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 SIDECAR, LLC; OAKTREE CAPITAL MANAGEMENT, L.P.; HIGHSTAR IV CAIMAN II HOLDINGS, LLC; FR BR HOLDINGS L.L.C.; 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 PUBLIC VERSION FILED MARCH 12, 2020

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

This appeal arises from a post-trial opinion in which the Court of Chancery interpreted provisions in the current limited liability company agreement (the "LLC Agreement") of Caiman Energy II, LLC ("Caiman") governing (1) an initial public offering of Caiman or its affiliates (Sections 6.8 and 9.5), and (2) amendments to the LLC Agreement (Section 12.2).[1] Appellant Williams Field Services Group, LLC ("Williams"), one of Caiman's members, appeals certain of the trial court's interpretations regarding the IPO-related provisions and contends that the trial court should not have engaged in such contract interpretation at all (despite having asked the trial court to interpret these provisions); Defendants cross-appeal the trial court's interpretation of the amendment provision.

The central dispute in the parties' pleadings and at trial was whether the LLC Agreement required the entity created in connection with an IPO (the "IPO Issuer") to carry forward the geographic and business limitations in the LLC Agreement's purpose clause ("Restrictive Purpose Clause").[2] The trial court ruled for Defendants on this pivotal issue, holding that "[t]here is nothing in the Caiman LLC Agreement that requires the governing documents of the [IPO Issuer] to have a provision analogous to the Purpose Clauses." Post-Trial Op. (the "Opinion" or "Op.") at 55.

[1] Unless noted, "Section _._" refers to a section in the LLC Agreement.

[2] *E.g.,* B1822-41; B1881-94; A173-84; B1957-76.

Williams does not appeal this holding.[3] Instead, in the latest round of its efforts to buy out Caiman's other members at clearance-sale prices (or at least forestall competition between Caiman and Williams' nearby assets), Williams attempts to thwart any IPO that might implement this holding. To do so, Williams contends that it has the unilateral authority to approve three intermediary transactions common in IPOs: (1) merging entities, (2) amending an operating subsidiary's governing documents, and (3) transferring assets from an existing entity into the entity conducting the IPO.[4] Williams, of course, does not care whether a transitory merger or asset transfer occurs during an IPO, but it intends to use this supposed approval authority to veto any IPO unless and until the IPO Issuer's charter includes a Restrictive Purpose Clause. Op. 54.

The trial court correctly rejected Williams' overreaching, and this Court should affirm. The LLC Agreement is clear that EnCap,[5] another Caiman member, has the unilateral authority to effectuate a Qualified IPO, including one involving the challenged transaction steps. Sections 6.8(c) and 9.5(a)-(b), which apply

[3] *See* Appellant's Op. Br. ("OB") at 42 (appealing other sections of the Opinion).

[4] *See* OB 14, 29-30, 42.

[5] "EnCap" refers collectively to 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. These parties are referred to as EnCap solely for consistency with the LLC Agreement and other relevant documents.

"notwithstanding" the provision Williams invokes (Section 6.8(b)), allow EnCap (among other things) to unilaterally:

- "approve a Qualified IPO;"
- "take any action, authorize or approve, or enter into any binding agreement with respect to…the foregoing;"
- "approve the transaction or transactions to effect the IPO Exchange;" and
- "take all such other actions as are required or necessary to facilitate the Qualified IPO."

Contrary to Williams, Sections 6.8(c) and 9.5 give EnCap more than a titular ability to "approve" an IPO that comports with Williams' wishes, and the LLC Agreement does not limit EnCap to "transactions to effect the IPO Exchange" ***other than*** transactions Williams needs to approve outside of the IPO context. Indeed, in an internal memorandum drafted just a few weeks after executing the LLC Agreement, Williams acknowledged that "[a]ctions requiring Board approval ***in connection with*** a Qualified IPO…require the affirmative vote of one EnCap Manager ***and no other***."[6] Thus, the trial court correctly determined that EnCap's authority to

[6] B0348. All emphases in this brief are added.

effectuate an IPO trumps Williams' rights under Section 6.8(b) so long as the IPO satisfies the definition of "Qualified IPO" and the criteria set forth in Section 9.5.

Perhaps recognizing the lack of support for its theory, Williams begins its appellate brief arguing that the trial court rendered an inappropriate "advisory opinion" on whether the LLC Agreement allows EnCap to take the three challenged steps in connection with an IPO. But the trial court simply explained its interpretation of the LLC Agreement's IPO provisions in resolving a dispute concerning these provisions, as Williams and Defendants requested. The fact that this interpretation might be relevant to future disputes or transactions does not make it an impermissible advisory opinion. If Williams were correct, nearly every judicial opinion interpreting a live contract would be an impermissible advisory opinion.

The absurdity of Williams' position is most evident when viewing the actual portions of the Opinion that Williams appeals. For example, the Opinion explains that "[a]lthough EnCap would have the authority to cause Caiman II to merge if required or necessary to facilitate a Qualified IPO, EnCap has failed to show that the Up-C IPO is a Qualified IPO that would give it the power to take this step." Op. 68. According to Williams, the second half of this sentence is fine, but the first half of the sentence is an inappropriate "advisory opinion." This Court should decline to rewrite the Opinion line by line as Williams requests. The trial court did not analyze a hypothetical future transaction; it explained its reasoning. This is not error,

particularly where (as here) Williams and Defendants asked the trial court to construe the very provisions that Williams now claims should not have been construed.

The trial court did, however, err in interpreting the LLC Agreement's amendment provisions. In advance of a planned IPO, Caiman sought to amend the LLC Agreement to accommodate an "Up-C IPO," which is more tax advantageous than a traditional "C-Corp IPO," and to facilitate a synthetic secondary offering (the "Proposed Amendments"). Contrary to the Opinion and Williams' appellate brief, EnCap did not seek to unilaterally approve the Proposed Amendments under its IPO-related powers; rather, Defendants proceeded under the LLC Agreement's amendment provisions, which say (among other things) that it may be amended by a majority in number of the investors, *provided* "this Agreement may not be amended in a way that adversely affects the rights or obligations of [Williams] without the approval of [Williams]."[7] All investors (other than Williams) supported the amendments. According to the trial court, the Proposed Amendments are adverse to Williams because "[a]t present, Williams is a majority investor in a privately held entity that operates within a governance arrangement that provides Williams with significant rights and protections. ***Through the Up-C***

[7] A317 §12.2(a)(v), (a)(ii).

IPO,…Williams would be a minority investor without significant governance rights." Op. 58-59.

The trial court erred by comparing Williams' *status* pre- and post-***IPO*** rather than comparing Williams' *rights* pre- and post-***amendment***. Even without any amendments, the LLC Agreement subjects Williams to becoming "a minority investor without significant governance rights" through an IPO. Under the current LLC Agreement, EnCap can unilaterally decide on behalf of Caiman that its operating subsidiary will conduct a Qualified IPO, resulting in Williams becoming a minority stockholder in a public corporation subject to common law corporate governance principles. The Proposed Amendments simply allow this already-existing possibility to occur in a manner more tax-advantageous to Williams and the other members.

The trial court dismissed this argument because "Section 12.2(a)(v) does not call for comparing Williams' situation under one set of amendments with Williams' situation under *another set of amendments*." Op. 59. But Defendants were not comparing Williams' rights under the Proposed Amendments to "another set of amendments;" they were comparing Williams' rights under the Proposed Amendments to Williams' ***currently existing rights without any amendments***. Because the Proposed Amendments do not cause the before-and-after situation that formed the basis of the trial court's adversity finding, the trial court erred.

SUMMARY OF ARGUMENT

1. Denied. The portions of the Opinion Williams challenges (*i.e.*, excerpts from Opinion §§II.D.3, II.D.5, and II.D.6) do not constitute an improper advisory opinion. Courts may explain the boundaries of contractual rights when determining whether parties acted within those boundaries. The trial court did nothing more: it did not "preapprove" a "hypothetical" or "future" transaction, rely on "hypothetical facts," or rule on the propriety of a specific alternative IPO structure. Williams' references to generic declaratory judgment cases provide no support for the notion that the trial court erred by construing the LLC Agreement or writing more than the bare minimum to resolve Williams' request for injunctive relief, particularly where (as here) the trial court (a) was simply—at Williams' and Defendants' request—interpreting the very provisions at issue in the parties' ripened dispute; and (b) did not enter any declaratory judgment on the three transactions at issue in Williams' appeal, (1) a merger of Caiman, (2) a transfer or sale of Caiman's assets in an "Exit Event," and (3) a material amendment to the LLC agreement of Caiman's operating subsidiary, Blue Racer Midstream, LLC ("Blue Racer"), let alone concerning any potential future IPO transactions.

2. Denied. The trial court correctly held that Williams' rights under Section 6.8(b) are subordinate to EnCap's Qualified IPO rights. Williams can argue otherwise only by ignoring that Sections 6.8(c) and 9.5(b), which set forth EnCap's

IPO-related rights, begin with "[n]otwithstanding…Section 6.8(b)" and "[n]otwithstanding anything to the contrary in this Agreement," respectively. Williams ***never addresses these "notwithstanding" clauses in its Opening Brief*** aside from blockquoting Sections 6.8(c) and 9.5(b). These sections, which trump Section 6.8(b) due to their "notwithstanding" clauses, allow EnCap to unilaterally "approve a Qualified IPO" and "any action" thereto, "approve the transaction or transactions to effect the IPO Exchange," and "take all such other actions as are required or necessary to facilitate the Qualified IPO." These broad powers permit EnCap to unilaterally determine that the IPO will occur via transactions Williams would otherwise have to approve under Section 6.8(b), including the three transactions at issue in Williams' appeal. Indeed, though unnecessary due to EnCap's broad powers, Section 9.5(a) specifically contemplates that a Qualified IPO might include a "merger" and/or "transfer" of assets, and an IPO will result in Caiman membership interests being "converted" or "exchanged" into equity securities of the IPO Issuer with fair market value equal to the membership interests' pre-IPO value.

As Williams concedes, EnCap can force Caiman's other members to surrender their membership interests in Caiman and receive equity securities of the IPO Issuer, a newly formed public company subject to different corporate governance laws, charters, and bylaws. It is nonsensical for Williams to acknowledge that it is subject

to this involuntary conversion but contend that EnCap must accomplish such a conversion without merging Caiman or transferring its assets. The LLC Agreement's plain language, common sense, and (should the Court choose to examine it) extrinsic evidence foreclose Williams' interpretation.

3. The trial court erred in finding the Proposed Amendments adverse to Williams. The Proposed Amendments do not change the Restrictive Purpose Clause, nor do they change the language allowing EnCap to create an IPO Issuer without a Restrictive Purpose Clause. Nevertheless, Williams alleged—and the trial court agreed—that the Proposed Amendments are adverse because they facilitate an Up-C IPO, and the ***Up-C IPO*** would result in an IPO Issuer without a Restrictive Purpose Clause. But ***even without any amendment to the LLC Agreement***, EnCap could effectuate an IPO that would result in an IPO Issuer without a Restrictive Purpose Clause, as the trial court held (and Williams does not appeal). Because the Proposed Amendments undisputedly did not cause Williams' alleged adversity, the trial court erred by finding adversity on this ground.

Because Williams offered no other ground for adversity, this Court should reverse. Williams and the trial court made passing reference to the Proposed Amendments adversely affecting Williams' financial rights. But Williams (and the trial court) offered no support for this theory, which is unfounded, and the evidence shows the Proposed Amendments would yield the same financial outcome for

Williams as the current LLC Agreement. In fact, Williams acknowledged it would approve the Proposed Amendments ***so long as the IPO Issuer was subject to geographic limitations***, which belies the notion that Williams is or was concerned about any purported "adversity" beyond the loss of Caiman's Restrictive Purpose Clause.

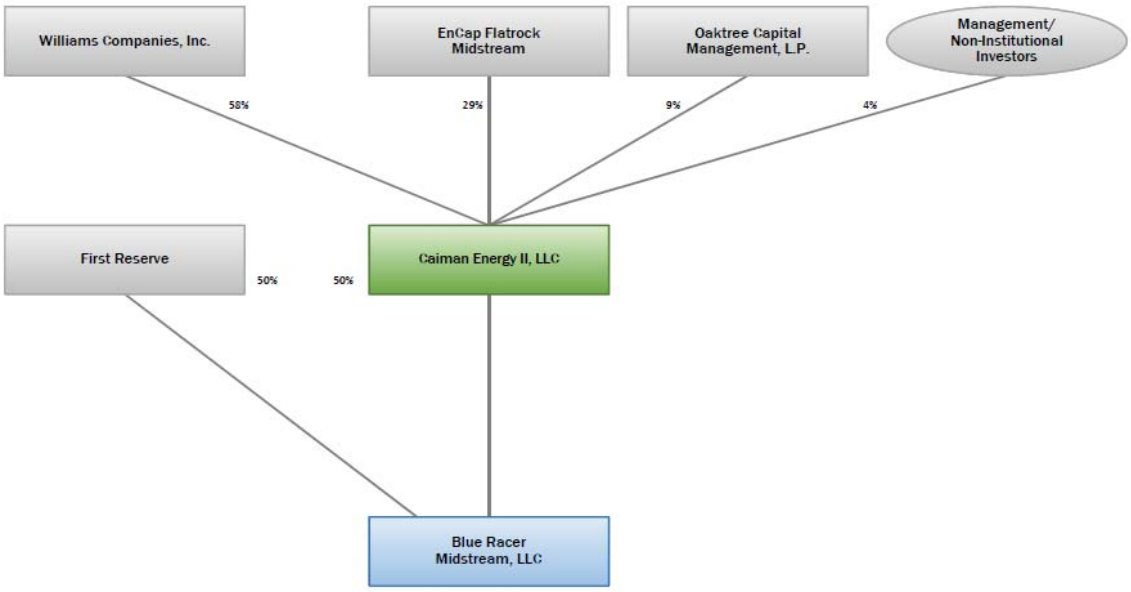
STATEMENT OF FACTS

I. The Parties

Caiman is a midstream company with several members ("Members") and a nine-person board of managers (the "Board").[8] EnCap, a private equity firm, owns 29% of Caiman's equity interests ("Membership Interests") with two designated Board appointees: Billy Lemmons and Dennis Jaggi. Certain investment funds managed by Oaktree Capital Management, L.P. ("Oaktree") and its affiliates (formerly Highstar Capital, L.P.) own 9% with one Board designee: at all relevant times, Steven Gudovic. Williams owns the remaining 58% with three designated Board appointees: Curt Carmichael, David Keylor, and T.J. Rinke. The three remaining Board members are Caiman management investors: Jack Lafield, Rick Moncrief, and Stephen Arata.

Caiman's sole asset is a 50% equity interest in Blue Racer. FR BR Holdings, L.L.C. ("First Reserve") owns the remaining 50% of Blue Racer, which it purchased from Dominion Energy, Inc. ("Dominion") in 2018. Caiman management operates Blue Racer. A simplified ownership structure of Caiman and Blue Racer follows:

[8] "Midstream" operators connect oil and gas producers ("upstream") to end users ("downstream").



II. The LLC Agreement

Caiman is governed by the LLC Agreement. At issue here are the LLC Agreement provisions concerning a "Qualified IPO," which is (generally) an initial public offering of the IPO Issuer that results in at least $75,000,000 in gross proceeds to the IPO Issuer.[9] The "IPO Issuer" can be Caiman or one of its Affiliates, including pre-existing or newly-created parent, sister, or subsidiary companies.[10] There is no further constraint on the IPO Issuer's form.

Section 6.8 of the LLC Agreement establishes a hierarchy of approval required for different Board actions. Section 6.8(a) lists twenty-one matters

[9] A265 §2.1.

[10] A261, A254 §2.1.

requiring "Majority Board Approval."[11] Section 6.8(b) lists fourteen "Special Voting Items," which require Majority Board Approval plus "the affirmative vote of at least one EnCap Manager and at least one [Williams] Manager."[12] Special Voting Items include merging Caiman, amending Blue Racer's LLC agreement (the "Blue Racer LLC Agreement"), and consummating a transaction that is an Exit Event.[13] Finally, Section 6.8(c) contains "Major Special Voting Items" that supersede 6.8(a) and 6.8(b) and require only EnCap's approval:

> (c) ***Notwithstanding Section 6.8(a) and Section 6.8(b)***, the following actions (each a "Major Special Voting Item") shall only require the affirmative vote of one EnCap Manager, and upon such affirmative vote shall be deemed approved as an act of the Board (and, for the avoidance of doubt, such actions may not be taken by any other vote or approval of the Board):
>
> (i) to approve a Qualified IPO, or
>
> (ii) 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***.[14]

Other subsections of Section 6.8 further emphasize that only EnCap's vote is required for a Qualified IPO. Section 6.8(a) states that for a Major Special Voting Item "the approval set forth in Section 6.8(c) and no other shall be required," and

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[11] A285-86 §6.8(a).

[12] A288 §6.8(b).

[13] A289-90 §6.8(b)(iii), (xi), (xii).

[14] A290 §6.8(c).

Section 6.8(e) provides, "subject to the provisions of Section 6.5(j) and Section 12.2, that the matters described in Section 6.8(a), Section 6.8(b) and Section 6.8(c) require the stated approval specified therein only and...no separate or additional Member vote, consent or approval shall be required in order for the Company to undertake such action."

Section 9.5(a) further details the Members' rights in a Qualified IPO and declares that "[s]olely for purposes of this Section 9.5, references to 'the Board' shall mean 'the Board with the approval required for a Major Special Voting Item,'" meaning EnCap's sole authority.[15] Section 9.5(a) sets forth Members' rights concerning ownership interests they will possess post-IPO, including:

- "In connection with any proposed Qualified IPO approved in accordance with this Agreement, the outstanding Membership Interests will be converted or exchanged in accordance with this Section 9.5 into equity securities of the IPO Issuer ("IPO Securities") of the same class or series as the securities of the IPO Issuer proposed to be offered to the public in the Qualified IPO[.]"
- "[E]ach holder of Membership Interests will…receive IPO Securities having a Fair Market Value equal to" a formula based on Caiman's pre-IPO liquidation value.

[15] A304-05 §9.5(a).

Section 9.5(b) concerns the process of carrying out the Qualified IPO, including:

- "***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 [with EnCap's sole approval] shall be entitled to approve the ***transaction or transactions to effect the IPO Exchange*** and to take ***all such other actions as are required or necessary to facilitate the Qualified IPO*** 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)."
- "[E]ach of the Members shall (i) take such actions as may be reasonably requested by the Board in connection with consummating the IPO Exchange," including transferring all of Caiman's Membership Interests or assets to the IPO Issuer and merging or consolidating Caiman into or with the IPO Issuer, and shall "use commercially reasonable efforts to (x) cooperate with the other Members so that the IPO Exchange is undertaken in a tax-efficient manner...."

Lastly, Section 12.2 governs amendments to the LLC Agreement. It provides that the LLC Agreement may not be amended in a way that adversely affects the rights or obligations of either EnCap or Williams without its approval.

III. The parties' course of dealing confirms that EnCap has broad, unencumbered rights to effectuate a Qualified IPO.

The parties agree the LLC Agreement is unambiguous; thus, the contract interpretation questions at issue on appeal may be resolved without resort to the evidentiary record. Nonetheless, the record—and particularly the LLC Agreement's negotiating history—further proves this agreement does not grant Williams the ability to control a Qualified IPO's steps as Williams claims.

A. Formation of Caiman

In 2009, Lafield and Moncrief formed Caiman Energy, LLC ("Caiman I"), which owned and operated midstream assets in the Marcellus region of the United States.[16] In 2012, Williams purchased Caiman I's assets in the Marcellus for $2.5 billion.[17] In the sale, Williams negotiated a two-year non-compete prohibiting Caiman I's private-equity sponsors and management from operating in Caiman I's region.[18]

During the sale negotiations, Caiman I's owners discussed with Williams the formation of a new company that would operate in the Utica shale. The parties

[16] A991/325:16-326:5 (Arata).

[17] A937/111:2-8 (Carmichael).

[18] B0165-66 §5.15; A937/111:9-22 (Carmichael).

signed a Memorandum of Understanding, giving Williams the right to invest in this new company.[19]

In June 2012, the current Caiman was formed, with Williams, EnCap, and Highstar as the primary institutional investors. Everyone knew that unencumbered exit rights were of paramount importance to private-equity sponsors EnCap and Highstar.[20] By contrast, Williams was known to be a strategic, long-term investor.[21]

To balance these competing interests, the original LLC Agreement executed in July 2012 (the "Original LLC Agreement") provided detailed exit rights. Under the Original LLC Agreement, EnCap could unilaterally approve an "Exit Event," including a "[d]isposition of all of the Membership Interests as a Drag-Along Sale."[22] Williams retained a right of first offer prior to any such sale.[23] But Williams had the absolute right to veto a Qualified IPO.[24]

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[19] B0314.

[20] A1059/483:1-11, A1060/488:15-489:7, A1060/489:20-490:5 (Lemmons); A1023/341:11-15 (Arata); A939/120:3-11, A956/185:9-19 (Carmichael); B1241/41:12-15 (Armstrong Dep.); B1683/39:22-40:2 (Lemmons Dep.); B1595/57:12-18 (Scheel Dep.).

[21] B1600/77:16-23 (Scheel Dep.); A1023/340:23-341:15 (Arata).

[22] B0044 §6.8(c)(i), B0055-58 §9.3, B0065-67 §9.7 (Redline of the Original LLC Agreement vs. the LLC Agreement); A1060/489:20-490:5 (Lemmons); A956/186:8-14 (Carmichael).

[23] *Id.*

[24] B0042-44 §6.8(b).

Because of this veto right, Williams deferred to management's formulation of all other IPO provisions and did not negotiate other protections in the event of a Qualified IPO.[25] Thus, the Original LLC Agreement (like the later LLC Agreement) provided the Board with broad discretion and few limitations on structuring an IPO.[26] As Williams' chief negotiator admitted, the Original LLC Agreement did not "spell out" the "metes and bounds of what an IPO would look like" because Williams then had "a consent right over" a Qualified IPO.[27]

B. EnCap trades one unfettered exit right for another in the amendment of the Original LLC Agreement.

Critically, Williams failed to curtail this broad discretion when it traded away the right to veto an IPO in a subsequent amendment to this agreement.[28] In late 2012, Caiman identified an opportunity to enter into a joint venture with Dominion in what would become Blue Racer.[29] To accommodate this development, the parties amended the Original LLC Agreement. Williams' principal executives on the transaction, Carmichael and Jim Scheel, wanted to eliminate EnCap's unfettered

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[25] B1596/60:4-17 (Scheel Dep.); A956/187:10-188:1 (Carmichael).

[26] B0061-63 §§9.5(a)-(d).

[27] A956/187:10-188:22 (Carmichael); B1345/80:1-24 (Carmichael Dep.).

[28] A943/134:11-18, A952/170:4-10, A956-57/187:2-190:11 (Carmichael) ("I'm not sure…how deeply that was thought about…"); A1025/349:3-350:5 (Arata); A916/26:15-21, A922/50:20-51:7 (Armstrong).

[29] A992/329:16-330:9 (Arata); B0390.

drag-along sale right.[30] But EnCap was unwilling to relinquish its exit rights altogether, and the non-Williams Members considered it fundamental to retain "a clear path to liquidity at the best fair market value that could be obtained in an open market[.]"[31] Highstar recognized the elimination of the drag-along right as a "pretty hefty ask" and noted "I don't know that there is a way to get [EnCap] comfortable with giving up [its] drag right, unless the trade is to go from a 'drag into a sale' to a 'drag into an IPO.'"[32]

To accomplish Williams' and the other Members' goals, the parties traded one unencumbered right for another. EnCap agreed to exchange its unfettered drag-along sale right under the Original LLC Agreement for the right to orchestrate and control an IPO exit.[33] The parties understood "it was a trade of one unqualified right for the other."[34] EnCap had the sole authority to determine the IPO's structure and

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[30] B1600/74:14-75:5 (Scheel Dep.); A1024/345:13-22 (Arata); A1051/452:11-453:1 (Miller); B0326.

[31] A1051/453:19-454:21 (Miller); A960/204:4-14 (Carmichael).

[32] B0322-24; A1024/346:3-23, A1025/348:13-349:2 (Arata) ("[O]ur private equity owners were very focused on a clear path to exit. And if we didn't have a clear path to drag the owners into a sale, they and we, as management, wanted a clear path to an IPO."); B1598/67:23-68:14 (Scheel Dep.); B1267/143:1-5 (Armstrong Dep.); B1765-72; B0328-30.

[33] A939/119:12-16, A957-58/192:20-193:18 (Carmichael); A1052/455:2-12 (Miller); B0331-33; B0039-45 §6.8.

[34] A1025/348:18-349:2 (Arata); A956/186:11-21, A958/193:6-194:8 (Carmichael).

terms.[35] EnCap explained "it's critical for us to be in control of what happens and…how all those mechanics work when it's time for us to exit those investments. It's one of the duties that we have [to EnCap's] investors."[36] Highstar confirmed that it would never have agreed to this trade had Williams retained any consent rights over an IPO.[37]

Williams obtained many benefits in exchange for trading this veto right: elimination of EnCap's drag-along sale right, an option to increase Williams' ownership interest in Caiman by 15%, and the ability to acquire and control the general partner if EnCap structured the IPO Issuer as a master limited partnership.[38] Williams did not obtain any changes to Sections 6.8(c), 9.5, or the applicable definitions to curb EnCap's broad power to approve, structure, and conduct a Qualified IPO.[39] While the entire Board had this power in the Original LLC Agreement, EnCap now had sole discretion.[40] As Carmichael admitted, Williams

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[35] A952-53/171:2-173:17 (Carmichael); A1061/492:20-493:12, 494:1-23, A1062/495:24-496:4 (Lemmons); A1052/457:13-458:20 (Miller).

[36] A1060/488:19-489:7 (Lemmons).

[37] A1052/457:21-24 (Miller).

[38] B0331-33; A957/191:20-24 (Carmichael); A1024/344:13-17, A1025/349:6-12 (Arata).

[39] B0007-22 §2.1, B0044 §6.8(c), B0061-64 §9.5; B0335; A956-57/187:2-189:11 (Carmichael); A1025/349:9-350:5 (Arata).

[40] B0007-22 §2.1, B0044 §6.8(c), B0061-64 §9.5.

"could have" but "did not negotiate for the right to control the IPO company in the event of any and all types of IPOs."[41]

When Williams entered into the LLC Agreement, it understood the parties' relative rights. In an internal Williams memorandum from its in-house counsel a few weeks after executing the LLC Agreement, Williams recognized "[a]ctions requiring Board approval ***in connection with*** a Qualified IPO…require the affirmative vote of one EnCap Manager ***and no other***."[42] Dissatisfied, Williams subsequently attempted to amend the LLC Agreement to curtail EnCap's IPO rights. In 2017, Williams proposed amending the LLC Agreement to make it "mandatory…that the business purpose clause…continue to the public entity" following an IPO.[43] Williams also sought to establish that a "Qualified IPO" could only occur where a pre-determined "MLP Agreement" is "adopted as the limited partnership agreement of the IPO Issuer."[44] These amendments were not adopted, and EnCap's unencumbered Qualified IPO rights have never been curtailed.

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[41] B1365/158:17-159:6 (Carmichael Dep.).

[42] B0348.

[43] A967/230:20-231:16 (Carmichael); B0501, B0504, B0549-50.

[44] B0504.

C. Williams frustrates IPO efforts for years in an attempt to purchase Caiman for a lower value.

From 2014 to 2017, Caiman made multiple attempts to complete an IPO of Caiman as a master limited partnership, a then-popular IPO structure for midstream companies. But Williams repeatedly stalled these IPO attempts, hoping these efforts would fail and Williams would be able to acquire Caiman for a lower price.[45] In 2017, Williams' CEO Alan Armstrong privately explained to Williams' Chairman: "We have been stiff arming them on [buyout] value for over a year now. We have continued to say good luck with your IPO…I would prefer they would not go through the IPO…"[46] The next year, Williams' financial advisor suggested a joint venture—strikingly similar to one Williams subsequently announced—to "dampen buyer interest in the Caiman auction," thereby enhancing Williams' "negotiating position" with Caiman and Dominion for ownership of Blue Racer (the "Northeast JV").[47] When Chad Zamarin learned First Reserve acquired Dominion's interest in Blue Racer, he texted Carmichael asking whether they should "ice caiman" (*i.e.*, delay the process) and "have them believe this hurts their chance of selling?"[48]

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[45] B1624/171:3-8 (Scheel Dep.); B0403-04 (Williams' "[i]mmediate priority" is to "acquire Caiman II GP with the least amount of incremental cash."); *see also* B0483-84; B0711-12; B0715-16; B0882.

[46] B0708.

[47] B0909.

[48] B2006. Zamarin attempted to explain away this text message as a "typo." B1502/148:13-17 (Zamarin Dep.).

Williams' strategy of frustrating an IPO of Caiman or Blue Racer to later buy out the other investors at a reduced value [redacted].[49] In March 2019, Williams announced the Northeast JV,[50] with the stated goal of consolidating its businesses in the Northeast United States.[51] [redacted][54] Williams' ongoing strategy—including this litigation—has been to stall Caiman's IPO process, [redacted]

[49] B0363; B0753; B0886.

[50] B0958-63; B0932-34, B0952.

[51] A920-21/44:16-45:15 (Armstrong); A980/282:11-283:18 (Zamarin).

[52] B0920; B0952; B0858 (consolidating Caiman and Blue Racer with the Northeast JV is a "High Priority – critical for achieving growth goals").

[53] B0894; *see also* B1506/165:2-17 (Zamarin Dep.).

[54] B2006.

[redacted][55]

D. The Caiman Board approves the current IPO.

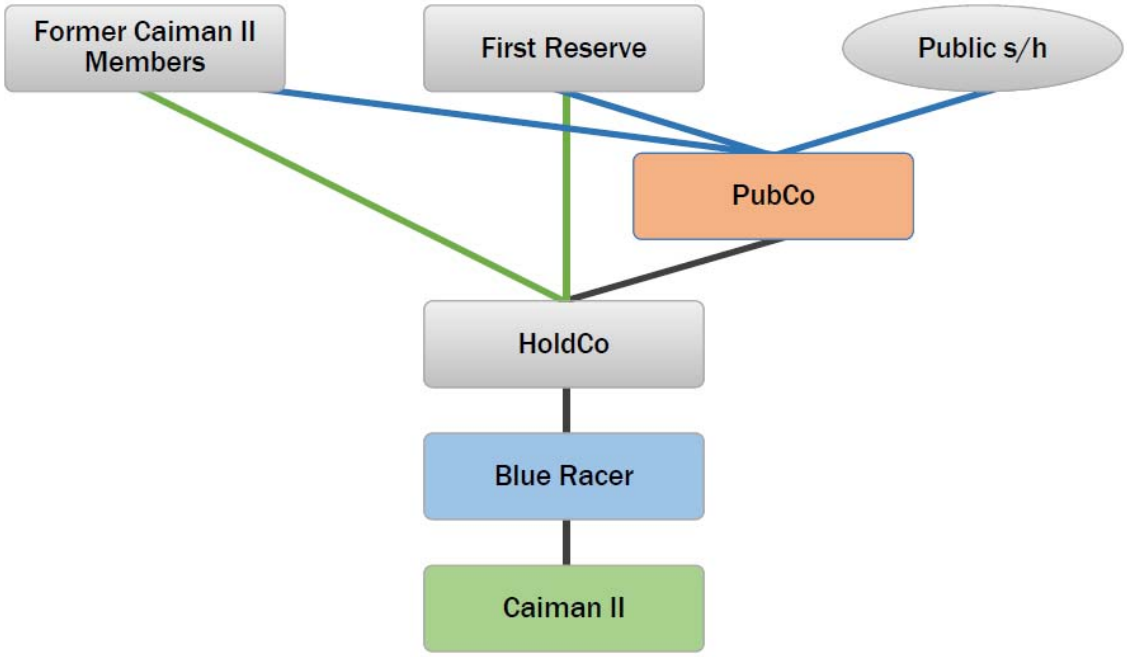
On April 5, 2019, the Board met and unanimously approved a Qualified IPO of Blue Racer (the "Proposed IPO").[56] The proposed IPO would be structured as an "Up-C," with "PubCo" as the IPO Issuer and the ultimate operating company (Blue Racer) as a partially-owned subsidiary of PubCo, typical in Up-C structures.[57] The Up-C structure was attractive because the market now disfavors MLPs and the Up-C structure held significant tax advantages over traditional "C-Corp" IPOs.[58] Although the parties continued to work out the details of the Up-C IPO after the April meeting, they planned the post-IPO structure as follows:

[55] B0925.

[56] A95 ¶46.

[57] A989/316:20-318:21, A990/321:14-22 (Arata).

[58] A1063/502:14-24, A1068-69/522:21-523:15, A1069/525:2-11, A1069/526:18-24 (Lemmons); A1032/377:4-15 (Arata).



E. Proposed Amendments to the LLC Agreement

In 2019, the parties negotiated the Proposed Amendments.[59] As revised, the Proposed Amendments serve two purposes: (1) facilitate an Up-C IPO; and (2) establish a procedure by which Members can participate in a synthetic secondary offering on a pro rata basis.[60] A month after receiving the Proposed Amendments, Carmichael could not articulate why the Proposed Amendments were adverse to Williams.[61] Williams subsequently made clear that it viewed the Proposed

[59] B1871-72; B1999-2001; B0966-67.

[60] Defendants explained during trial that, in the spirit of collaboration, they were willing to drop the amendments described in JX231 (B0966-67) that would have addressed changes to the tax laws. B1872.

[61] B1385/239:18-240:2, B1385/241:20-25, B1386/242:15-21 (Carmichael Dep.).

Amendments as adverse because the IPO would result in Blue Racer no longer being subject to the Restrictive Purpose Clause.[62] While Williams made passing reference to other potential grounds of adversity (B1765-B1772), it never advanced these allegations at trial and, instead, acknowledged repeatedly that it would approve the Proposed Amendments so long as the Restrictive Purpose Clause survived post-IPO: "[The] amendments to the Agreements…are adverse to Williams because they serve an attempted end-run around Williams's bargained-for property rights. Consistent with its rights, Williams will not consent to these steps without the protection of a Business Purpose Provision in the charter of the IPO Issuer."[63]

[62] B1842; A186-87 ("[T]he amendments, collectively, will plainly facilitate removing the Business Purpose Provisions in contravention of Williams's consent rights.").

[63] A125, A173, A178; B1842; B0964-65; B1383/232:7-233:16 (Carmichael Dep.).

ARGUMENT

I. The Court of Chancery did not exceed its authority by interpreting the LLC Agreement.

A. Question Presented

Did discrete portions of the Court of Chancery's opinion interpreting the LLC Agreement amount to an improper advisory opinion where the trial court was simply explaining its interpretation of the LLC Agreement provisions at issue in the lawsuit, a claim related to these provisions was ripe for adjudication, the Court's interpretation of those portions of the LLC Agreement was part of its analysis leading to its conclusion, and all parties sought a declaration of the Caiman Members' rights under the LLC Agreement concerning these provisions? (Op. 62-66, 67-68.)

B. Scope of review

This Court reviews questions of justiciability *de novo*. *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1216 (Del. 2014).

C. Merits of argument

The Court should reject Williams' attempt to mischaracterize the Opinion as an "advisory opinion" when, in reality, the trial court simply interpreted the LLC Agreement at the request of the parties to resolve an active, justiciable dispute regarding the proper interpretation of its provisions in the context of the Proposed IPO. There is an important distinction between an opinion that may have bearing on

a potential future transaction (as happened here and happens in nearly every opinion) and an opinion that adjudicates the validity of a potential future transaction (which did not happen here, contrary to Williams' suggestion). Williams' appeal is premised on conflating this distinction.

In its Opening Brief, Williams dances around the precise language it appeals from the Opinion, as an examination of this language reveals Williams is simply attempting to dissect the trial court's interpretation of the LLC Agreement and reasoning, rather than appealing an "advisory opinion." Williams believes the trial court committed legal error by including the italicized portions of the following statements:

- "***Although EnCap has the authority to amend the Blue Racer LLC Agreement in connection with a Qualified IPO***, EnCap has failed to show that the Up-C IPO is a Qualified IPO." Op. 63 (Section II.D.3 of the Opinion).
- **"*[A]lthough EnCap has the authority to make the distribution [of Caiman's primary asset, its Blue Racer units] in connection with a Qualified IPO***, EnCap has failed to show that the Up-C IPO is a Qualified IPO that would give it the power to take this step." Op. 65 (Section II.D.4 of the Opinion).[64]

[64] In its brief, Williams only requests that this Court vacate portions of Sections II.D.3, II.D.5, and II.D.6 of the Opinion. OB 1, 28. These sections pertain to whether EnCap has the power, in connection with a Qualified IPO, to amend the Blue Racer LLC Agreement (Section II.D.3 of the Opinion), merge an acquisition subsidiary into Blue Racer (Section II.D.5 of the Opinion), and merge Caiman with

- "***EnCap (rather than the Board) could cause Caiman II to exercise those rights [to merge Blue Racer] to the extent required or necessary to facilitate a Qualified IPO***….[But under] the structure of the Up-C IPO that EnCap has proposed, EnCap would lack the ability to approve the merger without the unanimous consent of the other members of Blue Racer, including Williams." Op. 67 (Section II.D.5 of the Opinion).
- "***Although EnCap would have the authority to cause Caiman II to merge if required or necessary to facilitate a Qualified IPO***, EnCap has failed to show that the Up-C IPO is a Qualified IPO that would give it the power to take this step." Op. 68 (Section II.D.6 of the Opinion).

This is a far cry from an improper "advisory opinion." OB 25-28. As Williams' own case citations make clear, an opinion is "advisory" if a court is asked to render judgment resolving an unripe dispute by applying a contract (or the law) to a set of abstract, conjectural facts. *See XL Specialty*, 93 A.3d at 1217 ("Delaware

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an acquisition subsidiary (Section II.D.6 of the Opinion). This is inconsistent with Williams' notice of appeal, which identifies Sections II.D.3, II.D.4, and II.D.6—but not II.D.5. Appellant's Notice of Appeal at 2. Additionally, in other portions of its brief, Williams appears to take issue with the Court's interpretation of whether EnCap has the authority to transfer Caiman's asset (Blue Racer units) in an Exit Event (Section II.D.4 of the Opinion). *See* OB 14, 27. Although the Qualified IPO is not an Exit Event, and Section II.D.4 of the Opinion is not listed in Williams' brief as a section that Williams appeals, Defendants nonetheless address this purported right.

courts decline to exercise jurisdiction over a case unless the underlying controversy is ripe…. That principle is sometimes expressed in terms of the adage that Delaware courts do not render advisory or hypothetical opinions."); *Stroud v. Milliken Enters., Inc*., 552 A.2d 476, 480 (Del. 1989) (explaining that "hypothetical opinions" are those that are "dependent on supposition;" courts "decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action is appropriate."). "In determining whether an action is ripe for judicial determination, a 'practical judgment is required.'" *Stroud*, 552 A.2d at 480 ("The law of ripeness…is now very much a matter of common sense.... What is required is that the interest of the court...in postponing review until the question arises in some more concrete and final form, be outweighed by the interests of those who seek relief from the challenged action's immediate and practical impact upon them."). For example, in *Stroud*, after the Court of Chancery enjoined a stockholder meeting due to a defective notice, defense counsel sent the court a letter attaching a draft revised notice and "stating that if the court had 'no problem' with [the draft notice], defendants would complete the notice for issuance." *Id.* at 477-78. The Court of Chancery "ruled that, with one exception, defendants' proposed revised notice complied with" Delaware law, which required it to adjudicate "novel and important [questions of] Delaware corporate law...." *Id.* at 478, 481. This Court held the "parties have thereby inappropriately drawn the trial court into the granting of an

advisory opinion upon a significant question of corporation law which, in our view, was clearly not ripe for judicial intervention." *Id.* at 481.

Williams mischaracterizes the Opinion in an effort to fit it within this mold. Contrary to Williams' assertion, the trial court did not opine on "future," "hypothetical" IPOs.[65] Rather, the trial court explained its interpretation of the extant, controlling LLC Agreement while analyzing the Proposed IPO to determine its validity under that agreement. Nowhere did the trial court hypothesize about future events, imagine alternate scenarios, or advise the parties on whether a potential future IPO structure would comply with its interpretation of the LLC Agreement. Nor did the trial court "preapprove" EnCap to take certain steps in a future transaction.[66] Williams argues that:

> 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.[67]

[65] OB 1, 4, 5, 23, 25, 27, 28.

[66] *Id.* at 5.

[67] *Id.* at 27.

But the trial court did not answer the question of "***[w]hether***" these actions "are 'required or necessary to facilitate' a hypothetical Qualified IPO in the future,"[68] and Williams will undoubtedly not concede that the Opinion is *res judicata* approving these actions in a future IPO. Indeed, the trial court (1) did not enter any declaratory judgment whatsoever on the issues Williams appeals, and (2) left open issues that would need to be resolved in any future IPO. For instance, the trial court determined that the clause allowing EnCap to approve "transactions to effect the IPO Exchange" was unavailable "in this case" due to the nature of the Proposed IPO and, as such, did not refer to this clause in examining the Proposed IPO's steps.[69] In future IPOs, this clause may afford EnCap authority to take the challenged steps without regard to whether EnCap also has authority under a separate clause allowing it to take actions as "required or necessary to facilitate" an IPO. Similarly, the trial court declined to resolve Williams' argument regarding Section 12.8 because it was "a fact-dependent question that cannot be answered on the current record." Op. 69.

If, as Williams suggests, courts cannot explain the rationale behind their interpretation of an agreement in a post-trial opinion that resolves a dispute about the meaning of the agreement, then almost all contract interpretation opinions would

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[68] *Id.*

[69] Op. 44 ("***In this case***, the defendants cannot rely on the IPO Exchange Clause as a source of authority for the Up-C IPO because EnCap is not using its authority 'to effect the IPO Exchange' as defined in Section 9.5(a).").

be improper advisory opinions. This is obviously not the law. *E.g.*, *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912 (Del. 2017) (interpreting a contract to enjoin one party from taking a particular contemplated action, while noting it leaves this party free to take action compliant with its interpretation); *Godden v. Franco*, 2018 WL 3998431 (Del. Ch. Aug. 21, 2018) (interpreting an LLC Agreement, including in its analysis the validity of certain actions under the contract assuming that the described predicate conditions are satisfied); *K&K Screw Prod., L.L.C. v. Emerick Capital Invs., Inc.*, 2011 WL 3505354 (Del. Ch. Aug. 9, 2011) (similar). Implicit in Williams' argument is the thinly-veiled concern that the discrete italicized portions of the Opinion listed above will have some bearing on a future dispute concerning a future IPO. But this potential—which all precedential opinions share—does not render it speculative or advisory. The trial court was well within its powers to issue an opinion interpreting the contract, and Williams does not have the right to dictate the order in which the trial court conducted its analysis or insist that it phrase its opinions more narrowly.

Williams' argument—that the trial court should not have explained its interpretation of the LLC Agreement—is even more remarkable given that Williams ***asked the trial court to do so*** in its request for declaratory relief. "Parties to a contract can seek declaratory judgment to determine 'any question of construction or validity' and can seek a declaration of 'rights, status or other legal relations

thereunder.'" *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *6 (Del. Ch. Oct. 11, 2006). Williams and Defendants did so here. The Opinion begins by explaining, "[t]his post-trial decision addresses the parties' competing requests for declaratory judgments that interpret the currently operative [LLC Agreement]." Op. 1. Indeed, at every stage in this litigation, Williams has vigorously pursued a declaration of the parties' rights under the LLC Agreement in relation to the Proposed IPO.[70] Defendants, likewise, sought a "judgment declaring [the parties'] rights and obligations under the LLC Agreement."[71]

The purpose of a declaratory judgment is to provide guidance so that parties may conform their future actions to the law. *KLM Royal Dutch Airlines v. Checchi*, 698 A.2d 380, 382 (Del. Ch. 1997) ("[T]he objective of such an action is to advance the stage of litigation between the parties ***in order to address the practical effects of present acts of the parties on their future relations***. In this way the declaratory judgment serves to promote preventive justice."); *K&K Screw Prods., L.L.C.*, 2011 WL 3505354, at *7 (A declaratory judgment "is a practical timing device that permits courts to adjudicate controversies ***earlier than the stage*** at which a matter is traditionally justiciable."). Thus, Williams—who itself sought a declaratory judgment—should not be heard to complain that the trial court's interpretation of the

[70] A52-78 ¶¶9-90, A79; B1823-41; A87 ¶¶3-5; A170-84; A216-231.

[71] B1226; *see also* B1881-1920; A87-89 ¶¶7-10; B1957-76, B1998-2002.

LLC Agreement may shed light on the propriety of future conduct under that same agreement.

Williams does not contend that the Court of Chancery lacked a live, justiciable controversy, nor could it. This is not a situation where the Court purports to resolve "a mere allegation that a term of the contract may be subject to some future significant difference of opinion." *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 663 (Del. 1973). Rather, the existence of an operative LLC Agreement and a live controversy regarding its interpretation demonstrates that "the rights of the parties are presently defined rather than future or contingent." *Stroud*, 552 A.2d at 481. Williams' arguments are simply its latest attempt to delay any and all IPOs by requiring the trial court to engage in protracted, inefficient litigation every time EnCap attempts to exercise its rights in the future. *Supra* Facts §III.C. Williams does not and cannot dispute that this litigation presented an active controversy requiring a definition of the parties' rights under the LLC Agreement, and the Court had the authority to interpret the LLC Agreement as it did.

II. The Court of Chancery correctly held that Sections 6.8(b)(iii), (xi), and (xii) do not negate EnCap's IPO-related rights.

A. Question Presented

Did the Court of Chancery correctly hold that EnCap's rights relating to a Qualified IPO include the ability to unilaterally approve transactions Williams would otherwise have to approve under Section 6.8(b), including the three transitory transactions at issue in Williams' appeal? (Op. 62-66, 67-68; B1224-B1225; B1884-B1887; B1960-B1962)

B. Scope of review

This Court reviews the Court of Chancery's legal conclusions *de novo*. *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018) ("We review questions of law and contractual interpretation, including the interpretation of LLC agreements, *de novo*.").

C. Merits of argument

1. The Court correctly determined that EnCap has the full authority of the Board with respect to a Qualified IPO.

As the trial court correctly held, Williams' rights under Section 6.8(b) are subordinate to EnCap's rights to control a Qualified IPO under Sections 6.8(c) and 9.5(a)-(b), such that EnCap has unilateral authority to approve transactions—including a merger, transfer of assets, or amendment to the Blue Racer LLC Agreement—as part of a Qualified IPO, notwithstanding Williams' right to approve

such transactions in the non-IPO context. Williams' contrary interpretation cannot be squared with the LLC Agreement's plain language.

a. Section 6.8(c)

Section 6.8(c) grants EnCap the unilateral power to (i) "approve a Qualified IPO" and (ii) "take any action, authorize or approve, or enter into any binding agreement with respect" thereto.[72] The LLC Agreement provides that a "Qualified IPO," must be, *inter alia*, an underwritten initial public offering of the IPO Issuer resulting in at least $75,000,000 in proceeds to the IPO Issuer.[73] The "IPO Issuer" can be Caiman or one of its Affiliates,[74] which include pre-existing or newly created parent, sister, or subsidiary companies.[75] The LLC Agreement provides no further constraint on the IPO Issuer's form or the IPO's structure other than certain distribution and fair market value requirements in Section 9.5. Beyond these parameters, EnCap has the authority to dictate the IPO's terms and structure.

The power to "approve a Qualified IPO" necessarily entails the power to approve the specific terms and structure of that IPO, and the power to "take any action…with respect" thereto necessarily entails (at a minimum) the powers

[72] A290 §6.8(c).

[73] A265 §2.1.

[74] A261 §2.1.

[75] A254 §2.1, A261 §2.1.

specified in Section 9.5.[76] Section 6.8(c) would be toothless if, as Williams suggests, EnCap merely had a ceremonial ability to "approve" a generic, undefined Qualified IPO, with Williams and the other Members able to dictate the IPO's terms and structure. *See Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992) ("Under general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless."). When a board "approves" a transaction, it approves a specific transaction, not just the general pursuit of that type of transaction. *Cf. Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *8 (Del. Ch. June 24, 2016) (explaining that Williams' board of directors "voted to approve the Merger Agreement" after negotiating and evaluating its specific terms), *aff'd*, 159 A.3d 264 (Del. 2017). Thus, the power to approve a Qualified IPO includes the power to plan and structure that IPO.

Section 6.8(c) provides that EnCap's right to approve a Qualified IPO overrides any otherwise applicable approval process. Section 6.8(c) explicitly states that it applies "[n]otwithstanding…Section 6.8(b)," and Section 6.8(a) similarly states that Sections 6.8(a)-(b) apply "unless the matter is" subject to Section 6.8(c), "in which event the approval set forth in Section 6.8(c) ***and no other*** shall be

[76] A290 §6.8(c), A304-07 §9.5.

required."[77] Section 6.8(e) further confirms that actions listed in Section 6.8(c) "require the stated approval specified therein only" and "no separate or additional Member vote, consent or approval...."[78]

b. Section 9.5

Section 9.5 further establishes that EnCap's decisions regarding a Qualified IPO (a) include the right to undertake the transactions at issue in this appeal (b) without Williams' consent. Among other things, Section 9.5(b) allows EnCap "to [1] approve the transaction or transactions to effect the IPO Exchange and to [2] take all such other actions as are required or necessary to facilitate the Qualified IPO…without the consent or approval of any other person (including any Member)."[79] In the "IPO Exchange," "[e]ach outstanding Membership Interest will be converted into or exchanged for IPO Securities at such time as determined by the Board with the approval required for a Major Special Voting Item in a transaction or series of transactions that" subject to certain distribution and fair market value requirements.[80]

Under the first enumerated clause (the "IPO Exchange Clause" in the Opinion), EnCap can unilaterally approve transitory mergers, transfers of assets, and

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[77] A288-90 §§6.8(a), (c).

[78] A290 §6.8(e).

[79] A305 §9.5(b) (enumerations added).

[80] A304 §9.5(a)

amendments to the Blue Racer LLC Agreement as part of the "transactions to effect the IPO Exchange" subject to distribution and fair market value requirements.[81] Independently, under the second clause (the "IPO Facilitation Clause" in the Opinion), EnCap can unilaterally approve such transactions so long as they are "required or necessary to facilitate the Qualified IPO."[82] As the Court correctly held, and Williams does not challenge on appeal, "facilitate" means "to make easier : help bring about." Op. 47. Thus, the "IPO Facilitation Clause" empowers EnCap to take steps that help bring about a Qualified IPO; it does not require the IPO to be impossible without those steps. Were that the test, this clause would be toothless.

On three separate occasions, Section 9.5 establishes that the rights in this section are superior to Williams' rights under Section 6.8(b). First, Section 9.5(b) begins with "***[n]otwithstanding anything to the contrary in this Agreement***."[83] Williams' Opening Brief conspicuously avoids addressing this language, which only highlights its significance. Delaware law is clear that a "notwithstanding" clause makes the provision that follows "paramount to all other provisions" in the contract. *Katell v. Morgan Stanley Grp., Inc.*, 1993 WL 205033, at *3 (Del. Ch. June 8, 1993); *Medicis Pharm. Corp. v. Anacor Pharm., Inc.*, 2013 WL 4509652, at *8 n.46 (Del.

[81] A305 §9.5(b).

[82] *Id.*

[83] *Id.*

Ch. Aug. 12, 2013) (quoting *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993)) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section. 'A clearer statement is difficult to imagine.'"). In fact, the phrase "Notwithstanding anything to the contrary in this Agreement" "should be read and interpreted as if [the rest of the agreement] did not exist." *Kenneth A. Adams*, *Manual of Style for Contract Drafting* §§13.466-67 (3d ed. 2013). "[T]he catch-all notwithstanding is a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 127 (2012). Further, the breadth of the "notwithstanding" clause in Section 9.5(b) is unique in the LLC Agreement and demonstrates the drafters' intent that it override all other provisions in the Agreement. In other "notwithstanding" clauses, the parties carved out specific exceptions: Section 5.1(b)(iv) applies "[n]otwithstanding any provision hereof to the contrary ***except Section 5.1(b)(iii)***...." The parties could have begun Section 9.5(b) by saying "[n]otwithstanding anything to the contrary in this Agreement ***except Section 6.8(b)***," but they did not.

Second, Section 9.5(a) defines "Board" for the purposes of that section as the vote of one EnCap Manager: "[s]olely for purposes of this Section 9.5, references to 'the Board' shall mean 'the Board with the approval required for a Major Special

Voting Item,'" which Section 6.8(c) defines as the affirmative vote of one EnCap Manager.[84]

Third, Section 9.5(b) emphasizes that the powers it grants do not require "the consent or approval of any other person (including any Member)" other than EnCap.

c. Williams' interpretation of the LLC Agreement cannot be squared with its plain language.

In response to EnCap's broad powers and the unmistakable elevation of Sections 6.8(c) and 9.5 over Section 6.8(b), Williams raises a number of arguments that contradict the LLC Agreement's plain language. According to Williams, EnCap may act unilaterally under Sections 6.8(c) and 9.5 only if it can do so without taking actions the Board may take under other provisions of the LLC Agreement, such as actions that are "Special Voting Items" under Section 6.8(b).[85] Sections 6.8(c) and 9.5 plainly provide otherwise.

i. The "[s]olely" clause in Section 9.5(a) is a grant of power, not a limitation.

According to Williams, the phrase explaining that EnCap acts on behalf of the Board "[s]olely for the purposes of this Section 9.5" means that EnCap must have Williams' consent to undertake anything listed as a "Special Voting Item" under

[84] A304 §9.5(a), A290 §6.8(c).

[85] OB 31-32.

Section 6.8(b), even if such an action is taken in connection with a Qualified IPO.[86] But this ignores Section 9.5's structure. The clause "[s]olely for purposes of this Section 9.5" is a grant of authority to EnCap, not a limitation or rank-ordering of provisions in the LLC Agreement. This clause empowers EnCap to act on behalf of the Board with respect to Section 9.5's powers, but it says nothing about the scope of these powers. Rather, it is the following subsection, Section 9.5(b), that delimits the breadth of these powers. As described above, the superiority of Sections 6.8(c) and 9.5 is governed by three different clauses in Section 9.5—which make clear that Section 6.8(b) is subordinate to Section 9.5—not the "[s]olely" provision. Further, Williams' argument ignores Section 6.8(c), which expressly provides EnCap with authority superior to that in Section 6.8(b) and gives EnCap the right to "take any action, authorize or approve, or enter into any binding agreement with respect" to the approval of a Qualified IPO, including the rights granted in Section 9.5. *Supra* Argument §II.C.1.a.

ii. Section 9.5 expressly allows EnCap to undertake the very types of actions that otherwise fall under Section 6.8(b).

Even if the "[s]olely" clause operated as Williams contends, Williams' appeal fails because it is based on the false premise that Section 9.5 does not grant EnCap authority to effectuate a merger of Caiman, transfer of Caiman's assets, or

[86] *Id.* at 31-35.

amendment to the Blue Racer LLC Agreement in connection with a Qualified IPO.[87] Williams does not dispute EnCap's right under the LLC Agreement to control the "transaction or transactions to effect the IPO Exchange and to take all such other actions as are required or necessary to facilitate the Qualified IPO."[88] Nor does Williams seriously dispute that "transactions to effect the IPO Exchange" or actions "required or necessary to facilitate the Qualified IPO" may include a merger, transfer of assets, or amendments to the Blue Racer LLC Agreement. Instead, Williams merely argues that Section 9.5 does not ***explicitly mention*** "Special Voting Items" (i.e., transactions that Williams must approve outside of the context of a Qualified IPO) or the three specific "Special Voting Items" at issue in Williams' appeal, and it contends Section 9.5's "powers have nothing to do with Special Voting Items."[89] These arguments fail for several reasons.

First, "transactions to effect the IPO Exchange" and "actions required or necessary to facilitate the IPO" are broad grants of authority. Such "transactions" and "actions" undisputedly can involve a transitory merger, transfer of assets, or the amendment of a subsidiary's operative documents.[90] The LLC Agreement need not

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[87] *Id.* at 32-33.

[88] A305 §9.5(b).

[89] OB 32-33 ("Section 9.5 does not mention Special Voting Items at all.").

[90] B1328-29/13:5-14:23 [redacted]

B1361/142:17-143:12 ([redacted]

provide a comprehensive list of the various "transactions" or "actions" EnCap may take or exhaustively cross-reference the LLC Agreement's myriad clauses that might touch upon such "transactions" or "actions." Section 9.5 cabins this discretion (*i.e.*, the "transactions" must fulfill the definition of IPO Exchange, and other "actions" must be "required or necessary to facilitate the IPO"), meaning other limitations should not be read into the agreement. *See Alpine Inv. Partners v. LJM2 Capital Mgmt.*, L.P., 794 A.2d 1276, 1286 (Del. Ch. 2002) ("[F]or a court to add a limitation that is not found within the express language of the contract is untenable.").

Second, even setting aside this broad, affirmative grant of power, Section 9.5 specifically contemplates that "transactions to effect the IPO Exchange" and "actions required or necessary to facilitate the IPO" entail steps that otherwise require Williams' consent under Section 6.8(b), including the steps Williams challenges on appeal. For example, Williams argues that it must consent to the IPO steps involving mergers because Section 6.8(b)(iii) requires Williams' vote "to merge, combine, or consolidate the Company with any other entity."[91] But the LLC Agreement gives EnCap the authority to "merge or consolidate [Caiman] into or

[redacted] (Carmichael Dep.).

[91] OB 14 (quoting A289 §6.8(b)(iii)).

with an IPO Issuer" as part of a Qualified IPO.[92] Likewise, Williams claims it has the right under Section 6.8(b)(xi) to consent to the "transfer of all or substantially all of the Equity Securities" of Caiman.[93] Once again, Section 9.5(b) specifically contemplates a transfer of all Membership Interests and Caiman assets to an IPO Issuer as part of a Qualified IPO.[94]

Also, in a Qualified IPO, Section 9.5(a) requires that "the outstanding Membership Interests will be converted or exchanged...into equity securities of the IPO Issuer."[95] But Section 6.8(b)(iii) requires Williams' approval to "convert the Company into another form of entity" or "exchange interests in the Company with any other person."[96] Were Williams correct, EnCap could not fulfill the very first sentence of Section 9.5(a) without Williams' approval. Further, under this provision of Section 9.5(a), Members (including Williams) will lose their Membership Interests in Caiman and have those interests replaced with equity securities in a different entity, the "IPO Issuer," which can be a new entity formed "without the consent . . . of any . . . Member" other than EnCap (and notwithstanding other LLC

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[92] A305 §9.5(b)

[93] OB 14 (quoting A289 §6.8(b)(iii)).

[94] A304-05 §9.5(b).

[95] *Id.* §9.5(a).

[96] A289 §6.8(b)(iii).

Agreement provisions).[97] Williams does not—and cannot—explain how this "conversion" and/or "exchange" would occur without mergers or asset transfers. *See In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, 2014 WL 5667334, *6-7 (Del. Ch. Nov. 5, 2014) ("[T]he agreement of one entity cannot be re-written so that its units become units in a different limited partnership, or in this case the equity interests in a corporation, which is a different type of entity entirely.").

iii. Williams' attempt to conjure a "list" of permitted actions from Section 9.5 is unavailing.

Williams next attempts to use canons of construction *noscitur a sociis* and *ejusdem generis* to manufacture a limitation in Section 9.5 that does not exist. Williams argues that Section 9.5 contains a "list" of actions EnCap could take in connection with a Qualified IPO and thus its power to "take all such other actions as are required or necessary to facilitate the Qualified IPO" was limited to actions like the things on the list.[98] This argument also fails.

First, no such list exists in Section 9.5. Williams pulls out specific actions from disparate clauses that address different issues with respect to a Qualified IPO and strings them together to form a "list." Without a list of permitted actions, Williams' reliance on *noscitur a sociis* and *ejusdem generis* is misplaced.

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[97] A305 §9.5(b).

[98] OB 33-35.

Second, Williams omits from its "list" several permitted actions in Section 9.5(a)-(b), and the challenged actions are "of the same general kind or class as" these omitted powers. *See Del. Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427-28 (Del. 2012). Williams' list of actions included in Section 9.5 (OB 33) do not include several specific actions that may be part of a Qualified IPO, including "transfer[ring] all of the issued and outstanding Membership Interests or the assets of the Company to an IPO Issuer or its general partner" and "merg[ing] or consolidat[ing] the Company into or with an IPO Issuer or its general partner."[99] As discussed above, these actions are the same or similar to the Special Voting Items listed in Section 6.8(b), further evincing the Agreement's intent that EnCap's Qualified IPO powers override the consent powers Williams otherwise has. *Supra* Argument §II.C.1.c.ii.

iv. The words "shall not" and "must" in Section 6.8(b) do not trump "notwithstanding" clauses.

Williams next argues that Section 6.8(b) is paramount because it uses the words "shall not" and "must" (OB 36), but neither the cases Williams cites nor the LLC Agreement support this theory. Williams' cited cases do not elevate provisions using this language above other provisions, particularly where (as here) the other provisions begin with "notwithstanding anything to the contrary…." *See Musser v. United States*, 414 U.S. 31, 37 (1973); *Wood v. Coastal States Gas Corp.*, 401 A.2d

[99] A305 §9.5(b).

932, 940 (Del. 1979); *HM Wexford v. Encorp*, 832 A. 2d 129, 152 (Del. Ch. 2003) (all cited at OB 36). These cases simply state that ***where a provision governs,*** it is not optional; this is a far cry from ruling that provisions using the words "shall not" and "must" are applicable and controlling in all circumstances. *See Musser*, 414 U.S. at 37; *HM Wexford*, 832 A.2d at 152. And Williams' argument overlooks the numerous LLC Agreement clauses that explicitly elevate Sections 6.8(c) and 9.5 over Section 6.8(b). *Supra* Argument §II.C.1.c.

v. There is no conflict between the Court's interpretation of Section 9.5 and the language of Sections 6.1 or 6.5(e).

Williams miscasts Sections 6.1 and 6.5(e) as limitations on EnCap's Qualified IPO power, but neither provision supports Williams' position. According to Williams, "Sections 6.1 and 6.5…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."[100]

But Section 6.1 simply divides authority between Caiman's owners and directors, explaining that the "business and affairs of the Company shall be managed under the direction of" the Board except for matters requiring Member approval.[101] Section 6.1 does not detail the degree of authority required to approve Board actions,

[100] OB 39-40.

[101] A281 §6.1.

nor does it explain which matters require Board approvaland which matters require Member approval. The approval required for various actions is set out elsewhere, *e.g.*, Sections 6.8 and 9.5. The fact that "Section 6.1 makes no reference to Section 9.5" does not aid Williams' claim.[102] Section 6.1 does not reference ***any other*** LLC Agreement section, including Section 6.8(b), on which Williams relies. Notably, Williams never cited to this provision in pre- or post-trial briefing. Williams' invocation of a new, irrelevant provision illustrates the degree to which Williams grasps at straws in this appeal.

Section 6.5(e) also does not support Williams' argument. According to Williams, Section 6.8 trumps Section 9.5 because Section 6.5(e) requires majority Board approval "except as otherwise provided in Section 6.8(a), Section 6.8(b), Section 6.8(c) and Section 6.8(d)."[103] But Williams ignores that Section 9.5(a) states that "the Board" for purposes of Section 9.5 "shall mean 'the Board with the approval required for a Major Special Voting Item," which is the approval required in Section 6.8(c), one of the provisions explicitly listed in Section 6.5(e). Under Williams' interpretation of Section 6.5(e), the Board would have to provide majority approval for actions that EnCap has unilateral authority in Section 9.5 to undertake. This is wholly inconsistent with the LLC Agreement.

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[102] OB 40.

[103] OB 40 (quoting A83 §6.5(e)).

vi. Williams is not without protections in the event of a Qualified IPO.

To the extent Williams claims it relies on Section 6.8(b) as "protection" in a Qualified IPO, Williams attempts to get more than it bargained for. The LLC Agreement specifies Williams' protections in a Qualified IPO. Members are assured that, in the IPO Exchange, Caiman membership interests must be converted into the securities of the IPO Issuer (the "Caiman Interests Requirement" in the Opinion), they will receive the same IPO Securities as each other (the "Same Securities Requirement" in the Opinion) and the public, with "Fair Market Value equal to the same proportion of the aggregate Pre-IPO Value, if any," for each Member pursuant to a valuation formula (the "Waterfall Distribution Requirement" in the Opinion).[104] Similarly, under Section 9.5(e), Williams can "purchase [Members'] Interests in the [MLP's] general partner" if EnCap conducts an MLP IPO.[105] But Williams is not entitled to control the transactions by which an IPO Exchange is effectuated, nor does it have veto power over a Qualified IPO via Section 6.8(b). The fact that Williams negotiated control rights for only one type of Qualified IPO but no other "speaks volumes." *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, *11 (Del. Ch. Sept. 10, 1999) (inclusion of some terms

[104] A304-05 §9.5(a).

[105] A306-07 §9.5(e).

supports inferences that others were intentionally excluded); *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 147-48 (Del. Ch. 2009) ("a sophisticated party represented by able counsel" could insist on different contractual terms and will be held to the terms it actually negotiated).

d. The step-transaction doctrine requires that the steps challenged by Williams be treated as a single Qualified IPO transaction, which EnCap has power to undertake.

Even if Section 6.8(b) could trump Sections 6.8(c) and 9.5, Williams incorrectly attempts to slide and dice the Qualified IPO into individual steps to scrutinize it for compliance with Section 6.8(b). While EnCap has the unilateral authority to undertake each of these steps, as discussed above, this conclusion becomes even clearer if these steps are treated as a single transaction (*i.e.*, the treatment Williams invokes when contending that the Proposed Amendments are adverse).

Both Williams and the Court relied on the step-transaction doctrine to analyze the Proposed Amendments and to hold that they were part of a single IPO transaction that was "adverse" to Williams, an issue discussed more fully in Section III of this brief. Yet in its brief, Williams seeks to chop the Qualified IPO into minor, transitory steps—a merger of Caiman, a transfer or sale of Caiman's assets, and an amendment to the Blue Racer LLC Agreement—to argue that EnCap was authorized to execute the whole IPO transaction but could not undertake the ***individual pieces***

of that transaction.[106] But applying the step-transaction doctrine to a Qualified IPO defeats that argument and Williams' appeal.

As the Court explained, "[t]he [step-transaction] doctrine treats the 'steps' in a series of formally separate but related transactions involving the transfer of property as a single transaction, if all the steps are substantially linked. Rather than viewing each step as an isolated incident, the steps are viewed together as components of an overall plan. The purpose of the step-transaction doctrine is to ensure the fulfillment of parties' expectations notwithstanding the technical formalities with which a transaction is accomplished." Op. 60 (quoting *Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.*, 1999 WL 182568, at *6 (Del. Ch. Mar. 24, 1999); *Coughlan v. NXP B.V.*, 2011 WL 5299491, at *7 (Del. Ch. Nov. 4, 2011)).

The Court further cited two tests to determine that the step-transaction doctrine should apply here: the "end result test," which is met "if it appears that a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result," and the "interdependence test," which is met if "the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion

[106] OB 19-21.

of the series." Op. 60-61 (citing *Noddings*, 1999 WL 182568, at *6).[107] To the extent the Proposed Amendments and Proposed IPO meet these tests (as the trial court held), the Proposed IPO's individual steps undoubtedly also meet these tests. Each of the three steps challenged by Williams was part of a single transaction: an IPO. Further, the steps were so interrelated that any one would have been fruitless without completion of all. Nobody has ever suggested that EnCap can—or would—consummate these individual steps other than as part of a Qualified IPO.

Williams cannot have it both ways. If the Proposed Amendments are examined as one step in a unitary IPO transaction and not in isolation, the same standard must apply to the other steps of an IPO, including a merger of Caiman, transfer of Caiman's assets, or amendment to the Blue Racer LLC Agreement. Viewed in this prism, so long as the overall IPO complies with the requirements for a "Qualified IPO" and "IPO Exchange," it is not appropriate to parse the individual steps of a Qualified IPO (though, as explained above, Defendants prevail even if the Court does so).

2. The extrinsic evidence supports EnCap's interpretation.

All of the parties, including Williams, agree the LLC Agreement is unambiguous and speaks for itself. Thus, no extrinsic evidence is necessary to interpret this agreement. *E.g.*, *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903

[107] The trial court also noted a third test, which it did not apply. *Id.*

A.2d 728, 740 (Del. 2006); *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

Nonetheless, the evidence presented at trial supports Defendants', and not Williams', interpretation of the LLC Agreement. As discussed *supra* in Facts §III.B, EnCap traded an unfettered right to drag Williams into a sale for an unfettered right to undertake a Qualified IPO. All the parties agree that this was an essential part of the LLC Agreement. Further, as Williams concedes, Williams relinquished the right to control the terms of a Qualified IPO (in the Original LLC Agreement, Williams could veto any IPO) in exchange for valuable rights to (1) veto a drag-along sale, (2) purchase the general partner in an MLP IPO, and (3) increase its Caiman ownership interest from 47.5% to 62.5%. *Supra* Facts §III.B. Thus, the notion that Defendants bargained for EnCap to be able to control the terms of a Qualified IPO only to be stymied by Sections 6.8(b)(iii), (xi), and (xii) directly contradicts the history of negotiations between the parties. Williams never negotiated, nor does the LLC Agreement provide, for Williams to retain control over an IPO that happens to involve a merger of Caiman, transfer of Caiman's assets to a new entity, or amendment to the Blue Racer LLC Agreement. *Id.* It is absurd to suggest the parties intended EnCap to control a Qualified IPO ***so long as it tap-danced around these steps in wiring the IPO***.

Williams' focus on these transitory steps belies its true intent: to thwart an IPO altogether so it can buy Caiman at a fire-sale price (or, at the very least, forestall competition between Blue Racer and Williams' midstream assets). *Supra* Facts §III.C. Nothing in the record suggests Williams has legitimate concerns about the transitory steps leading to a Qualified IPO other than the fact those steps lead to a Qualified IPO, period. As the trial court recognized, Williams would have consented to these steps had geographic limitations been placed on the IPO Issuer to prevent competition with Williams. Op. 54. Williams is attempting to assert rights it does not have to prevent competition it does not want.

III. The Court of Chancery erred by finding the Proposed Amendments adverse to Williams under Section 12.2 where the only basis for adversity was the removal of geographic limitations following a Qualified IPO.

A. Question Presented

Did the Court of Chancery err when it concluded the Proposed Amendments were "adverse" to Williams because the IPO Issuer would not have geographic restrictions following a Qualified IPO, despite holding that this would be the result of a Qualified IPO even without the Proposed Amendments? (Op. 56-62; B1220-26; B1789-1790; B1837-1843; B1943-44; B1998-2001)

B. Scope of review

The Court's contractual interpretation of adversity under Section 12.2 is subject to *de novo* review. *See CompoSecure*, 206 A.3d at 816.[108]

C. Merits of argument

Although the Court of Chancery correctly held (and Williams does not appeal) that ***under the current LLC Agreement***, the IPO Issuer in a Qualified IPO need not have geographic limitations in its purpose clause (Op. 53-56), the trial court incorrectly interpreted Section 12.2 by agreeing with Williams that the Proposed Amendments were "adverse" because these amendments allow EnCap to effectuate

[108] To the extent any factual analysis is required, it is a mixed question of law and fact and thus the Court's review should remain *de novo*. *See Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996); *Sloan v. Segal*, 996 A.2d 794 (TABLE), at *5 (Del. 2010); *Wedderien v. Collins*, 937 A.2d 140 (TABLE), at *3 (Del. 2007).

a different IPO that would ***also*** result in an IPO Issuer without geographic restrictions. Because a Qualified IPO would result in an IPO Issuer without geographic restrictions pre-amendment ***or*** post-amendment, the trial court erred by finding adversity on this basis.

1. Defendants propose the Proposed Amendments under Section 12.2.

Defendants proposed amendments to the LLC Agreement to facilitate an Up-C IPO and a synthetic secondary offering within the already-existing Qualified IPO provisions. Contrary to the Opinion and Williams' brief (Op. 58; OB 3), EnCap did not attempt to unilaterally approve the Proposed Amendments under its IPO-related abilities. Rather, Defendants advanced the Proposed Amendments under Section 12.2, which permits amendment by majority vote unless, among other exceptions, the amendment "adversely affects the rights or obligations of" a Member, in which case that Member must consent.[109] Thus, analysis of the Proposed Amendments turns on whether they "adversely affect[] the rights or obligations of" Williams.

2. At trial, Williams argued that the Proposed Amendments were adverse because the Restrictive Purpose Clause would not apply post-IPO.

Williams claims the Proposed Amendments are adverse because they "facilitate removing the Business Purpose Provisions."[110] Other than pointing to the

[109] A317 §12.2(a)(v); *accord id.* §12.2(a)(ii).

[110] A130, A168, A186-87.

ultimate outcome—an IPO Issuer without a Restrictive Purpose Clause—Williams has presented no evidence that any of the Proposed Amendments is actually adverse. At trial and in briefing, Williams did not criticize any particular language in the Proposed Amendments, and it is undisputed that the Proposed Amendments (1) do not amend the LLC Agreement to remove the Restrictive Purpose Clause, (2) do not grant EnCap new authority to form an IPO Issuer that lacks geographic restrictions, and (3) are necessary for EnCap to structure the Qualified IPO as an Up-C IPO rather than a C-Corp IPO or MLP IPO. In other words, the dispute between the parties and the dispositive issue on this appeal do not turn on the Proposed Amendments' particular language; rather, they boil down to whether the Proposed Amendments can be deemed adverse because after a Qualified IPO, Blue Racer's operations would no longer be geographically restricted.

Nevertheless, to eliminate any potential confusion, it may be helpful to clarify the Proposed Amendments' scope. In its Opinion, the trial court stated that "EnCap proposes to make extensive changes to the Caiman LLC Agreement to enable the Up-C IPO to take place" and included a bulleted list of what the trial court believed were Defendants' proposed "amendments." Op. 56-58 (citing B1083-B1196). However, many of the amendments identified in the Opinion were not the Proposed Amendments, but rather, were ***prior amendments*** already voted on and approved. The redline the trial court cited was a comparison of the LLC Agreement with the

Proposed Amendments versus the LLC Agreement as it existed in December 2012.[111] However, between December 2012 and May 2019, the parties made several amendments to the LLC Agreement, which were approved as separate amendments but not incorporated into a form of amended and restated LLC Agreement (the "Previously Approved Amendments").[112] Some Previously Approved Amendments were incorporated years earlier. A version of LLC Agreement from 2017 shows that many of the changes identified in the Opinion as "Proposed Amendments" had already been approved as separate amendments.[113] Further, Defendants made clear they were willing to drop amendments addressing new tax laws if Williams

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[111] B1083-1196.

[112] *E.g.*, A57 ¶34 (the LLC Agreement was amended in 2016 for reasons with "no relevance to the issues" in Williams' Complaint).

[113] *See* B0597-B0707. For example, the trial court identified the following as "Proposed Amendments" when, in fact, the parties had approved these amendments years ago: amending the definition of "Available Cash;" adding defined terms for "Blue Racer Members," and "BRM Additional Cash Contribution;" amending Section 5.4(c) and introducing a new Section 5.4(d) to alter the requirement to distribute Available Cash and provide for the automatic retention of cash under particular circumstances; adding two new items requiring Majority Board Approval: the determination of Available Cash to be distributed (Section 6.8(a)(xvii)) and the determination of the amount of Available Cash to be reinvested (Section 6.8(a)(xxi)); and altering a Special Voting Item addressing a limitation on the funding for Blue Racer (Section 6.8(b)(ii)). *Compare* B0597-B0707 *with* B1083-B1196. In addition, the current Caiman LLC Agreement also already included the defined terms "Incentive Award," "LTIP," "Approved BRM Expenditure," and "Retained Available Cash" and amendments to Section 5.4 related to the waterfall distributions to treat Incentive Awards under the newly defined LTIP as advances of distributions to holders of Class D units.

considered them adverse.[114] Only a few of the redlined revisions in the May 2019 draft (B1083-1196) constitute the ***actual*** Proposed Amendments at issue; the parties' briefing identified which of the redlined changes were the actual Proposed Amendments in dispute.[115]

In short, the Opinion does not accurately reflect the Proposed Amendments at issue in this litigation. This Court need not (and should not) rely on the bulleted list in the Opinion when resolving the question on appeal here—*i.e.*, whether Williams articulated (and the trial court adopted) a cognizable ground for "adversity."

3. The Court applied an improper standard for judging adversity.

The trial court erred in holding that the Proposed Amendments are adverse to Williams. Under Section 12.2, Williams only has the right to unilaterally block the Proposed Amendments if they "adversely affect[] the rights or obligations of" Williams.[116] According to the trial court, this "calls for comparing the situation Williams currently enjoys with its situation under the proposed amendments" to determine whether those amendments are adverse. Applying its test, the trial court found the Proposed Amendments adverse because "[a]t present, Williams is a

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[114] B1872.

[115] B1871-72; B1999-2000; A132 (identifying the "amendments [that] require Williams's consent under Sections 6.8(b)(xii) and 12.2(a)(v)").

[116] A317 §12.2(a)(v).

majority investor in a privately held entity that operates within a governance arrangement that provides Williams with significant rights and protections. Through the Up-C IPO,...Williams would be a minority investor without significant governance rights." Op 58-59. This was erroneous in two respects.

First, the LLC Agreement's adversity test turns on changes to Williams' "rights or obligations" under the LLC Agreement, not Williams' "situation."[117] The trial court's analysis went beyond Williams' "rights or obligations" under the LLC Agreement, such as comparing Williams' percentage ownership interest pre- and post-IPO.

Second, the Proposed Amendments did not cause the purported adversity. An amendment cannot be adverse when the alleged adverse effect is not caused by the amendment itself and could occur absent the amendment. *See Warner Commc'ns Inc. v. Chris-Craft Indus., Inc*., 583 A.2d 962, 967-68 (Del. Ch. 1989) (holding that if a contemplated adverse action could be accomplished without amendment, the amendments are not adverse). ***Even without the Proposed Amendments***, a Qualified IPO at the Blue Racer level would convert Williams from a 58% owner in Caiman to "a minority investor without significant governance rights."[118] Because

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[117] *Id*.

[118] Op. 56 (holding that EnCap has the authority to form entities to conduct an IPO without a business purpose clause); B1364-65/156:2-159:6 (Carmichael Dep.); A1094/626:4-22 (Reaves).

the same consequences would occur in a Qualified IPO whether or not the Proposed Amendments are adopted, these consequences cannot serve as a basis for finding adversity.

The trial court's adversity analysis also leads to absurd results. Under the trial court's expansive view of adversity, nearly every party to these common contractual provisions will have an all-encompassing veto right over any amendment. For example, Caiman's officers are Members, and Members must approve "adverse" amendments in certain circumstances.[119] Applying the Court of Chancery's logic, Caiman's officers could have blocked the Proposed Amendments as adverse because the amendments will "facilitate" an IPO that subjects officers to common law fiduciary duties and a public stockholder base, potentially "adverse" to management, even though the amendments had nothing to do with officers' duties and management would have faced the same outcome in a Qualified IPO without any amendments.

For several reasons, the step-transaction doctrine does not justify the trial court's conflation of amendment-related "adversity" and IPO-related "adversity." First, the step-transaction doctrine does not resolve the causal problem discussed above. The trial court suggested that the "amendment loads the gun, which adversely

[119] A317 §12.2(a)(ii).

affects the target of the gun" (Op. 60), but in reality, the LLC Agreement itself already "load[ed] the gun." *Supra* Argument §III.C.2. Second, "a court should refrain from applying the step-transaction doctrine to interpret a contract if doing so would contravene the parties' intent." *Coughlan*, 2011 WL 5299491, at *8. Section 12.2 of the Caiman LLC Agreement gives Williams a consent right over ***amendments***, not a Qualified IPO. Thus, the Court erred by applying the step-transaction doctrine to deprive EnCap of its rights to undertake a Qualified IPO. The parties did not intend to give Williams the ability to block amendments that undisputedly improve the tax treatment of a Qualified IPO for all parties based on Williams' disdain for Qualified IPOs. To the contrary, the parties agreed to "use commercially reasonable efforts to…cooperate with the other Members so that the IPO Exchange is undertaken in a tax-efficient manner…."[120] Third, Williams' and the trial court's fusing of the Proposed Amendments with the Qualified IPO (for purposes of Section 12.2) is inconsistent with their chopping of the Qualified IPO into its component transactions (for purposes of Sections 6.8 and 9.5). *Supra* Argument §III.C.1.d. The trial court acknowledged this inconsistency but offered

[120] A304-05 §9.5(b).

no justification. Op. 66-67. Williams also offered no justification for its attempt to have it both ways.[121]

The trial court dismissed Defendants' adversity arguments because "Section 12.2(a)(v) does not call for comparing Williams' situation under one set of amendments with Williams' situation under another set of amendments." Op. 59. But Defendants were not comparing Williams' rights under the Proposed Amendments to "another set of amendments;" they were comparing Williams' rights under the Proposed Amendments to Williams' ***currently existing rights without amendments***. Because the Proposed Amendments do not cause the before-and-after situation that formed the basis of the trial court's adversity finding, the court erred.

4. With one potential (and incorrect) exception, Williams did not raise any other grounds for adversity.

As the absence of geographic limitations following a Qualified IPO cannot support a finding of adversity, the Proposed Amendments were not adverse. Throughout the litigation, Williams repeatedly conceded that the only reason it believed the Proposed Amendments were adverse was because the resulting entity would not have the Restrictive Purpose Clause. Indeed, Williams stated it would consent to the "amendments to the Agreements that are adverse to Williams" if

[121] OB 19-21; A112, A130 (arguing that Williams' consent is required for multiple steps of the amendments); A177-78 (arguing that because the Proposed Amendments as a whole further the goal of removing the business purpose clause they are adverse).

Defendants agreed to "a Business Purpose Provision in the charter of the IPO Issuer."[122] At trial and during post-trial briefing, Williams' "adversity" arguments consisted of statements that ***removing the purpose clause*** would be "adverse."[123] Other than broadly stating that any amendments that accomplished an IPO would be adverse, Williams failed to identify any particular Proposed Amendment it viewed as adverse.[124] Williams proffered no evidence that it would suffer adversity, and its witnesses confirmed that they are unaware of any actual adversity.[125]

Aside from the geographic restrictions, Williams' only conceivable challenge to the Proposed Amendments was a stray statement in its post-trial brief that the "definition of 'Pre-IPO Value' would be amended to make the distribution 'waterfall' provisions in the [LLC] Agreement benefit Caiman Management in an Up-C structure."[126] Even if a single statement adequately raised an alternative theory of adversity—and it does not—the theory fails. Williams offered no explanation for this theory, let alone any evidence. By contrast, Defendants presented evidence that

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[122] A125, A173, A178; B1842; B0964-65.

[123] A125, A135, A168, A176, A178, A187.

[124] *Id.*; *see also* A226-27 (arguing that Williams offered "proof of adversity" because "Defendants are attempting to circumvent Williams's consent rights over any change to the AMI [*i.e.*, geographic area] in which Caiman and its Affiliates (including Blue Racer, Pubco, and Holdco) may operate.").

[125] A979/277:17-278:6, A981/288:5-7, A985/303:18-304:7, A985-86/304:19-305:18, A986/305:15-306:11 (Zamarin).

[126] A132.

the proposed amendments to the waterfall distribution rights resulted in the same financial outcome for Williams as under the current LLC Agreement.[127]

The trial court concluded, and Williams does not dispute, that Williams has no contractual right under the LLC Agreement to impose the Restrictive Purpose Clause on a new IPO Issuer. Thus, the IPO Issuer's lack of geographic restrictions cannot constitute adversity for Williams and, by extension, cannot support a conclusion that the Proposed Amendments were adverse to Williams. Williams advanced no other theory of adversity, and this Court should therefore reverse and hold that the Proposed Amendments are not adverse to Williams.

[127] B2012-B2013; B0966-68 (cover email).

CONCLUSION

For the foregoing reasons, the Supreme Court should affirm the Court of Chancery's judgment except Section II.D.2 of the Opinion and the corresponding provisions of the Order, which should be reversed to the limited extent it found the Proposed Amendments adverse to Williams, and judgment rendered for Defendants on that issue.

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CERTIFICATE OF SERVICE

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