at inopportune times and may be forced to realize significant unintended tax consequences resulting from unplanned sales.

81. Nonetheless, advisers have a financial incentive to use leverage, despite the significant risks and interest expenses created for shareholders, because many—like Guggenheim and Tortoise—are paid management fees based on a percentage of a fund's *total* managed assets, not its *net* assets.

82. The 1940 Act regulates the use of leverage by closed-end funds. Specifically, the 1940 Act limits borrowing by closed-end funds to 33% of its total assets (*i.e.*, for every dollar the fund borrows, it must have three dollars in assets).

83. In this case, the Board was required to install meaningful processes, procedures and controls to ensure that decisions regarding the use of leverage were sound and not motivated by the Managers' conflicting financial interests, and that the trustees received timely information permitting them to independently evaluate the fund's liquidity positions and the levels of risk.

## C. <u>MLP Investments And Their Unique Tax Implications</u>

84. The Fund invests primarily in MLPs, which are publicly traded limited partnerships generally with shares (referred to as “units”) listed on a national securities exchange.

85. Many energy infrastructure companies are organized as MLPs because MLPs do not pay income taxes at the entity level, but rather are able to pass through their taxable income to investors in the form of dividends.

86. Under Accounting Standards Codification Section 740 (“ASC 740”), corporations—including the Fund, which is taxed as a C Corporation—must account for income taxes on an accrual basis. This accounting must include current taxes that the corporation expects to pay within one year (*i.e.*, a current payable) and deferred taxes (*i.e.*, an asset or liability that will increase or decrease any subsequent period’s amount of tax to be paid).

87. Among other tax concerns, investors in MLPs—like the Fund—must be cognizant of so-called IRS “recapture” rules when selling MLP investments, even in circumstances where a fund recognizes a book loss.

88. MLPs will frequently report substantial depreciation expenses to investors, permitting investors, like the Fund, to obtain tax benefits by reporting net operating losses. However, when an investor sells an MLP interest, Section 751 of the Internal Revenue Code (“Section 751”) requires it to recognize a gain, and pay

income tax, on the proceeds that exceed the adjusted tax basis for the MLP (which accounts for previously recognized depreciation).

89. The portion of the sale recognized as a gain under Section 751 is considered to be "recaptured" as ordinary income—and taxed accordingly—up to the amount of the previous depreciation expense.

90. Properly accruing for tax expenses arising from MLP investments, such as recapture liabilities, is critically important for closed-end funds, which are required to publish an accurate NAV every trading day. A tax liability, either current or deferred, results in an expense for the Fund, directly affecting the value of the Fund's portfolio and should result in a corresponding reduction of NAV.

## V. SUBSTANTIVE ALLEGATIONS

### A. The Trustees Simultaneously Oversee More Than 150 Funds

91. The Trustee Defendants sit on multiple boards of Guggenheim funds, totaling at least 156 distinct, diverse, and complicated investment portfolios.

92. The sheer volume and variety of funds overseen by the Board made it practically impossible for the Trustee Defendants to engage regarding any particular fund at more than a superficial level.

93. During the relevant period, the Board held five regular meetings per year, during which it considered over 150 funds at the same time.

94. Defendant Toupin testified that he "would expect to look at between 1,000 and 1,200 pages" of Board materials per meeting.

95. Although the Fund was a complex product with a portfolio consisting almost exclusively of volatile investments in the energy industry, the risks of which were amplified by the Managers' significant use of leverage, it rarely received meaningful individual attention from the Trustee Defendants, even at critical points leading up to, and during, its collapse.

### B. The Managers Begin To Ratchet Up The Fund's Leverage To Salvage Their Decreasing Assets And Fees

96. In or around 2017, the Fund's performance began to precipitously decline and the value of its assets under management fell. The Fund ultimately would become the single worst performer among its peers for its most recent 15-year period (according to Morningstar) and would underperform 89% or more of its peers for the most recent 3-, 5-, and 10-year periods.

97. Despite these performance issues, the Board does not appear to have addressed the Fund's circumstances at this time, such as placing it on a "watch list" or otherwise moving it up in importance among the more than 150 other Guggenheim funds under the Trustee Defendants' watch.

98. As the Fund's size steadily declined, the use of leverage became more and more critical to salvaging the Managers' shrinking fee revenue. To combat the

declining assets—and the Managers' proportionately declining fees—the Managers began to unilaterally ratchet up the Fund's use of leverage beyond its normal historical range.

99. Between 2017 and 2020, the Managers collected over $21 million in management fees, despite the Fund's poor investment performance and shrinking assets. Nearly half of that fee revenue—roughly $10 million—was attributable to fees on assets acquired through borrowing and other leverage.

100. By 2019, the value of capital invested by Fund shareholders amounted to only $274.8 million (down from $411 million in 2017), but the Managers had obtained an additional $178.2 million in assets through leverage.

101. Although leverage had typically accounted for only 22% to 28% of the Fund's managed assets, by the end of the Fund's 2019 fiscal year, leverage comprised 40% of the Fund's managed assets.

| **FMO Leverage as Percent of Managed Assets** | |
|---|---|
| FY 2016 | 27% |
| FY 2017 | 36% |
| FY 2018 | 38% |
| FY 2019 | 40% |

102. Relative to the Fund's net assets—*i.e.* the value of the capital contributed by shareholders—leverage grew to 65%.

| FMO Leverage as Percent of Net Assets | |
|---|---|
| FY 2016 | 37% |
| FY 2017 | 56% |
| FY 2018 | 61% |
| FY 2019 | 65% |

103. By the end of 2019, the Fund was more highly leveraged than *all but three* comparable closed-end MLP funds, and two of the three more-leveraged funds *were also managed by Tortoise*, leaving only one peer fund managed by an unaffiliated advisor with roughly equal leverage.

104. Because the 1940 Act limits the amount of borrowing a closed end fund may utilize, the Managers relied heavily on an atypical form of portfolio leverage—"reverse repurchase agreements" (or "repos")—in order to impose maximum leverage on the Fund. In the absence of effective Board oversight, the Managers used repos as a means of financial engineering to sidestep the traditional limits on leverage under the 1940 Act's regulation.

105. In a repo transaction, a fund transfers possession of a security to another party, typically a broker-dealer or bank, in return for cash, but retains record ownership. The fund agrees to repurchase the security at a designated date for the amount paid by the counterparty plus interest.

106. Notably, the Fund was the only member of its peer group to utilize repos. Although it held none in 2016, it had acquired over $100 million worth of these financial instruments by 2018.

| Reverse Repurchase Agreements | |
|---|---|
| FY 2016 | $0 |
| FY 2017 | $110,230,215 |
| FY 2018 | $110,022,062 |
| FY 2019 | $85,210,117 |

107. The Managers' aggressive reliance on leverage successfully propped up their fees, at least in the short term: Guggenheim and Tortoise extracted millions of dollars in additional fees as a result. In doing so, however, they created significant risks to the Fund's long-term viability.

## C. The Board Has No Effective Controls For Mitigating Leverage And Liquidity Risks

108. Throughout the relevant period, the Trustee Defendants lacked the resources (or simply refused) to effectively check the Managers' conflict of interest and control the Fund's excessive leverage and dangerous liquidity position.

109. The Board's only controls over the Fund's liquidity and use of leverage was [redacted].

110. Although the Fund Policies provided for [redacted] the Board failed to establish any parameters with respect to the Fund's leverage levels or the timing or magnitude of increases in leverage. Nor did it establish any criteria for assessing the reasonableness of the Fund's leverage levels (such as relative to peers or historical norms) or the maximum permissible leverage levels in light of the Fund's portfolio and market conditions.

111. Nor did the Fund Policies include standard risk management activities like portfolio stress testing to determine the effects of volatility and price declines on the Fund's liquidity position. This should have included (but did not) regular stress testing to determine whether and how the Fund would be able to manage its borrowings and portfolio leverage commitments during various historic and potential market conditions, including scenarios involving market-wide price declines caused by supply or demand shocks similar to the type experienced by the Fund in the first quarter of 2020.

112. In the Fund's semi-annual reports, the Board represented to investors that, at least annually, it "considered information regarding [Tortoise's] use of leverage, including with respect to the process for determining how much leverage to employ at any particular time." It also stated that it had reviewed Guggenheim's role in overseeing the Fund's "use of leverage" and "risk management functions."

113. Based on materials reviewed in connection with Plaintiff's inspection demands, these representations were inaccurate. To the extent that the Trustee Defendants received reports on the Fund's use of leverage, the information provided was nowhere near enough to effectively assess and oversee the Fund's risks.

114. Moreover, the superficial quarterly reports to the Board were ignored by the Trustee Defendants even when they demonstrated that the Fund had been leveraged well beyond its historical norms and virtually all of its peers.

115. The Trustee Defendants likewise lacked effective controls over the Fund's liquidity position, despite the Fund's excessive reliance on leverage.

116. Although investors were told that the Fund "intends to earmark or segregate cash or liquid securities" in connection with its use of leverage, the amounts segregated were nowhere near sufficient to mitigate the associated risks.

117. For example, the Managers stated in the Fund's annual report that, as of November 2019, the Fund had invested only $6.2 million (2.3% of its assets) in money market funds (*i.e.*, cash-like securities), relative to borrowings of $93 million plus another $85 million in repos. Moreover, the only "hedging" strategy implemented for the Fund was a "covered call on a single equity security for the purpose of downside protection."

118. The Trustee Defendants not only failed to implement guidelines and benchmarks to *avoid* a liquidity crisis, but they also failed to establish processes and procedures to help the Fund navigate such a crisis if (and when) one arose.

119. For example, the Board failed to implement risk management mechanisms for the Fund, like a program for affiliated loans from the Managers and/or the other funds they manage, nor did the Board establish alternative lines of credit or other debt facilities, or even basic controls to ensure that the Board received timely notice of liquidity issues and thus could oversee the Managers' response.

120. These failures left the Fund unsupervised and exposed to the next downturn in the market.

## D. The Board Turns A Blind Eye As The **Fund's Leverage Skyrockets In A Turbulent Market**

121. At the end of the Fund's fiscal year in November 2019, the energy sector was reeling from increased volatility and price declines, and the Fund posted a 16.17% loss for the year.

122. In a November 12-13, 2019 meeting, the Board received a report stating that [redacted]" (emphasis added), and that the Fund's use of leverage significantly exceeded its peers and its historical range. The report included the following chart, [redacted].

[redacted]

123. The Board also learned that the Managers had unilaterally—not at the Board's request and without the Board's knowledge—[redacted]" (Emphasis added.)

124. However, the Board was not advised of the extent to which the Fund's leverage levels continued to exceed its peers and historical levels or its continued risk level, nor did the Board inquire.

125. It merely accepted the report at face value, and the minutes [redacted].

126. In December 2019, uncertainty and volatility increased further as the Organization of Petroleum Exporting Countries ("OPEC") publicly sparred with Russia, Iraq and other countries over OPEC's efforts to implement production cuts.

127. Again, the Trustee Defendants failed to address the Fund's financial or liquidity position in any way until a regularly scheduled meeting in January 2020.

128. In a January 23, 2020 meeting, the Trustee Defendants were again informed that the Fund had purportedly "[redacted]" but failed to inquire as to the continued risk level, the reasonableness of the Fund's current leverage levels, or any other risk management consideration relating to the Fund's liquidity position in a volatile market.

129. These omissions are all the more shocking given that Defendants Toupin, the Board's Chairman, Nyberg and Barnes had already overseen a closed-end fund collapse under similar circumstances and should have known the risks that FMO had taken on.

130. In 2008, while Defendants Toupin, Nyberg and Barnes were trustees, HCE, a closed-end fund, had similarly significantly increased its "leveraged exposure to market declines and volatility," according to an SEC finding. By 2008, it "was exposed to massive potential losses if the S&P 500 declined rapidly or became very volatile." The adviser had over time changed HCE's portfolio from "a fund that provided some downside protection, to one with magnified downside exposure."

131. “Beginning in early September 2008, the financial markets began declining rapidly and became very volatile,” and as HCE began to realize losses its managers “did not take sufficient actions to assess the risks to the portfolio going forward or to understand the significance of those positions to HCE’s portfolio.”

132. HCE ultimately lost 72.4% of its net asset value in a two-month period. Under the Defendants’ watch, FMO would soon meet an similar fate.

## E. <u>Modest Declines In The MLP Market Spark A Fire Sale</u>

133. In February 2020, the ongoing dispute over production cuts between OPEC and Russia as well as lockdowns caused by the COVID-19 virus triggered price declines in oil and other commodities.

134. Given the Fund’s precarious position, it began to receive margin calls on or around February 24, 2020. At that time, the Fund’s benchmark, the Alerian MLP Index, had fallen only *4.9% for the month* and what should have been a manageable 13% year to date.

135. In the absence of Board oversight or Board-imposed protocols for handling the Fund’s liquidity crisis, the Managers were left to address it as they saw fit: by dumping securities for enormous losses.

136. By the end of February, the Managers had sold over $45 million in securities to deleverage.

137. These sales, however, were just the beginning: in March, as energy markets continued to decline amidst the emergence of the COVID-19 pandemic, the Managers liquidated hundreds of millions of dollars of additional securities—nearly the *entirety* of the Fund's remaining assets—to meet additional margin calls.

138. During this period, the Fund's leverage spiked to over 60% of total assets (over 100% of net assets) before being paid down with proceeds obtained through the fire sale.

139. By May 2020, order returned to the energy markets, but the Fund's portfolio had been decimated: its net assets had declined by $185 million—*an 81.7% loss for the quarter*.

140. The Alerian MLP Index reported a loss of only 24.26% for the same period, and only *two* of the more than twenty comparable MLP funds incurred losses worse than FMO (both of those funds had also been recklessly leveraged heading into 2020).

### F. The Board Remains Unaware Of The Fund's Liquidity Crisis And Takes No Action

141. Books and records obtained through Plaintiff's inspection demand show that the Trustee Defendants were not even aware of the Fund's circumstances and thus were not in a position to take corrective action as the Fund melted down in February and March of 2020.

142. The Board did not meet at all, much less discuss the Fund's financial position, in February 2020.

143. Guggenheim would later admit that it "[redacted]" but the Board did not participate in those discussions.

144. The Board held a regularly scheduled meeting on March 4-5, 2020—at which point the Fund was experiencing a full-blown liquidity crisis—but failed to address the Fund's circumstances.

145. The Board received a [redacted].

146. Despite learning in the March meeting that an astounding [redacted]—and while virtually every financial news outlet was covering significant volatility in the energy markets—[redacted].

147. The Trustee Defendants took no action with respect to the Fund until April 25, 2020—after the Fund had incurred virtually all of its losses—when the

Board’s counsel sent a memorandum to Tortoise requesting “[redacted]

148. The Board’s tepid response revealed its apathetic handling of the Fund’s crisis. By April 2020, the Fund’s assets were largely gone and a “performance” analysis had become irrelevant, given that investors had no realistic chance of recovering their capital regardless of the Fund’s future returns.

149. As shown by the chart below, [redacted]

[redacted]

150. Tortoise explained that [redacted] (a euphemism for the Fund's collapse) was the "[redacted]

151. Tortoise admitted that the "[redacted]" and acknowledged that funds that employed a more "defensive" strategy did not incur losses at the level of those the Fund incurred.

152. Tortoise also admitted that [redacted].

153. Because the Board had no oversight mechanisms and was otherwise disengaged, it was unable to *even consider* any of the range of available options during the crisis.

154. For example, a conscientious board informed of the crisis could have held Guggenheim and Tortoise accountable as the parties responsible for causing the Fund's crisis, including by insisting that Guggenheim purchase newly issued shares from the Fund in a private transaction and at a premium to market in order to raise the capital required to meet the Fund's margin calls. Guggenheim could have done

so at any time with little or no delay and without the requirement for regulatory or shareholder approval.

155. As another alternative, the Board could have insisted that Guggenheim or its affiliates or any of their managed funds agree to extend a favorably priced unsecured loan to the Fund for the capital required. Although such a loan would have entailed risks, Guggenheim, as the Fund's adviser and the culprit behind the crisis, was uniquely positioned to evaluate and assume those risks.

156. The Board also could have caused the Fund to conduct a rights offering to issue new shares to current investors, with Guggenheim backstopping the issuance so as to ensure the offering's success.

157. These options, among others, could have saved hundreds of millions of dollars in losses from the Fund's forced sales at the bottom of the market, and are merely examples of what a conscientious board could have considered under such circumstances.

158. This Board, however, had already deferred completely to the Managers and was so disengaged that it was not even aware of the Fund's crisis in the first place and never had the opportunity to consider potential responses.

159. The Board's grossly negligent handling of the Fund's liquidity crisis relegated the consequences entirely to shareholders (locking in their losses, even as

energy markets rebounded), and left the Managers unscathed, despite that the Managers were responsible for causing the catastrophe.

### G. In The Aftermath, The Board Ignores The Fund's Losses And Hires Guggenheim Again

160. The Board maintained its apathetic approach to the Fund even after learning more about the Fund's liquidity crisis and losses.

161. In regularly scheduled meetings on May 15, 2020 and May 18, 2020, the Board was informed that the Fund had lost 81.67% year-to-date, wiping out all historical returns.

162. The Board also received an analysis from Tortoise demonstrating that the Fund's losses were driven by "[redacted] and that the Fund, as a result, "[redacted]"

163. It was also advised, again, that [redacted]—a fact that it had blatantly ignored at the time.

164. Nonetheless, the Board took no remedial action and effectively ignored those losses entirely.

165. In April 2020, the Board asked Guggenheim to evaluate potential "strategic alternatives" for the Fund, which was now crippled by its losses earlier in the year.

166. In the meantime, in May 2020, the Board *renewed Guggenheim's agreement for another year*, finding that doing so was in the "best interests of the Fund" and that Guggenheim was "qualified to serve the Fund," despite that Guggenheim had lost nearly all of the Fund's assets in the months before.

167. In connection with the renewal, the Board informed shareholders that it would "further monitor the performance of the Fund as well as consider strategic alternatives for the Fund."

168. The "strategic alternatives" did not include, however, any evaluation of a potential recovery from Guggenheim, Tortoise or any other person in connection with the Fund's losses.

### H. Guggenheim Decides To Liquidate The Fund Because It Is Too Small And Going Nowhere

169. In connection with its evaluation of "strategic alternatives," Guggenheim began to analyze the value of a liquidation as well as solicit interest from managers for a potential merger with the Fund.

170. In the summer of 2020, Guggenheim had discussions with three fund managers with funds that could serve as potential merger partners with FMO, including [redacted] and Kayne Anderson.

171. In an August 26, 2020 memorandum (the "August Memo"), Guggenheim stated to the Board that it had been "[redacted]" including a (i) manager or strategy change; (ii) strategic transaction, and (iii) liquidation of the Fund, but did not include details regarding the potential merger partners.

172. As to liquidation, Guggenheim acknowledged that shareholders would "[redacted]" (*i.e.*, that investors would receive the full underlying value of the Fund's portfolio, which traded at a significant discount in the market), and that it would make "[redacted]."

173. By October 2020, Guggenheim had cut off talks with merger partners and had concluded that the liquidation was the best option for shareholders.

174. Brian Binder, the Fund's President and a Guggenheim Managing Director, testified in this action that "[redacted]"

175. In an October 6, 2020 memorandum to the Board (the "October Memo"), Guggenheim made a formal recommendation in favor of liquidation, stating that "[redacted]"

176. In support of its recommendation, Guggenheim noted that the "[redacted]"

177. Guggenheim calculated in the October Memo that a "[redacted] and would permit shareholders the [redacted]

178. It also stated that liquidation was a preferred alternative in light of the fund's "[redacted]" and the fact that

“[redacted].”

179. Guggenheim disclosed in the October Memo that it had “[redacted]”

180. Guggenheim noted that “[redacted]” (Emphasis added.)

181. Guggenheim stated that it would utilize a “[redacted]” structure [redacted] and provided the Board with [redacted].

182. Under the Liquidation Plan, the Fund would exist only “[redacted].”

183. The Fund’s liabilities would expressly include “[redacted]

184. Guggenheim proposed announcing the liquidation to shareholders on October 12, 2020 [redacted]

## I. Guggenheim Discovers $23 Million In Undisclosed Tax Liabilities And Shuts Down The Liquidation Proposal

185. In connection with the liquidation proposal, Guggenheim acknowledged that Fund's "[redacted]"

186. In the October Memo, Guggenheim stated that it was working with EY "[redacted]"

187. The night before the Board's meeting on October 12, 2020 to approve the Fund's liquidation, Guggenheim and EY made a bombshell discovery: separate from the proposed liquidation, the Fund's fire sale earlier in the year—unbeknownst to Guggenheim—had generated outsized Section 751 recapture expenses that had not been accrued when realized earlier in 2020.

188. On October 12, 2020, the Board held a special meeting. Guggenheim stated that while it "[redacted]" it was not making that recommendation because of the discovery

of a "[redacted]"

189. Guggenheim admitted that it was "[redacted]" but that it was working with EY and "[redacted]"

190. This turned out to be the tip of the iceberg. Later in October, Guggenheim retained PricewaterhouseCoopers LLP ("PwC"), which conducted an analysis of the Fund's unaccrued recapture liabilities using a tool that was widely known, but that neither Guggenheim nor EY had chosen to use to calculate recapture amounts in the past.

191. In a November 11, 2020 memorandum to the Board (the "November Memo"), Guggenheim disclosed that EY and PwC had determined that the Fund had *unaccrued and undisclosed* recapture expenses in the amount of "[redacted] (the "Recapture Expenses").

192. Guggenheim admitted that these Recapture Expenses had been generated (but not accounted for) in the first quarter of 2020 when "[redacted]

193. In a November 12, 2020 special meeting, the Board was again informed of the Recapture Expenses, which would range between "[redacted]" and would require the Fund to restate its NAV. The belated accrual announcement would be disclosed by press release the next day.

194. On November 13, 2020, Guggenheim announced to investors that the Fund's NAV would be adjusted from $10.76 per share to $6.20 per share—*a 42% correction*. The following trading day, Fund's share price plummeted on heavy volume.

195. At the end of the Fund's fiscal year, its tax expenditures exceeded $22 million. None of the Fund's peers faced anything near the magnitude of the Fund's tax problems.

| **Fund Name** | **2020 Tax Liability As A Percentage Of Net Assets** |
|---|---|
| **The Fund** | **41.60%** |
| First Trust New Opportunities MLP & Energy Fund | 18.02% |
| First Trust MLP & Energy Income Fund | 10.31% |
| Center Coast Brookfield MLP & Energy Infrastructure Fund | 7.72% |
| ClearBridge MLP & Midstream Total Return Fund Inc. | 5.29% |
| First Trust Energy Income & Growth Fund | 2.40% |
| ClearBridge Energy Midstream Opportunity Fund Inc. | 1.80% |
| Duff & Phelps Select MLP & Midstream Energy Fund Inc. | 1.06% |
| Kayne Anderson Energy Infrastructure Fund, Inc. | 0.34% |

196. Plaintiff's inspection demands would reveal that the Fund lacked controls to ensure that tax consequences were known in advance of trades and that expenses were reported in a timely and accurate manner.

197. Tortoise would admit that the Fund's sales in 2020 were not made with an eye toward tax implications, but rather that "[redacted]."

198. Further, controls over recognition and reporting were so lax that the Fund actually reported as of May 31, 2020 that its "NAV included a *net deferred tax asset* [*i.e.*, benefit] of $4.2 million. (Emphasis added.)

199. The failure to properly accrue the Recapture Expenses stemmed from shoddy practices in prior years when liabilities "[redacted]" and interim amounts had been permitted to slide until final year-end amounts were calculated.

200. EY would eventually state to the Board that "[redacted]" Because the Fund's liabilities were "knowable" and could have been estimated at the time of the sales, ASC 740 required them to be accrued immediately.

201. In the aftermath, Guggenheim would implement [redacted]”

202. But by then, it was too late. When the dust settled in 2020, the Fund had lost roughly *$220 million in net assets* due to the Defendants’ reckless management of both the Fund’s liquidity and its exposure to income taxes.

### J. Guggenheim Scrambles To Minimize Its Liability Through A Fund Merger And “Shareholder Compensation Program”

203. While Guggenheim sorted out the Fund’s tax fiasco, it shut down consideration of “strategic alternatives,” including its recommendation that shareholders be permitted to capture the Fund’s NAV through a liquidation.

204. In early 2021, Guggenheim restarted its evaluation. [redacted]

205. However, as the magnitude of Guggenheim’s potential liability to the Fund and shareholders began to emerge, its internal position would quickly change.

206. In February 2020, Guggenheim retained Cornerstone Research (“Cornerstone”), a consulting firm, [redacted].

207. [redacted], Cornerstone provided the Board [redacted].

208. Cornerstone's finding [redacted] resulting from the Fund's months-long publication of a materially inaccurate NAV.

209. In addition, Guggenheim had received on January 1, 2021 an inspection demand from Plaintiff's counsel, which sought records relating to the Recapture Liabilities and the Fund's NAV restatement.

210. The letter focused on the Fund's deficient tax and reporting controls, the inaccuracy of the Fund's published NAV throughout the preceding months, and Guggenheim's and the Board's conduct that permitted the errors to occur. Because the Fund's NAV did not take into account the Recapture Liabilities, it was overstated for months, and thousands of transactions involving millions of shares were executed at incorrect and inflated prices.

211. Despite having previously admitted, after extensive analysis, that a merger would "[redacted] and would "[redacted] Guggenheim abruptly changed course.

212. This was because in a liquidation, as previously described to the Board, a liquidation trustee would be obligated to reconcile both the Fund's assets—including any legal claims of material value—as well as the Fund's liabilities—including any federal securities liabilities arising from its NAV errors. All roads led to liability not only to the Fund, but to Guggenheim and the Board.

213. Merging the Fund away would allow Guggenheim to avoid, for its own self-interested benefit, reconciling the outstanding claims and liability exposure.

214. Emails showed that Guggenheim knew the Board was "[redacted]" but it decided to put a merger together anyway.

215. In the meantime, Guggenheim worked on a plan to mitigate its exposure to shareholder suits over the Fund's tax errors and NAV restatement. During a February 17-18, 2021 meeting, the Board was informed that a "[redacted]" and that the plan would be presented to the Board.

216. Despite the calamity that had beset the Fund under the Board's watch, the Board actually granted, during the February meeting, [redacted].

217. On March 24, 2021, after having been solicited by Guggenheim earlier in the year, [redacted] expressed interest in a merger "as an attractive option," but expressed doubt about the deal from the perspective of shareholders because the NAV discount of the funds were "unattractive" (*i.e.*, that shareholders would not realize the value of the Fund's full NAV through a merger). Guggenheim asked for a [redacted].

218. On March 29, 2021, [redacted] made a proposal that included "[redacted]"

219. [redacted] provided Guggenheim with precedent for a successful transaction of this kind under the 1940 Act.

220. However, even before [redacted] made its proposal, Guggenheim had already decided that it opposed a tender offer because of its perceived likelihood to ultimately lead to a liquidation, which Guggenheim wanted to avoid.

221. In a February 2020 email, a Guggenheim managing director stated that [redacted].

222. Guggenheim did not inform the Board of [redacted].

223. On March 30, 2021, Guggenheim received a proposal from Kayne Anderson, which Guggenheim had also solicited earlier in the year, regarding a merger with KYN.

224. The proposal did not include a tender offer or any other opportunity for shareholders to exit at NAV. Indeed, Kayne Anderson expressly stated that "[redacted]"

225. Kayne Anderson argued, in favor of its proposal, that a liquidation may have tax implications, but [redacted].

226. In addition, while [redacted].

227. It stated that [redacted]

[redacted]”

228. Neither Guggenheim nor the Board considered whether merger consideration to the Fund or its shareholders would be appropriate or could be obtained, and Guggenheim proceeded under the assumption that there would be no merger consideration.

229. In mid-April 2021, while continuing to investigate the Fund’s claims with respect to the Recapture Expenses, Plaintiff’s counsel agreed to engage in preliminary discussions to gauge the potential for settlement. Around the same time, Kayne Anderson sent diligence requests to Guggenheim.

230. In the course of discussions between counsel, Plaintiff’s counsel agreed to share with counsel for Guggenheim a draft complaint reflecting the scope of the investigation at the time and the Fund’s claims against the Defendants.

231. On April 26, 2021, Plaintiff’s counsel shared a draft complaint with Guggenheim and engaged in further settlement discussions thereafter, which ultimately did not lead to a resolution of the Fund’s claims.

232. By the end of April, Guggenheim had unilaterally decided to reject a transaction with [redacted], which had included a tender offer for shareholders to exit at NAV, and was proceeding apace with Kayne Anderson for a stock-for-stock transaction that would merge the Fund away without a liquidation proceeding.

## K. Guggenheim Announces An Extrajudicial "Shareholder Compensation Program" And Moves Quickly To Merge The Fund

233. On May 18, 2021, with merger negotiations well underway, Guggenheim announced the "Shareholder Compensation Program" in an effort to avoid or mitigate its exposure to shareholder lawsuits arising from purchases and sales during the period that the Fund's NAV was incorrectly stated.

234. The program was not court-approved and was not subject to judicial or regulatory oversight of any kind, but participants were required to "agree to a standard release in favor of the Fund, the Trustees of the Fund, GFIA, and each of their advisors, affiliates and related parties."

235. Despite requiring that participating shareholders give away their claims against Guggenheim and the Trustee Defendants, Guggenheim's compensation formula contemplated only [redacted], with no compensation for any losses or tax expenses caused by the liquidity crisis. Further, [redacted].

236. The program, however, would ultimately result in the compensation of only [redacted], thus leaving significant continued exposure to Guggenheim and the Board.

237. On May 17, 2021, Guggenheim sent a memorandum to the Board (the "May Memo"), disclosing the Kayne Anderson negotiations regarding the proposed Merger between the Fund and KYN.

238. In the May Memo, Guggenheim set forth a one-sided defense of the Merger, stating that it had "[redacted]"

239. Guggenheim argued that the Merger purportedly would [redacted]" that could be realized "[redacted]" But it had not quantified the taxes likely to be caused by liquidation and ignored the countervailing value to shareholders of realizing the Fund's NAV.

240. Unlike it had done in October 2020, Guggenheim did not calculate a [redacted].

241. Guggenheim also informed the Board that "[redacted]."

242. But the purported [redacted] shown to the Board were not only immaterial in comparison to the overall [redacted], but they were also simply incorrect.

[redacted]

243. Kayne Anderson would later confirm that [redacted] whether because of economies of scale or otherwise.

244. Further, Kayne Anderson would eventually [redacted] (as discussed further below).

245. Defendant Toupin, the Board's Chairman, testified in this action that [redacted]. Indeed, neither Guggenheim nor the Board [redacted], and thus the Board had no ability to consider [redacted].

246. Guggenheim also concealed in the May Memo the full extent of [redacted] that would be caused by the Merger. The expense shown in the Merger Proxy (defined below) are the following:

[redacted]

247. But the May Memorandum showed [redacted].

[redacted]

248. Internal emails demonstrate that [redacted].

249. The May Memorandum also omitted any discussion of the potential value of the Fund's claims arising from the liquidity crisis, which were a material asset to the Fund that would be given away through the Merger. Guggenheim had known for months that the claims were being pursued and had even [redacted].

250. On May 25, 2021, the Board met to consider the "[redacted]"

251. During the meeting, Guggenheim argued that the deal would provide "[redacted].

252. Neither Guggenheim nor the Board discussed the basis for Guggenheim's prior recommendation in favor of liquidation, namely that shareholders would realize the Fund's NAV. Nor did they evaluate any purported tax expenses that might counsel against a liquidation.

253. The Board also continued to ignore the Fund's potential claims in connection with the Merger—except to seek assurances that [redacted]

[redacted]—even though the claims were material enough for [redacted]

254. The Board also failed to consider whether a tender offer could be included as part of the transaction, as previously set out in [redacted] prior proposal, which could have unlocked value similar to a liquidation.

255. Rather, Guggenheim merely informed the Board that "[redacted]"

256. On June 1, 2021, Plaintiff made an additional inspection demand to the Fund seeking records relating to the liquidity crisis, use of leverage, the Board's oversight, and the purported Shareholder Compensation Plan announced by Guggenheim.

257. The new demand set forth in detail the Fund's excessive use of leverage in comparison to its historical levels and peers, the Board's apparent abdication of its oversight duties, and the liquidity risk management procedures, which caused the Fund's enormous losses in 2020.

**L. <u>Guggenheim Presses To Finalize And Announce The Merger</u>**

258. On July 1, 2021, Guggenheim and Kayne Anderson finalized a non-binding indication of interest for exclusive transaction discussions. In August 2021, the parties began finalizing the transaction and exchanged diligence responses.

259. Also in August, Guggenheim began preparing materials to justify the deal and obtain the Board's approval.

260. In an August 5, 2021 email [redacted]" (Emphasis added.)

261. On August 10, 2021, Guggenheim [redacted]."

262. Later in the day, [redacted].

263. In its response, [redacted].

[redacted]

264. In an updated memorandum to the Board dated August 25-26, 2021 (the "August Memo"), Guggenheim formally recommended the Merger to the Board on the basis that it was "in the best interests of the Fund and its shareholders."

265. While Guggenheim still informed the Board that [redacted]

266. Further, like the May Memo, the August Memo again argued generally that the Merger would avoid the tax implications of a liquidation, but still failed to estimate any such taxes.

267. The Board had no information regarding [redacted].

268. [redacted]

269. Indeed, Guggenheim had just stated in October 2020 that a merger would not be "[redacted]" investors could realize "net benefits" through a liquidation on top of associated costs, and that it "[redacted]"

270. But the August Memo intentionally ignored and obscured these factors.

271. The August Memo likewise failed to address the potential for the Fund to make a recovery (through this action or otherwise) for its investment losses and tax expenses, despite that Guggenheim knew a filing was imminent and that the Merger, unlike a liquidation, would interrupt the Fund's pursuit of any claims.

272. In an August 25-26, 2021 meeting, the Board received an update on "[redacted]" relating to the Merger.

273. Guggenheim told the Board that it "[redacted]

274. Still, despite the above, the Board refused to evaluate whether any of the Fund's claims had material value in connection with the Merger, but [redacted].

275. Defendant Toupin testified in this action that [redacted].

276. No Board minutes or materials, Fund records, or other documents of any kind [redacted].

277. As in its prior meetings, the Board also failed to consider (i) the value shareholders would realize through a liquidation, as it had done in October 2020; (ii)

the extent of any tax implications that might (or might not) weigh against a liquidation; and (iii) the extent of the increase in overall operated expenses expected to be caused by the Merger [redacted].

278. On September 3, 2021, Guggenheim sent another updated memorandum to the Board (the "September Memo"), which was materially the same as the August Memo and made the same misstatements and omissions regarding liquidation value, expected tax consequences, potential synergies, the expected increase in overall expenses, and the potential value of the Fund's claims.

279. Defendant Toupin testified in this action that [redacted].

280. Also on September 3, 2021, the Board received a memorandum from [redacted]—*i.e., counsel to Guggenheim in this action and the law firm that had been handling the Plaintiff's inspection demands and the discussions regarding the Fund's potential claims*—[redacted]"

281. This was the only memorandum the Board received regarding its legal responsibilities in connection with the Merger.

282. The [redacted] Memo revealed the extent to which Guggenheim had created an informational vacuum in the Board's approval.

283. [redacted].

284. [redacted].

285. The [redacted] Memo also referenced [redacted].

286. But it did not evaluate the Fund's potential claims or whether the claims had material value that should be assigned in connection with the Merger, despite having just published an analysis in February 2021 cautioning Delaware entities to "carefully consider whether to assign value to the derivative claim" in connection

with a merger as well as "how materiality will be viewed by courts after the transaction is completed."[1]

287. The [redacted] Memo also [redacted].

288. Nor did the [redacted] Memo discuss [redacted]).

289. On September 10, 2021, the Board through its counsel at Vedder Price belatedly asked Guggenheim to [redacted]

290. In response, Guggenheim stated that the [redacted] deal would have been "[redacted]" but concealed discussion of the proposed tender offer at NAV and the self-interested reasons that Guggenheim wanted to avoid it.

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[1] *See* https://www.dechert.com/knowledge/onpoint/2021/2/morris-v--spectra-energy-partners.html

291. On September 15, 2021, the Board met to consider and approve the Merger.

292. During the meeting, Guggenheim stated that it had "[redacted]" but again failed to address the factors that had initially led it to recommend a liquidation, including the value to shareholders of realizing the Fund's trading discount, which was around 11% at the time.

293. While the Board purportedly considered that a liquidation "[redacted]" it received no information whatsoever regarding the extent of any such taxes and had no way to evaluate the net benefit of liquidation to shareholders.

294. Strikingly, at this point, Guggenheim still had not quantified the expected taxes in a liquidation (which would turn out to be significantly less than the potential value of a liquidation), and thus the Board had no basis to compare the tax expenses against the Fund's then-current trading discount or calculate the net benefit of a liquidation.

295. Further, while the Board purportedly [redacted].

296. The Board also learned at the meeting that the Plaintiff in this action was [redacted].

297. Defendant Toupin admitted in testimony in this action that [redacted].

298. Despite the Board's obstinance in recognizing the potential value of the Fund's claims to shareholders, [redacted].

299. Guggenheim also continued to have concerns over liability, as demonstrated by a September 3, 2021 email in which [redacted]

300. [redacted]

[redacted]

301. Nonetheless, the Board rubber stamped the Merger without considering at all whether merger consideration could be obtained for shareholders from any party, whether on the basis of the value of the Fund's claims, the value of FMO's trading discount, or otherwise.

### M. Guggenheim Reveals The Merger And Then Seeks To Delay The Filing Of This Action

302. On September 15, 2021, following the Board meeting, Guggenheim announced that the Board had approved a stock-for-stock merger between the Fund and KYN. The press release revealed that "[t]he outstanding common stock of [the Fund] will be exchanged for newly-issued common stock of KYN," and the assets would be managed under KYN's preexisting investment mandate

303. On September 24, 2021, Plaintiff made a third inspection demand, seeking records relating to the unfair terms of the Merger and the Board's rubber stamp approval.

304. The demand made clear that the investigation would focus on, among other things, that the Merger would "deprive shareholders of the full value of

FMO['s] portfolio," which could otherwise have been realized through a liquidation of the Fund.

305. On October 11, 2021, counsel for Guggenheim stated, with respect to the new inspection demand, that it "jumps to a series of illogical and premature conclusions regarding the Merger that are based on sheer conjecture, as opposed to rational consideration of the detailed information regarding the Merger and the Board's approval thereof that shortly will be supplied to all Fund shareholders on SEC Form N-14 and through the filing of the Merger Agreement with the SEC (both of which are expected to occur within the next several weeks)."

306. Counsel further stated that "[g]iven that the Shareholder has not yet had the opportunity to consider the actual terms of the Merger or the Form N-14," the Fund would not be responding to the inspection demand at that time.

307. Following receipt of the demand, Guggenheim began to shore up its arguments in favor of the Merger and against liquidation. [redacted].

308. In an October 15, 2021 email [redacted]

[redacted]

309. [redacted]

310. The email included [redacted]:

[redacted]

311. [redacted].

312. Brian Binder, the Fund's president and a Guggenheim managing director, testified in this action that [redacted]. Nonetheless, the calculation was utilized in the proxy statement.

313. Mr. Binder also testified that [redacted].

314. The next week, on October 22, 2021, the Fund filed its preliminary proxy statement (the "Preliminary Proxy Statement"), which contains material misstatements and omissions relating to the costs and benefits of the Merger, as set forth in detail below.

315. Among other things, it attempted to utilize Guggenheim's dubious [redacted] in an effort to minimize the liquidation alternative, despite that the value of realizing the 11.59% trading discount at the time was nearly $12 million.

316. On December 17, 2021, Plaintiff filed this action.

317. Upon review of the Preliminary Proxy Statement, the SEC required Guggenheim to revise and restate its pro forma expected expenses to show the full extent that overall expenses would increase through the transaction (which the Board did not understand at the time of approval). Guggenheim struck language in the Preliminary Proxy Statement stating that synergies would "substantially offset" the increase in expenses, given that it was plainly untrue.

318. On December 29, 2021, the Fund filed its definitive proxy statement (the "Merger Proxy"), which likewise is false and misleading for the reasons set forth below.

319. In the Merger Proxy, Guggenheim inserted reference to this action, but failed to disclose material facts regarding its circumstances and the Fund's claims,

including that the action may recover material value for shareholders and that the Merger would interrupt the Fund's ability to pursue the claims.

320. In the Merger Proxy, the Fund announced a February 4, 2022 shareholder special meeting to consider the proposed Merger.

## N. The Merger Proxy Conceals Material Facts About The Merger And The Board's Process

321. The Merger Proxy conceals multiple material facts that shareholders are entitled to know about the Merger itself and the Board's process for considering and approving the Merger.

322. Board's Process For Considering The Merger. The Merger Proxy misstates, omits and obscures the following with respect to the Board's process for considering the Merger and the basis for its recommendation in favor of the Merger: (i) the Board did not consider the net benefit of liquidation; (ii) the Board did not quantify the expected tax that would be incurred in a liquidation, and thus had no basis to consider the potential value of a liquidation; (iii) the Board did not consider the final pro forma projected expenses; (iv) the Board did not attempt to quantify the expected increase in overall expenses; (v) the Board did not consider the final estimate of Merger "synergies" in advance of approval; (vi) the Board did not consider whether the Fund's claims had material value in connection with the Merger; (vii) the Board did not consider the possibility of a tender offer in

connection with the Merger; and (viii) the Board did not consider the possibility of obtaining merger consideration for the Fund or shareholders, [redacted].

323. Guggenheim's Prior Recommendation. The Merger Proxy omits the highly material fact that Guggenheim had been prepared to recommend that the Fund liquidate in October 2020 on the basis of its calculation that a liquidation would provide "net benefit" to shareholders, which was not updated for the Board in 2021. Unlike in October 2020, the Board had no basis to evaluate whether the benefits of the Merger outweighed the potential net benefit of a liquidation.

324. The Value Of A Liquidation. The Merger Proxy conceals the current net benefit of the liquidation alternative for shareholders.

325. The Liquidation Tax Estimate. The Merger Proxy conceals that Guggenheim's stated tax associated with a liquidation is only an estimate, relies on unverified inputs including a potentially overstated tax rate, and has not been formally endorsed by an accounting firm.

326. The $0 Valuation. The Merger Proxy conceals that the Merger values the Fund's claims in connection with the Merger at $0 and that the Merger will interrupt the Fund's pursuit of the claims in this action, which may provide material benefits to shareholders if successful.

327. Self-Interest In Avoiding Liquidation. The Merger Proxy conceals Defendants' self interest in avoiding a liquidation; namely, that liquidation would require it to face the potential liability arising from the liquidity crisis in 2020. Guggenheim and the Board have both acknowledge in various ways the materiality of this liability, including through their actions with respect to insurance and indemnification.

328. Tortoise's Proposal With Tender Offer. The Merger Proxy conceals the existence of, and that Guggenheim unilaterally rejected, an alternative proposal that included a tender offer for shareholders at NAV. Neither Guggenheim nor the Board considered the possibility of a tender offer in connection with the Merger.

**O. The "Benefits" Set Forth In The Merger Proxy Are Mere Pretenses**

329. Guggenheim's Recommendation In Favor. The Trustee Defendants credit the fact that Guggenheim "recommended that the Board of [the Fund] approve the Merger based on [Guggenheim's] belief that the Merger will benefit [Fund] shareholders," but conceal that Guggenheim's recommendation comes from an entirely conflicted and self-interested position. Guggenheim is one of the largest beneficiaries of the Merger; it is attempting to escape personal liability and avoid continued management of an unprofitable fund with an atrocious performance track record.

330. Guggenheim's Compensation. The Trustee Defendants state in favor of the deal that "[Guggenheim] will not receive any payment in connection with the Merger," but conceal Guggenheim's ulterior motive: to interrupt this case, which seeks to impose hundreds of millions in dollars of liability. The fact that Guggenheim is giving away managed assets in a deal like this for free is not charitable, it is telling.

331. Investment Strategies & Performance. The Trustee Defendants point to various rationales relating to investment performance, including KYN has "similar investment objectives and investment strategies"; KYN provides "exposure to a broader range of investment opportunities may contribute positively to future performance"; and KYN has "relatively more favorable longer term net performance." These points are irrelevant because shareholders can buy KYN at any time; they do not need the ill-conceived Merger to do so. Further, irrespective of the Board's vague promises of future investment performance, pre-crisis shareholders have virtually no chance of recovering their principal. It would take many decades of exceptional performance for investors to merely break even.

332. Operating Expense Savings. The Trustee Defendants initially contended in the Preliminary Merger Proxy that "[t]he increase in management fees is substantially offset by the reduction of other operating expenses (excluding leverage expenses)." This was simply incorrect given the magnitude of the expected

increase in expenses post-Merger, and the Definitive Merger Proxy strikes that language. However, it continues to tout a purported $400k per year in expected cost savings, which is simply immaterial.

333. Post-Merger Total Expenses. The Trustee Defendants contend that their decision was supported by the supposed fact that "KYN's annualized operating expense ratio (*before interest, distributions on mandatory redeemable preferred stock* . . . *and taxes*) as a percent of average total assets was less than that of [the Fund]." (Emphasis added.) But they do not explain how this manipulated expense comparison supports the deal. Post-Merger, shareholders will pay all of those categories of expenses (*i.e.*, interest, distributions on MRP Shares, and taxes), and thus there is no basis to exclude them from consideration. The Merger Proxy admits that the "Merger is expected to result in an increase in total expenses as a percentage of net assets for FMO shareholders," and suggesting an expense benefit to the Merger is misleading.

334. NAV-for-NAV Swap. The Trustee Defendants state that the "exchange will take place at the [two funds'] relative NAV per share," apparently suggesting that shareholders will receive full value for their shares, but this point is intentionally misleading. It conceals that shareholders will be deprived of the value of the Fund's full NAV, over $13 million in additional value, which would be realized through a liquidation. Given that KYN is equally discounted, shareholders will lose the

opportunity to realize the full value of the Fund's NAV if the Merger is consummated.

335. Fund-level Taxes Caused By Liquidation. The Trustee Defendants attempt to diminish the value of liquidating the Fund by arguing that a liquidation "would result in [the Fund] paying approximately $6 million in federal and state corporate income taxes." But the Board did not even see that estimated tax expense in advance of its approval of the Merger, and the Board has not tested its reliability. Moreover, even if it were accurate, the taxes are less than the value that would be realized through a liquidation—more than $13 million—which the Board does not admit. Indeed, it is ironic that the Trustee Defendants had no qualms causing the Fund to pay over $20 million in avoidable taxes in 2020, but would forego the greater value of liquidation merely to avoid the prospect of paying any additional taxes.

336. Shareholder-level Taxes Caused By Liquidation. The Trustee Defendants similarly diminish the potential of a liquidation by stating that shareholders "who have a tax basis in their shares that is less than the net proceeds to be received for those shares would incur income taxes on amounts in excess of their tax basis to the extent the shares are held in a taxable account." But they do not disclose that they have conducted no analysis whatsoever on these potential taxes and cannot estimate whether they are likely to exist. Indeed, no shareholder who

held before the Fund's collapse in 2020 are likely to have unrealized gains because of the scale of the Fund's losses.

337. Advisers Are Covering Merger Costs. The Trustee Defendants credit that there will be "[n]o cost to [the Fund] to effect the Merger," given the outsized benefits obtained through the Merger, the minimal transaction expenses are well worth it to Guggenheim and Kayne Anderson. In any event, the fact that the Merger is "free" from transaction costs is not a business rationale: the deal comes at enormous cost to shareholders through the deprivation of value.

338. Shareholder Rights. The Trustee Defendants state, surprisingly, that "[s]hareholder rights are expected to be preserved" through the Merger. This statement is misleading because it conceals that the very purpose of the Merger is to interrupt—not preserve—claims against Guggenheim and the Board and any rights relating to those claims.

## VI. PRE-SUIT DEMAND IS EXCUSED

339. Plaintiff brings this action derivatively in the right and for the benefit of the Fund to redress the breaches of fiduciary duty, breaches of contract, and other violations of law by the Defendants, as alleged herein.

340. Plaintiff has owned shares of the Fund continuously at all relevant times set forth herein.

341. Plaintiff will adequately and fairly represent the interests of the Fund and its shareholders in enforcing and prosecuting the Fund's rights, and Plaintiff has retained counsel experienced in prosecuting this type of derivative action.

342. Plaintiff has not made, and is excused from making, a pre-suit demand on the Board to assert the claims herein for the reasons that follow.

343. The Trustee Defendants are incapable of disinterestedly and independently considering a demand under the futility analysis set forth in *United Food and Commercial Workers Union v. Zuckerberg*, No. 404 2020, 2021 WL 4344361 (Del. Sept. 23, 2021).

## A. Demand Is Futile Because Each Trustee Defendant Is Receiving A Material Personal Benefit From The Merger

344. Demand is futile where a majority of the members of the board "received a material personal benefit from the alleged misconduct that is the subject of the litigation demand." *See United Food*, 2021 WL 4344361 at *16.

345. The Trustee Defendants (with the Managers) are direct beneficiaries of the Merger because the deal seeks to interrupt the Fund's pursuant of over $200 million in unexculpated liabilities that the Trustee Defendants would otherwise face in their personal capacities.

346. Indeed, the benefits to shareholders, if any, are so superficial—and the detriments are so large—that no other plausible business purpose can be inferred other than to avoid outstanding liability.

347. Because the Merger has been orchestrated by the Trustee Defendants to avoid this liability for their own personal benefit, they are financially interested in the outcome and cannot disinterestedly and independently consider a demand.

## B. Demand Is Futile Because The Trustee Defendants Face A Substantial Likelihood Of Unexculpated Liability

348. Demand is also futile where a majority of the members of the board "would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand." *See United Food*, 2021 WL 4344361 at *16.

349. Here, the Fund's Declaration of Trust does not limit liability for gross negligence or recklessness and therefore the Trustee Defendants face personal, unexculpated liability for the claims set forth herein.

350. The Trustee Defendants have breached their duties of care and loyalty in multiple respects, resulting in the Fund's collapse. They cannot be expected to pursue claims against themselves, and in fact they have taken steps to arrange the Merger in an effort to escape that very liability.

351. First, the Trustee Defendants face substantial liability for their grossly negligent and reckless oversight of the Managers' use of leverage and inherent conflicts of interests.

352. Second, the Trustee Defendants face substantial liability for their grossly negligent and reckless management of the Fund's liquidity position and the risks created by the Managers' excessive use of leverage.

353. Third, the Trustee Defendants face substantial liability for their grossly negligent and reckless oversight of the Fund's exposure to income taxes and its tax accrual and reporting requirements.

354. Fourth, the Trustee Defendants face substantial liability for its grossly negligent and reckless handling of the Fund's liquidity crisis, which it did not even know was occurring and was not in a position to manage.

355. Fifth, the Trustee Defendants face substantial liability for their grossly negligent and reckless management of the Fund following the crisis, including the Board's failure to consider making a recovery for the Fund or otherwise holding Guggenheim and Tortoise accountable.

356. Sixth, the Trustee Defendants face substantial liability for their careless approval of the Merger proposal without consideration of material facts about the liquidation alternative, expense increase and merger consideration, among other things.

357. Seventh, the Trustee Defendants face substantial liability for their disloyal approval of the Merger in an effort to interrupt the Fund's pursuit of claims in this action and their refusal to seek merger consideration in connection with the transaction, which constitutes waste.

358. Eighth, the Trustee Defendants caused the Merger Proxy to make misstatements and omissions regarding the Merger as set forth above, including with respect to the net benefit of the liquidation alternative, the value of the Fund's claims, and the Board's process for considering the Merger.

359. As a result of the grossly negligent, reckless, and disloyal conduct above, the Trustee Defendants face a significant probability of personal liability and pre-suit demand would be futile.

## VII. DIRECT CLAIM AND CLASS ACTION ALLEGATIONS

360. Plaintiff brings Counts V and VI of this action pursuant to Rule 23 of the Rules of the Court of Chancery, individually and on behalf of all other holders of the Fund's common shares of beneficial interest (except Defendants herein and any persons, firm, trust, corporation, or other entity related to or affiliated with them and their successors in interest) who are or will be threatened with injury arising from Defendants' wrongful actions (the "Class"), as more fully described below.

361. Plaintiff has standing to bring Counts V and VI of this action *directly*, on behalf of the Class, because Counts V and VI allege that the merger itself is unfair

"by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price."[2]

362. Plaintiff's claims meet the three-part test adopted by the Delaware Supreme Court in *Spectra Energy*.[3]

363. First, Plaintiff's underlying derivative claims are viable, given that they allege well-pled claims for breaches of the fiduciary duties of loyalty and care against Guggenheim and the Trustee Defendants, and neither Guggenheim nor the Trustee Defendants are exculpated from personal liability for their breaches. Thus, Plaintiff's derivative claims are likely to survive a motion to dismiss.

364. Second, as a result of Guggenheim's and the Trustee Defendants' breaches of fiduciary duty, the Fund incurred losses in excess of $220 million, but the Merger assigns the Fund's claims a value of $0.

365. Third, the acquirer, Kayne Anderson, will not prosecute the derivative claims. Kayne Anderson already knows about the liability exposure and has negotiated a transaction that values the claims at $0 (and has paid no merger consideration at all). It has also required Guggenheim in connection with the Merger to indemnify it for "[l]iabilities and other [l]osses arising from, related to, in

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[2] *Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121, 132 (Del. 2021).

[3] *Spectra*, 246 A.3d at 136.

consequence of, or in any way involving claims asserted by a putative shareholder of FMO who has threatened a derivative shareholder lawsuit against FMO's Board of Trustees, Guggenheim, [and] its subadviser." Thus, Kayne Anderson is not in a position to assert the claims and would gain nothing by pursuing them.

366. Counts V and VI of this action are properly maintainable as a class action.

367. The Class is so numerous that joinder of all members is impracticable. The Fund has thousands of shareholders who are scattered throughout the United States. As of the October 29, 2021 record date, the Fund had 7,088,154 shares of beneficial interest outstanding.

368. There are questions of law and fact common to the Class including, *inter alia*, whether:

a. Guggenheim and the Trustee Defendants breached their fiduciary duties by agreeing to the Merger;

b. Guggenheim and the Trustee Defendants acted in furtherance of their own self-interests to the detriment of the Class;

c. Plaintiff and the other members of the Class have been injured by the wrongful conduct alleged herein and, if so, what is the proper remedy and/or measure of damages; and

d. Plaintiff and the other members of the Class have been damaged irreparably by Defendants' conduct.

369. Plaintiff is committed to prosecuting the action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of the other members of the Class, and Plaintiff has the same interests as the other members of the Class. Plaintiff is an adequate representative of the Class.

370. Defendants have acted, or refused to act, on grounds generally applicable to, and causing injury to, the Class.

## CAUSES OF ACTION

### COUNT I

### Derivative Claim Against The Trustee Defendants For Breaches Of Fiduciary Duties

371. Plaintiff repeats and realleges all of the allegations set forth in the paragraphs above as if fully set forth herein.

372. The Trustee Defendants owed the Fund the highest fiduciary duties of care and loyalty.

373. The Trustee Defendants breached their duties to the Fund by their (i) grossly negligent and reckless management of known and obvious risks relating to the Managers' use of leverage; (ii) grossly negligent and reckless management of the Fund's liquidity position; (iii) grossly negligent and reckless management of the Fund's liquidity crisis; (iv) grossly negligent and reckless management of the Fund's

trading and tax implications as well as accrual; (v) grossly negligent and reckless management of the potential for the Fund to make a recovery in connection with the liquidity crisis; and (vi) grossly negligent and reckless management of the Merger without consideration of material facts and on an incomplete record.

374. As a result of the Trustee Defendants' breaches of duty, as set forth above, the Fund incurred losses in excess of $220 million.

375. The Trustee Defendants are liable to the Fund for these losses.

## COUNT II

### Derivative Claim Against Guggenheim For Breaches Of Fiduciary Duties

376. Plaintiff repeats and realleges all of the allegations set forth in the paragraphs above as if fully set forth herein.

377. As the Fund's investment advisor, Guggenheim owed the Fund the highest fiduciary duties of care and loyalty.

378. Guggenheim breached its duties to the Fund by its (i) grossly negligent and reckless failure to realize, and disclose to the Board, the extent of the Fund's risks caused by its excessive use of leverage; (ii) grossly negligent and reckless failure to timely disclose to the Board the Fund's subsequent liquidity crisis and asset fire sale; (iii) disloyal negotiation of the Merger on unfair terms to advance its own financial interests; and (iv) grossly negligent and reckless recommendation to the

Board in favor of the Merger, which caused the Board to approve the Merger, without disclosing material facts, including the net benefit of the liquidation alternative, associated taxes, and the expected increase in overall expenses caused by the Merger.

379. As a result of these breaches of duty, the Fund incurred losses in excess of $220 million.

380. Guggenheim is liable to the Fund for its losses.

## COUNT III

### Derivative Claim Against Guggenheim For Breaches Of Contract

381. Plaintiff repeats and realleges all of the allegations set forth in the paragraphs above as if fully set forth herein.

382. Under the IAA, Guggenheim agreed to oversee the Fund's day-to-day operations, including with respect to the Fund's use of leverage, liquidity, and tax management.

383. Under the IAA, Guggenheim expressly assumed liability for "a loss resulting from willful misfeasance, bad faith or gross negligence on its part in the performance of its duties or from reckless disregard by it of its duties."

384. For the reasons set forth above, Guggenheim performed its contractual duties in a grossly negligent manner and is therefore liable to the Fund.

385. In particular, Guggenheim, in a grossly negligent and reckless manner, failed to appropriately (i) manage the Fund's leverage and liquidity positions so as to maintain sufficient liquid assets to cover liabilities and avoid margin calls; (ii) manage the liquidation of the Fund's portfolio during its liquidity crisis in a manner intended to preserve value; (iii) consider known tax implications in advance of the Fund's fire sale; and (iv) accrue the tax liabilities in a timely manner.

386. As a result of Guggenheim's misconduct, the Fund incurred losses of $220 million.

387. Because Guggenheim conducted its contractual duties in a grossly negligent manner, it is liable to the Fund under the IAA.

## COUNT IV

### Derivative Claim Against Tortoise For Breaches Of Contract

388. Plaintiff repeats and realleges all of the allegations set forth in the paragraphs above as if fully set forth herein.

389. Tortoise agreed pursuant to the Subadvisory Agreement to manage, on a day-to-day basis, the Fund's investment portfolio, including with respect to the Fund's use of leverage, liquidity, and tax management.

390. Under the Subadvisory Agreement, Tortoise expressly assumed liability for "a loss resulting from willful misfeasance, bad faith or gross negligence

on its part in the performance of its duties or from reckless disregard by it of its duties."

391. For the reasons set forth above, Tortoise performed its contractual duties in a grossly negligent manner and is therefore liable to the Fund.

392. In particular, Tortoise in a grossly negligent and reckless manner failed to appropriately (i) manage the Fund's leverage and liquidity positions so as to maintain sufficient liquid assets to cover liabilities and avoid margin calls; (ii) manage the liquidation of the Fund's portfolio during its liquidity crisis in a manner intended to preserve value; (iii) consider known tax implications in advance of the Fund's fire sale; and (iv) accrue the tax liabilities in a timely manner.

393. As a result of Tortoise's misconduct, the Fund incurred losses of $220 million.

394. Because Tortoise conducted its contractual duties in a grossly negligent manner, it is liable to the Fund under the Subadvisory Agreement.

## COUNT V

### Direct Claim Against Guggenheim And The Trustee Defendants For Breach Of Fiduciary Duty In Connection With The Merger And For Injunctive Relief

395. Plaintiff repeats and realleges all of the allegations set forth in the paragraphs above as if fully set forth herein.

396. Guggenheim and the Trustee Defendants owe the Fund and its shareholders the highest fiduciary duty of candor.

397. Through the Merger Proxy, in an effort to procure shareholder approval of the unfair Merger, Guggenheim and the Trustee Defendants intentionally obscure and conceal that the Merger seeks to eliminate the Fund's valuable claims in this action, deprives shareholders of the true value of the remaining assets in the Fund, and requires shareholders to pay exponentially higher expenses for the same services in the years going forward. Among other things, the Merger Proxy conceals that:

- Guggenheim had been prepared to recommend that the Fund liquidate in October 2020 based on its calculations of the "net benefit" to shareholders;
- There would be a net benefit to shareholders as of September 2021 in a liquidation;
- Guggenheim's estimate of taxes in connection with the Merger are unverified and not endorsed by an accounting firm;
- The Merger values the Fund's claims arising from the liquidity crisis at $0;
- The Merger, if effected, will interrupt the Fund's prosecution of its claims in this action, which may provide material benefit to shareholders of the Fund if successful;
- Defendants are self-interested in the Merger to the extent that it avoids a liquidation of the Fund, which would require Defendants' to reconcile the Fund's claims and liabilities in connection with the liquidity crisis and subsequent tax accrual error
- Guggenheim unilaterally rejected an alternative proposal that included a tender offer for shareholders at NAV; and

- The Board did not quantify and thus did not consider the expected tax that would be incurred in a liquidation;
- The Board did not consider the correct pro forma projected expenses;
- The Board did not attempt to quantify the expected increase in overall expenses;
- The Board did not consider the correct Merger "synergies" in advance of approval;
- The Board did not consider whether the Fund's claims had material value in connection with the Merger;
- The Board did not consider the possibility of a tender offer in connection with the Merger; and
- The Board did not consider the possibility of obtaining merger consideration for the Fund or shareholders, despite Kayne Anderson's initial willingness to pay for the assets.

398. Plaintiff and the Class face irreparable harm if an injunction is not granted because any shareholder vote will be unfair and uninformed, which cannot be remedied by monetary damages post-closing.

399. There is little to no burden in delaying the Merger, given that there are no genuine business reasons supporting it, much less reasons that are time-sensitive or subject to market conditions as in an operating company merger. The Fund is merely a pool of assets with no operations, and the only time-sensitive reason for the Merger now is the Defendants' expectation of personal liability from this action and its desire to part ways with the Fund. No party or interest will be truly prejudiced by

delaying the Merger, save for Defendants' interests in escaping their management obligations and the liabilities they have incurred.

400. Plaintiff and the Class have no adequate remedy at law.

401. For these reasons, Plaintiff is entitled to injunctive relief enjoining the shareholder vote on the Merger and its closing while this litigation proceeds.

## COUNT VI

### Direct Claim Against Guggenheim And The Trustee Defendants For Breach Of Fiduciary Duty In Connection With The Merger

402. Plaintiff repeats and realleges all of the allegations set forth in the paragraphs above as if fully set forth herein.

403. This Count VI is asserted in the alternative to Counts I through IV above in order to preserve the rights of shareholders to pursue claims in the event that the Merger is consummated.

404. Guggenheim and the Trustee Defendants owe the Fund and its shareholders the highest fiduciary duties of care and loyalty.

405. Guggenheim and the Trustee Defendants breached their duties to the Fund's shareholders by negotiating and approving a self-interested Merger on unfair terms in an effort to avoid liability.

406. The Fund's derivative claims, as set forth in this action, are worth in excess of $220 million, but Guggenheim and the Trustee Defendants assigned no value to them and secured no value for them in connection with the Merger.

407. The Fund's derivative claims are viable and are likely to survive a motion to dismiss.

408. The $220 million value of the derivative claims is material in comparison to the $0 valuation assigned to the claims in the Merger and in comparison to the current net assets of the Fund, which are approximately $94 million.

409. Kayne Anderson will not prosecute the derivative claims because Guggenheim and Kayne Anderson are transaction partners, and in connection with the Merger Guggenheim has agreed to indemnify Kayne Anderson for liability relating to the Fund's derivative claims above and any related shareholder claims. In addition, Kayne Anderson was aware of the claims in connection with the Merger, and was aware that the Merger assigned them no value, and there is no reason to believe that it will pursue the claims now.

410. As a result of Guggenheim's and the Trustee Defendants' breaches of duty, Plaintiff and the Class incurred losses in excess of $220 million.

411. Guggenheim and the Trustee Defendants are liable to Plaintiff and the Class for their losses.

## PRAYER FOR RELIEF

**WHEREFORE**, Plaintiff demands judgment as follows:

A. Declaring with respect to Counts I through IV that a pre-suit demand on the Board would be futile and is excused;

B. Declaring with respect to Counts V and VI that this action is properly maintainable as a class action;

C. Declaring that the Trustee Defendants, Guggenheim and Tortoise breached their fiduciary duties of care and loyalty owed to the Fund and/or the Class;

D. Declaring that Guggenheim breached its duties under the IAA and that Tortoise breached its duties under the Subadvisory Agreement;

E. Awarding damages for the monetary losses incurred by the Fund and/or the Class caused by the misconduct set forth herein in an amount to be proven at trial including pre-and post-judgment interest;

F. Enjoining the shareholder vote on the Merger and its closing unless and until the misleading Merger Proxy is remediated;

G. Granting any additional extraordinary equitable and injunctive relief against all Defendants and in favor of the Fund to the fullest extent permitted by law and/or equity and consistent with the allegations above;

H. Awarding Plaintiff the costs of the action, including reasonable attorneys' fees, accountants' fees, consultants' fees, and experts' fees, costs, and expenses; and

I. Granting such further relief as the Court deems just and proper.

Dated: January 17, 2022

**BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP**

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## CERTIFICATE OF SERVICE

I, Gregory V. Varallo, do hereby certify that, on January 24, 2022, the foregoing **Public [redacted] version of the Verified Amended Derivative and Class Action Complaint for Declaratory, Injunctive and Monetary Relief** was filed and served via File & Serve*Xpress* upon the following counsel of record:

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