IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CORRECTED APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

In Appellant's Opening Brief ("AOB"),[1] Williams established that the Court of Chancery legally erred in two distinct ways when it declared that EnCap could, if necessary or required for a hypothetical Qualified IPO, unilaterally approve certain Special Voting Items under Section 6.8(b) of the Caiman Agreement—namely, (i) amending Blue Racer's LLC agreement, (ii) causing Caiman to distribute all of its Blue Racer units to Caiman's members and (iii) forming a new acquisition subsidiary of Blue Racer and causing Caiman to merge with it. First, these declarations were improper advisory opinions, and second, the court's contractual interpretation conflicted with the clear and unambiguous language of the Caiman Agreement's provisions. Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal ("Ans. Br.") provides no meaningful response to Williams' arguments. To the contrary, defendants' lengthy opposition brief largely ignores the Court of Chancery's findings of facts and disregards its legal determinations. Defendants offer no grounds for upholding the Court of Chancery's ruling on the narrow portions of the Memorandum Opinion and order appealed by Williams.

[1] Unless otherwise stated, all terms defined in Appellants' Opening Brief retain their meanings herein.

As Williams demonstrated, the declarations it appealed were advisory opinions in light of the Court of Chancery's determination that the only IPO that defendants had put before the court—a Proposed Up-C IPO—was not a "Qualified IPO" within the meaning of the Caiman Agreement. Accordingly, determinations about what powers EnCap might be able to exercise if there were a Qualified IPO in the future, without any proposal as to what terms or provisions that IPO would entail, was improper. (AOB at 25-28.) In response, defendants neither dispute their failure to propose any alternative IPO nor suggest that the terms and structure of a future Qualified IPO are, at this point, anything but speculative. They do not even contest that the Court of Chancery's rulings on these points were dicta. Instead, they make the hyperbolic claim, without any support, that if this dispute is not sufficiently ripe for resolution, then no cases involving contractual interpretation could ever be decided. When that fails, defendants attempt to recast the Court of Chancery's determination into a mere explanation of its opinion, yet—tellingly—defendants fail to identify any portions of the court's ruling that were elucidated by its declarations about the powers EnCap might be able to exercise in connection with a theoretical Qualified IPO in the future.

Williams also showed that permitting EnCap to unilaterally exercise the powers to approve Special Voting Items would conflict with other provisions

of the Caiman Agreement. (AOB at 29-41.) The Court of Chancery based its declaration on EnCap's powers under Section 9.5 of the Caiman Agreement to act for the Caiman Board if necessary or required for a Qualified IPO, but the court disregarded that EnCap's authority under that section is limited "[s]olely for purposes of this Section 9.5," and does not extend to the approval of Special Voting Items under an entirely different section of the Caiman Agreement—Section 6.8(b). (AOB at 30-34.) Other provisions of the Caiman Agreement, including the other subsections of Section 6.8, as well as Section 6.1 and Section 6.5, mandate in absolute terms—with limited exceptions that do not include Section 9.5—that approval of the Special Voting Items enumerated in Section 6.8(b) can be accomplished *only* through the vote of a majority of the Caiman Board, including at least one Williams Manager. (AOB at 35-41.) Defendants respond with legal arguments that the Court of Chancery expressly rejected below (and which they did not appeal), and arguments based on the parties' supposed course of dealing that turn either on facts that the Court of Chancery never found, or directly contradict the court's factual findings. Defendants' fall-back position—making broad but unsupported assertions of EnCap's powers under the Caiman Agreement—misconstrues the text of the provisions on which Defendants rely and cannot be reconciled with the Agreement as a whole.

Defendants' cross-appeal fares no better. Defendants appeal from the Court of Chancery's correct holding that their Proposed Amendments were adverse to Williams because they would have transformed Williams' ownership structure and altered Williams' financial rights—which the Court of Chancery found on the facts after evaluating the uncontested evidence of adversity that Williams presented at trial. Defendants failed to address this evidence in their brief. Instead, they argue that the Proposed Amendments cannot be adverse because they claim that defendants could theoretically structure an IPO that would be adverse to Williams in some (but not all) of the same ways, but *would not* require any amendments to the Caiman Agreement. Regardless of whether defendants have the power to do so—which, again, is a hypothetical that was not before the Court of Chancery—this theoretical IPO does not at all answer the question of whether the Proposed Amendments were adverse to Williams.

For the reasons stated below, this Court should vacate those limited portions of Sections II.D.3, II.D.4, and II.D.6 of the Court of Chancery's Memorandum Opinion and the corresponding provisions of the Order that concern EnCap's powers in a future Qualified IPO and deny defendants' cross-appeal.[2]

[2] Williams appeals from limited portions of Sections II.D.3, II.D.4, and II.D.6 of the Court of Chancery's Opinion, as identified in Williams' Notice of Appeal and (Continued . . .)

SUMMARY OF ARGUMENT

As to defendants' cross-appeal:

3. Denied. The Court of Chancery correctly found that, pursuant to Section 12.2(a)(v) of the Agreement, EnCap could not amend the Caiman Agreement unilaterally in pursuit of its Up-C IPO because those amendments were adverse to Williams' rights and obligations under the Agreement. (Op. 58-60.) The Court of Chancery assessed each of the amendments EnCap proposed, and upon considering the specific, unrebutted evidence of adversity that Williams presented at trial, found that the amendments were adverse to Williams' current rights. These amendments do not cease to be adverse based on defendants' claim (which they did not prove at trial) that "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" (Ans. Br. at 9 (emphasis omitted)). Even if an alternative transaction would result in some (but not all) of the same adversity to Williams, the correct vantage from which to determine adversity is Williams' current situation, not a hypothetical one. The Court of Chancery, moreover,

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(. . . continued)
contextually throughout Appellant's Opening Brief (*e.g.*, AOB at 4, 20, 23-24, 25, 27, 29-30). The references to II.D.5 (rather than II.D.4) in Appellant's Opening Brief (AOB at 1, 28, 32, 42) were typographical errors.

correctly applied the step transaction doctrine in determining that EnCap's Proposed Amendments should be viewed together for purposes of adversity, and collectively were adverse to Williams' rights and obligations. (Op. 60-62.)

STATEMENT OF FACTS

With respect to defendant's cross-appeal, Williams relies on the statement of facts in its Opening Brief. (*See* AOB at 9-24.) As set forth in detail in Point II.D of the Argument herein, Williams also specifically denies the additional purported facts contained in defendants' Answering Brief, which were not found by the Court of Chancery below or conflict with the Court of Chancery's express findings of fact. (*See infra* Argument, Point II.D.)

ARGUMENT

I. THE COURT OF CHANCERY ISSUED AN IMPROPER ADVISORY OPINION

A. The Court's Declarations About EnCap's Powers Under the IPO Facilitation Clause Were Dicta

As an initial matter, defendants do not dispute that the Court of Chancery's pronouncements about what EnCap could do in the event of a hypothetical Qualified IPO were nonbinding dicta. (*See* AOB at 28.) Indeed, the Court of Chancery held that the only IPO that Defendants proposed did not meet the requirements of a Qualified IPO under the Caiman Agreement, resolving altogether this case's essential question. (Op. 42-51, 55-62, 63, 65-66, 68.) As Williams established in its opening brief, the Court of Chancery's extraneous analysis about what would have happened if EnCap had proposed a different IPO therefore had "no effect on the outcome of th[e] case," *Brown v. United Water Del., Inc.*, 3 A.3d 272, 276-77 & n.17 (Del. 2010). (AOB at 28.) Nowhere in their brief do defendants argue otherwise.

To the contrary, defendants expressly acknowledge that the Court of Chancery's declarations regarding EnCap's powers (in the context of a different type of IPO) fell outside the scope of its declaratory judgment. They argue that the court below "did not enter any declaratory judgment on . . . (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." (Ans. Br. at 7.) Accordingly, defendants concede that this portion of the Court of Chancery's opinion was, at a minimum, dicta "without precedential effect," *Brown*, 3 A.3d at 276-77 & n.17, and thus did not render any binding judgment regarding EnCap's powers to effect a different kind of IPO in the future.

B. The Court Offered an Advisory Opinion Regarding EnCap's Powers

The Court of Chancery's assertions about the actions that EnCap could take to facilitate a hypothetical Qualified IPO also amounted to an improper advisory opinion. Defendants acknowledge that Williams sought a "declaration of the parties' rights . . . in relation to the Proposed IPO" (Ans. Br. at 34), and that the question before the Court of Chancery was to resolve a dispute "in the context of the Proposed IPO" (*id.* at 27). They nonetheless contend that the court did not "render judgment resolving an unripe dispute by applying a contract (or the law) to a set of abstract, conjectural facts" (*id.* at 29), when it determined what EnCap could do if it were to engineer an IPO different from the one EnCap had proposed. Both the Court of Chancery's analysis and Delaware law belie Defendants' argument.

As Williams described in its opening brief, the Court of Chancery resolved the only controversy before it: that the IPO at issue was not a Qualified IPO, and that Defendants could not unilaterally amend the Agreement to redefine a Qualified IPO to permit the IPO they proposed. (AOB at 26 (citing Op. 42-51, 55-62, 63, 65-66, 68).) Therefore, the court's statements about what EnCap could do—had it approved a Qualified IPO—were not actually necessary to settle the "live, justiciable controversy" before it. (*See* Ans. Br. at 35.)

Defendants unsuccessfully attempt to spin *Stroud v. Milliken Enterprises Inc.*, 552 A.2d 476 (Del. 1989), as support for their position, when, in fact, *Stroud* confirms the advisory nature of the Court of Chancery's Memorandum Opinion below. In *Stroud*, the Court of Chancery enjoined defendant directors from holding an annual stockholders' meeting because, among other reasons, their notice of the meeting was deficient. *Id*. at 477. Defendants later provided an alternative draft meeting notice, which the Court of Chancery found to be deficient on other grounds. *Id*. at 478-79. On appeal, this Court held that the lower court's issuance of a declaratory judgment about the validity of the alternative draft meeting notice was improper because it adjudicated "an alternative course of action," not a "dispute between the parties . . . close to a 'concrete and final form.'"

Id. at 481 (quoting *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987)).

Here, the Court of Chancery faced even less of a concrete dispute than did the court in *Stroud*: it was not even presented with an alternative to the now-enjoined proposed Up-C IPO. (Ans. Br. at 30-31.) Indeed, the Court of Chancery used the conditional tense to describe the powers that EnCap would have in a theoretical IPO. (*See e.g.*, Op. 63 ("If EnCap *could* properly amend the Blue Racer LLC Agreement to create a single class of units, then EnCap *could* effectuate a distribution of Caiman II's Blue Racer units in connection with a Qualified IPO." (emphases added)); Op. 68 ("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." (emphases added)).) The court's adjudication of EnCap's rights was contingent on "the occurrence of some future event"—the engineering of a Qualified IPO—"before the action's factual predicate [was] complete." *Multi-Fineline Electronix, Inc. v. WBL Corp.*, 2007 WL 431050, at *8 (Del. Ch. Feb. 2, 2007); *accord XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1218 (Del. 2014) (declaratory relief is not ripe for adjudication where it "would necessarily be premised on uncertain and hypothetical facts"). As in *Stroud*, the

Court of Chancery's determination of these rights was therefore improper. 552 A.2d at 481 (holding that declaratory relief was improper advisory opinion because management's *actually proposed* alternative notice did not give rise to "a final record for determining at this time the significant issues raised by the parties").

Unable to dispute that the Court of Chancery adjudicated the parties' rights in an IPO that was "not immediate and inevitable," *Multi-Fineline*, 2007 WL 431050, at *8, defendants attempt to recharacterize the Memorandum Opinion into something it is not. They assert that "the trial court was simply explaining its interpretation of the LLC Agreement provisions at issue in the lawsuit." (Ans. Br. at 27.) Defendants, however, entirely fail to address which aspects of the Court of Chancery's Opinion were purportedly "explained" by its rulings on what EnCap would be permitted to do in an alternative Qualified IPO with unknown terms. In any case, because "[t]he grant of declaratory judgment is always discretionary," a court "should declare the rights of parties in a dispute" only where it is "convinced that litigation sooner or later appears to be unavoidable." *Stroud*, 552 A.2d at 481; *Multi-Fineline*, 2007 WL 431050, at *8 ("[W]hen the material facts are not static and litigation in the matter is not immediate and inevitable, a reviewing court should move with great caution and hesitancy and should normally close the courthouse doors to the litigants on the particular matter unless truly extraordinary

and exigent circumstances are present."). Here, the Court of Chancery could make no such judgment because whether there will ever be a Qualified IPO is entirely unknown (AOB at 27-28), as defendants presented no evidence of their intent or ability to proceed with one at trial (*id.* at 26).

Defendants insist that if this Court rejects their arguments, "then almost all contract interpretation opinions would be improper advisory opinions" (Ans. Br. at 32-33), a doomsday prediction that is supported by none of the cases they cite.[3] Defendants' further contention that the Court of Chancery was justified in adjudicating the parties' rights in a future IPO because Williams "asked the trial

[3] Contrary to defendants' contention, the cases they cited do not stand for the proposition that Delaware courts may grant declaratory relief based on assumptions about future facts or hypothetical situations. *See Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 915-16, 936 (Del. 2017) (stating only that the court's injunction "leaves [defendant] *free to make any argument* []" during a post-closing contractual true-up proceeding "that addresses a change in facts or circumstances that occurred between signing and closing"—an event that had *already* occurred (emphasis added)); *Godden v. Franco*, 2018 WL 3998431, at *5, *15 (Del. Ch. Aug. 21, 2018) (making assumptions about which entity had called a board meeting that had *already* occurred and refusing to grant declaratory relief as to certain provision because "plaintiffs *are not entitled to this declaration until formal action is taken* by HMS Inc." (emphasis added)); *K&K Screw Prod., L.L.C. v. Emerick Capital Invs., Inc.*, 2011 WL 3505354, at *10 (Del. Ch. Aug. 9, 2011) (finding in a declaratory judgment action that "the only contingent fact that arguably remains is whether the Company will repay fully its Senior Loans" but that the dispute was ripe because plaintiff "is forecasting that this contingency will occur 'imminently'").

court to do so" is equally mistaken. (Ans. Br. at 33 (emphasis omitted).) Williams' request for declaratory judgment did not seek a declaration on *all* rights under the Agreement, nor did it seek declarations about the terms of hypothetical, future IPOs that had not even been proposed. Defendants expressly acknowledge this. (Ans. Br. at 27 (describing "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*" (emphasis added))). Because the Court of Chancery went further in adjudicating EnCap's rights in a future, preapproved Qualified IPO, its declarations in this regard amounted to an improper advisory opinion and should be vacated. *See Stroud*, 552 A.2d at 480 (explaining that unnecessary determinations on hypothetical facts "run[] the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law").

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

Williams' opening brief established that EnCap does not have the unilateral authority to (i) amend Blue Racer's LLC agreement, (ii) cause Caiman to distribute all of its Blue Racer units to Caiman's members or (iii) form a new acquisition subsidiary of Blue Racer and cause Caiman to merge with it under Section 6.8(c) and Section 9.5 of the Agreement. Defendants contend otherwise, but their arguments conflict with the plain language of the Caiman Agreement and simply ignore the Court of Chancery's legal determinations. To the extent that defendants' position is based on extrinsic evidence about the parties' supposed course of dealing, it turns on facts that were not found by the Court of Chancery and contradicts the court's factual findings.

A. Defendants' Claim for Unlimited Power Under Section 6.8(c) Should Be Rejected

Defendants' primary argument for affirmance is one that the Court of Chancery specifically rejected below and that defendants never appealed: that Section 6.8(c)(ii) of the Agreement—a generic provision authorizing EnCap 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" (A290 § 6.8(c)(ii))—

gives it the unfettered right to unilaterally dictate any terms it wishes in an IPO. (Ans. Br. 37-39.) As the Court of Chancery correctly held in Section II.B of its Memorandum Opinion, however, the "foregoing" referred to in Section 6.8(c)(ii) is limited to what is in Section 6.8(c)(i), which is "to *approve* a Qualified IPO." (Op. 36-41; A290 § 6.8(c)(ii) (emphasis added).)[4] Section 6.8(c)(ii) thus "does not give EnCap expansive authority to take any conceivable action with respect to a Qualified IPO," but rather provides EnCap the gap-filling authority to take the necessary steps to *approve* a Qualified IPO, such as circumventing otherwise applicable quorum voting requirements.[5] (Op. 40-41.) Defendants' reading, by contrast, "has no natural limiting principle" and renders other provisions of the Agreement meaningless. (Op. 37-38.) In what becomes a pattern in their brief, however, defendants do not address these points or even acknowledge the Court of Chancery's Opinion on this issue—which, again, defendants did not appeal.

Instead, defendants assert that "the power to approve a Qualified IPO includes the power to plan and structure that IPO"; according to defendants,

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[4] Defendants' Notice of Cross-Appeal does not mention any appeal from Section II.B of the Memorandum Opinion.

[5] In this regard, Section 6.8(c)(ii) is akin to Sections 6.8(a)(xxi) and 6.8(b)(xiv), which provide similar gap-filling authority to effectuate the actions provided for in the other subsections of Sections 6.8(a) and (b).

EnCap's right to approve a Qualified IPO under Section 6.8(c) would be "toothless" and "meaningless" were it not limitless. (Ans. Br. at 38.) Defendants are mistaken. The Agreement itself states what "approval" means in the context of Section 6.8(c): "At a meeting of the Board at which a quorum is present, approval by the Board of any action and any determination by the Board of any matter required by this Agreement shall require the affirmative vote in favor of such action of those Managers with a Majority of the Voting Power; except as otherwise provided in Section 6.8(a), Section 6.8(b), Section 6.8(c) and Section 6.8(d)." (A283 § 6.5(e).) "Approval" in Section 6.8(c) is thus the process by which the Caiman Board votes to exercise the company's powers in accordance with the other provisions of the Agreement. This is precisely how the Court of Chancery construed the term.

Delaware courts interpreting contracts read their provisions "in conjunction" in order to "harmonize[]" and "give[] meaning" to each of the contract's provisions. (Op. 39-40; *see also Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998).) The Court of Chancery, adopting Williams' interpretation of Section 6.8(c), did just that by harmonizing Section 6.8(c) with Section 9.5 and rejecting defendants' "unreasonable" interpretation of Section

6.8(c). (Op. 38-40.) Section 6.8(c) is not meaningless or toothless merely because it does not grant EnCap the expansive authority defendants now claim.

Moreover, the Agreement expressly provides that Section 6.8(c) is *not* limitless. It is, for example, expressly made subject to Section 12.2, which prohibits amendments adverse to Williams' rights and obligations under the Agreement unless Williams consents to them. (A290 § 6.8(e); A317 § 12.2(a)(v).) As Williams demonstrated below, and as the Court of Chancery held, EnCap's authority under Section 6.8(c) does not authorize it to "ignore mandatory provisions in the Caiman LLC Agreement and act unilaterally to amend those provisions." (Op. 50.)

Like the Court of Chancery, this Court should similarly reject defendants' expansive and unlimited interpretation of Section 6.8(c) here.

B. The Court of Chancery's Ruling Conflicts with the Plain Meaning of Section 9.5

1. Section 9.5 Authorizes EnCap to Act For the Board *Solely* For Purposes of That Section of the Caiman Agreement

In its opening brief, Williams demonstrated that the Court of Chancery's rulings in Sections II.D.3, II.D.4, and II.D.6 of the Memorandum Opinion concerning the powers EnCap would have in a Qualified IPO (i.e., the limited portions of those sections that Williams has appealed) conflict with the

plain meaning of Section 9.5 of the Caiman Agreement. Section 9.5 of the Agreement provides that EnCap can act on behalf of the Caiman Board "***solely*** for the purposes of this Section 9.5"—that is, solely to undertake the specific enumerated actions listed in Section 9.5—and not on behalf of the Board under any other section of the Agreement, let alone in all respects. (AOB at 30-35 (emphasis added).)

In response, defendants state that "[t]he clause 'solely for the 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." (Ans. Br. at 43.) This assertion directly contradicts the Court of Chancery's holding that "[t]he primary purpose achieved by the plain language of Section 9.5(a) is *not to empower EnCap*, but rather to establish the requirements for carrying out a Qualified IPO." (Op. 42 (emphasis added).) Defendants labor to "elevat[e]" EnCap's powers under Sections 6.8(c) and 9.5 and "subordinate" those held by Williams under Section 6.8(b) through abstractions, but ultimately fail to offer any arguments or explanation as to how the word "solely," which means "exclusively" or "alone," should operate. As Williams showed in its opening brief, Section 9.5 plainly limits EnCap's authority to act for the Board so that it applies "*[s]olely* for purposes of this Section 9.5"; in other words, authority delegated to other Members or

Managers through other provisions of the Agreement, such as Section 6.8(b), do not accrete to EnCap through Section 9.5. (AOB at 31.) Having properly interpreted Section 9.5(a) in rejecting EnCap's argument below, the court then improperly ignored Section 9.5(a)'s "solely" limitation in finding that EnCap was broadly empowered to undertake acts expressly set forth in Section 6.8(b) in the event of a hypothetical future Qualified IPO. The court failed to give effect to each of the Caiman Agreement's terms and inappropriately rendered "solely" mere surplusage. *See Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) (courts interpreting contracts must "give each provision and term effect, so as not to render any part of the contract mere surplusage").

Properly understood, Section 9.5 enumerates six specific actions that EnCap can take on behalf of the Board, all of which relate to the mechanics and details of the IPO Exchange. These powers are as follows:

> [1] determining when the IPO Exchange will occur (A304-05 § 9.5(a));
>
> [2] determining whether, in connection with the IPO Exchange, it is "advisable" for Caiman's Members to contribute their Membership Interests to the IPO Issuer in one transaction or a series of transactions (*id.*);
>
> [3] approving—but only "after the approval of a Qualified IPO in accordance with this agreement"—"the transaction or transactions to effect the IPO Exchange" (A305 § 9.5(b));

> [4] "form[ing] any entities required or necessary in connection with the Qualified IPO" (*id.*);
>
> [5] making reasonable requests to Members "in connection with consummating the IPO Exchange" (*id.*); and
>
> [6] determining "in its reasonable judgment" the Fair Market Value of the IPO Securities for purposes of cashing out certain Caiman Members' Membership Interests in the event that there is no effective IPO registration statement (A305-06 § 9.5(c)).

Defendants quibble with this list but do not point to any other power provided to EnCap under Section 9.5. Although defendants assert, in response to this list, that there are other "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 consolidating the Company into or with an IPO Issuer or its general partner'" (Ans. Br. at 48), these actions are delegated to *Members*, and are *not* actions that EnCap is empowered to take unilaterally. (A305 § 9.5(b).)

To the extent defendants assert that these Member-authorized actions prove that Section 9.5 entirely overrides Section 6.8 because they are in some ways similar to certain Special Voting Items enumerated in Section 6.8(b), defendants show a fundamental misunderstanding of how the provisions of the Caiman Agreement fit together. To be sure, under Section 9.5 *and* if necessary for a Qualified IPO approved in accordance with the Caiman Agreement's terms (which

the Court of Chancery found was not present here), EnCap could, for example, reasonably request that a Member transfer its Membership Interests to the IPO Issuer to consummate the IPO Exchange (which the Court of Chancery also determined was absent here). However, because Section 9.5 expressly limits EnCap's authority to act on behalf of the Board *solely* to those actions authorized in Section 9.5, EnCap cannot graft its Section 9.5 powers onto other sections of the Caiman Agreement, such as Section 6.8(b), to assert that EnCap has the unilateral right to dictate any Special Voting Item listed in that section. Indeed, defendants have it backwards. Because Section 9.5 carefully enumerates only certain actions similar to Special Voting Items that EnCap can reasonably request from Members, that provision, if anything, indicates that EnCap has no such right with respect to all other Special Voting Items. *See, e.g.*, *iBio, Inc. v. Fraunhofer USA, Inc.*, 2016 WL 4059257, at *6, n.59 (Del. Ch. July 29, 2016) (interpreting a contract using the rule *expressio unius est exclusio alterius*, or the expression of one item is the exclusion of other items).

Section 9.5(b)'s IPO Facilitation Clause authorizes EnCap to take "other actions as are required or necessary to facilitate the Qualified IPO," but under familiar canons of construction, actions taken pursuant to this clause must be similar to the section's enumerated actions. (AOB at 34-35.) In a further

distraction, defendants assert—without support—that these canons have no place without a "list of permitted actions." (Ans. Br. at 47.) This assertion directly contradicts the very authority that defendants cite elsewhere in their brief, which confirms that "a listing is not prerequisite" to the use of *noscitur a sociis*—"[a]n 'association' is all that is required." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 197 (2012) (cited at Ans. Br. at 41). Here, the "association" is clear: the powers are associated with each other through their enumeration in Section 9.5. The meaning of the "other actions" clause must therefore reflect this association and be given a meaning that is similar to the other enumerated powers. Thus, "other actions as are required or necessary to facilitate the Qualified IPO" must be similar to the examples provided, such as approving the timing or transaction(s) required to facilitate the IPO Exchange. (A304-05 § 9.5(a)-(b).) Defendants' interpretation would have Section 9.5's "other actions" clause swallow the entire Agreement.

Defendants are reduced to arguing that the IPO Facilitation Clause provides "broad grants of authority." (Ans. Br. at 44.) But defendants again fail to grapple with the Court of Chancery's holding in this regard: "EnCap *cannot take actions that the Caiman LLC Agreement has empowered specific members to take*, such as designating or removing particular managers." (Op. 49 (emphasis added).)

As explained below, Section 6.8(b) mandates that specific Members consent to taking the Special Voting Items enumerated therein; defendants cannot demonstrate how, when the Caiman Agreement's provisions are properly reconciled as required under Delaware law, EnCap can exercise powers found in Section 6.8(b).

2. Section 9.5(b)'s "Notwithstanding" Clause Does Not Override Everything Else in the Agreement

Among defendants' scattered arguments is the claim that Section 9.5(b)'s "notwithstanding" clause "override[s] all other provisions in the Agreement." (Ans. Br. at 40-41.) Once again, defendants fail to respond to the Court of Chancery's contrary conclusion. As the Court of Chancery correctly held:

> The defendants argue that because the IPO Facilitation Clause begins with the phrase '[n]otwithstanding anything to the contrary in this Agreement,' EnCap can ignore mandatory provisions in the Caiman LLC Agreement and act unilaterally to amend those provisions. Although that reading might be plausible when the IPO Facilitation Clause is read in isolation, it does not take into account the Caiman LLC Agreement as a whole . . . . EnCap . . . cannot disregard mandatory requirements or amend them such that they are no longer meaningful. The IPO Facilitation Clause . . . does not empower EnCap to override or amend the Caiman LLC Agreement.

(Op. 50-51.)

Moreover, defendants ignore another "notwithstanding" clause: the clause in Section 6.8(e), which unequivocally states that "*notwithstanding anything to the contrary in this Agreement or in the Act*," the Special Voting Items described in Section 6.8(b) "require the stated approval *specified therein only*" (A290 § 6.8(e) (emphasis added); *see also* A285-86 § 6.8(a) (for Special Voting Items, "the approval set forth in Section 6.8(b) and *no other shall be required*." (emphasis added).) As Williams demonstrated in its opening brief, although Section 6.8(e)'s "notwithstanding" clause is expressly subject to certain other provisions of the Caiman Agreement (including Williams' rights to consent to any adverse amendments in Section 12.2), *Section 9.5 is not one of them*. Section 6.8(e) simply does not carve out or yield to Section 9.5. (AOB at 38-39.) Under defendants' proposed construction, however, approval by a single EnCap Manager under Section 9.5 would substitute for the approval requirements set forth in Section 6.8(b). In that case, the provisions of Section 6.8(b) would not govern "notwithstanding anything to the contrary in this Agreement," including Section 9.5(b), which would contravene Section 6.8(e)'s explicit command.

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

The Court of Chancery's ruling that the IPO Facilitation Clause allows EnCap to unilaterally exercise the Board's powers under Section 6.8(b)(iii),

(xi) and (xii) if required or necessary to facilitate a hypothetical future Qualified IPO is also erroneous because it conflicts with the unambiguous terms of Sections 6.8, 6.1 and 6.5 of the Caiman Agreement. As Williams established in its opening brief, Section 6.8(b) contains mandatory language: Caiman "*shall not* take any" of those actions (Special Voting Items) "without having first received Majority Board Approval, which majority *must* include the affirmative vote of at least one EnCap Manager and one [Williams] Manager." (AOB at 36-38; A288 § 6.8(b) (emphasis added).)

Defendants respond that Williams attempts to "elevate" Section 6.8(b) "above other provisions." (Ans. Br. 48-49 (emphasis omitted).) But Williams' interpretation simply comports with the plain language in Section 6.8(b), which means that Caiman "shall not" take action under Section 6.8(b) without Majority Board Approval, which "must" include approval by Williams. Defendants' attempt to recast Williams' cases[6] is unpersuasive; defendants fail to explain how these cases prove the tautology that "where a provision governs, it is not optional" (Ans. Br. 48-49), and why that undermines Williams' argument.

[6] *Musser v. United States*, 414 U.S. 31, 37 (1973); *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 940 (Del. 1979); *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 152 (Del. Ch. 2003).

Indeed, the Court of Chancery determined that the IPO Facilitation Clause does not empower EnCap to "ignore mandatory provisions in the Caiman LLC Agreement," to "take actions that the Caiman LLC Agreement does not empower the Board to take," or to "take actions that the Caiman LLC Agreement has empowered specific members to take." (Op. 49-50.) The Court of Chancery's subsequent statement that EnCap can unilaterally exercise the powers of the Board under Section 6.8(b) in connection with a Qualified IPO thus cannot be squared with this limitation, because the approval requirements for Special Voting Items are mandatory ("shall not take," "must include"); the Board cannot approve Special Voting Items without specified approval; and that specified approval is committed to, among others, Williams.

The other subsections of Section 6.8 likewise confirm the conclusion that Section 9.5(b) does not alter the compulsory approval requirements for Special Voting Items in the context of a Qualified IPO. As described above, Section 6.8(e) unequivocally states that "[t]he [Caiman] Members acknowledge and agree, *notwithstanding anything to the contrary in this Agreement or in the Act*," that Special Voting Items "*require* the stated approval *specified therein only*." (A290 § 6.8(e) (emphasis added).) Further, Section 6.8(a) states that, for Special Voting Items, "the approval set forth in section 6.8(b) and *no other shall be*

required." (A286 § 6.8(a) (emphasis added).) The Court of Chancery's failure to address these provisions results in an interpretation at odds with the plain language of the Caiman Agreement and with other parts of the Opinion.

Williams also showed in its opening brief how the Court of Chancery's construction of Section 9.5 conflicts with Sections 6.1 and 6.5, which unqualifiedly provide that, subject to limited exceptions not relevant here, the Board cannot act without Majority Board Approval. (AOB at 39-40.) Defendants dismiss Section 6.1 as providing for nothing more than a division of labor between Caiman's owners and managers. (Ans. Br. at 49-50.) But Section 6.1's definition of the Board as meaning Caiman's Managers "who shall act as a board of managers," exercise "the powers of the Company" and direct its "business and affairs" is critical, because it does not reference Section 9.5, which redefines the "Board" to apply "solely" for the purposes of Section 9.5. (A281 § 6.1.) Indeed, as defendants state, "The approval required for various actions is set out elsewhere, *e.g.*, Sections 6.8 and 9.5." (Ans. Br. at 50.) This is precisely Williams' point: The approval requirements set forth in Section 6.8 must be followed, as confirmed by the fact that Section 6.1 does not carve out Section 9.5 as an exception.

Section 6.5(e) further supports Williams' interpretation. (AOB at 40.) Section 6.5(e) provides that Board action requires "the affirmative vote in favor of

such action of those Managers with a Majority of the Voting Power; except as otherwise provided in Section 6.8(a), Section 6.8(b), Section 6.8(c) and Section 6.8(d)." (A283 § 6.5(e).) Again, Section 9.5 is not listed as an exception, because it redefines the Board to apply "solely for purposes of this Section 9.5." Far from trying to interpret Section 6.8 to "trump[]" Section 9.5, as defendants suggest, Williams' interpretation accords meaning to both.[7]

Defendants assert that Williams is trying to use Section 6.8(b) to "get more than it bargained for" under the Caiman Agreement. (Ans. Br. at 51.) Defendants claim that Williams' only "protections" are under Sections 9.5(a) and (e), with respect to the value of the IPO Exchange and its right to buy the general partner entity in a master limited partnership ("MLP") IPO. (*Id.*) These "protections," however, have nothing to do with the approval requirements at issue

[7] Defendants assert that although Section 9.5 is not mentioned as an exception in Section 6.5(e) it should nonetheless be understood as an *implied* exception through the reference to Section 6.8(c), because Section 9.5 defines EnCap's powers to act for the Board in language referencing Major Special Voting Items, which are otherwise dealt with in Section 6.8(c). (Ans. Br. at 50.) This contention, however, must be rejected. The sophisticated parties to the Caiman Agreement took pains to specify which provisions they wished to carve out when creating exceptions. They easily could have carved out Section 9.5 from Section 6.5(e)'s requirements had they intended to do so. They did not, and this Court cannot rewrite the parties' contracts as defendants wish. *See Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 507 (Del. 2019).

here, which is why the Court of Chancery ignored similar arguments in defendants' briefing below (B1887-89; B1962-63). Defendants' arguments should be rejected, not least because they repeat arguments already rejected by the Court of Chancery and fail to grapple with the Court of Chancery's rulings as to the meaning of Sections 6.8 and 9.5.

D. Defendants' Brief Inappropriately Seeks to Rewrite the Court of Chancery's Factual Findings

Although defendants agree that no extrinsic evidence is required to interpret the plain terms of the contract (Ans. Br. at 54), they go on to make assertions about facts that are unsupported by the record and that contradict the Court of Chancery's findings of fact. Defendants' efforts to rewrite the facts in such a manner cannot be credited under Delaware law. *See Science Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 966 (Del. 1980) (rejecting appellant's argument because it "completely ignores the Trial Court's express findings of fact"). This Court should not countenance them on appeal. *See, e.g.*, *Am. Family Mortg. Corp. v. Acierno*, 1994 WL 144591, at *3 (Del. Mar. 28, 1994) ("While [the Delaware Supreme] Court may draw its own conclusions as to the written terms of the contract, we defer to the trial court on findings of fact based on evidence beyond the four corners of the document, assuming those findings are the product of an orderly and logical deductive process.").

For example, defendants claim in their brief that EnCap had an "unfettered" exit right in an IPO (Ans. Br. at 55). But the Court of Chancery found otherwise. In an MLP IPO, which the parties "invariably" expected Caiman to pursue, the Court of Chancery specifically determined that Williams bargained for the right to buy the other Caiman Members' interests in the general partner entity. (Op. 15-16.) Moreover, according to the factual record and the Court of Chancery, even Caiman recognized that Williams retained certain rights through *any* IPO—including the proposed one. (Op. 25 (when defendant Stephen Arata, Caiman's CEO, suggested that Williams would lose the right to vote regarding adverse changes in connection with the IPO, "[t]he general counsel of Caiman II shot down that idea").) Defendants also assert that Williams' "true intent" in asserting its rights in this litigation is to thwart competition with Blue Racer (Ans. Br. at 56)—an argument that defendants raised below (B1995-1997), but which the Court of Chancery declined to credit. Defendants proclaim that "Williams repeatedly stalled . . . [prior] IPO attempts, hoping these efforts would fail and Williams would be able to acquire Caiman for a lower price." (Ans. Br. at 22.) The Court of Chancery, as trier of fact, found the opposite: that Williams "supported" the contemplated 2017 MLP Conversion and "took care to comply" with its "contractual obligation to support a Qualified IPO." (Op. 22; *see also* AOB at 17-

18.) And contrary to defendants' assertions (Ans. Br. at 22-23), Williams did not frustrate earlier efforts to take the company public; "[u]nfavorable market conditions" did (Op. 23; *see also* AOB at 17-18). Defendants' attempt to supersede the Court of Chancery's factual findings with their preferred view of the record should be rejected, and the Court of Chancery's factual findings should be deferred to in the absence of clear error, in accordance with Delaware law. *See DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago*, 75 A.3d 101, 108 (Del. 2013).

III. THE COURT OF CHANCERY CORRECTLY HELD THAT THE PROPOSED AMENDMENTS WERE ADVERSE TO WILLIAMS

A. Question Presented.

Did the Court of Chancery correctly hold that defendants' Proposed Amendments were adverse to Williams, when the Proposed Amendments would have transformed Williams' ownership from a majority investor in one privately held entity to a minority investor in two different entities with few governance rights, and would have altered Williams' financial rights through changing Section 5.4's distribution waterfall? (Op. 56-62.)

B. Scope of Review.

Where a legal issue presents a mixed question of law and fact, this Court reviews the Court of Chancery's findings of fact for clear error. *Bank of N.Y. Mellon Tr. Co. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011). The Court of Chancery's fact findings receive "a high level of deference," and will not be set aside "unless they are clearly wrong and that doing of justice requires their overturn." *DV Realty Advisors LLC*, 75 A.3d at 108 (citation and internal quotation marks omitted). After reviewing the Court of Chancery's factual determinations, "the issue becomes whether the trial court properly concluded that

a rule of law is or is not violated," which this Court reviews *de novo*. *Id.* (citation omitted).

C. Merits of the Argument.

As the Court of Chancery explained in its Memorandum Opinion, EnCap proposed sweeping amendments to the Caiman Agreement under the IPO Facilitation Clause. (Op. 56-58.) The amendments, however, were subject to Section 12.2(a)(v) of the Caiman Agreement, which provides that "this Agreement may not be amended in a way that adversely affects the rights or obligations of [Williams] without the approval of [Williams]." (Op. 56; A317 § 12.2(a)(v).) After considering Williams' uncontroverted evidence presented at a full trial, the Court of Chancery determined that the Proposed Amendments would "radically" and "adversely" affect Williams' rights by altering Williams' ownership rights through forcing it to hold two different types of securities, as well as Williams' financial rights under the distribution waterfall. (Op. 59.) Because these sweeping changes required Williams' consent, the court correctly found that EnCap could not unilaterally impose the Proposed Amendments and "force Williams out of the current Caiman II structure and into the post-Up-C IPO structure." (*Id.* at 58.) Defendants' arguments to the contrary again misstate the record and disregard the

court's findings of fact, as well as the plain terms of Section 12.2 of the Agreement.

1. The Proposed Amendments Were Adverse to Williams

The record squarely refutes defendants' sweeping claim that "Williams has presented no evidence that any of the Proposed Amendments is actually adverse." (Ans. Br. at 59.) Williams presented substantial evidence of adversity at trial, including an email from its outside counsel describing to Caiman's lawyers exactly why the Proposed Amendments were directly adverse to Williams' interests. Among other forms of adversity, this exhibit demonstrated that the Proposed Amendments would eliminate the Business Purpose provisions *and* modify the economic waterfall provisions (by changing the definition of "IPO Value") to reduce Williams' economics in an Up-C IPO in favor of Caiman Management:

> [Williams] view[s] as adverse ***any amendments to the LLC Agreement that would incorporate changes to facilitate an Up-C Structure*** or ***changes to IPO Value to make the economic waterfall provisions more advantageous to other parties in connection with an Up-C Structure (which changes are adverse on their own because they reduce Williams's share of the economics that would result from the provision as currently drafted)***, where the other parties are taking the position that in connection with an Up-C IPO important rights of Williams can be changed without its consent.

> That is what is at issue in the litigation, and we view any changes in that regard to be adverse.

(B1765-66 (emphases added).) Williams' witness and Caiman Manager, Curt Carmichael, expressly adopted and agreed with this analysis in his trial testimony. (A950 ("Q. And do you agree with the substance of this email? A. Yes, I do.").) Williams also briefed this issue to the Court of Chancery in its pre- and post-trial submissions, in which it marshalled additional evidence of adversity from trial. (A175-176 (describing various amendments to redefine IPO Exchange to permit conversion of non-Caiman Membership Interests into a different class of IPO securities from those offered to public as "adverse to Williams—as part of a reorganization to strip Williams of its bargained-for property rights"); *see also* A132-134; A177-78; A192; B1811-12, B1841-43; *accord* AOB 15-17, 19-20 (describing Caiman Agreement's requirements for IPO Exchange and ways in which certain Proposed Amendments diverge from them).) Another trial exhibit, frequently cited before, during, and after trial, showed that even Caiman's general counsel understood that the Up-C IPO reorganization—which could not be implemented without adopting the Proposed Amendments—was adverse to Williams because it would "strip Williams of rights it currently has" and therefore could not be implemented without Williams' consent. (AR1; Op. 25.)

Williams' evidence on adversity was not contested at trial. And the Court of Chancery, as finder of fact, expressly found that "Williams advised Caiman II that Williams would view 'as adverse' any amendments to the Caiman LLC Agreement that would 'facilitate an Up-C Structure' or 'make the economic waterfall provisions more advantageous to other parties in connection with an Up-C Structure.'" (Op. 30.)

In the face of all this evidence and the Court of Chancery's findings, defendants concede that their Proposed Amendments *would* be adverse to Williams by eliminating Caiman's Business Purpose limitations and removing Williams' protections as a majority owner of Caiman, but assert, wrongly, that this adversity does not count. (Ans. Br. at 62-63, 65-66.) Defendants' position is entirely baseless for the reasons demonstrated below (Point III.C.2 *infra*).

As defendants also acknowledge, Williams argued that the Proposed Amendments were adverse insofar as they replaced the definition of "Pre-IPO Value" in the Caiman Agreement with a new definition of "IPO Value," which would benefit Caiman Management in an Up-C IPO by taking into account the value of the IPO Issuer's nonpublic securities (that would not be included in value for purposes of the economic waterfall on an Up-C IPO in the existing definition of Pre-IPO Value), thereby altering the economic distribution "waterfall" provisions

in favor of Caiman management at Williams' expense. (Ans. Br. at 66 (citing A132).) Defendants attempt to dismiss this argument as a "stray statement" unsupported by explanation or evidence, but they are mistaken. In fact, as shown above, Williams produced evidence of precisely this adversity at trial (B1765-66; A950), and repeatedly argued this point before and after trial (*e.g.*, B1811-12; A132; A192; AR28-29).

The only time defendants *even attempted* to contest Williams' showing of adversity, moreover, was when they asserted for the first time at the post-trial oral argument that the Proposed Amendments to the definitions of "Pre-IPO Value" and "IPO Value" would not produce any economic difference in the distribution waterfall in the event of an Up-C IPO. (AR134-35.) But the only supposed "evidence" they cited—a nearly inscrutable spreadsheet that they also reference in their Answering Brief (Ans. Br. at 66-67 & n.127 (citing B2012-2013))—does nothing to support their claim. To the contrary, in order to demonstrate the supposed economic equivalence between the unamended and amended definitions, defendants assumed their own conclusion and treated their calculations of "Pre-IPO Value" *as if the amendments had already been made*: they "[r]evised" the "Publicly Offered Securities" component "to include Class B/HoldCo Units"—i.e., the nonpublic securities that the existing definition of "Pre-

IPO Value" necessarily excludes because, under the existing terms of the Caiman Agreement, a Qualified IPO contemplates the issuance of only one class of securities to all investors. (Compare B2013 *with* B983 (proposed amended definition of "IPO Value" including nonpublic securities) & B987 (proposed amendment striking "Pre-IPO Value," which excludes nonpublic securities); A304-05 § 9.5(a).) The Court of Chancery did not credit defendants' evidence. Rather, it concluded that the "amendments would [] alter the distribution waterfall under Section 5.4 of the Caiman LLC Agreement, which would change Williams' financial rights." (Op. 59.) The Court of Chancery's finding was fully supported by the record.

Defendants devote many words in their Answering Brief to explaining why the Court of Chancery's list of Proposed Amendments was supposedly overinclusive (Ans. Br. at 59-61), but this issue is nothing more than a distraction. The Court of Chancery's adversity analysis focused on the amendments that *all* parties agree defendants proposed in 2019 in connection with their contemplated Up-C IPO: the changes that would allow EnCap to implement the Up-C IPO (including the redefinition of the IPO Exchange) and the amendments that would alter the distribution waterfall in the resulting Up-C IPO, which, the court concluded, would "radically alter" Williams' position. (Op. 58-59; *see* A132; Ans.

Br. at 61 n.115.) The court's analysis of adversity did *not* address the incremental amendments, such as the irrelevant alteration of the definition of "Available Cash," that defendants argue predated 2019.[8] (Ans. Br. at 60 n.113.) The amendments that were proposed—and which the Court of Chancery correctly identified—were adverse to Williams, and the inclusion of other irrelevant amendments did not change the court's analysis or conclusion.

The Court of Chancery's findings of fact were well supported by the evidence presented at trial. Defendants offer no meaningful argument—because they cannot—that those findings constitute clear (or any) error. Having reached the proper factual conclusion that the Proposed Amendments were adverse to Williams, the Court of Chancery also properly concluded that Section 12.2(a)(v) required Williams to consent to the Proposed Amendments before they could be implemented.

[8] Furthermore, the court's reliance on the redline of "a comparison of the LLC Agreement with the Proposed Amendments versus the LLC Agreement as it existed in December 2012" (Ans. Br. at 59-60; *see* Op. 56-58 (citing B1083-B1196 (JX232)) can be traced back to *defendants'* citation of this same redline, from a different exhibit (JX231), in their briefing to describe the Proposed Amendments. (*See* B1970, B1999-2000; *compare* B969-B1082 (JX231) *with* B1083-B1196 (JX232).)

2. Defendants Fail to Overcome the Court of Chancery's Record on Adversity

Defendants concoct a handful of theories about why the Court of Chancery's "standard for judging adversity" was purportedly "improper." (Ans. Br. at 61.) As an initial matter, they claim (although they did not prove at trial) that if they could theoretically construct, without amending the Agreement, a Qualified IPO with an IPO Issuer that lacked geographic limitations, then the Proposed Amendments to effect the proposed Up-C IPO—in which the IPO Issuer would also have lacked geographic limitations—must not be adverse. (*Id.* at 57-58.) This reasoning is flawed for several reasons.

First, *any* Qualified IPO with an IPO Issuer that lacked geographic limitations would be adverse to Williams. That it might theoretically be possible to create that same adversity without amending the Caiman Agreement—again, an unproven assertion by defendants[9]—does not lead to the conclusion that

[9] Among other things, defendants offered no evidence about what would become of Caiman in their theoretical, unproposed IPO. But, as Court of Chancery recognized, Section 12.8 of the Caiman Agreement—which prohibits Caiman's Affiliates (including Blue Racer and any IPO Issuer) from taking any actions that Caiman is prohibited from taking (including actions in violation of Caiman's Business Purpose)—could well apply post-IPO, depending on the specific facts and circumstances. (Op. 68-69; A319 § 12.8.) The Court of Chancery found it unnecessary to reach this issue below in connection with the Proposed Up-C IPO. Defendants, however, have not demonstrated that the IPO Issuer in their (Continued . . .)

amendments that *do* create this adversity are *not* adverse to Williams' rights. The proper inquiry is whether *these* Proposed Amendments to effect *this* proposed Up-C IPO were adverse—and the Court of Chancery answered that question in the affirmative. (Op. 58-60.) Because those amendments *were* adverse to Williams, they required Williams' consent under Section 12.2.

Second, defendants' hypothetical fails to account for all of the ways in which Williams demonstrated and the Court of Chancery found the Proposed Amendments to be adverse. As the Court of Chancery recognized, the change to the economic waterfall (by changing the definition of "Pre-IPO Value") is a Proposed Amendment that is adverse to Williams. (Op. 30, 59.) Defendants do not—and cannot—argue that they could theoretically construct, without amending the Agreement, a Qualified IPO with a different economic waterfall.

Third, defendants assume, but failed to prove at trial, that their alternative hypothetical IPO would meet the requirements of a Qualified IPO. (Ans. Br. at 62.) In fact, the only "evidence" they cite for this proposition is some

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(. . . continued)
hypothetical alternative IPO would not be bound by Caiman's Business Purpose limitations through Section 12.8. And as the Court of Chancery found, at least some of defendants' officers understood that the issuer *would* have to comply with those limitations. (Op. 27.)

irrelevant witness testimony that has nothing to do with a Qualified IPO, and a portion of the Memorandum Opinion declaring that *if* "required or necessary for a Qualified IPO," EnCap could form certain entities without including a Business Purpose limitation in their charters. (*Id.* at 62 & n.118 (citing Op. 56, A1094 (discussing Business Purpose limitations in connection with *this* Up-C IPO), and B1364-65 (discussing MLP IPO).) The Court of Chancery, however, determined that EnCap had no such power in connection with this proposed Up-C IPO, because *this* proposed Up-C IPO failed to meet the requirements of a Qualified IPO. (Op. 56.)

Fourth, the only case that defendants cite for the proposition that the Proposed Amendments are not adverse, *Warner Communications Inc. v. Chris-Craft Industries, Inc.*, 583 A.2d 962 (Del. Ch. 1989), does not support their argument. *Warner* does not stand for a legal proposition that "if a contemplated adverse action could be accomplished without amendment, the amendments are not adverse." (Ans. Br. at 62.) Rather, the court in *Warner* concluded that in that case, the relevant certificate of incorporation did not grant a right to vote on "every merger in which [an] interest would be adversely affected," because "[s]uch a right was conferred expressly but only in narrowly defined circumstances concededly not present here." 583 A.2d at 964. To the extent that the court opined on

amendments to the certificate of incorporation, it clarified that the relevant adverse conversion of stock would occur *not* "upon the amendment" of the certificate of incorporation, but rather "pursuant to Section 251 of the statute which authorizes mergers and defines the steps necessary to effectuate a merger." *Id.* at 967. Here, by contrast, adversity *would* occur upon the Proposed Amendments; "[w]ithout the amendments, EnCap lacks the ability to implement the Up-C IPO." (Op. 60.) Accordingly, Section 12.2 of the Agreement requires Williams' consent before such amendments can be implemented.

Fifth, defendants further contend that although the Court of Chancery determined that the amendments were adverse to Williams' "situation," it failed to determine that the amendments were adverse to Williams' "rights or obligations." (Ans. Br. at 62). Defendants fail to explain this distinction (because there is none). Indeed, the Court of Chancery explained that "[c]ompared to the situation that Williams currently enjoys under the Caiman LLC Agreement, the amendments are adverse" *because* of their impact on, for example, Williams' ownership rights "within a governance arrangement that provides Williams with significant rights and protections." (Op. 58-59.)

As the Court of Chancery observed, "The defendants' overly simplified approach ignores the fact that the amendments are designed to authorize

and clear the path for the Up-C IPO, a transaction that adversely affects Williams . . . . They adversely affect Williams by eliminating the provisions that foreclose the Up-C IPO and exposing Williams to the threat of the Up-C IPO." (Op. 59-60.) Defendants' "overly simplified approach" should be rejected once again here.

3. The Court of Chancery Correctly Applied the Step-Transaction Doctrine

The Court of Chancery correctly applied the "step-transaction doctrine" in assessing whether the proposed amendments were adverse to Williams. EnCap's proposed amendments to effectuate its Up-C IPO must be analyzed together for purposes of assessing adversity because, under Delaware Law, "'steps' in a series of formally separate but related transactions involving the transfer of property" must be treated "as a single transaction if all the steps are substantially linked." (Op. 60 (quoting *Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.*, 1999 WL 182568, at *6 (Del. Ch. Mar. 24, 1999)).) The Court of Chancery correctly determined that the proposed amendments met not one, but two tests that require the application of the doctrine, because the amendments were a "series of separate transactions [that] were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result" and because "the legal relations created by one transaction would have been fruitless without a

completion of the series." (Op. 60-61 (quoting *Noddings*, 1999 WL182568, at *6)). Nowhere do defendants dispute that EnCap's amendments were cast as a single transaction, nor that EnCap's Up-C IPO would fail without completion of the series of amendments.

Defendants complain that the application of this doctrine is Williams' and the Court of Chancery's "attempt to have it both ways" (Ans. Br. at 59), but defendants do not explain why the approach is internally inconsistent. Nor is it. In order to consummate the Up-C IPO, EnCap must have the requisite contractual *power* to perform each step (Op. 51-68); collapsing the steps together would not change the question of whether EnCap had the authority to take certain actions. By contrast, the Court of Chancery applied the step-transaction doctrine to assess adversity, and in doing so, exposed the Proposed Amendments for what they were: merely means unto the end of the proposed Up-C IPO. Therefore, the Court of Chancery's analysis was correct and proper, and defendants' arguments to the contrary should be rejected.

CONCLUSION

For the foregoing reasons, this Court should vacate the Court of Chancery's declarations that Section 9.5 authorizes EnCap to exercise certain of the Board's powers that constitute Special Voting Items under Section 6.8(b) if those actions are required or necessary to facilitate a hypothetical Qualified IPO, and should reject defendants' arguments on cross-appeal as to the adversity of the Proposed Amendments to Williams.

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