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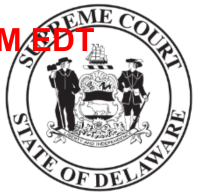

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC., ALAN S. ARMSTRONG, STEPHEN W. BERGSTROM, NANCY K. BUESE, STEPHEN I. CHAZEN, CHARLES I. COGUT, MICHAEL A. CREEL, VICKI L. FULLER, PETER A. RAGAUSS, SCOTT D. SHEFFIELD, MURRAY D. SMITH, WILLIAM H. SPENCE, and COMPUTERSHARE TRUST COMPANY, N.A., Defendants-Below, Appellants, v. STEVEN WOLOSKY and CITY OF ST. CLAIR SHORES POLICE & FIRE RETIREMENT SYSTEM, Plaintiffs-Below, Appellees.	No. 139, 2021 Court Below: Court of Chancery of the State of Delaware Consolidated C.A. No. 2020-0707-KSJM

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NATURE OF PROCEEDINGS

On March 19, 2020, the board of directors (the "Board") of the Williams Companies ("Williams" or the "Company") adopted a poison pill (the "Plan") with the singular purpose of shutting down any communications between or among stockholders and the Board regarding the Company. The Plan was not designed to protect Williams from opportunistic and unwanted takeover bids, to protect tax assets, or to protect against any active threat to corporate control. Instead, and contrary to its publicly disclosed rationale, the Board adopted the Plan for the purpose of granting the Board a year-long vacation from the burden of having to discuss Company business with the owners of the enterprise.

The Plan's architect characterized his "novel" brainchild—with its 5% triggering threshold and a highly aggressive acting-in-concert ("AIC") provision with an expansive "daisy chain" feature and a deceptive "carve-out" for passive investors (the "Plan")—as a "nuclear weapon of corporate governance,"[1] designed to impose a "one-year moratorium" on activism.[2] The Plan threatened Williams' stockholders with such catastrophic financial consequence—and yet so severely limited their ability to ascertain or control the risk of triggering that consequence—that it functionally foreclosed them from trying to assert their views and, in turn,

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[1] A1815:10-18.

[2] A1819:11-18.

their fundamental stockholder rights. These extraordinary provisions were unmoored from the original purpose of a poison pill and weaponized for the sole and express purpose of halting stockholder activism. The Court below correctly held that Williams and its directors (the "Director Defendants") did not meet their burden under *Unocal Corp. v. Mesa Petroleum Co.*[3] with respect to the Plan. This Court should summarily affirm.

Over a decade ago, this Court unanimously upheld the use of a 5% trigger in a stockholder rights plan carefully tailored to protect a substantial net operating loss ("NOL") asset against a frontal assault. In doing so, however, the Court reaffirmed that *Unocal* remained the governing standard and warned corporate planners that "[t]he fact that the NOL Poison Pill was reasonable under the specific facts and circumstances of this case, should not be construed as generally approving the reasonableness of a 4.99% trigger in the Rights Plan of a corporation with or without NOLs."[4] Since then, the corporate bar has carefully utilized the 5% trigger almost exclusively to protect NOL assets.

Given the "omnipresent specter that directors could use a [poison pill] improperly,"[5] *Unocal* sets forth a two-part enhanced scrutiny test for assessing

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[3] 493 A.2d 946 (Del. 1985).

[4] *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010) (hereinafter "*Selectica II*").

[5] *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 30 (Del. Ch. 2010).

whether directors satisfied their fiduciary duties in adopting a pill. Under the first prong, directors must establish they had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person's stock ownership."[6] Under the second prong, directors must establish that their response to that danger was "reasonable in relation to the threat posed."[7] The Plan's *raison d'etre* and unprecedented terms foreclose Defendants from satisfying either prong.

On February 26, 2021, following expedited discovery and trial, the Court of Chancery issued its post-trial opinion (the "Opinion" or "Op."). Carefully analyzing the evidence and applying its factual findings to the relevant legal framework, the trial court held that the Director Defendants breached their fiduciary duties in adopting and maintaining the Plan, and issued a mandatory injunction requiring the Plan's elimination.[8]

The trial court held that (i) "[t]he Board's general concern about stockholder activism is insufficient" under *Unocal*'s first prong;[9] (ii) "[e]ven if justifications of short-termism or disruption could rise to the level of a cognizable threat,

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[6] *Unocal*, 493 A.3d at 955.

[7] *Id*.

[8] Op. 89.

[9] *Id*. 70-71.

hypothetical versions of these justifications cannot" and "[t]he concerns in this case are raised in the abstract;"[10] and (iii) even assuming *arguendo* that the potential for rapid accumulation of Williams' shares could constitute a cognizable "threat," the Board's response was disproportionate.[11]

Regarding proportionality, the trial court held that the Plan's "key features" were "extreme," and "increase[d] the range of Williams' nuclear missile [] by a considerable distance beyond the ordinary poison pill."[12] The trial court further held that (i) "the 5% trigger alone distinguished the Plan,"[13] (ii) "[t]he Plan's combination of features [we]re likely to chill a wide range of anodyne stockholder communications,"[14] (iii) the AIC provision's "broad language swe[pt] up potentially benign stockholder communications" and "encompasse[d] routine activities such as attending investor conferences and advocating for the same corporation action,"[15] and (iv) the Plan "glom[med] on to [its] broad scope the daisy-chain concept that operates to aggregate stockholders even if members of the group have no idea that

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[10] *Id*. 73.

[11] *Id*. 77-89.

[12] *Id*. 78.

[13] *Id*. 77.

[14] *Id*. 82.

[15] *Id*. 83.

the other stockholders exist."[16] These features "limit[ed] the act of communicating itself, whether with other stockholders or management"; "restricted the stockholders' ability to nominate directors"; and thus "infringe[d] on the stockholders' ability to communicate freely in connection with the stockholder franchise[.]"[17] The trial court thus correctly concluded that, even assuming Defendants could establish a legitimate corporate threat, they had "failed to show that this extreme, unprecedented collection of features" fell "within the range of reasonable responses[.]"[18]

In an 8-K filed on March 3, 2021, Williams disclosed that, consistent with the trial court's post-trial Opinion, it had eliminated the Plan.[19] On May 6, 2021—over six weeks after the Plan would have expired—Defendants filed their Notice of Appeal. Through this appeal, Defendants seek to reverse a post-trial decision regarding a Plan that, even absent this Action, would have expired ***over four months ago***.

This appeal will answer a simple but critical question: can Delaware directors use a pill to stifle all stockholder activism? Respectfully, the question answers itself.

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[16] *Id*.

[17] *Id*. 45.

[18] *Id*. 88-89.

[19] B0789-B0791.

Among the most fundamental rights of stockholders—the ***owners*** of the corporation—are the rights to nominate directors, make proposals to the board and/or the broader stockholder body, discuss their views regarding corporate policies, and freely communicate those views. The COVID-19 pandemic did not eliminate those elemental rights, and the Board's opportunistic deployment of a "nuclear" device expressly to vitiate those rights is deeply troubling. Affirming the trial court's Opinion will not only faithfully adhere to applicable precedent, but also vindicate fundamental stockholder rights.

SUMMARY OF ARGUMENT

1. Denied. The lower court correctly applied the *Unocal* standard following this Court's express direction to do so in *Selectica II*.[20] Moreover, the court's findings of an entrenchment effect were the product of an orderly and logical deductive process, well-supported in the record and entitled to deference.

2. Denied. The lower court's conclusion that Defendants failed to carry their burden at trial of showing that the Plan was proportional to any legally recognizable threat was a correct application of settled law. Stockholder communication for purposes of expressing ideas and positions to the Board, including about such subjects as environmental, social and governance ("ESG") issues, is neither a "threat" nor an acceptable basis for deploying the most severe suite of defensive devices ever concocted by corporate planners.

[20] 5 A.3d 586.

STATEMENT OF FACTS

A. Williams and its Board

Williams is an Oklahoma-based Delaware corporation that owns and operates natural gas infrastructure assets.[21] As of March 2020, the Board comprised twelve members.[22]

B. Cogut Devises the "Nuclear Weapon"

In the six months preceding March 2020, Williams' stock price was relatively stagnant.[23] Beginning in March 2020, two "global" factors—neither Williams-specific—began influencing stock prices: (i) the COVID-19 pandemic; and (ii) volatility in the oil market.[24]

Around early March 2020,[25] Williams director Casey Cogut proposed to Williams management "something that was germinating in [his] mind"[26]—*i.e.*, a "novel concept, using the technology of shareholder rights plans ***to provide insulation [for] management***[.]"[27] As Cogut explained, he was "trying to put a halt for a year to ***any activism*** that distracted the board from their job of managing the

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[21] Op. 4.

[22] *Id*. 5.

[23] A0081 ¶32; A0065.

[24] Op. 6-7; A0093 ¶83.

[25] Op. 8, 10.

[26] A1766:16-24.

[27] A1770:4-11 (emphasis added).

company through the uncertainty associated with COVID," regardless of the activism's nature or benefits.[28]

As a former corporate partner at Simpson Thacher & Bartlett LLP who helped clients adopt pills roughly a dozen times beginning in the 1980s,[29] Cogut understood the genesis and evolution of poison pills.[30] He recognized that the original "concept" for pills was to protect companies from hostile takeovers and that they originated in response to front-loaded, two-tier tender offers.[31]

Cogut confirmed, however, that the Plan was never intended or designed to address takeover threats.[32] Rather, Cogut's "novel rights plan"[33] was "a different type of pill,"[34] specifically designed to insulate Williams from activism for a year:

> Q. So as far as you were concerned, up until the time this pill was put in, there's ***no precedent for the idea of having a rights plan that was focused not on a potential change of control but, instead, on limiting activity of potential activists***; is that right?
>
> A. ***Correct***[…]
>
> Q. So you conceptualized this as sort of a ***new step in the evolution of pills***; right? Just like the 5 percent pill is used to protect NOLs, your

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[28] A1772:6-A1773:20 (emphasis added).

[29] Op. 8.

[30] A1754:5-17.

[31] Op. 8-9.

[32] A1765:19-23; A1794:16-19.

[33] A1847:3-5.

[34] A1766:5-A1766:8.

> idea was that ***this was a new use to protect against activists during COVID***; correct?
>
> A. ***Right***.
>
> Q. And you thought it was ***so novel that everybody should consider doing it***; right?
>
> A. ***Yes***.[35]

To halt all activism for a year,[36] Cogut armed the Plan with a 5% trigger despite "full[y] knowing that the 5 percent [trigger] was novel."[37]

Cogut volunteered at trial that his Plan was a "***nuclear weapon of corporate governance[.]***"[38] And despite admitting that "there's nothing inherently wrong with ***most*** activism"[39] and some activism is socially useful,[40] Cogut admitted he made no distinctions among types of activism.[41] Rather, he hoped to impose a "one-year moratorium" on ***all*** activism.[42]

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[35] A1770:12-A1771:4 (emphasis added).

[36] A1772:15-A1772:22; B0697 116:16-23.

[37] A1856:10-23; *see also id.* at A1756:11-A1757:2 (Cogut had no "precedent" for a 5% trigger outside the NOL context); A1781:8-12 (same).

[38] A1815:10-20 (emphasis added); *see also id.* at A1815:21-24.

[39] A1775:16-18 (emphasis added).

[40] A1774:7-10.

[41] Op. 10; A1773:21-A1776:6.

[42] Op. 10; A1819:11-18; *see also* A1855:22-A1856:23.

C. Cogut Sells the "Nuclear Weapon" to Williams Management

Cogut proposed his anti-activism Plan to Williams General Counsel Lane Wilson.[43] Wilson approached the Company's litigation counsel Davis Polk & Wardwell LLP ("Davis Polk"), who "tuned up" Williams' on-the-shelf pill and sent Wilson the revised version on March 11, 2020.[44] Cogut then socialized the Plan among Williams senior management, including CEO and director Alan Armstrong, who Cogut expected to support the Plan because Armstrong had "barely survived" a prior activist "attempt to get him fired."[45]

Wilson also asked Cogut to discuss the Plan with Board Chairman Stephen Bergstrom, who lacked any experience with poison pills[46] and had expressed concerns regarding the novel Plan.[47] Cogut spoke with Bergstrom, but does not recall detailing any of the Plan's downsides[48] or disclosing he was not aware of any 5% pill outside the NOL context.[49]

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[43] A1765:24-A1766:11.

[44] Op. 11; B0430-B0431; B0003-B0004.

[45] Op. 11; B0001 at 1-2; B0429.

[46] Op. 11; A1778:15-17; B0430-B0431.

[47] A1777:14-21.

[48] A1784:3-6.

[49] A1781:17-20.

D. The Board Reflexively Adopts the Anti-Activist Plan

On March 17, 2020, Williams sought to schedule "an urgent special telephonic board meeting to discuss the possibility of a shareholder rights plan."[50] Although the scheduling email suggested the Board needed only one hour-long meeting on ***either*** March 18 or 19, Wilson recommended "hav[ing] a second board meeting to approve, at least a day later, ***to show appropriate consideration by the Board***."[51]

The Board convened a 75-minute meeting on March 18, at which Williams management first proposed the Plan in concept and the Board discussed certain non-Plan related issues.[52] The Board did not receive a draft of the Plan until that evening, ***after*** that day's meeting.[53] And yet, as the trial court found, "[a]lthough the Board had not yet seen a draft of the Plan, by the end of the March 18 meeting, the Board had decided to adopt it."[54] Immediately after the March 18 meeting, Williams' corporate secretary emailed Computershare Trust Company, N.A., noting that "our

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[50] B0007-B0008.

[51] B0005-B0006 (emphasis added).

[52] Op. 12-13; B0010-B0013; A1784:23-A1785:3; A2295:13-A2296:4.

[53] A2297:7-17; B0167-B0168; B0172-B0263.

[54] Op. 15.

Board will tomorrow adopt a shareholder rights plan" and asking to "chat tomorrow about Computershare's role as the rights agent."[55]

Consistent with Wilson's advice that "two meetings would look better,"[56] the Board scheduled a 60-minute meeting on March 19, at which the Board approved the Plan, and then adjourned after 40 minutes.[57]

Williams management led both meetings,[58] with Davis Polk and Morgan Stanley & Co. ("Morgan Stanley") present to "help answer questions" per Wilson's belated request on the morning of the March 18 meeting.[59] The only presentation delivered by either advisor was Morgan Stanley's March 19 presentation,[60] and the Board never consulted with either advisor regarding the Plan outside of formal meetings.[61] Morgan Stanley's March 19 presentation instructed, *inter alia*, only 2% of pills had triggers below 10% and "[n]o precedents exist below 5%," but did not cover any other Plan provisions.[62] Cogut considered the information about other pill

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[55] Op. 16; B0105.

[56] Op. 12.

[57] Op. 20; B0264-B0268.

[58] A2255:4-9; A2298:16-21.

[59] B0009.

[60] A1785:14-17; A2047:6-9; B0264-B0268.

[61] A2292:23-A2293:19.

[62] Op. 18; B0176.

triggers "irrelevant" because "this was not a traditional shareholder rights plan."[63] The Board never received any advice from Delaware attorneys.[64]

Several directors never even read the Plan, and remained oblivious to critical aspects thereof until preparing for their depositions in this Action.[65] Further, the Board never considered (i) simply installing an "on-the-shelf" pill,[66] which would have been "easily capable of being implemented"[67] and deployable within mere "hours"[68] if an actual threat emerged; or (ii) subjecting the Plan to a stockholder vote, despite conceding that nothing prevented such a vote.[69] Director Stephen Chazen admitted that failing to put the Plan to a stockholder vote was a mistake, and that he "knew better" but "was preoccupied at the time and didn't think it through."[70]

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[63] Op. 19 (quoting A1788:20-A1791:1).

[64] A2291:14-A2292:1.

[65] A1787:4-15; A1788:1-15; A1796:6-16; A1807:21-A1808:2; A2046:2-7; A2046:11-21; A2306:19-A2307:1; A0748:5-A0749:7; A0754:18-A0756:20; A0841:12-19; A0849:6-21; B0682 54:3-8; B0705 148:12-16; B0572 254:5-22; B0576 272:6-19; B0577 273:3-9; B0582 293:10-294:10.

[66] A2275:11-A2277:9.

[67] A2274:12-A2275:6.

[68] A2275:7-10; B0530 87:20-88:9.

[69] A1818:7-A1819:18; A2305:6-24; B0702 133:1-12.

[70] B0346.

Although certain directors attributed the lack of a vote to time exigency,[71] after adopting the Plan the Board never even considered a ratification vote.[72]

E. The Plan Was Adopted to Stop Unspecified Potential Activism, Not Address Any Identified Threat to Williams

The record irrefutably establishes the Plan's generalized anti-activist purpose and function.

At trial, Cogut testified that the Plan was intended to "provide insulation [for] management during the uncertainty created by the pandemic"[73] by "prevent[ing] an activist buying a toehold of 5 percent or more or acting in concert with other activists so that our management could be freed up…to use their time to run a company during COVID."[74] Director Murray Smith likewise testified that the Plan's purpose was to "protect the company from more outside pressures so we can get our job done."[75] Similarly, despite testifying that "there can be a lot of benefit gained by [activist] shareholders taking certain positions and pushing for certain types of agendas[,]"[76] director Nancy Buese confirmed that the Plan's existential purpose was to address activism.

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[71] A2264:10-16; *see also* A1818:7-13; A0849:22-A0850:8.

[72] A0571; B0528 78:3-24; A0853:19-A0854:10.

[73] A1770:8-A1771:4.

[74] A1815:21-A1816:22.

[75] A2021:14-A2022:5; *see also id.* at A2022:1-18.

[76] A2237:7-16.

The documentary record is in accord, as Board updates acknowledged the Plan was "designed to prevent an activist from acquiring 5% or more of the Company's common shares[.]"[77] Further, Bergstrom testified that the Plan and its "five percent trigger would hopefully avoid activist [] shareholders coming in and being disruptive to the company in a time where we needed the management team to focus[.]"[78] And Williams' CFO (and 30(b)(6) designee) John Chandler confirmed that "[t]he pill was designed to prevent an activist from acquiring five percent or more of the company's shares[.]"[79] Indeed, Defendants' expert Professor Guhan Subramanian conceded that "[b]ecause the pill isn't really any meaningful deterrent to a hostile bid for the full company, it must have been for the purpose of creating an orderly voice of prospective ***activists***."[80]

The record is equally clear that the Plan was not adopted in response to any specific—or even particular ***type*** of—threat. For example:

- Chandler candidly told investors: "[W]e did not adopt that [rights] plan in response to any specific threat."[81]

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[77] B0271.

[78] B0534 103:4-9.

[79] A1186:7-23.

[80] A2077:13-22 (emphasis added); *see also id*. at A2085:22-A2086:1.

[81] B0299; *see also* B0443 ("Plan was not adopted in response to any known / specific threat"). Likewise, Director Vicki L. Fuller perceived no "current threat" to Williams when the Plan was adopted. A0908:22-A0909:5.

- The Board was not trying to protect any NOLs.[82]
- The Board was not aware of any threatened takeovers, activist activities or proxy contests.[83]
- The Board was not aware of any person or group seeking to take control of, harm or exploit the Company, or otherwise opportunistically capitalize on then-present conditions.[84]

Rather, as the trial court held, "the Plan was not adopted to protect against any *specific* threat at all."[85]

Finally, the Plan was not a response to—or justified by—the market-wide dislocation or the impact thereof on Williams' stock, as Cogut testified unequivocally.[86]

F. The Plan's Terms and Features

The Plan contained three deeply problematic features: (i) the 5% Trigger; (ii) the AIC Provision; and (iii) the Passive Investor definition. As the trial court found, these features "limit[ed] the act of communicating itself, whether with other

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[82] A2047:19-22; A2299:23-A2300:2; A1250:17-21; B0629:130:7-15; B0748:140:16-20.

[83] A2054:6-14; A1250:22-A1251:12; B0521 52:13-16; B0628-B0629 128:21-129:3; B0286 ("[T]his was solely a proactive effort, that we monitor our positions frequently and that we have no indication of anyone being in our stock.").

[84] A2054:15-A2055:2; A2300:7-14; A2300:19-A2301:3; B0553-B0554 180:5-181:6; B0629 129:10-130:6; B0749 141:3-142:13; A1250:22-A1251:7.

[85] Op. 53 (emphasis in original).

[86] A1844:9-24; *see also id*. at A1794:11-15.

stockholders or management," "restrict[ed] the stockholders' ability to nominate directors," and thus "infringe[d] on the stockholders' ability to communicate freely in connection with the stockholder franchise[.]"[87] And yet, as the trial also found, these features "received little attention during the March 18 and March 19 Board meetings," and "[m]ost directors admitted they had not even read the key features of the Plan before this litigation began."[88]

1. The 5% Trigger

The Plan is triggered if any stockholder acquires "beneficial ownership" of 5% or more of Williams' stock or commences "a tender or exchange offer" that would result in their ownership reaching that threshold.[89]

In adopting the Plan to achieve Cogut's desired "one-year moratorium"[90] on activism, the Board knew its 5% triggering threshold was unprecedented outside of

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[87] Op. 45.

[88] *Id*. 21.

[89] A0494-A0495.

[90] A1819:11-18.

the NOL context.[91] As Plaintiffs' expert—experienced (typically board-side)[92] proxy advisor Joseph Mills—testified, this 5% cap, particularly in combination with the AIC Provision, made it substantially more difficult for stockholders to obtain the support needed to seek change at Williams.[93] Indeed, Bergstrom testified that the Board chose the 5% trigger to give the Plan "teeth."[94]

The market recognized the 5% trigger's extraordinary nature, with Institutional Shareholder Services ("ISS") characterizing it as a "hair-trigger" and declaring it: (i) "problematic, as it is highly restrictive";[95] and (ii) "also low in a relative sense; 14 companies (including The Williams Companies) adopted poison pills between March 13 and March 31 in response to the pandemic. Boards at the other 13 companies all adopted triggers ranging from 10 to 20 percent."[96]

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[91] A1756:11-A1757:2; A1781:8-12; A1790:20-A1791:1; A2047:10-13; A2048:15-A2049:5; B0176; B0437 (investor Q&A document stating: "We acknowledge that 5% is unusual"); B0690 87:20-88:3; B0698 118:1-22; B0557 195:15-22; B0571 251:15-19; B0758 173:25-174:7; B0769 217:20-218:1; A0727:4-A0728:2. When the Plan was adopted, only one other non-NOL pill with a trigger this low had ***ever*** been deployed by a U.S. company. That pill responded to a campaign launched by an activist holding approximately 7% of the company. B0406-B0407, ¶47.

[92] A1880:23-A1882:1.

[93] A1893:21-A1894:24; B0420, ¶70.

[94] B0534 103:4-9; B0556 191:9-20.

[95] A0096 ¶92; A0568.

[96] A0095-A0096 ¶91; A0571.

An April 8, 2020 ISS "Research Note" regarding poison pills adopted in response to the COVID-19 pandemic identified Williams' Plan as the outlier among the 21 such pills, ***20*** of which had triggers between 10% and 32%.[97] Further, 13 of the 20 non-Williams pills—including those adopted by Williams peer companies Delek US Holdings and Occidental Petroleum, which faced the same disruptive market forces confronting Williams[98]—were adopted in response to live activist engagements.[99]

2. *The AIC Provision*

The Plan contains a sweeping AIC Provision.[100] Cogut explained that the provision is "meant to control behavior"[101] by "prevent[ing] people from getting together and working together in a manner that's meant to be prevented by the 5 percent threshold…you know, working together to change or influence the control of the company…. The way it's supposed to work is to not have people knowingly do that."[102] The Plan gives the Board and management "very broad" latitude for

[97] B0314.

[98] A0570.

[99] B0314.

[100] A0088 ¶70.

[101] B0702 136:13-16.

[102] B0702 136:17-24.

determining whether stockholders are "acting in concert."[103] As Subramanian stated, the AIC Provision "necessarily leaves the discretion in the [B]oard's hands."[104]

The AIC Provision also contains a "daisy chain" provision, stating: "A Person who is Acting in Concert with another Person shall be deemed to be Acting in Concert with any third party who is also Acting in Concert with such other Person."[105] This allows the Board to trigger the Plan any time they perceive parallel conduct among stockholders collectively holding over 5%, regardless of whether those stockholders are even aware of each other's existence—making it virtually impossible for stockholders to determine with whom the Board might decide they were acting in concert.[106]

Buese testified it would not make sense for two stockholders who do not even know one another to be aggregated under the Plan,[107] but acknowledged that the Plan does precisely that.[108] When asked how stockholders can know when they are

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[103] B0654 231:3-6, 232:4-16.

[104] A2102:7-16; *see also* A2368:15-22 ("The [B]oard determines who would be acting in concert" under the Plan).

[105] A0088 ¶70.

[106] A1896:8-A1897:15; B0414-B0415, ¶¶59-60; A2392:18-A2393:3; A2106:13-17; A1803:18-A1804:2; A1804:14-18.

[107] A2309:4-8; A2309:23-A2310:7.

[108] A2309:9-14; A2310:16-A2311:14.

potentially acting in concert, Smith admitted: "They don't."[109] Cogut agreed there is no realistic way for stockholders to ascertain—let alone conclusively—with whom they are acting in concert under the Plan.[110]

In sum, as Buese conceded, the AIC Provision imposes limitations and restrictions not only on stockholder communication rights, but also stockholder voting rights.[111] And yet, the Board rendered itself largely ignorant of these issues when adopting the Plan. Cogut never even looked at the AIC provision until after learning about this lawsuit.[112] Similarly, Smith had not even heard of the AIC Provision until preparing for his November 2020 deposition.[113] Fuller did not know the AIC Provision was in the Plan when voting to approve it and could only "guess"—based on information learned in deposition preparation—why it was included.[114] Bergstrom confirmed "there was never any discussion" about the AIC Provision.[115]

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[109] B0658 245:4-9.

[110] A1803:18-A1804:2; A1804:14-18.

[111] A2285:13-A2286:2.

[112] A1788:1-7; A1796:6-16.

[113] A2046:11-21.

[114] A0748:5-12; A0754:18-A0755:17.

[115] B0572 254:5-22; B0582 293:10-294:10.

3. The Passive Investor "Exception"

The Plan carves "Passive Investors" out of the definition of "Acquiring Persons" subject to the Plan.[116] The carve-out "was intended to ensure that truly passive investors would be exempt from the definition of Acquiring Person under the Plan,"[117] whether or not they filed a Schedule 13G.[118] The Board viewed the Passive Investor definition as a key mitigating feature of the Plan.[119] Indeed, Cogut was "especially upset" that ISS's summary "failed to mention the exclusion for the passive investors."[120]

The Board never actually considered the Passive Investor definition when adopting the Plan. Smith never read it before voting to adopt it.[121] Cogut did not review it until preparing for his deposition.[122] Bergstrom was unaware of it.[123]

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[116] A0087 ¶69.

[117] Op. 27.

[118] A1807:11-16; A2306:1-3; A2306:15-18; *see also* B0002.

[119] A2247:17-A2248:9; A2306:4-14.

[120] A1858:12-20.

[121] A2046:2-7.

[122] A1788:8-15; A1807:21-A1808:2.

[123] B0576 272:6-19; B0577 273:3-9.

Fuller never "focused" on it and had no recollection of it being presented to the Board.[124] And the Board never discussed it in detail, if at all.[125]

Had the Board read the Passive Investor definition, they would have realized that in listing its three requirements in romanettes (i) through (iii), it "uses 'and' before romanette (iii), which makes the three requirements conjunctive" such that "a stockholder must meet all three conditions to qualify as an exempt 'Passive Investor.'"[126] Thus, as the trial court found, "the carve-out is far more exclusive" than intended,[127] and "as most of the defense witnesses testified, this conjunctive language appears to have been a mistake."[128]

Despite acknowledging that this error could be easily fixed by replacing the word "and" before romanette (iii) with the word "or,"[129] the Board never discussed or addressed the mistake.[130] And yet, as the trial court held (and Defendants' expert conceded[131]), even under the disjunctive formulation the Board purportedly

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[124] A0841:16-19; A0849:6-21.

[125] A2306:19-A2307:1.

[126] Op. 28.

[127] *Id.*

[128] *Id.* (citing A1808:3-A1810:15 (acknowledging there is a "typo")); A2307:9-A2308:13; A2399:21-A2401:15.

[129] A2308:7-13.

[130] A2308:24-A2309:3; *see also* A1811:11-16; A1812:5-21.

[131] A2207:21-A2208:8.

intended, the Plan's "Passive Investor Definition is quite narrow,"[132] excluding "at most [] three investors."[133]

G. Stockholders and the Market Rebuke the Plan

The Board correctly anticipated that the market and stockholders would rebuke the Plan.[134]

For example, on April 8—after discussions with Williams[135]—ISS recommended that stockholders vote against Bergstrom's re-election at Williams' April 28, 2020 annual meeting given the Plan.[136] ISS noted, "the pill was not a reaction to an actual threat – real or perceived – of an activist investor or hostile bidder."[137] ISS further opined that "the board did not appear to consider other alternatives," that "[w]hen ISS asked the company whether it had considered a shorter term, the answer appeared to be 'no,'" and that "[w]hen ISS asked the company whether it had considered adopting a more standard pill with a higher

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[132] Op. 29.

[133] *Id.*

[134] *Id.*; A2251:20-A2252:10; B0170.

[135] B0306-B0307.

[136] Op. 29-30; A0568.

[137] Op. 30; A0569.

trigger and using its upcoming annual meeting to seek shareholder ratification of its 5 percent plan, the answer appeared to be 'no.'"[138]

"After recognizing on April 7, 2020 that 'initial votes [were] trending against' Bergstrom due to anti-Plan backlash,"[139] Williams launched a robust stockholder outreach campaign to preserve his Board seat.[140] Williams executives and directors met with stockholders "to turn around some of the votes that ha[d] been cast and shore up the vote[.]"[141] Nevertheless, nearly one-third of votes cast—over 321 million—were against Bergstrom,[142] who was re-elected by "a slim margin—only 67% of the shares were cast in favor[.]"[143]

H. The Board's Failure to Even Consider Terminating the Plan Early

The Board could have redeemed (or amended) the Plan at any time,[144] and Williams stockholders requested that it do so.[145] And yet, despite not identifying

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[138] Op. 30; A0571.

[139] Op. 30; A0554.

[140] Op. 30; B0308-B0309; B0310-B0311; A0554.

[141] A0554; B0316-B0333.

[142] B0337-B0340; B0341-B0344.

[143] Op. 32; B0338.

[144] A2312:3-6; B0372, Response to Interrogatory No. 19; s*ee also, e.g.*, B0785 282:7-11.

[145] B0348 ("Terminating early would require Board approval. This issue was raised by several of our shareholders during our recent engagements with them.…");

any new threat since adopting the Plan,[146] and further notwithstanding that the "market dislocation" in Williams shares had entirely reversed itself, "outside of the context of privileged discussions concerning this litigation, the Board never considered redeeming the Plan."[147]

The Board's categorical refusal to even ***consider*** whether to redeem the Plan is particularly stark given Williams' financial performance and the fact that, as Cogut testified, "the market has clearly corrected itself and our stock is selling in the neighborhood that it was selling for at the beginning of last year…."[148]

B0335 (Maple Brown Abbott asked Williams to "consider terminating [the Plan] now").

[146] A2312:7-12.

[147] Op. 34; *see also* A2312:13-20; A0857:19-A0858:13; A0859:9-14; A0876:16-877:17, A0882:6-20; B0602 24:14-24; B0530 85:14-18.

[148] A1826:23-A1827:2; *see also* A2212:8-12 (agreeing that Williams' stock has substantially recovered).

PX Demonstrative 1

The fact that "Williams' stock price ha[d] substantially recovered"[149] reflected the Company's stable and largely unaffected performance. Indeed, on November 2, 2020, Williams reported Third-Quarter 2020 financial results, disclos[ing] that "[s]trong 3Q 2020 results demonstrate stability and predictability of business," and "[n]atural gas focused strategy delivers strong, predictable results."[150] Armstrong further stated that "[t]he ongoing stability of our financial performance continues to distinguish Williams during a year marked by disruption and uncertainty[.]"[151] Buese confirmed the same, agreeing that Williams had ***distinguished*** itself from its

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[149] Op. 34.

[150] A0099 ¶105.

[151] *Id.*

peers through its stable, strong, predictable performance,[152] and that the Company had ***exceeded*** its pre-COVID financial guidance for 2020.[153]

And yet, the Board never considered withdrawing the Plan.

I. This Action

Plaintiffs Steven Wolosky and City of St. Clair Shores Police and Fire Retirement System filed actions challenging the Plan on August 27 and September 3, 2020, respectively.[154] The trial court granted expedition on September 8 and consolidated the two actions on September 15.[155] On November 11, 2020, over Defendants' objection, the trial court certified a class defined as: "all record and beneficial holders of company common stock who held stock as of March 20, 2020, and who continue to hold stock through and including the date on which the rights plan expires or is withdrawn, redeemed, exercised or otherwise eliminated," excluding Defendants.[156] A three-day trial was held from January 12-14, 2021, involving live testimony from four fact and three expert witnesses.[157] The record

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[152] A2311:15-18; A2311:23-A2312:2; *see also* B0784 279:1-19, 280:2-12.

[153] A2239:1-A2239:4; *see also* A2018:16-A2019:1; A2020:19-24.

[154] Op. 35.

[155] *Id.*

[156] *Id.* 35-36.

[157] *Id.* 3, 36.

also comprises 206 trial exhibits, deposition testimony from eight fact and three expert witnesses, and one hundred fact stipulations.[158]

[158] *Id*. 3.

ARGUMENT

I. THE COURT BELOW CORRECTLY IDENTIFIED *UNOCAL* AS THE STANDARD APPLICABLE TO PLAINTIFFS' CHALLENGE TO THE ADOPTION OF A POISON PILL

A. Question Presented

Did the trial court correctly determine that the intermediate standard of review of *Unocal*[159] applied to the Plaintiffs' challenge to the Plan's adoption?

B. Standard of Review

"[T]he applicable standard by which the defendants' conduct is to be judged...is a legal question...subject to *de novo* review by this Court."[160]

C. Merits of Argument

Consistent with thirty-five years of Delaware jurisprudence, most recently reiterated by this Court in *Selectica II*, the trial court correctly held that *Unocal* provided the proper standard of review to consider the Board's adoption of and failure to redeem the Plan.[161]

Defendants' argument that the Board's adoption and maintenance of the Plan should be subject to business judgment review—three decades of precedent to the contrary notwithstanding—is meritless. Defendants' argument that the trial court erred "because the core rationale for enhanced scrutiny under *Unocal* was absent"

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[159] 493 A.2d 946 (Del. 1985).

[160] *Nixon v. Blackwell*, 626 A.2d 1366, 1375 (Del. 1993).

[161] Op. 47-48.

rests on the mistaken premise that "'the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders'" exists only "during contests for corporate control[.]"[162]

The problem for Defendants is that appellees in *Selectica II* made this precise argument:

> The Board's actions in this case do not call for *Unocal*'s enhanced scrutiny for the simple reason that the NOL Pill was not a device designed to ward off takeovers or to entrench the Board in office .... The 'omnipresent specter' of *Unocal* is not present where the issue before the Board was not prevention of a takeover but rather protection of a corporate asset that was potentially valuable to all stockholders.[163]

And this Court summarily rejected it:

> The *Unocal* two part test is useful as a judicial analytical tool because of the flexibility of its application in a variety of fact scenarios. Delaware courts have approved the adoption of a Shareholder Rights Plan as an antitakeover device, and have applied the *Unocal* test to analyze a board's response to an actual or potential hostile takeover threat. Any NOL poison pill's principal intent, however, is to prevent the inadvertent forfeiture of potentially valuable assets, not to protect against hostile takeover attempts. Even so, ***any Shareholder Rights Plan, by its nature, operates as an antitakeover device. Consequently, notwithstanding its primary purpose, a NOL poison pill must also be analyzed under*** **Unocal** because of its effect and its direct implications for hostile takeovers.[164]

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[162] Appellants' Opening Brief ("Op. Br.") 19 (quoting *Unocal*, 493 A.2d at 954).

[163] B0484-B0485, at 27-28 (citations omitted).

[164] *Selectica II*, 5 A.3d at 599 (emphasis added).

Selectica II squarely holds that ***all*** challenged rights plans are subject to *Unocal* scrutiny. Indeed, "both [the] Court [of Chancery] and the Supreme Court have used *Unocal* exclusively as the lens through which the validity of a contested rights plan is analyzed," "includ[ing] cases in which a rights plan has been used outside of the hostile takeover context."[165] If an ordinary pill is subject to *Unocal* review, the notion that this "nuclear missile" Plan, with its "extreme, unprecedented collection of features" that extended "a considerable distance beyond the ordinary poison pill"[166] warrants business judgment review makes no sense.

Defendants' argument that the trial court "paraphrased"[167] *Selectica II* is wrong.[168] So too is Defendants' argument that *Selectica II* "did not consider whether *Unocal* would apply where, as here, a rights plan was adopted on a clear day, not in response to any specific action already taken, and where the plan was not designed to operate, and could not effectively operate, as an antitakeover device."[169] Rather, "the application of the *Unocal* doctrine does not depend on what corporate strategy the board is protecting or whether the defensive measure was adopted before an

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[165] *Third Point LLC v. Ruprecht*, 2014 WL 1922029, at *15 (Del. Ch. May 2, 2014); *see also eBay*, 16 A.3d at 28 ("Enhanced scrutiny has been applied universally when stockholders challenge a board's use of a rights plan as a defensive device.").

[166] Op. 78, 88-89.

[167] Op. Br. 20.

[168] Op. 47 n.239.

[169] Op. Br. 20.

actual takeover threat emerged."[170] Authorities post-dating *Selectica II* confirm that *Unocal* is not limited to the takeover context and indeed provides the standard of review in the anti-activist pill context.[171] This is consistent with this Court's observation that the utility of *Unocal* review derives from "the flexibility of its application in a variety of fact scenarios,"[172] not merely takeovers.

Defendants claim entitlement to business judgment review because there was no takeover threat (and thus no specific threat to the Director Defendants' incumbency) and argue that the trial court inappropriately "expanded the concept of entrenchment."[173] Wrong. *Unocal* "rests in part on an 'assiduous...concern about

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[170] Vice Chancellor Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures In Stock-For-Stock Merger Agreements*, 56 BUS. LAW. 919, 934 (2001); *see also id*. ("The *Moran* case held that the adoption of a defensive measure on a clear day to protect corporate inertia was subject to *Unocal* review."); *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 477-81 (Del. Ch. 2000) (applying *Unocal* review to defensive measure adopted where "there [was] no record evidence to support a finding that any such [inadequate and coercive two-tiered, front-end loaded tender] offer was imminent").

[171] *Third Point*, 2014 WL 1922029, at *15 & n.10 (applying *Unocal* to an anti-activist poison pill, observing that Delaware courts have "used *Unocal* exclusively as the lens through which the validity of a contested rights plan is analyzed" and that "[t]his includes cases in which a rights plan has been used outside of the hostile takeover context"); *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 330-36 (Del. Ch. 2010) (applying *Unocal* to an anti-activist poison pill).

[172] *Selectica II*, 5 A.3d at 599; *see also Paramount Commc'ns, Inc. v. Time*, 571 A.2d 1140, 1153 (Del. 1990) ("The usefulness of *Unocal* as an analytical tool is precisely its flexibility in the face of a variety of fact scenarios.").

[173] Op. Br. 22.

defensive actions designed to thwart the essence of corporate democracy by disenfranchising shareholders.'"[174] It was "explicitly designed to give this court the ability to use its equitable tools to protect stockholders against unreasonable director action that has a defensive or entrenching ***effect***" and has been "applied…with a special sensitivity towards the stockholder franchise."[175] And for good reason: Delaware law recognizes that the stockholder franchise is the "'ideological underpinning upon which the legitimacy of the directors managerial power rests.'"[176]

After carefully parsing the trial record, the court below made express factual findings that: (i) the Director Defendants "acted with the purpose of insulating the Board and management from stockholder influence during a time of uncertainty,"[177] and (ii) the Plan "limit[ed] the act of communicating itself, whether with other stockholders or management" and "restrict[ed] the stockholder's ability to nominate directors," thus "infring[ing] on the stockholders' ability to communicate freely in

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[174] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 67 (Del. 1995) (quoting *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1378 (Del. 1995)).

[175] *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 258-69 (Del. Ch. 2013) (emphasis added); *see also Selectica II*, 5 A.3d at 599 (all rights plans, "by…nature," have a potentially entrenching "effect").

[176] *Coster v. UIP Cos., Inc.*, ---A.3d---, 2021 WL 2644094, at *7 (Del. June 28, 2021) (quoting *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2003)) (emphasis added).

[177] Op. 48 n.240; *see also id*. 57-61.

connection with the stockholder franchise[.]"[178] Because "stockholder activism is intertwined with the stockholder franchise" and because the Plan was expressly designed to impose a "one-year moratorium" on all activism,[179] the trial court concluded that the Plan had an entrenching effect, bringing it within the ambit of *Unocal*. These factual findings—none of which are clearly erroneous—are entitled to substantial deference.[180]

Thus, the trial court correctly held "that the Board's compliance with their fiduciary duties in adopting and then failing to redeem the Plan must be assessed under *Unocal*."[181]

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[178] *Id*. 45.

[179] *Id*. 57, 65.

[180] *See infra* nn. 183-187, 189.

[181] Op. 47-48.

II. THE COURT OF CHANCERY CORRECTLY APPLIED THE GOVERNING LAW TO INVALIDATE THE PLAN

A. Question Presented

Did the trial Court correctly apply the *Unocal* intermediate standard of review to its well-grounded factual findings to invalidate the Plan?

B. Standard of Review

The "review of a trial court's application of enhanced scrutiny to board action necessarily implicates a review of law and fact."[182] The "deferential 'clearly erroneous' standard applies to findings of historical fact,"[183] including "historical facts that are based upon credibility determinations" as well as "findings of historical fact that are based on physical or documentary evidence or inferences from other facts."[184] "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[185] "The Court of Chancery's factual findings will be accepted if 'they are sufficiently supported by the record and are the product of an orderly and logical deductive process.'"[186] Moreover, this Court affords "substantial deference" where, as here, factual determinations are

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[182] *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015).

[183] *Id*.

[184] *Id*. (quoting *Bank of N.Y. Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011)).

[185] *Id*.

[186] *Unitrin*, 651 A.2d at 1385 (quoting *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

based on the trial court's evaluation of expert testimony.[187] Although the "Court of Chancery's legal conclusions are reviewed *de novo*,"[188] its determination regarding directors' purported breaches of fiduciary duty—"being fact dominated"—is, "on appeal, entitled to substantial deference unless clearly erroneous or not the product of a logical and deductive process."[189]

C. Merits of Argument

The trial court correctly applied Delaware law and properly articulated the standard under *Unocal*.[190]

After a three-day trial, the trial court found that the Director Defendants breached their fiduciary duties under *Unocal* when adopting the Plan.[191] The Court found that the Board failed to show that the Plan's "extreme, unprecedented collection of features"—*i.e.*, the 5% trigger, the AIC provision, and the daisy-chain feature—fell "within the range of reasonable responses" to any recognizable threat.[192] Nowhere did the trial court suggest, much less conclude, that the Board

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[187] *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999).

[188] *RBC*, 129 A.3d at 849.

[189] *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 154 (Del. 1996) (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993)).

[190] Op. 48-51.

[191] *Id*. 89.

[192] *Id*. 88-89.

was required to adopt the "least restrictive" rights plan.[193] Nowhere did the trial court mention, much less apply, the "compelling justification" standard[194] articulated in *Blasius Industries, Inc. v. Atlas Corp.*[195] These, along with Defendants' other grounds for appeal, ignore that the trial court's conclusion was a straightforward application of settled law.

The Director Defendants did not carry their burden of demonstrating that their response (whether or not reasonable) was a reaction to an identified threat, and, in particular here, much less a valid threat recognized by the law. A fair reading of the Court's thorough opinion suggests the Director Defendants also failed that test,[196] but the Court never reached that holding, assuming instead that the Director Defendants ***did*** identify a legitimate purpose, notwithstanding that only one (Buese) appears to have even mentioned the "threat" the Court "assumed" was valid in conducting its analysis.[197]

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[193] Op. Br. 36-37.

[194] *Id*. 30-31.

[195] 564 A.2d 651 (Del. Ch. 1988).

[196] Op. 76, 77.

[197] A2302:16–17.

1. *The Trial Court's Factual Findings Concerning the "Threats" Purportedly Identified By the Board Are Entitled to Substantial Deference*

Defendants want this Court to conclude that, in carefully parsing the trial record to divine precisely what the Board actually believed to be the "threat" they were responding to, the trial court erred. Rather, the trial court predicated its *Unocal* analysis on the factual finding that "the lawyer-drafted documents to which one would typically look for a statement of a board's purpose—*e.g.*, board resolutions, board minutes, company disclosures—[did] not reflect the Board's actual intent."[198] In the absence of any "unitary danger"[199] the Board actually identified, the trial court carefully considered the testimony of the five testifying Director Defendants, most of which was inconsistent, and some of which conflicted. The trial court concluded that the Board had identified three "purely hypothetical" threats: (i) "the desire to prevent stockholder activism during a time of market uncertainty and a low stock price"; (ii) "the concern that activists might pursue 'short-term' agendas or distract management"; and (iii) "the concern that activists might rapidly accumulate over 5% of the stock[.]"[200]

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[198] Op. 52.

[199] Op. Br. 27.

[200] Op. 63.

Defendants "do not dispute that such themes are supported by the evidence" but instead complain that the trial court "broke the connected themes in the Board's reasoning apart" and failed to "analyze this objective holistically, as the Board had done[.]"[201] Wrong. There simply was no "clear identification of the nature of the threat," an "obvious requisite to determining the reasonableness of a defensive action."[202] Rather, the trial court concluded that the Board's actual purpose was not reflected in any board resolutions, board minutes, or company disclosures.[203] The trial court further concluded, based on an exhaustive review of deposition and trial testimony, that each Director Defendant provided her/his own "gloss" on the supposed threat, from which distinct themes emerged.[204] "Those findings are not clearly erroneous" and "[t]hey are supported by the record and the result of a logical deductive reasoning process."[205] Defendants' suggestion that the trial court improperly "substituted its own business judgment in assessing the nature of the threat" rather than "defer[] to the Board's determination" ignores the trial court's well-reasoned factual findings that the Board made no such unitary determination.[206]

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[201] Op. Br. 27-28.

[202] *Paramount*, 571 A.2d at 1154.

[203] Op. 52.

[204] *Id*. 57-62.

[205] *Selectica II*, 5 A.3d at 601.

[206] Op. Br. 28.

2. *The Trial Court Correctly Concluded That Hypothetical Threats of Stockholder Activism and Short-Termism Were Not Cognizable Under* Unocal

Defendants' argument that the trial court erred in "conclud[ing] that stockholder activism and short-termism/distraction were not cognizable threats under Delaware law" is similarly misguided.[207] The Opinion does not, as Defendants suggest, preclude directors from enacting reasonable "prophylactic defensive mechanisms" in response to threats to the corporate enterprise,[208] and Defendants' authorities merely reflect the unremarkable proposition that pills may be adopted in appropriate circumstances not present here.[209] Indeed, the trial court acknowledged "that certain conduct by activist stockholders might give rise to a cognizable threat" and "that a Board can adopt defensive measures in response to concrete action by a stockholder activist."[210] Rather, the Opinion reinforces the uncontroversial

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[207] *Id*. 29.

[208] *Id*.

[209] *Unitrin*, 651 A.2d at 1388 (board identified threat of substantive coercion from inadequate offer); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985) (board perceived environmental threat in the market place of coercive two-tier tender offers); *Gaylord*, 753 A.2d at 478 (board identified threat of "an inadequate and coercive two-tiered, front-end loaded tender offer" resulting from "the upcoming expiration of the [company's] dual class voting structure"); *Nomad Acq. Corp. v. Damon Corp.*, 1988 WL 383667, at *1 (Del. Ch. Sept. 20, 1988) (rights plan adopted by target after 13D disclosed that filer "was considering a variety of options relating to its investment, including the seeking of control of [target] through a negotiated transaction, a tender offer, or by some other means").

[210] Op. 65, 70-71.

proposition that "directors must demonstrate that they acted in good faith to achieve a 'legitimate corporate objective.'"[211]

The trial court correctly determined that thwarting the hypothetical specter of stockholder activism, short-termism or distraction were not "legitimate corporate objectives" warranting adoption of a "nuclear missile" Plan.[212] At its core, the hypothetical "threat" of unknown activism sweeps too broadly. Many forms of activism may benefit a corporation as Plaintiffs' expert explained and the trial court credited.[213] Defendants do not contest this finding,[214] which is entitled to "substantial deference."[215] Moreover, "stockholder activism is intertwined with the stockholder franchise,"[216] which rights this Court considers "sacrosanct."[217] Thus, treating activism (and by extension, short-termism and disruption) as a "threat" under *Unocal* requires a board to actually identify a "specific,"[218] "clear,"[219] or

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[211] *Id*. 48 (citation omitted).

[212] *Id*. 64.

[213] Op. 64 n.305 (citing B0394-B0395 ¶31).

[214] *See* A1774:7-10; A2237:2-16, A2282:17-23.

[215] *Schock*, 732 A.2d at 224.

[216] Op. 64.

[217] *Coster*, 2021 WL 2644094, at *7 n.43 (quoting *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012)).

[218] *Selectica II*, 5 A.3d at 606.

[219] *Paramount*, 571 A.2d at 1154.

"concrete"[220] threat against which it may tailor a reasonable defensive response. Defendants' argument that directors should be able to "pre-plan for the possibility that an activist might emerge and take such [concrete] action"[221] ignores this obligation, and Defendants' invocation of *Moran* and *Gaylord* is misguided for the reasons articulated in note 170 above. Further, the quibbles with the trial court's characterization of the cases enumerated on page 32, note 6 of Appellants' Opening Brief are waived.[222]

Defendants' suggestion that the trial court erred by purportedly surreptitiously reviewing the Director Defendants' conduct under the "compelling justification" standard in *Blasius* is misleading and nonsensical.[223] *Blasius* appears nowhere in the Opinion. Rather, Defendants theorize that the trial court's citation to *Pell v. Kill*[224] supplies the connective tissue. However, *Pell* relies on *Mercier v. Inter-Tel (Delaware), Inc.*,[225] in which then-Vice Chancellor Strine set forth the "obvious proposition" that "[t]he notion that directors know better than the stockholders about

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[220] Op. 70.

[221] Op. Br. 32.

[222] *See, e.g.*, *Murphy v. State*, 632 A.2d 1150, 1152 n.2 (Del. 1993) ("The rules of this Court provide that footnotes shall not be used…to raise claims of error.").

[223] Op. Br. 30-31.

[224] 135 A.3d 764 (Del. Ch. 2016).

[225] 929 A.2d 786 (Del. Ch. 2007).

who should be on the board is no justification at all."[226] This proposition—upon which the Opinion relies—is an "obvious" one, and then-Vice Chancellor Strine made this observation in connection with "employ[ing]…a reasonableness standard consistent with the *Unocal* standard."[227]

Defendants' related argument that "the Court of Chancery's determination that 'hypothetical' short-termism and its attendant distractions can *never* be cognizable threats" is wrong.[228] To the contrary, the trial court acknowledged that "short-termism or distraction could be deemed cognizable threats under Delaware law."[229] What the trial court appropriately declined to do was supply the "specific," "clear," or "concrete" threat of short-termism and distraction that the Board failed to actually identify and for good reason: the Board identified no such threat.[230] That factual finding is supported by the record and the product of an orderly and logical deductive process, and thus entitled to substantial deference.[231] Similarly, Defendants' suggestion that the trial court ignored the "unprecedented" circumstances facing Williams is both wrong and belied by the factual record, given

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[226] *Id*. at 811.

[227] *Id*. at 810.

[228] Op. Br. 33.

[229] Op. 72.

[230] *Id*. 73.

[231] *Unitrin*, 651 A.2d at 1385.

that many energy companies facing the same "global pandemic, coupled with a global energy crisis" as Williams adopted less restrictive pills in response to live activist engagements.[232]

Finally, Defendants erroneously conflate the trial court's factual finding that "there [were] no 'specific, immediate' activist play[s] seeking short-term profit or threatening disruption"[233] with the supposed "maxim that directors *must* 'maximize the value of the corporation over the long-term'"[234] without regard to context. Even if this were a "maxim," the trial court did not "ignore" it.[235] Rather, Defendants ignore that *Trados* and similar authorities made these pronouncements through examination of alleged fiduciary breaches in the context of short-term-oriented decisions.[236] Accordingly, these authorities recognize that this "duty" is highly fact-

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[232] *Compare* Op. Br. 33 *with* n. 99, *supra* and accompanying text.

[233] Op. 73.

[234] Op. Br. 33 (quoting *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013)) (emphasis added).

[235] Op. 72 ("Reasonable minds can dispute whether short-termism or distraction could be deemed cognizable threats under Delaware law.").

[236] *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *41-43 (Del. Ch. Oct. 16, 2018) (examining challenge to sale of company prompted by activist fund seeking to quickly exit its investment); *Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 WL 1437308, at *17-19 (Del. Ch. Apr. 24, 2017) (examining conflict between short-term oriented preferred stockholders desiring to use corporate funds and asset sale to fund redemptions and long term-oriented common stockholders seeking to maximize company's long-term value); *Trados*, 73 A.3d at 28-34 (examining conflict between short term-oriented preferred stockholders desiring sale

dependent and, in any event, "does not always mean acting to ensure the corporation's perpetual existence."[237] It certainly does not entitle fiduciaries to adopt an "extreme" and "nuclear missile" poison pill in response to "hypothetical" activism "untethered to any concrete event[.]"[238] Even if Defendants were correct that "the distraction of short-term activism can cause significant harm,"[239] the Board's failure to actually identify any such activism and attendant harm cannot justify its adoption a "nuclear" pill in response. Defendants' authorities, which involved concrete and specific harms identified by a board, are not to the contrary.[240]

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and long term-oriented common stockholders desiring to maintain status quo in the context of an offer to acquire the company for the value of the preferred stockholders liquidation claim); *TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290, at *11 (Del. Ch. Mar. 2, 1989) (considering when, if ever, a board must abandon its long-run strategy in the face of a hostile tender offer).

[237] *See, e.g.*, *Hsu*, 2017 WL 1437308, at *19.

[238] Op. 73, 78.

[239] Op. Br. 34.

[240] *Unitrin*, 651 A.2d at 1384 ("The record reflects that the Unitrin Board perceived the threat from American General's Offer to be a form of substantive coercion."); *Polk v. Good*, 507 A.2d 531, 533-37 (Del. 1986) (board identified cognizable threat under *Unocal* based on "disruptive effect and the potential long-term threat" posed by known takeover artist poised to make a "hostile" move against the company); *Cheff v. Mathes*, 199 A.2d 548, 551 (Del. 1964) (board identified cognizable threat under *Unocal* based on substantial stockholders' "threat[s] to liquidate the company or substantially alter [its] sales force"); *Air Prod. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 112 (Del. Ch. 2011) (board identified cognizable threat under *Unocal* based substantive coercion from inadequate offer). *Cf. Williams v. Geier*, 671 A.2d 1368, 1377 (Del. 1996) (*Unocal* inapplicable to challenged defensive measure approved by stockholder vote).

3. *The Trial Court Correctly Concluded that the Plan Did Not Fall Within a Range of Reasonableness*

The trial court correctly concluded that Defendants failed to prove that the Plan fell within the range of reasonable responses to the supposed threat of "lightning strikes,"[241] *i.e.*, the theoretical ability of a hostile acquiror to obtain over 5% of Williams' stock quickly and within the ten-day period under the federal disclosure regime before reporting its ownership. Notably, this conclusion rests on the trial court's generous assumptions that: (i) a board could properly adopt such a "gap-filling" pill under *Unocal*; and (ii) the Plan here was, in fact, meant to serve that purpose. Having found that the bulk of the (vague and non-recorded) "threats" the Board actually identified would fail *Unocal* scrutiny, the trial court nonetheless gave the Board the benefit of the doubt and ***assumed*** it had identified a legally cognizable "threat" to "corporate policy and effectiveness." Moreover, the trial court did so after carefully considering all the testimony and affording the Director Defendants the benefit of a favorable assumption on a record where they arguably could have been held to have failed to even identify a cognizable "threat."

In that regard, Defendants' complaint that the trial court erred "[b]y assessing the proportionality of the Plan through [the] unduly narrow lens" of lightning

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[241] Op. 74-75, 77.

strikes[242] is the height of ingratitude. It is also wrong. The trial court's factual findings rested on its searching review of the record and conclusion that the Board only identified three "themes" to which the Plan responded. Those findings are entitled to substantial deference. The trial court concluded that two of those three "themes" did not rise to the level of a "threat" to "corporate policy and effectiveness" under *Unocal*'s first prong, which conclusion was correct for the reasons above. Thus, the trial court properly framed the proportionality of the Board's response to hypothetical lightning strikes, the only cognizable threat the Board arguably identified.

The trial court correctly concluded that the Plan was a wildly disproportionate response to that supposed threat.[243] This conclusion rested on the trial court's exhaustive cataloguing of the Plan's "extreme, unprecedented collection of features"[244]—including the 5% trigger, the AIC Provision and its overbroad daisy-chain provision, and the misleading Passive Investor "carve-out"—and its reliance on expert testimony to inform its conclusion.

For example, based on its review of the factual record and expert testimony, the trial court concluded that the 5% Trigger was an extreme outlier compared to

[242] Op. Br. 36.

[243] Op. 82.

[244] *Id*. 88.

other rights plans, a fact the Board knew when adopting the Plan.[245] And, as noted above, the Board chose this outlier trigger notwithstanding that many other companies in the energy sector exposed to the same environmental exigencies adopted pills with higher triggers in the face of actual activist engagement.[246]

The trial court similarly concluded that the AIC Provision: (i) swept up potentially benign stockholder communications;[247] (ii) gave the Board "a great amount of latitude" for making the "Acting in Concert" determination, including the ability to determine whether innocuous "plus" factors including routine activities such as attending investor conferences and advocating for the same corporate action, could trigger the Plan;[248] (iii) exceeded the express-agreement default of federal law to capture "parallel conduct";[249] (iv) did not exempt routine communications among stockholders before the launch of a proxy contest or tender offer;[250] and (v) carved out insiders from its ambit.[251] The trial court additionally found that the "daisy-

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[245] Op. 77-78 (citing B0017; B0314; B0406-B0407 ¶47).

[246] *See supra* nn. 99-100.

[247] Op. 82-83.

[248] *Id*. 24, 83.

[249] *Id*. 78.

[250] *Id*. 26; *see also id*. 82 ("As Plaintiffs' proxy solicitor testified at trial, the Plan's combination of features are likely to chill a wide range of anodyne stockholder communications.") (citing A1910:7-23; A1932:6-14; A1934:4-11; A1956:7-12; B0411-B0413 ¶¶ 55-56; B0417-B0420 ¶¶ 64-68; B0421 ¶ 73).

[251] *Id*. 26.

chain" language aggregated stockholders even if they were unaware of one another's existence.[252]

Finally, the trial court found that the Plan's "passive investor" definition not only failed to operate as a mitigating factor as the Board intended but actually made the Plan ***more*** unreasonable. This conclusion rested on the factual findings that the "passive investor" definition: (i) excluded persons who seek to direct corporate policies, far exceeding the influence-control default of federal law[253] and (ii) carved out at most three investors, which the Board could nonetheless still exclude to the extent those investors sought to direct corporate policies.[254] Because each of these three investors—BlackRock, State Street, and Vanguard—often communicates with boards in a manner that could be considered to attempt to influence or direct corporate policy, the trial court credited Plaintiffs' expert's conclusion that the "passive investor" definition "impede[d] a wide range of socially beneficial and/or value-enhancing behavior common to many of the largest institutional investors, as well as routine discourse between and engagement among stockholders and management."[255] Perhaps most perniciously, the Board perpetuated the "easily

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[252] *Id*. 83 (citing A1891:8–14; A1897:2–15; A1967:8–267:5; B0413-B0414 ¶¶ 58–59).

[253] *Id*. 28, 78.

[254] *Id*. 29, 88.

[255] *Id*. 29 n.157; *see also id*. 88.

activated tripwire"[256] set by the "passive investor" definition by failing to correct the known error contained therein and even adduced facially incredible expert testimony at trial that "and" really meant "or."[257] The Board's insistent refusal to address the admitted flaws in the passive investor "carve-out" is an independent ground upon which to uphold the lower court's decision.

The trial court correctly deemed this combination of features "extreme" and "unprecedented" based on the aforementioned factual findings and expert testimony, which are entitled to substantial deference.[258] And, in reliance on Plaintiffs' expert, the trial court further found that "this combination of provisions" interfered with the stockholder franchise by "limit[ing] the act of communicating itself, whether with other stockholders or management" and "restrict[ing] the stockholder's ability to nominate directors."[259]

In the face of these factual findings and reliance on experts underpinning the trial court's conclusion that the Plan was disproportional to the supposed "threat" of lightning-strike attacks, Defendants argue that the "court erred in ***suggesting*** that the Board was obligated to enact the least restrictive plan available" "because it was

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[256] *Id*. 88.

[257] *Id*. 28 & n.153.

[258] *Id*. 88.

[259] *Id*. 45.

more restrictive than ‘less extreme’ plans proposed in two academics articles written years earlier.”[260] The term “suggesting” dooms this argument. Indeed, the trial court never purported to impose such an obligation on the Board. Rather, the trial court correctly stated that “the specific nature of the threat…‘sets the parameters for the range of permissible defensive tactics[.]’”[261] The trial court then carefully examined the Plan’s features, including by comparison to examples of pills designed to ward off lightning-strike attacks proposed by academics—including Defendants’ own expert.[262] Not only did the trial court correctly conclude that “the Board selected a Plan with features that went beyond those of gap-filling pills,” the trial court further concluded—based in part on testimony from Plaintiffs’ expert—that the “Plan’s features also raise concerns ***when evaluated independently and divorced from comparisons***.”[263] At bottom, the Board did not “select[] one of several reasonable alternatives”[264]—the Board selected the “nuclear” option.

Defendants’ argument that the trial court erred in “conclu[ding] that the Plan was unreasonable because it might have some incidental chilling impact on

[260] Op. Br. 36 (emphasis added).

[261] Op. 50-51 (citation omitted).

[262] *Id*. 79-82.

[263] *Id*. 82 (emphasis added).

[264] Op. Br. 36 (quoting *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45-46 (Del. 1994)).

stockholder communications, including in the lead-up to a proxy contest (without actually precluding a proxy contest)"[265] understates the Plan's "extreme, unprecedented collection of features" and misstates the harm they imposed on stockholders, as discussed above. Moreover, Defendants' argument merely quibbles with the trial court's ***factual*** findings rather than challenging the trial court's legal conclusions.[266] For the reasons discussed above, the Court's factual findings and reliance on expert testimony concerning each of the Plan's extreme features are not "clearly erroneous" and thus entitled to substantial deference.

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[265] Op. Br. 37-38.

[266] *Id*. 38, 41-42, 44.

CONCLUSION

The trial court's February 26, 2021 post-trial Opinion should be AFFIRMED.

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