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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAMS FIELD SERVICES GROUP, LLC, Plaintiff Below, Appellant, v. CAIMAN ENERGY II, LLC; ENCAP FLATROCK MIDSTREAM FUND II, L.P.; ENCAP ENERGY INFRASTRUCTURE FUND, L.P.; TT-EEIF CO-INVESTMENTS, LLC; UT EEIF SIDE CAR, LLC; LIC-EEIF SIDE CAR, LLC; OAKTREE CAPITAL MANAGEMENT, L.P., HIGHSTAR IV CAIMAN II HOLDINGS, LLC; FR BR HOLDINGS LLC; JACK M. LAFIELD; RICHARD D. MONCRIEF; STEPHEN L. ARATA; WILLIAM R. LEMMONS, JR.; DENNIS F. JAGGI; STEVEN GUDOVIC; and BLUE RACER MIDSTREAM, LLC, Defendants Below, Appellees,	)	No. 488,2019 Court Below: Court of Chancery of the State of Delaware C.A. No. 2019-0350-JTL

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Williams Field Services Group, LLC ("Williams") takes this appeal from those limited portions of the September 25, 2019 Memorandum Opinion (the "Memorandum Opinion" or "Op.") and the October 21, 2019 Order and Final Judgment (the "Order") of the Court of Chancery that granted defendants declaratory relief and prospectively allowed the EnCap defendants (defined below) to exercise certain powers of the Board of Managers (the "Board") of Caiman Energy II LLC ("Caiman") without first obtaining Williams' consent in the event of and to the extent "required or necessary" for a hypothetical "Qualified IPO" of Caiman's subsidiary, Blue Racer Midstream LLC ("Blue Racer"). (*See* Op. Sections II.D.3, II.D.5 and II.D.6.) The Court of Chancery's rulings in this regard were advisory opinions based on contingent facts and are *dicta*. To the extent they are proper legal determinations, they are erroneous because they conflict with the plain language of Caiman's operative limited liability company ("LLC") agreement (the "Caiman Agreement" or "Agreement"). This Court should vacate the Memorandum Opinion and Order in these limited respects.

Caiman is a joint venture among Williams (the majority owner), various private equity funds including EnCap, and Caiman's management. From its inception in 2012, Caiman's expressly limited and sole purpose has been to own, develop and operate oil and gas midstream assets geographically restricted to

the Utica Shale area of Ohio and northwestern Pennsylvania. Williams bargained for these restrictions as a key condition to its $380 million capital commitment. As a result, Caiman cannot operate outside of the contractually specified geographic area or expand that area without an affirmative vote of at least one Williams Manager on Caiman's Board. Caiman's only revenue-producing asset is Blue Racer, itself a joint venture between Caiman and—as of October 2018—another private equity fund, First Reserve. Blue Racer's LLC agreement contains an equivalent restriction on its business purpose, and pursuant to the Caiman Agreement, Blue Racer's LLC agreement likewise can be amended only with Williams' consent.

After years of trying to monetize its Caiman investments, EnCap secretly agreed with First Reserve in October 2018 to pursue an initial public offering ("IPO") of Blue Racer using an "Up-C" structure before the end of 2019. EnCap and First Reserve, together with Caiman's management, chose the Up-C structure in an effort to block Williams from exercising its consent and buyout rights under the Caiman Agreement. In April 2019, the Caiman Board (including Williams' Managers) unanimously voted to pursue an IPO of Blue Racer.

But, when Williams would not agree to amend the Caiman Agreement to remove the geographic restrictions on Caiman's business purpose (or the equivalent restrictions in Blue Racer's LLC agreement) for purposes of the IPO,

EnCap and the other defendants took a new tack. For the first time in Caiman's seven-year existence, defendants claimed that EnCap had the unilateral right to make any amendments to the Caiman Agreement it wished in connection with an Up-C IPO—even changes that would require Williams' affirmative consent under the express terms of the Caiman Agreement, such as removing or amending the Agreement's or Blue Racer's geographic restrictions in the business purpose provisions.

Williams sued to enjoin EnCap and the other defendants from proceeding with the Up-C IPO and taking Blue Racer public without the business purpose restrictions, and defendants counterclaimed for declaratory relief. After full discovery, a two-day trial, and pre- and post-trial briefing and argument, the Court of Chancery correctly held that the *only* IPO before it—the "Up-C IPO" defendants proposed—did not meet the requirements for a Qualified IPO under the Caiman Agreement's terms. (Op. 42-51, 55-56, 63, 65-66, 68.) Moreover, the court properly determined that EnCap could not unilaterally amend the Agreement's definitional requirements for a Qualified IPO so as to authorize defendants' desired Up-C structure because such amendments were adverse to Williams' rights and obligations and therefore required Williams' approval under Section 12.2 of the Agreement. (Op. 56-62.) Accordingly, the Court of Chancery permanently enjoined defendants from proceeding with the Up-C IPO or the

elements thereof that require Williams' consent. (Order ¶ 1.) Having resolved the essential question in the case, the Court of Chancery should have ended its analysis.

But the Court of Chancery did not limit its analysis to the essential aspects of the matter before it. Instead, the court went beyond the issues before it and declared that in the hypothetical event that there *were* a "Qualified IPO" (whatever that hypothetical IPO might be), EnCap—pursuant to what the court termed the "IPO Facilitation Clause" in Section 9.5(b) of the Agreement—could unilaterally exercise the Caiman Board's powers to amend Blue Racer's LLC agreement, cause Caiman to distribute all of its Blue Racer units (effectively Caiman's only valuable asset) to Caiman's members and form a new acquisition subsidiary of Blue Racer and cause Caiman to merge with it—provided that these actions were "required or necessary to facilitate" that Qualified IPO. (Op. 62-66, 67-68.) The Court of Chancery should not have granted defendants this declaratory relief for at least two reasons.

First, the Court of Chancery's declarations regarding EnCap's powers to effectuate a different, hypothetical Qualified IPO in the future were unnecessary to its determination that the actual, Up-C IPO proposed by defendants and presented at trial did not comply with the Caiman Agreement's terms and must be enjoined. There was, in short, *no* Qualified IPO before the Court of Chancery, and

defendants made no showing that they would pursue one in the future. As such, the court's declarations regarding EnCap's powers under the IPO Facilitation clause in some other hypothetical IPO in the future were improper advisory opinions and *dicta* with no effect.

Second, the Court of Chancery's declarations about the actions that EnCap might be permitted to take under the IPO Facilitation Clause if there ever *were* a Qualified IPO in the future were legally erroneous because they conflict with the Caiman Agreement's plain language. The Caiman Agreement allows the Board (not EnCap alone) to take those hypothetical (and now preapproved) actions *only* if they are approved as "Special Voting Items" under Section 6.8(b) of the Agreement, meaning that they "shall not" be taken without Majority Board Approval that includes the vote of at least one EnCap Manager and one Williams Manager. The Agreement empowers EnCap to act for the Board in the context of a Qualified IPO "[s]olely for the purposes" of Section 9.5—a provision that does not authorize *any* of the actions the Court of Chancery preapproved EnCap to take. The court's declarations empowering EnCap to act alone are based on a clear misreading of the Caiman Agreement. The Caiman Agreement unqualifiedly provides in Section 6.8(a) that "no other approval shall be required" for Special Voting Items, and Section 6.8(e) mandates that Special Voting Items require "*only*" the approval specified in Section 6.8(b), "notwithstanding anything to the

contrary in this Agreement." Sections 6.1 and 6.5, moreover, confirm that, subject to limited exceptions that *do not include actions taken pursuant to Section 9.5,* the Board *cannot* act without Majority Board Approval. The Court of Chancery's determination that EnCap can leverage its limited powers under the IPO Facilitation Clause to take certain actions that are committed to the Board only with Williams' approval disregards the Caiman Agreement's plain terms.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by declaring that Section 9.5(b)'s IPO Facilitation Clause authorizes EnCap to unilaterally exercise certain powers of the Board if "required or necessary to facilitate [a] Qualified IPO." This ruling was an improper advisory opinion. The Court of Chancery should not have reached this issue, which was not ripe once the court determined that the Up-C IPO proposed by defendants and presented at trial was not a "Qualified IPO" and should be permanently enjoined.

2. The Court of Chancery's declaration regarding the scope of EnCap's powers under the IPO Facilitation Clause conflicts with the Caiman Agreement's plain terms. Section 9.5(a) provides that EnCap can act as the Caiman Board "solely for purposes of this Section 9.5." But Section 9.5 does not authorize the Board (or EnCap) to take the actions that the Court of Chancery preapproved. Those actions can be taken only under Section 6.8(b) of the Caiman Agreement as "Special Voting Items," which require Majority Board Approval including the affirmative vote of at least one Williams Manager. Sections 6.8(a) and 6.8(e) confirm that subject to certain *other* provisions of the Agreement—but *not* Section 9.5—the requisite approval for Special Voting Items specified in Section 6.8(b) is mandatory and exclusive, and cannot be varied by any other provisions of the Agreement. Moreover, Sections 6.1 and 6.5 of the Agreement

provide that except for limited exceptions that also do not include Section 9.5, the Board can exercise Caiman's powers only when it acts with the requisite Majority Board Approval (which expressly includes, for Special Voting Items, the affirmative vote of at least one Williams Manager). The IPO Facilitation Clause cannot vary the Agreement's otherwise mandatory provisions and does not empower EnCap to take actions under Section 6.8(b).

STATEMENT OF FACTS

Caiman is a Delaware LLC that was formed in June 2012 specifically to acquire, own, develop and operate midstream pipeline and gas processing assets in the Utica Shale in Ohio and northwestern Pennsylvania. (Op. 5.) Williams is Caiman's majority owner, and currently owns approximately 58% of the company. (A57.)

A. The Formation of Caiman and Blue Racer

Caiman is the follow-on to a prior transaction involving many of the same parties. In March 2012, Williams paid $2.5 billion to purchase the assets of Caiman Energy, LLC ("Caiman I"), a company defendants Jack Lafield and Richard Moncrief formed to develop midstream assets in the Marcellus Shale in West Virginia. (Op. 3.) While negotiating this asset sale, Lafield, Moncrief, defendant Stephen Arata (together, "Caiman Management") and Williams expressed interest in pursuing a follow-on venture. (*Id.* at 4.)

In June 2012, Caiman Management formed a new entity, Caiman, to pursue the same business model in an adjacent geographic area—the Utica Shale in Ohio and Pennsylvania. (*Id.* at 3.) Caiman Management sought capital from Williams, which initially committed $380 million to fund Caiman—the largest investment that Caiman received. (*Id.* at 4.) The other investors included many of

the same private equity funds that invested in Caiman I, including defendant EnCap,[1] as well as Caiman Management and individual investors. (*Id.* at 3-4.)

To ensure Caiman Management could not use Williams' substantial capital to compete with the Caiman I assets that Williams had just purchased from those very same members of Caiman Management, Williams successfully negotiated for geographic and operational limitations on Caiman's business, memorialized in Section 1.3 of the Caiman Agreement (the "Business Purpose"). (*Id.* at 4-5.) Under the Agreement, Caiman could develop, own and operate only midstream assets and, subject to limited exceptions, only in the Utica Shale. (*Id.* at 5-6.) Williams would not have invested in Caiman without these protections. (*Id.* at 5.)

In late 2012, Caiman partnered with Dominion Natrium Holdings, Inc. ("Dominion") to form a joint venture that would operate through their wholly owned subsidiary, Blue Racer. (*Id.* at 10.) Blue Racer is Caiman's only revenue-producing asset and is the only entity through which Caiman conducts business. (*Id.*)

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[1] "EnCap" refers to defendants EnCap Flatrock Midstream Fund II, L.P., EnCap Energy Infrastructure Fund, L.P., TT-EEIF Co-Investments, LLC, UT EEIF Side Car, LLC, and LIC-EEIF Side Car LLC.

In connection with the Caiman/Dominion joint venture, the Caiman Members amended and restated the original Caiman Agreement. (*Id*.) Among other things, the amendments allowed Dominion to contribute to Blue Racer certain assets it held in West Virginia (near Williams' Marcellus assets acquired in connection with the Caiman I transaction) and gave Williams an express consent right over any further expansion of Caiman's Business Purpose. (*Id*. at 11-14.) A functionally identical Business Purpose limitation was included in the Blue Racer LLC Agreement ("Blue Racer Agreement"), which was put into place at the time of the Caiman/Dominion joint venture. (*Id*. at 13.) Furthermore, Williams received the right to prohibit Caiman from taking any action to amend any Blue Racer Agreement in any material way. (*Id*.)

The Caiman Members also agreed to amendments altering EnCap's and Williams' rights to exit and purchase Caiman, respectively. In the original Caiman Agreement, EnCap had a unilateral right (as a "Major Special Voting Item") to trigger a "Drag-Along Sale," pursuant to which all Caiman Members would have to sell their entire interest to a third party. (*Id.* at 7-8.) This right, however, was subject to Williams' right of first offer: EnCap could not sell to any third party without first giving Williams the opportunity to buy all of Caiman. (*Id.* at 9-10.) In connection with Blue Racer's formation, Williams negotiated for an amendment to eliminate EnCap's right to approve a Drag-Along Sale. (Op. 14-

19.) The amended Caiman Agreement treats all "Exit Events" (including all sales of the company or transfers of "all or substantially all" of Caiman's assets) as a "Special Voting Item" that requires approval from a majority of the Board including the affirmative vote of at least one EnCap Manager and one Williams Manager. (*Id*.) EnCap, however, gained the unilateral right to trigger a Qualified IPO as a "Major Special Voting Item" that requires only the vote of a single EnCap Manager. (*Id.* at 18.)

B. The Caiman Agreement

The Caiman Agreement governs all aspects of Caiman's governance and operations. Section 6.1 expressly authorizes the Board to direct Caiman's business:

> Except for matters in which the approval of the Members is required by this Agreement or by nonwaivable provisions of the [Delaware LLC] Act, the powers of the Company shall be exercised by or under the authority of, and the business and affairs of the Company shall be managed under the direction of managers, who shall be referred to in this Agreement individually as a "Manager" or collectively as the "Managers," and who shall act as a board of managers (when acting as a board of managers, the Managers are referred to in this Agreement as the "Board of Managers" or the "Board").

(A281 § 6.1 (underlining in original).) Section 6.5 of the Agreement specifies that "any determination by the Board of any matter required by this Agreement shall require the affirmative vote in favor of such action of those Managers with a

Majority of the Voting Power; except as otherwise provided in Section 6.8(a), Section 6.8(b), Section 6.8(c) and Section 6.8(d)." (A283 § 6.5(e) (emphasis omitted).)

As reflected in Sections 6.5 and 6.8(a), the Caiman Agreement identifies three levels of Board voting approval that are required to authorize certain actions:

- "Majority Board Approval"—defined as "approval of those Managers having the Majority of the Voting Power." (A261 § 2.1(a), A285-88 § 6.8(a).) Because the Board consists of nine seats, before Caiman can take any actions requiring Majority Board Approval, it must secure approval from at least five of the managers serving on the Board.

- "Special Voting Item"—defined in Section 6.8(b) as an action that Caiman "*shall not take* . . . without having first received Majority Board Approval, which majority must include the affirmative vote of at least one EnCap Manager and at least one [Williams] Manager." (A288 § 6.8(b) (emphasis added).)

- "Major Special Voting Item"—defined in Section 6.8(c) as requiring "the affirmative vote of one EnCap Manager." (A290 § 6.8(c).)

Section 6.8(e) of the Agreement is clear that "notwithstanding anything to the contrary in this Agreement or in the Act, but subject to the provisions of 6.5(j) and Section 12.2,[2] . . . the matters described in Section 6.8(a),

[2] Section 6.5(j), the first provision mentioned in Section 6.8(e), provides for the temporary recusal of Williams Managers from Board meetings addressing "Competitive Material." The other provision, Section 12.2, prohibits certain amendments to the Agreement without the consent of the Members who will be adversely affected by those amendments. As relevant (Continued . . .)

Section 6.8(b) and Section 6.8(c) require the stated approval specified therein only and that no separate or additional Member vote, consent or approval shall be required in order for the Company to undertake such action." (A290 § 6.8(e).)

The Caiman Agreement lists fourteen Special Voting Items in Section 6.8(b) that require Majority Board Approval that includes votes from both EnCap and Williams. Among those are the three that are subject of this appeal:

- any action "to merge, combine, or consolidate the Company with any other entity" (A289 § 6.8(b)(iii));
- any action "to enter into or consummate any transaction that will constitute an Exit Event" (A290 § 6.8(b)(xi)), where "Exit Event" includes "the sale or other transfer of all or substantially all of the assets of the Company promptly followed by a dissolution and liquidation of the Company" (A258-59 § 2.1(a) (defining "Exit Event")); and
- any action "to amend, modify or otherwise change . . . in any material respect any Blue Racer Agreement" (A290 § 6.8(b)(xii)).

There is only one substantive Major Special Voting Item in the Caiman Agreement subject to EnCap's unilateral authorization: approval of a Qualified IPO. (A290 § 6.8(c)(i).) A Qualified IPO has several requirements: (i) it must be an underwritten IPO of equity securities; (ii) of an "IPO Issuer" (defined

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here, that section provides that "this Agreement may not be amended in a way that adversely affects the rights or obligations of [Williams] without the approval of [Williams]." (A317 § 12.2(a)(v).)

as Caiman or an Affiliate, including Blue Racer); and (iii) with aggregate cash proceeds to Caiman of at least $75 million. (A261, 265 § 2.1(a) (defining "Qualified IPO" and "IPO Issuer").) Under Section 9.5(a), the Qualified IPO must also result in the "IPO Exchange": "the outstanding Membership Interests will be converted into or exchanged in accordance with this Section 9.5 into equity securities of the IPO Issuer . . . of the same class or series as the securities of the IPO Issuer proposed to be offered to the public in the Qualified IPO." (A304 § 9.5(a).) As the Court of Chancery observed, "Membership Interests" are the "interest[s] of a Member" in Caiman. (Op. 43 (quoting A262 § 2.1(a) ("Membership Interest").) The court thus determined that Section 9.5(a) imposes two additional requirements for a Qualified IPO: the "Caiman Interests Requirement"—that the Membership Interests in Caiman (and not another company) must be converted into IPO Securities—and the "Same Securities Requirement"—that the IPO Securities that the Members receive for their Membership Interests must be of the same class or series as those the IPO Issuer offers to the public. (Op. 42-43.)

Like Sections 6.8(a) and (b), Section 6.8(c) also includes ancillary powers "to take any action, authorize or approve or enter into any binding agreement with respect to or otherwise commit to do any of the foregoing." (*Compare* A290 § 6.8(c)(ii), *with* A288 § 6.8(a)(xxi), A290 § 6.8(b)(xiv).) As the

Court of Chancery determined, however, this provision confers only the power to take the steps necessary to "approve" a Qualified IPO, "notwithstanding potential procedural impediments" in the Caiman Agreement. (Op. 36-37, 39-41.)

Section 9.5 of the Caiman Agreement identifies the actions that "the Board" may take to effectuate a Qualified IPO (the "Qualified IPO Section"). Unlike how "the Board" is defined for all other provisions of the Caiman Agreement, Section 9.5 redefines "the Board" as used ***solely*** in that section ***alone*** to mean "the Board with the approval required for a Major Special Voting Item" (A305 § 9.5(a))—*i.e.*, the affirmative vote of one EnCap Manager (*see* A290 § 6.8(c)). This special meaning of "the Board" expressly applies "[s]olely for purposes of this Section 9.5." (A305 § 9.5(a) (emphasis omitted).)

The powers that "the Board" (*i.e.*, EnCap) may exercise under Section 9.5 are specifically listed:

> Each outstanding Membership Interest will be converted into or exchanged for IPO Securities at such time as determined by the Board . . . . If, in connection with the IPO Exchange, the Board determines that it is advisable to have the holders of the Units contribute all of the Units to the IPO Issuer or its general partner . . . each holder of Units agrees to participate in such an exchange.

(A304-05 § 9.5(a).)

> Notwithstanding anything to the contrary in this Agreement, at any time after the approval of a Qualified IPO in accordance with this Agreement, the Board shall be entitled to approve the transaction or transactions to

> effect the IPO Exchange [*the "**IPO Exchange Clause**"*] and to take all such other actions as are required or necessary to facilitate the Qualified IPO [*the "**IPO Facilitation Clause**"*] including forming any entities required or necessary in connection with the Qualified IPO without the consent or approval of any other person (including any Member) [*the "**Entity Formation Clause**"*].

(A305 § 9.5(b) (bracketed terms are as defined in the Court of Chancery's Memorandum Opinion).)

> Notwithstanding anything to the contrary in this Section 9.5, if no registration statement covering the issuance of the IPO Securities to the Members in the IPO Exchange has been declared effective under the Securities Act, then each of the Members that is not then an Accredited Investor for the purposes of the issuance of the IPO Securities may be required . . . [to] agree to accept cash in lieu of any IPO Securities such Member would otherwise receive in an amount equal to the Fair Market Value of such IPO Securities, as determined by the Board in its reasonable judgment . . .

(A305-06 § 9.5(c).)

Notably, *none* of the powers that Section 9.5 authorizes the Board to use to effectuate a Qualified IPO includes any of the fourteen actions designated as "Special Voting Items" in Section 6.8(b), including the three powers at issue in this appeal.

C. Prior Contemplated IPOs

Between 2014 and 2019, defendants sought on several occasions to take Caiman public. (Op. 19-23.) These efforts did not result in an IPO due to

unfavorable market conditions. (*Id.*) In connection with those efforts, defendants never took the position that EnCap had a unilateral right to approve Special Voting Items without Williams' consent. (A140.) To the contrary, defendants explicitly acknowledged—in their communications, in drafts and in the preliminary S-1 registration statements that were filed with the SEC in connection with those prior attempted IPOs—that Williams' approval was necessary for at least one Special Voting Item that Caiman Management wanted to implement: removing the geographic restrictions on Caiman's Business Purpose. (Op. 19-23.)

D. First Reserve's Investment in Blue Racer

By 2018, EnCap had tried for years to exit its position in Caiman, and was now approaching the end of its investment's seven-year time horizon. (A355; A1066/513:5-514:24 (Lemmons); A832 (Reaves Dep.).) In September 2018, First Reserve, a private equity firm, purchased Dominion's interest in Blue Racer. (Op. 23.) First Reserve "[did] NOT want to be in a 50/50 [Blue Racer] investment with Williams 'for a variety of reasons.'" (A357.)

First Reserve and EnCap secretly committed to work together to achieve an IPO of Blue Racer. (Op. 23.) In October 2018, they entered into a confidential side agreement requiring them to use commercially reasonable efforts to facilitate an Up-C IPO and associated reorganization of Blue Racer by the end of 2019. (Op. at 23; A365-A376.) The parties chose an Up-C structure at least

partly to make it "very hard for Williams" to object to the IPO. (A359; A365-66 § 1(a)-(b); A1068-69/522:21-523:15 (Lemmons).) EnCap agreed to a lock-up until December 31, 2019 under which it could exit its Caiman investment only through the Up-C IPO proposed by First Reserve. (A1067-68/518:10-519:2 (Lemmons).) Although the agreement was confidential (A372-73 § 15), First Reserve and EnCap disclosed it to the other defendants, but they never told Williams of its existence (A760 (Arata Dep.)).

E. The Proposed IPO

Williams did not learn that Caiman Management and EnCap were considering another IPO until March 2019, months after EnCap's secret agreement with First Reserve. (Op. 25, 23.) Nevertheless, Williams indicated that it would support an IPO as long as its rights under the Caiman Agreement were maintained, and voted in favor of pursuing a Qualified IPO of Blue Racer at an April 5, 2019 Board meeting. (*Id.* at 25.)

At an April 17, 2019 organizational meeting for the proposed IPO, Caiman Management presented an "Up-C" structure involving an elaborate reorganization with at least ten different steps.[3] (*Id.* at 26; *see also* A191-97.) As

[3] An "Up-C" IPO is an IPO of an LLC that allows the pre-IPO members (the "Sponsors") to retain their ownership interest in the LLC and their pass-through tax treatment. (Op. 24.) Typically, a new corporation ("NewCo") is formed to issue Class A common shares to the public that confer both voting (Continued . . .)

relevant here, these steps included the three Special Voting Items at issue on this appeal: amending the Blue Racer LLC agreement to create a single class of Blue Racer membership units; distributing all of Caiman's Blue Racer LLC units—which amount to all or substantially all of Caiman's assets—to Caiman's Members; and merging Caiman with a newly formed Blue Racer subsidiary. (Op. 26 (Steps Two, Five & Eight).)

Importantly, this proposed structure was not only complicated but also atypical: it would have moved Caiman from the top of the capital structure to the bottom (*i.e.*, from parent to wholly owned subsidiary), while a new shell LLC (HoldCo) would have acquired 100% of the LLC interests in Blue Racer. (*See id.* at 26; A191-97.) The Caiman Members, moreover, would not convert their Membership Interests in Caiman into any shares of the proposed IPO Issuer (PubCo), let alone Class A shares—*i.e.*, the class of securities to be offered to the public; instead, they could only convert newly issued HoldCo units, together with new PubCo Class B shares (which they would receive in exchange for Blue Racer

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> and economic rights. NewCo uses the proceeds to buy new membership interests in the LLC, and is designated the managing member. The Sponsors retain their LLC interests (with economic rights) and receive NewCo Class B shares (with only voting rights) pro rata with their equity interest in the LLC. The Sponsors can exchange their LLC interests and a corresponding number of Class B shares for an equivalent amount of Class A stock. (*Id.*)

units—not Caiman Membership Interests), into PubCo Class A stock. (*See* Op. 26; A191-97.) As defendants conceded below and as determined by the Court of Chancery, the Caiman Agreement would have to be amended to permit such a transaction. (Op. 45-46; A1084 (Reaves Dep.).) None of these steps was necessary to take Blue Racer public (Op. 56), and as Williams argued below, their only apparent purpose was to eliminate the Business Purpose provisions (A160-61).

At the end of the April 17 meeting, Caiman Management requested Williams' consent for removing the Business Purpose provision from the Caiman Agreement. (Op. 27.) Williams declined to consent. (*Id.*)

At a Board meeting on May 7, 2019, Caiman Management formally proposed to amend the Caiman Agreement to allow the various steps contemplated in the proposed Up-C IPO. (*Id*. at 27-28.) These contemplated steps would have vitiated Williams' contractual rights relating to the expansion of the Business Purpose of Caiman. Consequently, Williams voted against the proposal, causing it to fail. (*Id.* at 28.)

On May 10, 2019, Blue Racer filed a confidential Form S-1 for the Up-C IPO. (Op. 28; A509-722.) Unlike the 2015 and 2017 registration statements that expressly acknowledged that Caiman as a public entity would operate within a limited geographic area as a result of the restrictions imposed by the Caiman

Agreement, the 2019 S-1 made no mention of the Business Purpose limitations. (A70 ¶ 66; A509-722.)

F. The Caiman Litigation

In response to the filing of the S-1, Williams filed the underlying lawsuit on May 13, 2019, naming as defendants Caiman, Blue Racer, EnCap, the other Caiman Members, First Reserve, Caiman Management, and the non-Williams Board Managers. Williams sought to enjoin the proposed Up-C IPO that defendants were attempting to effectuate in violation of Williams' rights under the Caiman Agreement. (Op. 29.) Defendants filed counterclaims and asserted affirmative defenses. (*Id.* at 29-30.) Among other things, defendants sought a declaration that EnCap "is entitled to dictate the terms of the Qualified IPO, including structuring the 'IPO Issuer.'" (A100 ¶ 60(c).) After five weeks of expedited pre-trial proceedings, the case was tried before the Honorable J. Travis Laster of the Court of Chancery on June 25 and 26, 2019. Trial was followed by post-trial briefing and argument.

On September 25, 2019, the Court of Chancery issued the Memorandum Opinion, which determined that defendants could not proceed with their proposed Up-C IPO, because it did not meet the requirements of a Qualified IPO. Among other reasons, the court determined that the Up-C IPO did not satisfy the Caiman Interests Requirement or Same Securities Requirement for the IPO

Exchange under Section 9.5(a) because the Up-C IPO does not provide for an exchange of Caiman membership units into securities of the same class as would be issued to the public. (Op. 42-46, 55-56.) The Court of Chancery further held that under the IPO Facilitation Clause of Section 9.5(b), EnCap can only exercise the powers of the Caiman Board; EnCap thus cannot disregard otherwise mandatory provisions of the Caiman Agreement, nor can it unilaterally amend the Agreement to redefine a Qualified IPO so as to permit the Up-C IPO defendants wished to pursue. (Op. 47-51, 56-62.) As the court determined, the amendments necessary to effectuate the Up-C IPO were adverse to Williams' rights under the Agreement and, under Section 12.2 of the Agreement, therefore could not be approved without Williams' consent. (Op. 56-62.)

Instead of ending its opinion after deciding the essential issue before it, however, the Court of Chancery ventured further. The court declared EnCap's authority to take certain actions in connection with a future, hypothetical IPO in the event such an IPO otherwise meets the requirements of a Qualified IPO. In particular, the Court of Chancery opined that if "required or necessary to facilitate" a future Qualified IPO within the meaning of Section 9.5(b)'s IPO Facilitation Clause, EnCap could unilaterally cause Caiman to amend Blue Racer's LLC agreement, distribute all of Caiman's Blue Racer units to Caiman's members and form a new acquisition subsidiary of Blue Racer and cause Caiman to merge with

it—even though these actions are Special Voting Items under Section 6.8(b) and require Williams' approval. (Op. 62-66, 67-68.) The Court of Chancery reached these conclusions despite defendants' failure to propose any alternative IPO or indicate that they would pursue a different IPO structure that might meet the Qualified IPO requirements. On October 21, 2019, the Court of Chancery entered its Order memorializing these rulings. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY ISSUED AN IMPROPER ADVISORY OPINION

A. Question Presented.

Did the Court of Chancery issue an improper advisory opinion when, after it determined that the IPO proposed by the defendants could not proceed under the Caiman Agreement, it nevertheless provided an interpretation of the Agreement in connection with a hypothetical Qualified IPO? (Op. 62-66, 67-68.)

B. Scope of Review.

This Court reviews questions of justiciability *de novo*. *XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1216 (Del. 2014); *Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co. of Texas*, 962 A.2d 205, 208 (Del. 2008).

C. Merits of the Argument.

The Court of Chancery should not have issued an advisory opinion about the actions EnCap may take if required or necessary in the future to facilitate a hypothetical Qualified IPO. "Delaware courts do not render advisory or hypothetical opinions." *XL Specialty Ins. Co*., 93 A.3d at 1217; *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479-80 (Del. 1989). Declaratory relief is not ripe for adjudication where it "would necessarily be premised on uncertain and

hypothetical facts" and "ultimately may never become necessary." *XL Specialty Ins. Co.*, 93 A.3d at 1218.

But that is precisely what the Court of Chancery did here. The only IPO that defendants presented to the Court of Chancery was the proposed Up-C IPO. The Court of Chancery unequivocally and repeatedly held that the IPO proposed by defendants did not meet the requirements of a Qualified IPO under the Caiman Agreement, and that defendants could not amend the Agreement over Williams' objections to redefine a Qualified IPO to permit their proposed Up-C IPO. (Op. 42-51, 55-62, 63, 65-66, 68.) The Court permanently enjoined defendants from proceeding with the Up-C IPO or the elements thereof that require Williams' consent. (Order ¶ 1.) Defendants proposed no alternative that satisfied the requirements for a Qualified IPO. They did not demonstrate an intent to pursue any other IPO in the future that would satisfy those requirements, let alone describe what features such an IPO would have. There was thus no Qualified IPO for the Court of Chancery to assess. *See Stabler v. Ramsay*, 88 A.2d 546, 550 (Del. 1952) ("Thus, some aspects of the problem here presented are not merely anticipatory of the future, but may never become actual issues at all.").

Under the circumstances, it was speculation for the court to rule on what actions EnCap might be able to take if there were a Qualified IPO that otherwise satisfied the Agreement's express contractual requirements. Indeed, the

Court of Chancery itself refrained from ruling on other issues in the case that it believed were dependent on future, hypothetical facts that were not before it. (Op. 68-69.) Whether amending the Blue Racer LLC agreement (Op. 62-63), distributing Caiman's Blue Racer units to its Members (Op. 63-66) or merging Caiman with a newly formed acquisition subsidiary of Blue Racer (Op. 67-68) will be actions that are "required or necessary to facilitate" a hypothetical Qualified IPO in the future likewise will depend on the specific features of that IPO and myriad other facts that do not yet exist and were not before the Court of Chancery. Delaware courts, however, may not render declaratory relief "where facts are not fully developed," *Stroud*, 552 A.2d at 480, or where "based on speculation and hypothetical facts," *XL Specialty Ins. Co.*, 93 A.3d at 1211.

It is unclear, moreover, whether such a ruling will ever be required. The Caiman Agreement conditions EnCap's ability to exercise the Board's powers under the IPO Facilitation Clause on the prior approval of a Qualified IPO. By the terms of Section 9.5(b), EnCap can only invoke those powers "*at any time after* the approval of a Qualified IPO *in accordance with this Agreement*." (A305 § 9.5(b) (emphases added).) Once the Court of Chancery determined that no Qualified IPO had been approved in accordance with the Caiman Agreement (*e.g.*, Op. 56), there was no basis for EnCap to exercise *any* powers under Section 9.5(b) in connection with the proposed Up-C IPO. Any further determination the court made about the

scope of EnCap's powers to facilitate a Qualified IPO was based on a counter-factual set of circumstances. Whether EnCap might have some basis in the future to invoke the powers under Section 9.5(b) so as to necessitate a ruling about the scope of such powers is currently unknowable. The issue accordingly is not ripe, and the Court of Chancery should not have opined on it now. *See XL Specialty Ins. Co.*, 93 A.3d at 1218.

At a minimum, the Court of Chancery's determinations as to what actions EnCap might be empowered to take in the event of a hypothetical future Qualified IPO were unnecessary to support its judgment. As such, they were *dicta* without force or effect. *Brown v. United Water Del., Inc.*, 3 A.3d 272, 276-77 & n.17 (Del. 2010) (dictum defined as judicial statements on issues that "would have no effect on the outcome of th[e] case" and are thus "without precedential effect" (citations omitted)). The Court of Chancery therefore should not have ruled on them. *See Stroud*, 552 A.2d at 480 (explaining that unnecessary determinations on hypothetical facts "run[] the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law"). Accordingly, this Court should vacate Sections II.D.3, II.D.5, and II.D.6 of the Court of Chancery's Memorandum Opinion and the corresponding provisions of the Order to the extent that they address EnCap's powers to act for the Board in connection with a hypothetical future Qualified IPO.

II. THE COURT OF CHANCERY ERRED BY INTERPRETING SECTION 9.5(B) IN A MANNER THAT CONFLICTS WITH THE CAIMAN AGREEMENT'S PLAIN LANGUAGE.

A. Question Presented.

Did the Court of Chancery err in declaring that the IPO Facilitation Clause in Section 9.5 empowers EnCap to unilaterally exercise the Board's powers under Sections 6.8(b)(iii), (xi) and (xii) of the Caiman Agreement in connection with a hypothetical Qualified IPO, even though those powers are Special Voting Items that require Williams' approval, and EnCap's authority to exercise the Board's powers under the Agreement's Qualified IPO provisions of Section 9.5 is limited "solely for purposes of this Section 9.5," which does not authorize the Board to approve any Special Voting Items? (Op. 62-66, 67-68; A132-34, A171, A175-78, A219-21, A223-25.)

B. Scope of Review.

This Court reviews the Court of Chancery's legal conclusions *de novo*. *In re Peierls Charitable Lead Unitrust*, 77 A.3d 232, 235 (Del. 2013); *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits of the Argument.

The Court of Chancery's statements that EnCap can unilaterally cause Caiman to approve amendments to the Blue Racer Agreement, distribute Caiman's

Blue Racer units to its Members or merge with a newly formed Blue Racer acquisition subsidiary in a hypothetical future Qualified IPO were legally erroneous because they contravene the Caiman Agreement's plain language. *See, e.g.*, *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) ("A court must accept and apply the plain meaning of an unambiguous term . . . ."); *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) ("When the language of a contract is plain and unambiguous, binding effect should be given to its evident meaning.") (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

1. The Court of Chancery's Ruling Conflicts with the Unambiguous Terms of Section 9.5.

The Court of Chancery based certain of its rulings on its interpretation of the IPO Facilitation Clause in Section 9.5(b), which it held allows EnCap to "act[] on behalf of the Board" to the extent such actions are "required or necessary to facilitate" a Qualified IPO. (Op. 48-51, 63, 64-65, 68.) Although the court *correctly* held that this clause does not authorize EnCap to take actions that the Caiman Board is *not* otherwise permitted to take (*id.* at 49), the Court of Chancery erred in declaring that the clause empowers EnCap to take *every* discretionary action that the Board can otherwise take under Sections 6.8(a), (b) and (c)—regardless of the level of required approval (*id.*). That is simply *not* what the IPO Facilitation Clause (in particular) or Section 9.5 (generally) provides.

Rather, Section 9.5 plainly limits its grant of authority to EnCap so that it applies "*[s]olely* for purposes of *this* Section 9.5." (A305 § 9.5(a) (emphases added).) It does so by redefining the term "Board" as used in Section 9.5 to mean "the Board with the approval required for a Major Special Voting Item" (*id.*), that is, with the approval of a single EnCap Manager (A290 § 6.8(c))—but, again, "[s]olely" for purposes of the actions set forth in Section 9.5. EnCap's authority to act for the Board is thus limited "solely" to those actions the Board may take "for purposes of this Section 9.5" and cannot be exported to other provisions of the Agreement that delegate authority to other Members or Managers. The Court of Chancery erred by failing to even reference—let alone consider—this limitation. *See, e.g., Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) (courts interpreting contracts must "give each provision and term effect, so as not to render any part of the contract mere surplusage").

Section 9.5(a)'s "solely" limitation is not ambiguous and must be enforced according to its plain meaning. *See, e.g., Lorillard Tobacco Co.*, 903 A.2d at 740. "[S]olely" means "exclusively" or "alone." *See, e.g., Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018) ("'Solely' means 'alone'"); *State Dep't of Labor, Div. of Unemployment Ins. v. Reynolds*, 669 A.2d 90, 92 (Del. 1995) (interpreting "solely" to mean "exclusively"); *James v. Getty Oil Co.*

(E. Operations), Inc., 472 A.2d 33, 39 (Del. Super. Ct. 1983) ("'Solely' is defined as 'without another,' 'singly,' and 'to the exclusion of all else.'"). Thus, EnCap's unilateral powers under the IPO Facilitation Clause are limited *exclusively* to actions that the Board is authorized to take in "this Section 9.5" *alone* (A305 § 9.5(a))—*to the exclusion* of actions that the Board is only authorized to take under other provisions of the Caiman Agreement.

By its plain terms, Section 9.5 does not authorize the Board—with the approval of an EnCap Manager or otherwise—to approve *any* Special Voting Items (*i.e.*, those actions requiring the affirmative vote of at least one Williams Manager), including the three on which the Court of Chancery opined in Sections II.D.3, II.D.5 and II.D.6 of the Memorandum Opinion. Indeed, Section 9.5 does not mention Special Voting Items at all. Special Voting Items are governed by an entirely different part of the Caiman Agreement, Section 6.8(b), which requires the approval of a majority of Caiman's Board, including both an EnCap Manager *and* a Williams Manager. (A288 § 6.8(b).) Section 9.5's definition of the term "Board"—which applies "*solely* for purposes of *this* Section 9.5" (A305 § 9.5(a) (emphases added))—clearly does not bear on the requirements in Section 6.8(b)—a *different* section (*i.e.*, not "this Section") of the Agreement. By reading into the contract the power to use Section 9.5 to take the actions listed under Section 6.8(b) without Williams' approval, the Court of Chancery, "in effect, create[d] a new

contract with rights, liabilities and duties to which the parties had not assented." *Lorillard Tobacco Co.*, 903 A.2d at 739 (quoting *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1195-96).

Section 9.5 does enumerate certain actions the Board (and therefore EnCap) has the power to take in connection with a Qualified IPO, but those powers have nothing to do with Special Voting Items and are not an unlimited delegation of the Board's authority under the rest of the Caiman Agreement. To the contrary, Subsections (a), (b) and (c) of Section 9.5 identify six specific actions the Board may take under "this Section 9.5." These powers are as follows:

> [1] determining when the IPO Exchange will occur (A304-05 § 9.5(a));
>
> [2] determining whether, in connection with the IPO Exchange, it is "advisable" for Caiman's Members to contribute their Membership Interests to the IPO Issuer in one transaction or a series of transactions (*id.*);
>
> [3] approving—but only "after the approval of a Qualified IPO in accordance with this agreement"—"the transaction or transactions to effect the IPO Exchange" (A305 § 9.5(b));
>
> [4] "form[ing] any entities required or necessary in connection with the Qualified IPO" (*id.*);
>
> [5] making reasonable requests to Members "in connection with consummating the IPO Exchange" (*id.*); and
>
> [6] determining "in its reasonable judgment" the Fair Market Value of the IPO Securities for purposes of cashing out certain Caiman Members' Membership Interests in the event that there is no effective IPO registration statement (A305-06 § 9.5(c)).

None of these powers concerns a Special Voting Item. To the contrary, they principally relate to the mechanics and details of the IPO Exchange—*i.e.*, the conversion of the Membership Interests in Caiman into securities of the IPO Issuer of the same class being offered to the public. (A304 § 9.5(a).)

Although Section 9.5(b)'s IPO Facilitation Clause also authorizes EnCap to "take all such other actions as are required or necessary to facilitate the Qualified IPO," that specific power cannot be used to swallow the entire Agreement. Where, as here, a contract identifies a general category and then lists specific examples of the items in that category, Delaware courts apply traditional canons of construction to interpret the general category as being limited to the same types of items as the examples. *Del. Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427-28 (Del. 2012) (under related principles of *noscitur a sociis* and *ejusdem generis*, "'words grouped in a list should be given related meaning'" and general language that follows a list is "to be held as applying only to persons or things of the same general kind or class as those specifically mentioned") (citation omitted). Under these fundamental principles of contract interpretation, the "other actions as are required or necessary to facilitate the Qualified IPO" must be similar to the examples provided, such as approving the timing or transaction(s) required to facilitate the IPO Exchange. (*See* A304-05 § 9.5(a)-(b).) At a minimum, interpreting the catchall to extend to Special Voting Items—which are not similar

to any of the provided examples and are expressly enumerated in an entirely different section of the contract—contravenes these applicable rules of construction.

2. The Court of Chancery's Ruling Conflicts with the Unambiguous Terms of Sections 6.8, 6.1 and 6.5.

The Court of Chancery's determination that the IPO Facilitation Clause allows EnCap to unilaterally exercise the Board's powers under Section 6.8(b)(iii), (xi) and (xii) if required or necessary to facilitate a hypothetical future Qualified IPO is erroneous for the additional reason that it conflicts with the unambiguous requirements of Sections 6.8, 6.1 and 6.5 of the Agreement.

As the Court of Chancery correctly observed (Op. 50), Delaware law requires that the Caiman Agreement be interpreted as a whole. *E.g., Kuhn Constr., Inc.*, 990 A.2d at 396-97 (Del. 2010) ("We will read a contract as a whole . . . ."). Accordingly, the Court of Chancery should have harmonized its interpretation of Section 9.5(b) with the requirements of Sections 6.8, 6.1 and 6.5. *E.g., Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) ("[T]he controlling rule of construction is that where a contract provision lends itself to two interpretations, a court will not adopt the interpretation that leads to unreasonable results, but instead will adopt the construction that is reasonable and that

harmonizes the affected contract provisions."). The Court of Chancery's failure to do so was error.

The Court of Chancery's interpretation fails to give full effect to the mandatory terms of Section 6.8(b)—the provision governing Special Voting Items. That subsection unequivocally provides that Caiman "*shall not* take any" of those actions (Special Voting Items) "without having first received Majority Board Approval, which majority *must* include the affirmative vote of at least one EnCap Manager and one [Williams] Manager." (A288 § 6.8(b) (emphases added).) The terms "shall not" and "must" are mandatory and must be enforced as such, absent language to the contrary. *See, e.g.*, *Musser v. United States*, 414 U.S. 31, 37 (1973) (holding that regulation's "mandatory language" that "classification 'shall not be reopened' unless the proviso is met, requires no less"); *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 940 (Del. 1979) ("Given what we believe to be mandatory language ('(n)o adjustment . . . shall be made') prohibiting a change in the conversion ratio, we conclude that such a change may be made only if it is 'expressly provided.'"); *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 152 (Del. Ch. 2003) ("The word 'shall' is a mandatory term."). On its face, Section 9.5 does not purport to alter Section 6.8(b)'s mandatory approval requirement. As demonstrated *supra*, neither the IPO Facilitation Clause nor any other portion of

Section 9.5 uses the term "Special Voting Item" or describes Board actions that are Special Voting Items.

In this regard, the Court of Chancery's decision is at odds with itself. As the court correctly determined, the IPO Facilitation Clause does *not* empower EnCap to "ignore *mandatory* provisions in the Caiman LLC Agreement," to "take actions that the Caiman LLC Agreement does *not* empower the Board to take," or to "take actions that the Caiman LLC Agreement *has empowered specific members to take*."[4] (Op. 49-50 (emphases added).) Yet, the approval requirements for Special Voting Items—including the three on which the Court of Chancery opined—fit each of these categories. The specified approval is mandatory ("shall not take," "must include"); the Board cannot approve Special Voting Items without the specified approval; and that approval is committed not only to a majority of the Board, but also to the two specific Members whose Managers must vote affirmatively—EnCap and Williams. Thus, if the Court of Chancery was correct about the limits on the IPO Facilitation Clause—and it was—then its opinion that

[4] These limitations on the powers of the Board are inherent in Section 6.1, the provision of the Caiman Agreement that empowers the Board to act for the Company, which vests the Board with the ability to exercise Caiman's powers and manage its business and affairs "[e]xcept for matters in which the approval of the Members is required by this Agreement or by nonwaivable provisions of the Act." (A281 § 6.1.)

EnCap can unilaterally exercise the powers of the Board under Section 6.8(b) must be wrong.

The other subsections of Section 6.8 likewise confirm the conclusion that Section 9.5(b) does not alter the compulsory approval requirements for Special Voting Items in the context of a Qualified IPO. Section 6.8(a) is clear: For Special Voting Items, "the approval set forth in Section 6.8(b) and *no other shall be required*." (A286 § 6.8(a) (emphasis added).) Section 6.8(e) is even more unequivocal, reflecting that "[t]he [Caiman] Members acknowledge and agree, *notwithstanding anything to the contrary in this Agreement or in the Act*," that the matters described in Section 6.8(b) "*require* the stated approval *specified therein only*" (A290 § 6.8(e) (emphases added)). But, if Section 9.5(b) created a Qualified IPO exception in which the approval of a single EnCap Manager substitutes for the approval requirements set forth in Section 6.8(b), then, *another* approval would indeed be required, and "the stated approval specified" in Section 6.8(b) would not be the *only* one necessary. In that case, moreover, the provisions of Section 6.8(b) would *not* govern "notwithstanding anything to the contrary in this Agreement"; rather, Section 9.5(b)'s terms would govern instead—the exact opposite of Section 6.8(e)'s command. *See W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *10 (Del. Ch. Nov. 2, 2007) (contract provision's introductory clause, "'[a]nything to the contrary notwithstanding,' allows [that

provision] to trump any other provision that might conflict with it"), *aff'd*, 985 A.2d 391 (Del. 2009), *as corrected* (Nov. 30, 2009). By interpreting Section 9.5(b) to supersede Section 6.8(b)'s absolute approval requirements "if required or necessary to facilitate a Qualified IPO," the Court of Chancery did not give effect to Section 6.8(e)'s terms—it contravened them.

If the parties to the Caiman Agreement had intended to alter the approval requirements for Special Voting Items in this matter, they easily could have done so by expressly subjecting those requirements to the terms of Section 9.5(b). They did not. In fact, although Section 6.8(e) *does* explicitly make Section 6.8(b)'s requirements "subject to the provisions of Section 6.5(j) and Section 12.2," it does not condition them on Section 9.5(b). Because the parties declined to do so in the Agreement, the Court of Chancery was not at liberty to do so in its ruling. *See Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 507 (Del. 2019) (court "should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it." (citation, internal quotations omitted)).

The Court of Chancery's ruling that EnCap may unilaterally approve certain Special Voting Items under Section 9.5(b) if required for a Qualified IPO similarly conflicts with Sections 6.1 and 6.5 of the Agreement. Those provisions unqualifiedly provide that, subject to limited exceptions that *do not include actions*

pursuant to Section 9.5, the Board cannot act without Majority Board Approval. Section 6.1 defines the term "Board" to mean Caiman's Managers "who shall act as a board of managers," and it vests the Board with the authority to exercise "the powers of the Company" and direct its "business and affairs." (A281 § 6.1.) Importantly, Section 6.1 makes no reference to Section 9.5—because the altered definition of the "Board" in Section 9.5 applies "solely" to that section. (A281 § 6.1, A304-05 § 9.5.) Likewise, Section 6.5(e) provides that Board action requires "the affirmative vote in favor of such action of those Managers with a Majority of the Voting Power; except as otherwise provided in Section 6.8(a), Section 6.8(b), Section 6.8(c) and Section 6.8(d)." (A283 § 6.5(e).) Section 9.5 is *not* listed as an exception—which is sensible, given that the altered definition of the "Board" in Section 9.5(a) applies "solely for purposes of this Section 9.5" and *is limited to that Section*. Because the parties chose not to reference Section 9.5 in Section 6.5(e)'s specific and limited exceptions to the Majority voting requirement for approving actions that the Board is empowered to take under Section 6.8 (including Special Voting Items), the *only* permissible conclusion is that the parties did not intend Section 9.5 to function as such an exception. The Court of Chancery therefore erred by treating it as such. *See Lorillard Tobacco Co.*, 903 A.2d at 739 (court should not, in guise of interpretation, create "rights, liabilities and duties to which the parties had not assented").

* * *

The Court of Chancery incorrectly interpreted a provision applicable "solely" to Section 9.5 as applying to every provision in the Agreement and, in doing so, improperly created new rights under the Agreement; failed to abide by its own ruling that EnCap may not ignore mandatory provisions in the Agreement or take actions that the Agreement has empowered specific members to take; and failed to give effect to other parts of the Agreement. Its interpretation on these limited issues therefore was incorrect. This Court should vacate this erroneous interpretation and make clear that Section 9.5 does not empower EnCap to usurp the approval necessary for Special Voting Items under Section 6.8(b).

CONCLUSION

For the foregoing reasons, Sections II.D.3, II.D.5, and II.D.6 of the Court of Chancery's Memorandum Opinion and the corresponding provisions of the Order should be vacated to the limited extent that they declare that Section 9.5 authorizes EnCap to exercise certain of the Board's powers that constitute Special Voting Items under Section 6.8(b) if those actions are required or necessary to facilitate a hypothetical Qualified IPO.

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