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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC., Plaintiff Below-Appellant, v. ENERGY TRANSFER EQUITY, L.P., et al., Defendants Below-Appellees.	No. 330, 2016 Court below: Court of Chancery of the State of Delaware C.A. Nos. 12168-VCG and 12337-VCG

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Dated: September 12, 2016

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NATURE OF PROCEEDINGS

In a carefully reasoned opinion following a merits trial, the Trial Court found that a critical closing condition could not be satisfied and concluded that Energy Transfer Equity, L.P. (together with its affiliates, "ETE") had the right to terminate its merger agreement ("Agreement") with The Williams Companies, Inc. ("Williams"). Williams' appeal is fatally flawed. It mischaracterizes the record and the Trial Court's opinion, attempts to rewrite the Agreement, and cannot cite any evidence of any action that ETE could have taken to obtain a tax opinion that ETE's tax counsel determined in its good faith judgment could not be issued.

Reflecting that "a tax-free transfer…was necessary for the deal to make economic sense," a condition precedent to the Agreement was Latham & Watkins LLP's ("Latham's") delivery of an opinion that, as of the closing, a major component of the merger "should" qualify as tax-free (the "721 Opinion"). Op. 30-31. Williams conceded that delivery of this opinion was uncertain and depended on Latham's judgment. *Id.* at 32-33. However, when Latham, after exhaustive analysis, determined that it could not deliver this opinion, Williams filed suit seeking to force ETE to close the merger notwithstanding a potential billion-dollar tax liability that would adversely affect both Williams' and ETE's equity-holders.

In an attempt to secure *de novo* review of the Trial Court's fact-intensive rejection of Williams' claims, Williams states that it is appealing the legal bases for the Trial Court's judgment. But Williams' challenges are factual in nature. As such, these challenges may only be reviewed for clear error, and no such error exists. The Trial Court gave Williams every benefit of the doubt, approaching ETE's claims "with a skeptical" and "jaundiced eye." *Id.* at 3, 33. Nevertheless, with the opportunity to observe the witnesses and examine the evidence, the Trial Court correctly concluded that the evidence overwhelmingly supported ETE.

First, based "[u]pon a review of the evidence," the Trial Court rejected Williams' allegations that ETE (a) had breached its contractual obligation to use commercially reasonable efforts to obtain the 721 Opinion and (b) caused the failure of the condition. *Id.* at 45. The Trial Court correctly interpreted the Agreement as requiring ETE "to do those things objectively reasonable to produce the desired 721 Opinion, in the context of the" Agreement. *Id.* at 46. As the Trial Court found, ETE fulfilled its obligations because, among other things:

- ETE asked Latham to conduct a thorough, independent analysis. *Id.* at 43.
- At ETE's request, Latham "devoted considerable effort in this endeavor," spending "over 1,000 hours of attorney time in the process" by "extensively analyz[ing] the regulations and case law regarding the issue." *Id.* at 38.
- When Latham preliminarily indicated that it could not deliver the 721 Opinion, ETE asked one of the nation's leading partnership tax lawyers to provide a "'fresh look.'" *Id.* at 20.
- When Williams suggested two potential solutions to the tax problem, ETE asked Latham to fully evaluate the proposals; Latham did so, concluding that the proposals would not allow it to deliver the 721 Opinion. *Id.* at 22.

Thus, the Trial Court found: (a) ETE did not breach the Agreement, and (b) even if it had, such breach did not cause the condition precedent to fail. *Id.* at 45-47.

Second, the Trial Court rejected Williams' claim that Latham acted in bad faith. "[B]ased on the evidence," the Trial Court found that Latham acted in good faith and "reached its conclusion based upon its independent judgment." *Id.* at 43. The Trial Court "credit[ed] the testimony of" Latham's tax partners, who exhibited "personal integrity" and "were obviously embarrassed that they" and Williams' attorneys had "missed this issue" when the parties negotiated the Agreement. *Id.* at 42. Notably, Williams' brief does not assert that the transaction should (or would) have been tax-free; nor does it appeal the Trial Court's "good faith" finding. There is no dispute on appeal that the transaction had a serious tax problem.

Despite these two findings and without citing any evidence, Williams argues that ETE should have done *even more* to obtain the 721 Opinion. But the Trial Court sensibly rejected this argument as well, finding that "[t]he record demonstrates no" actions "available to [ETE] that would have caused Latham, acting in good faith, to issue the 721 Opinion." *Id.* at 46-47. And "based on the demeanor of" a Latham witness, who testified "forcefully," the Trial Court found that Latham's opinion was not "influenced by" ETE. *Id.* at 42.

Third, the Trial Court rejected Williams' allegation that ETE breached a representation. The parties each represented that, when they executed the Agreement, they did not "know[] of the existence of any fact that would reasonably be expected to prevent" the transaction from qualifying for tax-free status under Section 721. *Id.* at 52. According to Williams, ETE knew, but failed to disclose, "the legal theory on which Latham now bases its decision not to issue a 721 Opinion." *Id.* at 53. The Trial Court held that a "theory of tax liability" is not a "fact" for purposes of this representation. *Id.* Further, even if it were a "fact," the Trial Court correctly found that (a) "nothing in the record indicates to me that this legal theory was developed at the time of signing" and (b) ETE undisputedly wanted to structure the deal in a tax-free manner. *Id*. at 53-54.

Williams abandons this argument on appeal. Instead, Williams now argues that *even though ETE did not breach this representation*, the Trial Court should have estopped ETE from terminating a tax-defective merger because Williams relied on ETE's representation as a binding guarantee of a 721 Opinion absent a tax-law change before closing. Williams was a sophisticated party with experienced counsel who knew that (1) the 721 Opinion would be based on Latham's post-signing analysis, (2) ETE bore any tax liability if the transaction were not tax-free, and (3) the tax treatment of this novel structure was not free from doubt. Williams cannot obtain such extraordinary relief based on what it now concedes was a non-breach, and it cannot rely on this representation as a guarantee that an uncertain condition would be satisfied.

This Court should respect the province of the fact-finder and affirm.

SUMMARY OF ARGUMENT

The Trial Court made well-supported findings that ETE (1) satisfied its duty to use commercially reasonable efforts to obtain the 721 Opinion, (2) did not cause Latham's inability to issue the opinion, and (3) made no misrepresentation that would prevent it from invoking the 721 condition. Because those findings are correct, and certainly not clearly erroneous, this Court should affirm.

I. Denied. Williams contends that the Trial Court committed two errors in finding that ETE satisfied its obligation to use "commercially reasonable efforts" to obtain the 721 Opinion. Both arguments fail. First, the Trial Court did not "lower[] the standard required by ETE's efforts obligations." Williams' Op. Br. ("OB") 5. In a fact-specific inquiry that appropriately considered "the context of the [parties'] agreement," the Trial Court correctly found that ETE engaged in "reasonable behavior," including affirmative acts, "to allow Latham to give the 721 Opinion." Op. 46. Second, the Trial Court did not "import[] a causation requirement into its breach analysis." OB 5. It separately found no breach and no causation (meaning either finding is an independent ground for affirmance). Nor did the Trial Court misallocate the burden of proof on causation. The Trial Court correctly found that "no matter how [it] allocate[s] the burden," ETE prevails on causation because "the record is barren of any indication that the action or inaction of [ETE] ... contributed materially to Latham's inability to issue the 721 Opinion."

Op. 47 n.130. This Court can thus affirm without deciding who bore the burden. Should the Court reach this issue, it should hold Williams bore the burden as the party asserting breach of contract (the only claim at issue on appeal). OB 1.

II. Denied. The Trial Court did not err in refusing to estop ETE from terminating the Agreement. To begin, Williams' appellate argument is barred under Del. Sup. Ct. R. 8 because it was not "fairly presented to the trial court." Instead, Williams offers an entirely new factual basis for its estoppel claim, shifting from a claim based on what *ETE did* know, to a claim based on what *Williams* did *not* know. It also relies on a legal standard not presented to the Trial Court. Even if Williams' argument is not barred, it fails on the merits. First, Williams does not satisfy the elements of equitable estoppel. The Trial Court made factual findings establishing that Williams *did* have knowledge, or at least the means of obtaining knowledge, about the "facts" in question. And the reliance Williams claims based on ETE's tax representation is unreasonable in light of Agreement § 3.02(n)(i)'s plain language. Second, Williams' argument uses equitable estoppel to effectively rewrite Sections 3.02(n)(i) and 6.01(h) of the Agreement; Delaware law forbids this. Finally, Williams would use equitable estoppel to create a broader remedy than the specific remedy bargained for in the Agreement; again, this conflicts with Delaware law.

COUNTERSTATEMENT OF FACTS

I. Williams and ETE agreed to merge, subject to (among other things) Latham's delivery of the 721 Opinion

A. The Merger

Under the September 28, 2015 Agreement between ETE and Williams, ETE would combine with Williams (the "Merger"), whose stockholders would become shareholders of ETC, a newly created ETE affiliate. B0016; Op. 7-8. In a series of interdependent transactions under the Agreement: (a) Williams would merge into ETC; (b) ETE would transfer $6.05 billion and a fixed number of Class E Units (a new class of ETE securities) to ETC; (c) ETC would transfer a fixed number of newly issued ETC shares ("hook-stock")[1] and the former Williams assets to ETE; and (d) ETC would transfer the ETC shares, $6.05 billion in cash, and certain contingent consideration rights to the former Williams stockholders. *Id.* According to Williams' own tax counsel, the deal's structure was "very unusual" and "very tax-intensive." A2881 (Tr. 382:12-14, 382:18-383:10).

B. The parties included the 721 Opinion as a closing condition

"[A] tax-free transfer of the Williams Assets between ETC and [ETE] was necessary for the deal to make economic sense at the time of signing." Op. 31; A2882 (Tr. 384:22-385:5); B0001. "[T]he parties negotiated comprehensively" to "avoid" the Merger's "many potential negative tax ramifications." Op. 1. If this

[1] Hook-stock is stock that a subsidiary, here ETE, holds in its own parent, here ETC.

transfer were taxable, the "potential tax liability" was "estimated in the range of $1 billion." Op. 37; A2807 (Tr. 88:2-12), A2818 (Tr. 132:10-14). The Agreement thus included a condition providing that either party could terminate if Latham did not issue an opinion that the transfer of Williams' assets "should" be tax-free:

> [ETC] and [Williams] shall have received a written opinion from [Latham], dated as of the Closing Date…to the effect that the Contribution and the Parent Class E Issuance should qualify as an exchange to which Section 721(a) of the Code applies.[2]

B0095 § 6.01(h); Op. 15-16, 31-32. Four aspects of this condition are relevant.

First, the condition requires a tax opinion concerning Section 721(a) of the Internal Revenue Code, which provides that a contribution of property to a partnership in exchange for a partnership interest generally is tax-free. 26 U.S.C. § 721(a); A2900 (Tr. 458:11-16). However, if the contributor receives any other type of consideration (*e.g.*, cash) for the property, the contribution is not tax-free. A1911. Under tax provisions dealing with "disguised sales," if a partner contributes property to a partnership and, within two years, the partnership transfers cash to the partner, the two transactions are *presumed* to be a taxable sale rather than a tax-free exchange under Section 721(a). 26 U.S.C. § 707(a)(2)(B).

Second, the Agreement specifies a "should-level" tax opinion, the second-highest in the hierarchy of confidence levels. Op. 31-32. A should-level opinion

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[2] The "Contribution" is ETC's contribution of Williams' assets to ETE. B0022 § 1.01(b)(iii). The "Class E Issuance" is ETE's issuance of Class E units to ETC. *Id*.

requires a very high level of confidence;[3] Latham's standards require it to conclude that the tax position is "something with substantial certainty" where "there is very good case law" and any "contrary authorities" are "readily distinguishable." A2838 (Tr. 211:16-212:4), A2872 (Tr. 344:8-18); Op. 32-33. Reflecting the importance of the 721 Opinion, Williams did not negotiate for a lower level of confidence.[4] Op. 32-33; B3439 (Smith Dep. 221:16-18). Both Williams and ETE *wanted* a very high level of tax confidence; as Williams' tax counsel testified, failure to qualify under Section 721 is "a very, very bad result." A2872 (Tr. 345:1-13); B3440 (Smith Dep. 222:13-19); A2819 (Tr. 135:11-19).

Third, the parties negotiated for a mutual condition that turned on *Latham's opinion*. Op. 30-33; A2871-72 (Tr. 343:16-344:7), A2880 (Tr. 379:14-17); *see also* A2818 (Tr. 129:9-17), A2867 (Tr. 326:19-24); A2337-38 (Rackley 147:20-148:15, 150:18-23). The Trial Court found, and Williams does not dispute, that:

> The parties could have contracted to a different level of certainty for the condition-precedent 721 Opinion. They could have picked an independent third party to make such a determination, such as an academic. They could have opted for an objective standard, to be provided by a court or by an arbitrator. Instead, they assigned responsibility to Latham, [ETE's] tax counsel, and determined that a condition precedent to consummation of the Proposed Transaction would be *Latham's* opinion that the transfer "should" withstand a challenge to tax-free status under Section 721(a).

[3] The highest level is a "will"-level opinion, indicating the tax lawyer's opinion is virtually certain to be upheld by a court. A2838 (Tr. 211:4-15); Op. 32.

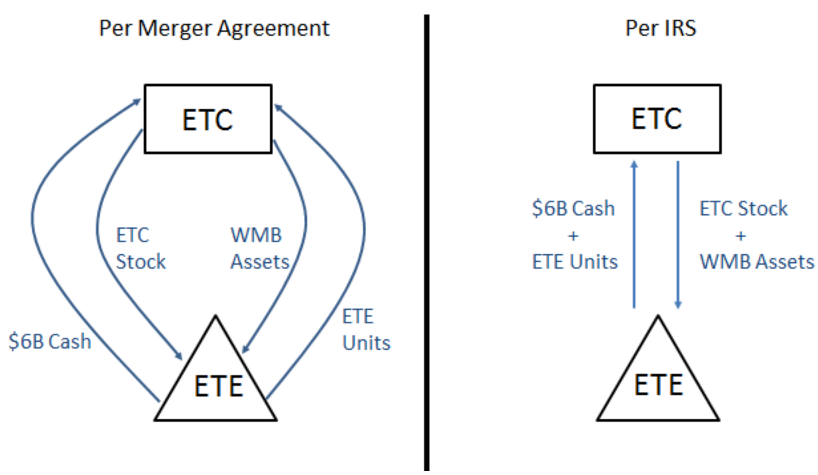
[4] Lower levels of confidence include "more likely than not," "substantial authority," and "realistic possibility of success." Op. 32; A1912.

Op. 32-33. The parties' agreement about which firm would opine is important because tax opinions involve professional judgments. A2827-28 (Tr. 167:17-168:17, 169:12-170:6) ("[S]hould is not a defined term [in tax law]. It's not like we have a scientific" measurement where "you add up enough until the scales tip over."), A2838 (Tr. 210:21-211:3), A2872 (Tr. 344:8-18), A2881 (Tr. 381:7-14); A1913. After all, Latham's task was to *predict* the outcome of a tax dispute that would not occur until after closing. In this respect, the 721 Opinion was fundamentally unlike, for instance, a regulatory approval condition, where the regulator gives approval prior to closing. B0094-95 (Agreement § 6.01(b)-(d)) (approvals from non-tax regulators "shall have been received").

Fourth, the Trial Court recognized the parties "negotiated an assurance that the Contribution…would receive such tax treatment *as of the date of closing*," instead of "relying on a binding tax review as of the time of signing" or "limit[ing] the condition precedent to application only where a change in tax law occurred or where other designated circumstances changed." Op. 15, 55. In other words, the parties knew Latham had not fully analyzed the issue at signing and might ultimately be unable to deliver the 721 Opinion, as they disclosed in every version of their joint proxy statement/prospectus ("S-4"). B0187, B0206, B0355.

C. No one foresaw the eventual emergence of an obstacle to Latham issuing the 721 Opinion

At the time of signing, Latham had conducted standard pre-signing diligence, but none of the parties or their lawyers had fully considered how the interrelationship between the Agreement's two ETC-ETE exchanges would affect the Section 721 analysis. Op. 53-54. In form, those exchanges are (1) ETC transfers Williams' assets to ETE in exchange for ETE equity (Class E units), and (2) ETC transfers newly issued stock to ETE for $6 billion. B0022, B0027 (Agreement §§ 1.01(b)(iii), 2.02(d)); A2847-48 (Tr. 248:23-249:5), A2899 (Tr. 455:7-14). However, the IRS would not be bound by the parties' characterization that ETE would pay its $6 billion in cash *solely* for ETC stock; the IRS could instead integrate the exchanges and conclude that ETE was to pay *both* cash and ETE Class E units for ETC stock and the Williams assets, with the result that the exchanged consideration would be allocated *pro rata*, and the exchanges would not be fully tax-free under Section 721(a). *See* A1854; A1901. Simplistically:



The deal's structure was "tax-intensive" and "very, very unusual." Op. 1, 40; A2881 (Tr. 382:12-14, 382:18-383:10), A2830 (Tr. 179:17-18), A2924 (Tr.

554:2-6). Yet neither party prepared customary "steps diagrams" to depict the transaction's mechanics. B3544-45 (Gordon Dep. 56:24-58:4). In fact, Williams' tax attorneys at Cravath, Swaine & Moore LLP ("Cravath") did not realize until April 2016 that the $6.05 billion in cash was paid to ETC first before being distributed to the former Williams' stockholders. A2931 (Tr. 580:1-581:22).

Whatever the reason, neither party realized until months after executing the Agreement that the two interrelated and interdependent ETE-ETC exchanges might be linked, a result fatal to the 721 Opinion. Op. 53-54; A2833 (Tr. 189:13-22, 191:9-19), A2840 (Tr. 218:5-9), A2850 (Tr. 257:3-7), A2856 (Tr. 282:12-15), A2901 (Tr. 462:19-22), A2903 (Tr. 468:23-469:2), A2918 (Tr. 529:12-15, 530:2-8). As the Trial Court found, "[n]othing in the record indicates…that this legal theory was developed at the time of signing." Op. 53. At signing, Latham expected to be able to deliver the 721 Opinion, and held that belief until April 2016. *Id.* at 16; A2856 (Tr. 281:4-7, 282:12-15). Nor was ETE aware in September 2015 of potential issues with the 721 Opinion. Op. 54; A2833 (Tr. 189:13-22, 191:9-19). "What would st[r]ain credulity," the Trial Court found, "would be a finding that [ETE] had this theory in mind at the time it entered the transaction and made the representation, and yet held it back. [ETE's] interest at that time was in consummati[ng]" the Merger. Op. 54. "[K]nowledge of such a theory is no more chargeable to [ETE] than to Williams." *Id*.

II. Despite ETE's efforts, Latham could not deliver the 721 Opinion

A. ETE's head of tax asked Latham to analyze a potential issue

In late March 2016, ETE's head of tax, Brad Whitehurst, when "considering tax issues that could arise if [ETE] decided to cut a portion of its cash distributions," discovered a detail of the Merger of which he was previously unaware. Op. 17, 34; A2818 (Tr. 129:18-132:8), A2823-25 (Tr. 150:15-18, 156:24-157:3), A2833 (Tr. 191:14-19), A2842-43 (Tr. 228:22-229:8). He observed that the number of shares of hook-stock and the Class E units were fixed, as was the cash to be exchanged between ETE and ETC, which became more apparent after the post-signing decline in ETE's unit price. *Id.*

Whitehurst immediately called Latham, on March 29, to ask whether he misunderstood the Agreement. Op. 18; A2843 (Tr. 229:1-24). When Latham responded that Whitehurst's original understanding of the structure was incorrect, Whitehurst asked Latham to "determine if [ETE] had a tax issue and, if so, whether there was a fix and how the issue could affect Latham's 721 Opinion." Op. 18; A2819-21 (Tr. 134:2-12, 140:22-141:1), A2844 (Tr. 234:15-24), A2856 (Tr. 284:4-13); A2863 (Tr. 309:1-8), A2903-4 (Tr. 470:6-24, 474:23-475:5). The Trial Court found, and Williams does not contest on appeal, that Whitehurst did not "direct Latham to come to a particular conclusion." Op. 35, 49; A2844 (Tr. 234:20-24), A2863 (Tr. 309:1-8), A2903 (Tr. 470:6-24).

B. Latham fully and independently analyzed the Merger and determined that it could not deliver the 721 Opinion

Over the ensuing days, Latham worked full time to get its arms around the economic relationship between the two ETE-ETC exchanges. Op. 35; A2843 (Tr. 230:1-17). When Latham realized that the issue "could be very material," lead tax partner Tim Fenn "pulled all the tax associates in Houston off of everything they were working on and put everybody all hands on deck, to start unraveling this [issue]" because "we have got to be able to give this opinion." A2843-44 (Tr. 232:10-234:8). Latham's analysis revealed that the values of the transaction's two legs moved in an exactly inverse relationship and would always offset precisely. Op. 38-39; A2899-901 (Tr. 455:2-457:9, 461:20-462:18). This analysis led Latham to realize, for the first time, that these complex interactions might implicate significant partnership tax issues. Op. 19, 38-39; A2843 (Tr. 230:18-231:13), A2901-3 (Tr. 462:1-18, 467:7-468:3).

Latham then worked intensively on the legal implication of those facts, again "trying to think of" how "we could still give an opinion." A2844 (Tr. 235:10-236:20), A2828 (Tr. 169:12-170:6) (Latham was "trying to get to a should" and "motivated to try to get to a should"), A2844 (Tr. 233:3-234:8), A2849 (Tr. 256:8-18), A2903-4 (Tr. 468:4-15, 473:2-16) (Latham was "absolutely" "wanting to get to a should level"); A2037-38 (Fenn Dep. 149:11-150:24) ("pushing and prodding in every direction…to try to get to where we could give a 721 opinion"), A2052 (Fenn Dep. 206:5-20). As Fenn testified:

> [A]t that point we're, again, still all hands on deck of trying to analyze this. So we're trying to think of every kind of -- you know, both where the issue could be, potential solutions as to where we could still give the opinion. We're doing as much legal research as we can, running down some rabbit trails that didn't lead somewhere, but we needed to run down those things....[M]y hope was always we would get to the point where we could give a should opinion on the transaction.

A2844 (Tr. 235:10-236:20), A2903-4 (Tr. 471:18-473:16). Fenn and his partner, Larry Stein (the former chair of Latham's tax department), consulted several other Latham attorneys for their views. A2844-46 (Tr. 244:3-9, 235:21-236:4, 240:15-21), A2904 (Tr. 472:10-473:1); B1320. Latham continued to brainstorm and explore potential solutions after determining that it could not deliver the 721 Opinion. A2846 (Tr. 241:1-17), A2919 (Tr. 534:9-535:21); A2053 (Fenn Dep. 212:9-213:6), A2083-84 (Tr. 333:11-334:7). Latham's work-papers reveal a thoughtful analysis, free from interference.[5] A2904 (Tr. 474:23-475:5); A2048-49 (Fenn Dep. 191:23-192:6, 194:24-195:5), A2063 (Fenn Dep. 251:1-7); A2923-24 (Tr. 550:24-553:13) (tax expert testifying that Latham's work-papers were "totally comprehensive" and "balanced"). Fenn testified that Whitehurst never "discourage[d] [Latham] from issuing that opinion" and that there was "[n]ot a chance" that anyone "told the Latham team, in form or substance, that it shouldn't give a should opinion." A2844 (Tr. 234:9-24), A2904 (474:23-475:5).

[5] Approximately 100 of Latham's work papers are exhibits in the record. *See, e.g.*, B3222.

"During this time, Latham held multiple discussions with [ETE], Wachtell, [ETE]'s deal counsel, and V&E, [ETE]'s litigation counsel, and consulted six other tax partners at Latham." Op. 19. Far from rubber-stamping Latham's work, the other tax lawyers "pressure test[ed]" Latham's analysis to "determine the validity of [its] statements." A2820 (Tr. 138:6-139:14), A2847 (Tr. 246:3-247:11), A2866 (Tr. 323:1-324:15). After working intensively for two weeks and consulting with numerous tax attorneys, Latham informed ETE on April 11 that it could not provide the 721 Opinion under then-existing circumstances. Op. 20; A2845-47 (Tr. 240:15-21, 242:16-244:9, 248:9-15), A2849 (Tr. 256:2-7).

The Trial Court found that "Latham took this responsibility seriously," "devoted considerable effort in this endeavor, ultimately investing over 1,000 hours of attorney time in the process," and "marshalled its tax attorneys and extensively analyzed the regulations and case law regarding the issue." Op. 38; A2855 (Tr. 278:11-14). The Trial Court credited Fenn's and Stein's testimony as truthful that Latham's "opinion was not influenced by the (concededly manifest) interests of its client, [ETE]."[6] Op. 42; A2904 (Tr. 474:12-22). Stein denied that Latham would bend its analysis or conclusions based on a client's request:

> Look, this is our opinion, our reputation. I've been in this firm 30 years. I chaired this tax department for 11 years. I've watched this firm grow. I've watched this tax department, with my fingerprints on

[6] The Trial Court further held that "the record is bereft of any explicit or implicit direction by [ETE] to Latham to reach a particular outcome." Op. 43.

> it, grow. I have a lot of pride in our integrity and in our professional ability. And I -- there's no way, for any client, I'm going to reach a conclusion that is contrary to my professional judgment. Not a chance.

A2904 (Tr. 475:12-20), A2837-38 (Tr. 208:9-14, 208:23-209:2), A2903 (Tr. 471:4-17), A2940 (Tr. 618:2-9); Op. 33-34. The Trial Court found that Latham acted in good faith in its determination and "reached its conclusion based upon its independent judgment." *Id.* at 40, 42-43. Even Williams' tax counsel would not say that Latham was lying. A2881 (Tr. 383:13-15).

C. ETE sought a second opinion from one of the nation's leading partnership tax lawyers

Contrary to Williams' rejected assertions, Latham's preliminary indication that it could not deliver the 721 Opinion was what Whitehurst described as his "worst nightmare." A2819 (Tr. 134:13-135:24). After all, as ETE's head of tax, an issue with the tax impact of the Agreement reflected poorly on Whitehurst:

> Q. So how did you react to the news that you might have a problem?
>
> A. It's your worst nightmare. I mean, you are talking about you are head of tax. You are responsible for tax, and you've got a major bust in your transaction. Any tax practitioner, it's – your heart stops. You panic because that's that realization that you've got a major problem with your tax structure and it results in a significant – could result in a significant tax liability.
>
> …. [A]t this point, my primary concern was my job….

Id.; *see also* A2835 (Tr. 198:18-199:4) (Williams' allegation that he raised the tax issue to "satisfy a [non-tax] business desire" is "almost insulting"). The record likewise contradicts Williams' hypothesis that other ETE executives were pleased:

> Q. How did [Kelcy Warren, ETE's Chairman] react?
>
> A. "How much is this going to cost me? What is the tax liability that the enterprise would face?" He was concerned about more strain. "Can you fix it?"

A2819 (Tr. 135:1-5).

Thus, while Latham was still analyzing the issues, ETE concurrently sought an independent "fresh look" from one of the country's most respected partnership tax practitioners, Bill McKee at Morgan Lewis & Bockius, LLP. Op. 20; A2819 (Tr. 136:1-22); A2318-19 (Rackley 73:24-74:11). Whitehurst asked McKee "to see if it was either a true issue or a solution could be found." A2819 (Tr. 136:8-22), A928 (Tr. 568:24-569:9). Whitehurst did not suggest that he wanted McKee to reach any particular answer. A2928 (Tr. 570:3-14). McKee and his team immediately began analyzing the issue.

On April 11, McKee told ETE that his team had concluded, independently and without interacting with Latham, that the transaction was likely taxable.[7] A2929-30 (Tr. 574:2-14, 576:6-24). As McKee recalled, "Whitehurst was very concerned that he had participated in a transaction that had a problem in it." *Id.*

As is typical with complex tax issues, Latham and McKee "came to a similar conclusion based on a somewhat different premise." Op. 39. McKee focused primarily on the facts that the hook-stock issuance and the Contribution were both

[7] Numerous of McKee's work papers are also exhibits in the record. *See, e.g.*, B1282-85.

part of one integrated transaction and that the rationale for the allocation of the cash solely to the hook-stock appeared tax driven, an improper maneuver referred to colloquially by tax practitioners as "cherry-picking."[8] Op. 21, 39. Latham concluded that, in addition to this cherry-picking risk, there was also incremental risk that the IRS would not respect the ETE-ETC exchanges as two separate transactions because value fluctuations in the two transactions offset each other exactly (what Latham calls the "perfect hedge" or "cherry-picking on steroids").[9] Op. 19-20; A2847-50 (Tr. 248:19-256:1, 257:19-258:5), A2899-02 (Tr. 455:4-457:9, 457:24-458:7, 461:20-462:22, 463:16-466:5), A2910-11 (Tr. 499:6-503:8). As the Trial Court concluded after reviewing written submissions and testimony at trial of six different tax advisors, "[t]his range of opinion indicates to me the closeness of the issue and the unusual nature of the transaction here."[10] Op. 41. By asking McKee and Latham to (at least initially) analyze the Section 721 issue

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[8] Contrary to Williams' suggestion, a business purpose for *including* hook-stock in the deal is irrelevant to whether the IRS will respect the *allocation* of $6 billion solely to the hook-stock; the relevant question is whether there is a business purpose for the *allocation itself*. A2823 (Tr. 149:3-150:4), A2926 (Tr. 563:1-4). "And that's the business purpose that" is "absent from the transaction." *Id*.; B3516 ¶ 4; B3499.

[9] ETC's share price was to move in parity with ETE's units (and deal mechanisms ensure that parity). The Agreement calls for ETE to pay a fixed price ($6 billion) for a fixed number of ETC shares. As ETE's unit price declined, ETE would in effect be substantially "overpaying" for ETC shares and "underpaying" for Williams' assets in precisely offsetting amounts.

[10] Williams claims that ETE's other tax advisors/experts "disagree" with aspects of Latham's analysis (OB 17), but all of ETE's tax advisors/experts unanimously agree with Latham's conclusion that there is too much tax risk to deliver the 721 Opinion. Op. 41; A1842-44; A1900; B3515 ("Given the complexity of the proposed transaction it would, in my experience, be surprising for two sets of advisors working independently to analyze a transaction identically, so the differences between Latham & Watkins's and my analyses are unexceptional.").

independently, Whitehurst allowed ETE's tax advisors to separately reach the same conclusion from "different points of view" with "different emphasis on different things"—this freedom to independently analyze the issues made their ultimate conclusion more reliable than if McKee had simply looked over Latham's shoulder. A2827-28 (Tr. 167:17-169:11), A2930 (Tr. 577:3-11); A2435 (Whitehurst 247:19-248:2).

D. ETE attempted to work through the issue with Williams

1. ETE promptly notified Williams, which responded with threats and bluster

Latham informed Cravath of the tax issue on April 12 and asked for Cravath's input. Op. 21, 43; A2820 (Tr. 140:13-17), A2847 (Tr. 245:9-12), A2850 (Tr. 258:17-23); B1334. Rather than discuss the issue in good faith, Williams—which had already sued ETE over a different issue—immediately launched into litigation mode. Cravath's lead corporate counsel, Minh Van Ngo, immediately told Cravath's lead tax counsel, Andrew Needham, to "communicate our reaction" to Latham. A2183 (Needham Dep. 150:22-151:5). Needham eschewed discussion in favor of posturing, telling Latham—a mere two hours after the initial call with Latham—that Cravath had "fully considered the issue" and "would give a will-level 721(a) opinion." A2851 (Tr. 261:4-262:4), A2874-75 (Tr. 355:19-356:21), A2882-83 (Tr. 387:9-388:7); B1334; A2185 (Needham Dep. 158:9-160:11). Cravath also intimated during this follow-up call that Williams would sue ETE over the 721 Opinion. A2851 (Tr. 262:1-20), A2875 (Tr. 356:3-7).

Needham now admits that his “will-level opinion” statement was posturing. It was not serious or researched. A2883 (Tr. 388:2-13); A2183-84 (Needham Dep. 153:23-154:14), A2189 (Tr. 176:12-18). In fact, Cravath never created any written analysis; as of trial, it had “no memos, no drafts, [and] no written communications with ETE or anyone else setting forth its Section 721 analysis.” A2881 (Tr. 380:10-20). Needham also conceded that “my primary concern was getting to a closing on behalf of our client,” A2888 (Tr. 409:17-410:18), apparently without regard to whether a closing would trigger $1 billion or more in taxes.

Williams’ collaboration-chilling response was typical of its approach. In March, when ETE reminded Williams of a potential issue regarding a different tax opinion specified in the Agreement that Latham had first raised before signing, Williams’ lead attorney immediately threatened to “sue Latham and [ETE].” A2845 (Tr. 237:1-239:24), A2809 (Tr. 93:22-94:8), A2907 (Tr. 484:12-16).

Around the same time it was bluffing about a will-level opinion, Williams asked Gibson Dunn & Crutcher LLP (“Gibson”) to analyze the 721 Opinion, never informing ETE or Latham about Gibson’s analysis and attempting to bury it in this litigation. A2808-09 (Tr. 92:10-16, 92:22-93:3). Documents produced three days before trial first revealed Gibson’s involvement, but Gibson never produced any written analysis of the Section 721 issue. Two terse emails from Gibson’s tax partner explain why Williams swept Gibson under the rug: the day before Williams sued ETE, he initially determined that "it is tough to get to a should." B3359. The following day, when Williams filed suit, he stated that he could get to a "weak should," albeit without any support. Op. 22; B3357.

Believing that Cravath's tax lawyers might be more receptive to McKee, ETE arranged for him to discuss the 721 issue with Cravath. B1382; A2821 (Tr. 142:5-143:11), A2930 (Tr. 578:10-17). During an April 13 call, Cravath expressed confusion about critical aspects of the Agreement; for example, Cravath put McKee on hold for several minutes after he pointed out that the $6 billion cash went first to ETC and not directly to Williams' stockholders—a critical fact for the 721 analysis. A2931 (Tr. 580:1-581:22); B1374; B1376; B1382-83; B2656-57. Following this call, Williams admitted that there was a legitimate tax risk that it had not identified previously; the head of Cravath's tax department ultimately conceded, "Isn't this the case that we all just messed up here?" A2912 (Tr. 505:13-22), A2921 (Tr. 542:7-543:7); B3544 (Gordon Dep. 56:17-23).

Williams and ETE then disclosed Latham's inability to deliver the 721 Opinion in the S-4. B1575. This issue was undisputedly a material fact that the parties had to disclose to comply with federal and Delaware law. B1354 (Needham: the disclosure is "certainly material"); B1390; A2820 (Tr. 139:21-140:4). "The record demonstrates that the public disclosure did not influence

Latham's decision, which was firm prior to the public disclosure." Op. 49 n.131.

2. Williams' proposed modifications did not solve the problem

With its new understanding, Williams offered two potential "solutions" to the 721 problem. Op. 43; B1402-03; A2885 (Tr. 396:13-397:18); B1389. Both proposals, developed in one day and unsupported by legal analysis, involved restructuring the Merger. A2885 (Tr. 396:13-18, 397:8-18). ETE cooperated by analyzing these proposals and asking Latham to do likewise. A2821-22 (Tr. 144:14-145:5), A2852 (Tr. 268:6-18), A2907 (Tr. 487:10-18). Latham fully vetted the issue, "scour[ing] the earth" in hopes of delivering the 721 Opinion. A2907-08 (Tr. 486:1-488:7), A2821-22 (Tr. 144:15-145:9), A2852 (Tr. 268:6-14); *see also, e.g.*, B2285.

Ultimately, Latham concluded that "neither proposal would allow us to give a should-level 721(a) opinion." A2852-53 (Tr. 268:6-269:10), A2908 (Tr. 488:13-489:2, 490:11-14). After extensive research and analysis, Latham "determined that, under the doctrine announced in *Commissioner v. Court Holding[ ] Co.*, tax authorities would disregard this late modification to the deal, and that it would be unable to issue the 721 Opinion even if either proposal were in place." Op. 22, 44 (finding Latham's conclusion on this point to have been made in good faith); A2852-53 (Tr. 268:19-270:1), A2908 (Tr. 488:13-490:22), A2912 (Tr. 504:18-23). In *Court Holding*, the U.S. Supreme Court held that parties cannot amend a transaction "solely to alter tax liabilities." *Commissioner v. Court Holding Co*., 324 U.S. 331, 334 (1945). As Stein explained:

> [T]here were a couple of different issues. But I think the most salient issue for us is…*Court Holdings*, which basically stands for the proposition that if you have an agreement between parties, and after you have an agreement you change that agreement in a noneconomic fashion solely for tax reasons, that that won't be respected….[There] are other issues you would need to grapple with, I think, if you somehow got past *Court Holdings*, but we didn't.

A2908 (Tr. 488:13-490:22). Williams doomed its own proposals by repeatedly emphasizing (often in written form, which is discoverable by the IRS) that the proposals would "not alter[] the economics of the deal or any right or obligation of the parties," a fatal concession under *Court Holding*. A2886 (Tr. 401:14-402:13); A2800 (Tr. 58:18-59:10), A2806 (Tr. 82:20-83:3); B1402. Latham searched diligently but unsuccessfully for a way around the *Court Holding* quandary. *See supra*. ETE's testifying experts agreed with Latham's determination. A2924-26 (Tr. 555:9-13, 555:17-24, 556:19-557:7, 559:8-560:1), A1915-22; A1872-82.

Latham further explained its analysis to Williams on April 29. A2853 (Tr. 270:2-10). Highlighting Williams' litigation-based motives and the glaring nature of the *Court Holding* problem, Williams' lawyers "weren't interested in really discussing" the proposals, which were "more used as straw men to evaluate Latham's views as to the existing structure." A2822 (Tr. 146:12-18), A2886 (Tr. 402:17-403:7), A2890 (Tr. 418:10-14); B3093.

3. Williams had ample time to suggest other potential solutions but instead responded with litigation

After Latham rejected the viability of Williams' proposals, Williams had two months until the June 28 "Outside Date" to make additional proposals or engage in further dialogue. B0098 (Agreement § 7.01). Williams never sent another proposal or requested another meeting, even though Latham told Williams that it was "happy to have another conversation." A2913 (Tr. 508:1-9), A2854 (Tr. 273:11-276:10); B3360. Williams' only other suggestion was to replace Latham. But ETE could not "opinion-shop" by hiring other tax advisors, particularly after several reputable lawyers had already told ETE that they would not deliver a should-level opinion. A2832 (Tr. 185:11-17). As Warren explained:

> [C]an you imagine if you're in my position and I ignore the advice of the defined [law firm] in a merger agreement and we -- as a result of my conduct, we incur billions of dollars of tax? That would be inexcusable conduct on my part.

A2496 (Warren Dep. 111:18-112:1). Williams also tried bolstering the record by sending Latham a threatening letter that mischaracterized the parties' discussions. A2912-13 (Tr. 506:8-509:19). Latham responded, "we are happy to have further good-faith discussions as appropriate." A2854 (Tr. 275:17-276:10). Williams replied by filing this lawsuit. *Id.*

ARGUMENT

I. Williams shows no error in the Trial Court's findings that ETE fulfilled the efforts clauses and did not cause the 721 condition to fail

A. Question presented

Did the Trial Court clearly err in finding that (1) ETE complied with its duty to use "commercially reasonable efforts" to secure the 721 Opinion, and (2) regardless of "how [the Trial Court] allocate[d] the burden of proof" on causation, "the record is barren of any indication that the action or inaction of [ETE] (other than simply drawing Latham's attention to the problem) contributed materially to Latham's inability to issue" that opinion? Op. 47 n.130.

B. Scope of review

Contrary to Williams' assertion that *de novo* review is appropriate, OB 22, the Trial Court's findings on breach and causation are factual findings reviewed for clear error. *See Addessi v. Wilmington Tr. Co.*, 530 A.2d 1128, 1987 WL 38559, *2 (Del.) ("Commercial reasonableness is normally a question of fact."); *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 864 (Del. 2015) ("[T]his Court reviews the issue of proximate cause for clear error.").

C. Merits of argument

The Trial Court found that (1) ETE did not "material[ly] breach" its obligation to use commercially reasonable efforts to obtain the 721 Opinion and (2) no "action or inaction of [ETE] (other than simply drawing Latham's attention to the problem) contributed materially to Latham's inability to issue" that opinion. Op. 45, 47 n.130. Because the Trial Court did not err, let alone clearly err, in those separate findings on breach and causation, this Court can—and should—affirm on either of these independent grounds.

1. ETE satisfied the efforts clauses

a. The Trial Court correctly considered the unique context created by the Agreement and *Court Holding*

This Court should reject Williams' attempts to (1) mischaracterize the Trial Court's opinion and (2) turn the context-specific factual standard ("commercially reasonable efforts") into a "one size fits all" set of rigid legal precepts. OB 26.

First, in challenging the Trial Court's finding that ETE did not breach the Agreement's efforts clauses, Williams incorrectly characterizes the court's opinion. Williams contends that the Trial Court "interpreted 'commercially reasonable efforts' [under Agreement § 5.07(a)-(b)] and 'reasonable best efforts' [under Agreement § 5.03] as imposing only a negative duty not to obstruct performance of the contract, rather than also an affirmative duty to help ensure performance." OB 23. Not so. The Trial Court correctly held that ETE "bound itself to do those things objectively reasonable to produce the desired 721 Opinion, in the context of the agreement reached by the parties." Op. 46 (ETE was "charged with reasonable behavior designed to allow Latham to give the 721 Opinion"). Williams is wrong in suggesting that by simply distinguishing *Hexion* on its facts,[11] the Trial Court held as a matter of law that commercial reasonableness merely requires not "actively 'torpedo[ing]' [a] deal." OB 24, 29-30.[12]

Second, the Court should decline Williams' invitation to hold, as a matter of law, that specific actions required to satisfy an efforts clause in another context are required here (or are required in all contexts). OB 26. The Trial Court correctly interpreted ETE's "efforts" obligations in the "context of the [A]greement." Op. 46. Such clauses require a contextual inquiry that depends on the "factual circumstances surrounding an agreement" and the objective toward which the "commercially reasonable efforts" are to be directed. *Crum & Crum Enters., Inc. v. NDC of Cal., L.P.*, 2010 WL 4668456, at *5 (D. Del.). The "fact intensive" nature of the inquiry explains why this Court defers to findings that a party used commercially reasonable efforts or reasonable best efforts. *Id.*; *see In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 79-81 (Del. Ch. 2001) (determining, without any legal citations, that an acquiror had not breached a reasonable best efforts clause).

The Trial Court correctly concluded here that commercial reasonableness must be measured in the unique context of attempting to obtain a 721 Opinion.

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[11] *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008).

[12] Because the Trial Court, like Williams, did not ascribe different meanings to "commercially reasonable efforts" and "reasonable best efforts," this Court can affirm without deciding whether "reasonable best efforts" imposes a higher standard of diligence. Op. 45-46. To the extent it is necessary to decide which clause applies, this Court should apply the commercial reasonable efforts clause, which specifically addresses the 721 Opinion, as opposed to the reasonable best efforts clause, which is a general provision. *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Specific language in a contract controls over general language.").

Op. 46. By conditioning closing on *Latham's* ability to reach a "should" level, the parties agreed that the 721 Opinion would be based on Latham's assessment of tax risk as applied to objectively verifiable information, such as relevant law and the Agreement's terms. *Supra* Facts § I.B. The Trial Court recognized that ETE had to take actions to obtain the 721 Opinion but that a third party would be the opinion's ultimate arbiter. A2892 (Tr. 424:7-12); *All. Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 751 (Del. 2009) ("all that [seller] got was a promise from [the buyer] itself to use reasonable best efforts, and no obligation on [buyer's] part to cause [a third-party] to do anything").

Further, the Trial Court correctly interpreted commercial reasonableness in the context created by the governing tax law, notably *Court Holding*. Williams concedes that, at most, reasonable efforts required ETE to amend the Agreement "without changing the economic terms."[13] OB 41 n.14; B2926; B2933; B3094-95. But under *Court Holding*, the IRS ignores non-economic changes made for tax purposes; Williams makes no argument to the contrary on appeal. As such, there were fewer potential "efforts" available to ETE than in a context unconstrained by *Court Holding* or the risk evaluation of independent tax counsel. Indeed, Williams

[13] ETE was not required to accept *any* changes to the Agreement, regardless of whether they might be described as "economic" or "non-economic." Agreement § 5.07(a) required ETE to use commercially reasonable efforts to cause the defined "Contribution and the Parent Class E Issuance"—not some other transaction—to qualify under Section 721. B0092; B0022 (defining "Contribution" and "Parent Class E Issuance"). But like the Trial Court, this Court need not reach this issue because Latham fully evaluated Williams' proposals, and the record reveals no other non-economic changes that might have modified Latham's conclusion. *See* Op. 48.

has never identified a reasonable action that could have solved the 721 problem, let alone offered evidence that such a hypothetical action might work.

The Trial Court's understanding of "commercially reasonable efforts" is also supported by Agreement § 5.07(b), which gives specific examples of "commercially reasonable efforts" in connection with the 721 Opinion. For instance, Section 5.07(b) requires the parties to "mak[e] representations, warranties and covenants requested by counsel in order to render" the 721 Opinion. B0092. Section 5.07(b)'s examples bear no resemblance to Williams' view of supposed "commercially reasonable efforts." *See, e.g.*, OB 26, 38-41. Perhaps Williams could have negotiated to include these supposed obligations in the Agreement. But it did not; and this Court should reject Williams' *post hoc* effort to redefine "commercially reasonable." *See Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998).

b. ETE satisfied the efforts clauses

The Trial Court found that ETE undertook "commercially reasonable efforts" to obtain the 721 Opinion. Op. 45. That finding was correct, well supported by the record, and certainly not clearly erroneous.

ETE empowered Latham to conduct a robust, independent analysis—*e.g.*, by asking Latham to fully evaluate whether it could give the 721 Opinion and, if not, *whether any problems could be fixed*. *Supra* Facts § II.A. ETE placed no temporal or financial restrictions on its lawyers, allowing Latham to spend over 1,000 hours on an issue that Cravath purported to "evaluate" in less than two. *Supra* Facts § II.B. ETE provided Latham all of the information that Latham needed to conduct its analysis or arrive at a "should" level opinion. *Id.* Williams does not contend otherwise, or allege that ETE gave Latham misinformation. When Latham first reported that it may not be able to deliver the 721 Opinion, ETE hired one of the nation's leading partnership tax lawyers to analyze the issue afresh and search for solutions; that effort confirmed Latham's conclusion. *Supra* Facts § II.C. Based on this evidence, the Trial Court found that ETE did not breach the efforts clauses.

Williams' contrary assertions are nothing more than disagreements with the Trial Court's factual findings, all of which are supported by the record.

Dissenting voices. Williams complains that "ETE took steps to insulate Latham from dissenting voices." OB 39-41; *id.* at 25-26. This argument fails for three reasons. First, even Williams acknowledges that Latham spoke to Wachtell, who provided a "skeptical" sounding board as early as April 7.[14] OB 2, 11; *supra* Facts § II.B. Second, the efforts clauses did not require ETE to involve Cravath in Latham's analytical process. The parties contracted for *Latham's*, not Cravath's or any other advisor's, judgment. B0095 (Agreement § 6.01(h)). As the Trial Court

[14] Williams mischaracterizes Wachtell's involvement with the 721 Opinion. Wachtell did not disagree with Latham. Rather, as part of ETE's efforts to obtain the 721 Opinion, Wachtell "pressure test[ed]" Latham's analysis to "determine the validity of" that analysis. A2820 (Tr. 138:6-139:14), A2847 (Tr. 246:3-247:11), A2866 (Tr. 323:1-324:15).

explained, the parties could have contracted for “an independent third party,” “an academic,” “a court,” or “an arbitrator.” Op. 32. They did not. Third, the Trial Court found that exposing Latham to “dissenting voices” earlier would not have affected Latham’s inability to issue the 721 Opinion. Op. 49-50. Latham determined that the only two proposals submitted by Williams would not allow it to provide the 721 Opinion. *Supra* Facts § II.D.2. And Williams hypothesizes about missed opportunities to have constructive conversations with Latham, but this argument is undermined by Williams’ refusal to constructively engage when Latham did call. *Supra* Facts § II.D.1; *IBP*, 789 A.2d at 81 (rejecting “reasonable best efforts” claim premised on “several ‘could have been’ scenarios”).

Public disclosure. Williams complains about ETE’s “decision to publicize Latham’s position,” which Williams asserts “boxed Latham in.” OB 14, 38, 40. ETE and Williams were required, under federal and Delaware law, to tell investors this indisputably material information in the next S-4 amendment. *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 249 (5th Cir. 2009). Complying with disclosure laws cannot constitute a breach of the efforts clauses. Indeed, Williams called this disclosure “certainly material” in April and wanted to disclose *more detail* because the “SEC will likely demand more.” B1354; B1390. Further, the Trial Court found that Latham’s position was already “firm prior to the public disclosure,” which “did not influence Latham’s decision." Op. 49 n.131. Finally, Williams' appellate argument conflicts with the Trial Court's findings regarding Latham's motives: Latham *wanted* to find a way to deliver the 721 Opinion and faced reputational injury if it *could not*; had Williams' proposed modifications solved the tax problem, Latham's initial public position would be no barrier to publicly saying "now we can give the opinion." Op. 33-34, 42, 49 n.131; *supra* Facts §§ II.B, II.D.2.

Search for solutions. Williams says that ETE did not "instruct any of its counsel to search for potential solutions to Latham's concerns" and "prohibit[ed] Morgan Lewis from further exploring" if Williams' proposals would work. OB 40-41, 26-28. But the Trial Court correctly held that ETE *did* ask Latham "whether there was a fix." Op. 18. Indeed, ETE asked *both* Latham and Morgan Lewis to search for a solution, and both firms tried diligently. *Supra* Facts §§ II.A, II.C. The Trial Court's finding that ETE was not required to do *even more* to explore Williams' proposals is amply supported. Latham fully analyzed Williams' proposals. *Supra* Facts § II.D.2. All of ETE's tax advisors—including Morgan Lewis—agreed with Latham that the proposals would not support a "should" level opinion given *Court Holding*. *Id.*; *see also* Op. 44. Williams does not challenge on appeal the Trial Court's finding that Latham acted in good faith in rejecting both proposals. And despite having had months to consider the issue before trial (and thereafter), Williams has never identified any other potential solution.

<u>"One firm" mindset</u>. Finally, Williams' assertion that ETE had to act as if Williams and ETE were "one firm" fails for at least two reasons. *See* OB 28 n.9. First, even if the Agreement required a "one firm" approach—and it did not—a single firm would be intensely concerned about a possible $1 billion tax bill that would be ultimately borne by the equity holders of both parties, and would demand comfort from its outside tax counsel that such liability was highly unlikely. Nothing suggests that "one firm" would have acted differently than ETE. Second, even under Williams' authorities, the duty to take "commercially reasonable efforts" permitted ETE "to give reasonable consideration to its own interests." *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979); *see also* 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 7.17c, at 405 (3d ed. 2004) (best efforts clauses do not require a party "to act primarily for the benefit of another").

Finally, Williams' contention that the Trial Court "found substantial failures by ETE" is incorrect. OB at 2. The Trial Court never characterized any of ETE's conduct as a "substantial failure" or breach of the Agreement, and never found ETE's conduct to be unreasonable or to negate the reasonable efforts ETE took in satisfaction of its obligation. Instead, and as discussed in more detail below, it found no demonstration that such conduct caused, or had a material effect upon, Latham's inability to issue the 721 Opinion. Op. 50; *infra* Arguments § I.C.2.

c. *Hexion* and the other decisions on which Williams relies provide no support

Contrary to Williams' contention, *see* OB 24, the Trial Court's finding of commercial reasonableness under the "unusual, perhaps unique" facts of this case, Op. 40 (quoting A2924 (Tr. 554:2-6)), in no way conflicts with *Hexion*. Hexion explicitly agreed, by contract, to use "reasonable best efforts" to consummate financing for a merger, to ***refrain*** from conduct that could reasonably be expected to materially impair the consummation of financing, and to promptly notify its counterparty (Huntsman) if it no longer believed in good faith that it could obtain financing. 965 A.2d at 749, 751. Hexion executed a "carefully designed plan" to scuttle the financing by secretly obtaining and publishing an opinion from a valuation firm that "the combined entity would be insolvent." *Id.* at 721, 725-26.

The "insolvency" opinion in *Hexion* is in no way analogous to the 721 Opinion. *Id.* at 727. An "insolvency" opinion was a concept invented by Hexion; it was given by a firm that was retained to testify in litigation and not bound by the legal profession's ethical standards, and it was obtained and published for the express purpose of scuttling the deal. *Id.* at 726, 751 n.97. The opinion relied on "skewed numbers provided by [Hexion]" and unduly "pessimistic" assumptions and projections of future performance. *Id.* at 726-30. By contrast, Latham's opinion involved application of tax law to objectively verifiable facts, including a novel transaction structure that was hard wired into the Agreement. *See* Op. 49, 51 (ETE did not "fail[] to fully inform Latham," "manipulate[] the knowledge or ability of Latham to render the 721 Opinion," or "coerce or mislead Latham").

Williams cites *Hexion* to argue that ETE had to notify Williams earlier of ETE's tax concerns. *See, e.g.*, OB 29-30. But the *Hexion* merger agreement included an *express requirement* that Hexion "'promptly'" (i.e., "'within two Business Days'") notify Huntsman if it had concerns about obtaining financing. *Hexion*, 965 A.2d at 749. The Agreement contains no such provision.

Furthermore, as to notice, the *Hexion* court discussed at length reasons that if Hexion had not secretly procured the insolvency opinion in bad faith, the parties might well have resolved the issue. *See Hexion*, 965 A.2d at 749 n.95. Here, by contrast, the record reveals—and even now, months later on appeal, Williams identifies—no "actions available to [ETE] that would have caused Latham, acting in good faith, to issue the 721 Opinion." Op. 47. ETE's efforts to obtain the 721 Opinion are simply not comparable to Hexion's deliberate, clandestine actions.

The other decisions Williams relies on—*WaveDivision Holdings, LLC v. Millennium Digital Media Systems, L.L.C.*, 2010 WL 3706624 (Del. Ch.), and *Bloor*—are also distinguishable. The *WaveDivision* defendant avidly pursued a better deal in clear violation of a no-solicitation clause. *See* 2010 WL 3706624, at *13. In *Bloor*, the defendant breached its promise to use "best efforts" to achieve "a high volume of sales" of the plaintiff's beer by adopting a "policy of stressing profit at the expense of volume." *Bloor*, 601 F.2d at 610, 614. Unlike *Bloor*, where the defendant controlled the decision to emphasize profit over volume, ETE and Williams agreed that Latham would reach its *own* expert legal judgment on the 721 issue based on tax law—a matter that no one involved controls.

d. Williams' position, not the Trial Court's decision, risks negatively affecting other cases

The Trial Court's "commercial reasonable efforts" finding will not have "far-ranging" negative consequences. OB 30. To the contrary, the Trial Court's decision effectuates Delaware's "pro-contractarian policy," and properly reflects the logical impact of a failure of a condition precedent that is predicated on the professional judgment of a designated third-party. *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *7 (Del. Ch.). *Williams'* approach, by contrast, *could* have far-reaching implications by (a) imposing an inflexible, quasi-fiduciary standard whenever parties use a term ("commercially reasonable") long understood to be informed by the context of an agreement, and (b) increasing the risk that a party will be forced to close a transaction despite the failure of an economically meaningful condition precedent. Per Williams, when sophisticated parties condition a transaction on the receipt of a yet-to-be-issued, economically-material tax opinion from a designated law firm, a court can hold a party liable (or force it to close) where the designated law firm subsequently determines in good faith that it cannot issue that opinion and there is nothing that party can do to change that determination. This Court should not create such a precedent.

2. ETE's alleged misconduct did not cause Latham's inability to issue the 721 Opinion

a. The Trial Court correctly found that ETE would prevail regardless of which side bore the burden

Because it does not, and cannot, argue any causal link between ETE's alleged misconduct and Latham's inability to deliver the 721 Opinion, Williams contends that the Trial Court "conflated the breach and causation inquiries" and erroneously "plac[ed] the burden on causation on the non-breaching party." OB 22. Williams again misreads the Trial Court's opinion on both issues.

First, the Trial Court did not conflate breach and causation. It expressly reached separate findings on those issues. *See* Op. 45 (finding no "material breach"); *id.* at 47 n.130 (addressing causation). On causation, the Trial Court—applying Williams' preferred legal standard—found that "the record is barren of any indication that the action or inaction of [ETE]. . .contributed materially to Latham's inability to issue the 721 Opinion." *Id.* at 47 n.130.[15]

Second, the Trial Court did not erroneously place the burden of proving causation on Williams. It expressly stated that "no matter how [it] allocate[d] the burden of proof [on causation], the result is the same." *Id.* Even if Williams were

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[15] The Trial Court's use of a "material contribution" standard was overly favorable to Williams. Agreement § 6.04 required Williams to prove that the failure of the 721 condition was "caused" by ETE's breach of the Agreement, and Agreement § 7.01(b)(i) required Williams to prove that ETE's breach was "a principal cause of or resulted in the failure of the Merger to be consummated" by the Outside Date. B0097-98. These provisions called for a more demanding causative linkage than the "material contribution" standard.

correct—which it is not—that ETE had to negate causation, Williams cannot (and does not attempt to) overcome the Trial Court's finding. In any case, Williams waived its burden argument by not expressly raising it in the Trial Court. *See* A2984-87; *see also* Del. Sup. Ct. R. 8. Instead, it was the Trial Court that, perhaps because of Williams' unclear briefing, raised the issue. *See* Op. 47 n.130. This Court thus can affirm without deciding who bore the burden of proof on causation.

If, however, the Court reaches the issue, it should hold that Williams bore the initial burden of proving that ETE's alleged breach contributed materially to the condition's failure, as part of Williams' overarching burden as the plaintiff in a breach-of-contract suit to prove that the alleged breach *caused* harm. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003). The Agreement does not modify this burden. *See* B0097-98 (Agreement §§ 6.04, 7.01(b)(i)).

The Restatement (Second) of Contracts ("Restatement") § 245, on which Williams itself purports to rely (OB 33 n.12, 35, 37), is consistent with this accepted approach. Under the Restatement, the plaintiff must first show that the defendant's breach materially contributed to a condition's non-occurrence before the burden shifts to the defendant to prove that "the condition would not have occurred regardless of the lack of cooperation." Restatement § 245 *cmt. b*. Courts, including the Delaware Superior Court, have interpreted the Restatement consistent with this plain reading. *Lesh v. ev3, Inc.*, 2013 WL 6040418, at *2 (Del.

Super. Ct.), *rev'd on other grounds*, 114 A.3d 527 (Del. 2014).[16] In contrast, the burden-shifting discussions in *Hexion*, *WaveDivision*, and *Bloor* (*see* OB 32-35) were *dicta* unnecessary to those results.[17]

The Trial Court's decision is consistent with Restatement § 245. It accurately summarized the very causation standard on which Williams purports to rely. And in any event, it said that the allocation of the burden did not matter, mooting the issue. Op. 47 n.130. Williams is thus wrong that the Trial Court "misunderst[ood]...ETE's contractual duties and the causation standard." OB 37.

b. The Trial Court correctly found that ETE did not cause Latham's inability to issue the 721 Opinion

Regardless of how the burden of proof is allocated, this Court can and should affirm because the Trial Court's specific findings about causation are correct, well supported by the record, and not clearly erroneous. As explained above, despite having now had months to consider the issue, Williams remains unable to identify a *single* step ETE should have taken (or refrained from taking) that would have materially contributed to obtaining the 721 Opinion from Latham.

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[16] *See also Ixe Banco, S.A. v. MBNA Am. Bank, N.A.*, 2009 WL 3124219, at *6 (S.D.N.Y.) (under Second Restatement § 245, "[s]hould the plaintiff establish that defendant's behavior 'materially contributed' to plaintiff's non-performance, the burden *then* shifts to defendant" (emphasis added)); *United States v. E. Mun. Water Dist.*, 2009 WL 2407688, at *65 (C.D. Cal.) (same).

[17] In each case, it was clear from the facts that the defendants' conduct had materially contributed to the plaintiff's damages. *See Bloor*, 601 F.2d at 614 (defendant's "misfeasances and nonfeasances…could have accounted in substantial measure for the catastrophic drop in [plaintiff's] sales"); *WaveDivision*, 2010 WL 3706624, at *15, *17, *19 (defendant's breach "materially contributed" to condition's failure); *Hexion*, 965 A.2d at 749 (buyer's liquidity-related solvency concerns could potentially have been addressed through discussions with seller).

See supra Facts § II.D.3. Indeed, the record demonstrates that no such steps exist. Because Latham's concerns were rooted in the structure of the parties' transaction, the only way to address the concerns would have been to restructure the transaction. Williams, however, concedes that ETE was not obligated to agree to any restructuring that would "chang[e] the economic terms of the deal." OB 41 n.14; *see also supra* Facts § II.D.2. And non-economic modifications would be disregarded for tax purposes under the *Court Holding* doctrine. Op. 44.

The Trial Court's findings on causation are bolstered by the testimony of the two primary Latham tax partners. They testified that, after spending "over 1,000 hours of attorney time" on the issue, *id.* at 38, Latham is unable to issue the 721 Opinion. *Supra* Facts §§ II.B, II.D.2. Based on, among other things, the witnesses' "demeanor" and the fact that declining to issue the opinion was "not in the reputational interest of [Latham]," the Trial Court credited their testimony and found that the "firm's opinion was not influenced by [ETE's] interests." Op. 42. No basis exists to override that finding. *Brody v. Zaucha*, 697 A.2d 749, 756 (Del. 1997) (credibility determination "will not be disturbed on appeal").

Thus, even if ETE bore the burden to negate causation, and even if the "material contribution" standard advocated by Williams is used, the evidence reflects that there is simply no breaching conduct that "contribute[d] materially" to Latham's inability to issue the 721 Opinion. Op. 47 n.130.

II. ETE was not equitably estopped from invoking the 721 Opinion condition.

A. Question presented

Did the Trial Court err in concluding that ETE's representation in Agreement § 3.02(n)(i) did not equitably estop ETE from invoking the 721 Opinion closing condition in Agreement § 6.01(h)? Op. 51-55.

B. Scope of review

Contrary to Williams' assertion that this issue is subject to pure *de novo* review, *see* OB 42, the Trial Court's equitable estoppel decision involves a mixed question of law and fact. *See SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013). Its factual findings are reviewed only for clear error, while its legal determinations are subject to *de novo* review. *Id.*

C. Merits of argument

1. Williams does not appeal independent grounds for affirming the Trial Court's decision

The Trial Court rejected Williams' estoppel theory at trial, and Williams doomed its own appeal by failing to challenge that ruling. Williams argued that ETE could not terminate "because Williams relied on ETE's representation" (A2656) in Agreement § 3.02(n)(i), in which ETE represented that it did not "know[] of the existence of any fact that would reasonably be expected to prevent [the Contribution]…from qualifying as an exchange to which Section 721(a) of the Code applies." B0064. The Trial Court properly understood Williams as arguing that ETE had either breached Agreement § 3.02(n)(i) or made a misrepresentation (which could trigger estoppel). *See* Op. 51-52. The court rejected both claims, finding that how it characterized the argument did not matter because there was "no misrepresentation or breach here." Op. 52.[18]

The Trial Court identified four independent grounds for its conclusion. First, Latham's "theory of tax liability" was not a "fact[]" covered by Agreement § 3.02(n)(i), so the plain language of Section 3.02(n)(i) foreclosed Williams' claim. Op. 51-53. Second, as a factual matter, ETE did not "ha[ve] this theory in mind at the time it...made the representation." Op. 54. Third, Williams' assertion that the tax theory "should have been objectively obvious" "proves too much" because the parties' mutual access to the deal documents means "knowledge of such a theory is no more chargeable to [ETE] than to Williams."[19] Op. 54.[20] Finally, Agreement § 6.01(h)'s unqualified language precluded Williams' assertion that Agreement § 3.02(n)(i) constrained ETE's right to invoke Section 6.01(h). Op. 54-55.

Because Williams does not appeal the Trial Court's first two independent grounds, this Court can affirm without reaching Williams' appeal concerning the

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[18] Williams is therefore mistaken in claiming that (1) the Trial Court "misapprehended" its argument, and (2) this supposed "misunderstanding" renders the Trial Court's reasoning "inapplicable." *See* OB 44-45. Williams is also mistaken in asserting that it presented separate breach and equitable estoppel arguments at trial. *Compare* OB 44 (numbering breach and equitable estoppel as separate arguments), *with* A2656-64 (making no such distinction).

[19] Williams made an identical representation. B0048 (Agreement § 3.01(n)(i)).

[20] *See* A2664 (Williams arguing that the basis for Latham's theory of tax liability was "evident on the face of the deal documents" (emphasis omitted)).

third and fourth grounds. But even if Williams had fully appealed the estoppel issue, this Court should affirm.

2. The estoppel argument in Williams' opening brief was not "properly presented" at trial and is therefore barred

In an attempt to circumvent the Trial Court's reasoning, especially its third ground for rejecting Williams' claim, Williams has transformed its estoppel argument on appeal by changing the factual basis of its estoppel claim and relying on a different legal standard. This new argument was not "fairly presented to the trial court," Del. Sup. Ct. R. 8, and thus should not be considered on appeal.[21]

First, Williams' argument changes the factual basis for its estoppel claim and thereby "present[s] a different theory" that "reframe[s]" its trial argument. *Russell v. State*, 5 A.3d 622, 627 n.15 (Del. 2010). At trial, Williams' estoppel argument focused on (1) what ETE supposedly knew when it made the representation,[22] and (2) what ETE's representation said about Latham's ability to deliver the 721 Opinion. *E.g.*, A2661-62. But on appeal, Williams completely reframes its estoppel claim from an argument based on what *ETE* supposedly *did* know about the Agreement, to one based on what *Williams* supposedly did *not*

[21] While this Court may consider new arguments "when the interests of justice so require," Del. Sup. Ct. R. 8, it does so only "if it finds that the trial court committed plain error requiring review in the interests of justice." *Smith v. Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012). A "plain error" is so obvious that it is "apparent on the face of the record." *Id*. Williams makes no plain error argument on appeal, and its newfound estoppel argument is not apparent on the face of the record. *See infra* Argument § II.C.3.

[22] *See* A2658-59 (pointing to the information available to ETE from the deal documents), A2769 (similar), A2959 (similar), A2988 ("facts set forth in the Merger Agreement").

know about ETE's future actions. *See* OB 47. This is "an entirely new theory" for equitable estoppel, not "merely an additional reason in support of a proposition urged below." *See Kerbs v. Cal. E. Airways*, 90 A.2d 652, 659 (Del. 1952).

Second, Williams' appellate argument relies on a legal standard that was never cited in its trial briefs. *See Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678-79 (Del. 2013) (argument was not "fairly present[ed]" where the post-trial and appellate briefs cited different "standard[s]" for reformation based on unilateral mistake). At trial, Williams simply argued that it relied on ETE's representation, without ever citing, or even acknowledging, Delaware law's three-part test for equitable estoppel. *See* A2656-64, A2767-69, A2958-60, A2988-89. Only on appeal does Williams build an argument around the three-part test for equitable estoppel. *See* OB 47-49 (citing and applying *Nevins v. Bryan*, 885 A.2d 233, 249 (Del. Ch. 2005)).

3. Williams' new estoppel argument also fails on the merits

Williams' estoppel argument also fails on the merits for three reasons: (1) Williams cannot satisfy the first two prongs of the test for equitable estoppel, (2) it is contrary to the plain language of the Agreement, and (3) Delaware law prohibits using equitable estoppel as a remedy for a bargained-for contractual right.

a. Williams cannot satisfy the first two elements of equitable estoppel

Although the Trial Court did not have the opportunity to consider Williams' new estoppel argument, the Trial Court's fully supported findings—which Williams does not challenge—establish that Williams cannot satisfy two of the three elements for equitable estoppel. First, Williams cannot establish that it "lacked knowledge or the means of obtaining knowledge of the truth of the facts in question." *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990). Williams argues that it "did not know—nor could it have known—that ETE would terminate based on a failure of the 721 Opinion condition due to facts that existed at signing." OB 47. But as the Trial Court acknowledged, the 721 Opinion is a "condition precedent" to closing; by definition, it can fail. Op. 53. And Williams knew that the failure to qualify under Section 721(a) is "a very, very bad result." A2872 (Tr. 345:1-13). Thus, Williams had "knowledge"—or at a minimum, the ability to obtain that knowledge—from the face of the Agreement itself. Indeed, in every S-4 filed by Williams and ETE, the parties jointly explained that "[t]he obligations of each of ETE and WMB to effect the merger are subject to…the receipt [of the 721 Opinion] from Latham….We cannot be certain when, ***or if***, the conditions to the merger will be satisfied." B0187, B0206, B0355.

The Trial Court's findings also establish that Williams cannot satisfy another element of estoppel—reasonable reliance. *Waggoner*, 581 A.2d at 1136; *Realty Growth Inv'rs v. Council of Unit Owners*, 453 A.2d 450, 457 (Del. 1982). As the Trial Court explained, *see* Op. 52-55, and as further argued below, *see infra*

Argument § II.C.2.b, Williams' argument (1) misreads Agreement § 3.02(n)(i), (2) is contrary to the plain language of Agreement §§ 3.02(n)(i) and § 6.01(h), and (3) would convert a representation into a guarantee concerning an uncertain future event. Such "unjustified inference[s]" cannot support an equitable estoppel claim, particularly given that Williams is a sophisticated party with skilled counsel, including tax attorneys. *Realty Growth Inv'rs*, 453 A.2d at 457.

b. Williams' argument rewrites the Agreement

Even if this Court looked beyond these unchallenged factual findings, the plain meaning of Agreement § 3.02(n)(i) does not support Williams' new estoppel theory. Under Delaware law, the doctrine of estoppel cannot be used to rewrite the plain language of a contract. *Brandywine Shoppe, Inc. v. State Farm Fire & Cas. Co.*, 307 A.2d 806, 809 (Del. Super. Ct. 1973) ("[T]he doctrine[] of estoppel…may not be invoked to make a new contract, or to change radically the terms of the policy."). Williams' estoppel argument rewrites the Agreement in two ways.

First, Williams' argument effectively rewrites Agreement § 3.02(n)(i) by adding obligations that do not exist in its express language. On appeal, Williams argues that Section 3.02(n)(i) was not only a representation and warranty about the facts ETE knew at signing, but also a guarantee that ETE would not "terminate the [] Agreement due to a failure of the 721 Opinion stemming from those *very same facts*." OB 45-46. But the plain language of Section 3.02(n)(i) limits ETE's representation to its "know[ledge] of the existence of any fact." B0064. A "fact" is "[s]omething that actually exists; an aspect of reality," not a *potential* future action. *See Black's Law Dictionary* 709 (10th ed. 2015). And the term "existence" further clarifies that Section 3.02(n)(i)'s representation is limited to "the time of signing." *Cf.* Op. 53. That plain language is "controlling." *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014). It means that ETE was informing Williams of the relevant "facts" so that Williams could assess the Section 721 risk for itself. It did not, however, strip Latham of its ability to further analyze the issue in connection with issuing an opinion.[23] ETE's representation of its awareness of current circumstances was not a promise about its (or Latham's) future course of conduct. Williams' argument is thus an impermissible rewriting of Section 3.02(n)(i).

Second, Williams' argument would convert Section 3.02(n)(i) into a guarantee that the 721 Opinion will be delivered absent a post-signing change in law or facts. The Trial Court held that Williams' argument at trial would effectively transform Section 3.02(n)(i) into "a waiver of any subsequent reliance on a failure of the 721 Opinion condition" in Section 6.01(h). Op. 54-55. To avoid this problem, Williams asserts, without support, that "[t]he 721 Opinion condition existed to protect the parties from unexpected, intervening changes in

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[23] Latham's witnesses testified regarding the function of tax representation clauses, Latham's normal pre-signing analysis (which was followed here), and Latham's more fulsome pre-closing analysis. A2837-41 (Tr. 208:23-210:1, 214:17-218:4, 219:16-223:10).

law...or facts...that would alter the Section 721 analysis." OB 45.[24] But as the Trial Court noted, the parties could have, yet did not, "limit[] the condition precedent to application only where a change in tax law occurred, or where other designated circumstances changed." Op. 55 n.136; *supra* Facts § I.B. As Latham explained, the representation is "not a guarantee….[I]f it was a guarantee, they wouldn't be asking for the opinion from counsel." A2841 (Tr. 223:8-10). Williams' argument is "untenable, because it adds a limitation not found in the contract language." *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 44 (Del. 1996).

c. Williams' argument obviates the Agreement's remedy

Although the Trial Court did not have occasion to reach the question, Williams' estoppel argument is deficient for an independent reason—it conflicts with bargained-for contractual provisions. Williams urges this Court to apply equitable estoppel to bar ETE, based on its representation in Section 3.02(n)(i), from invoking its contractual right to terminate under Agreement § 7.01. *See* OB 44. But equitable estoppel is not a proper remedy in "a dispute about enforcement of a bargained-for contractual right." *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 (Del. 2000). Instead, the remedy is contractual and should focus on "restor[ing the] contract rights actually bargained for." *Id*. at 15.

[24] Far from avoiding "surplussage," Op. 55, Williams' interpretation would create a conflict between Section 3.02(n)(i) and the unqualified language of Section 6.01(h). *See, e.g.*, *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) (courts "adopt the construction that is reasonable and that harmonizes the affected contract provisions"); *Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002).

Here, the Agreement contains a specific remedy in the event ETE breached the representation in Section 3.02(n)(i); namely, Williams could terminate the Agreement. B0097, B0099 (Agreement §§ 6.03(a)(iv), 7.01(d)). But Williams sought a broader remedy, invoking common-law notions of equitable estoppel to try to *prevent ETE* from terminating, despite conceding on appeal that ETE did not breach Section 3.02(n)(i). *See* OB 42, 45. This Court should reject Williams' remarkable attempt to obtain more than the Agreement provides without even having to prove a breach of the Agreement. *Genencor*, 766 A.2d at 14; *Brandywine Shoppe*, 307 A.2d at 809.

CONCLUSION

For the foregoing reasons, the Trial Court's judgment should be affirmed.[25]

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[25] Even if this Court were to agree with Williams' arguments, it would not entitle Williams to "reversal." Remand to the Trial Court would be necessary to address ETE's affirmative defenses. Op. 57-58; *see DuPont v. Del. Tr. Co.*, 320 A.2d 694, 700 (Del. 1974). Furthermore, the equitable considerations have changed dramatically since trial and foreclose Williams' request for specific performance. Williams abandoned its equitable requests both through its Notice of Appeal and its failure to seek expedition of this appeal. *See* Notice of Appeal at 2 (specifying that its "ability to recover damages" is the remedy issue "remaining in the case").

CERTIFICATE OF SERVICE

I, Benjamin M. Potts, Esquire, hereby certify that on September 12, 2016, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated below:

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