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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER E. RYAN, JR., Plaintiff Below-Appellant, v. ALAN S. ARMSTRONG, JOSEPH R. CLEVELAND, KATHLEEN B. COOPER, JOHN A. HAGG, JUANITA H. HINSHAW, RALPH IZZO, FRANK T. MACINNIS, ERIC W. MANDELBLATT, KEITH A. MEISTER, STEVEN W. NANCE, MURRAY D. SMITH, JANICE D. STONEY and LAURA A. SUGG, Defendants Below-Appellees, -and- THE WILLIAMS COMPANIES, INC., Nominal Defendant Below-Appellee.	**REDACTED VERSION** **DATED: August 30, 2017** No. 230, 2017 Court below: Court of Chancery of the State of Delaware C.A. No. 12717-VCG

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GLOSSARY OF TERMS

Appellant's Br.	Appellant's Opening Brief, filed in this Court on July 21, 2017
Barclays	Barclays Capital Inc.
Board	The Board of Directors of Williams
Company or Williams	The Williams Companies, Inc.
Complaint or *Ryan II* Complaint	Plaintiff's Verified Derivative Complaint, filed on September 2, 2016 in *Ryan II*
Defendants	Alan S. Armstrong, Joseph R. Cleveland, Kathleen B. Cooper, John A. Hagg, Juanita H. Hinshaw, Ralph Izzo, Frank T. MacInnis, Eric W. Mandelblatt, Keith A. Meister, Steven W. Nance, Murray D. Smith, Janice D. Stoney and Laura A. Sugg
ETE	Energy Transfer Equity, L.P.
First *Ryan I* Complaint	Plaintiff's Verified Class Action Complaint, filed on January 15, 2016 in *Ryan I*
May 6 Motion	Defendants' Motion to Dismiss the Second *Ryan I* Complaint, filed on May 6, 2016 in *Ryan I*
Opinion or Op.	Memorandum Opinion of the Court of Chancery, dated May 15, 2017, in *Ryan II*
Plaintiff	Walter E. Ryan, Jr.
Ryan I	C.A. No. 11903-VCG (Del. Ch.)
Ryan II	C.A. No. 12717-VCG (Del. Ch.)
Second *Ryan I* Complaint	Plaintiff's Verified Amended Class Action Complaint, filed on April 22, 2016 in *Ryan I*
September 28 Motion	Defendants' Motion to Dismiss the Complaint, filed on September 28, 2016 in *Ryan II*
WPZ	Williams Partners L.P.

NATURE OF THE PROCEEDINGS

This appeal involves a now-terminated agreement by Williams to acquire the outstanding public units of its majority owned subsidiary, WPZ (the "WPZ Acquisition"). After months of analysis, planning and negotiation, Williams' Board unanimously approved the WPZ Acquisition in May 2015 as a structural enhancement designed to generate near- and long-term shareholder value. By September 2015, however, the Board determined that it had a superior strategic option in a merger with ETE (the "ETE Merger"). As a result, the same Board that approved the WPZ Acquisition approved the ETE Merger—which, had it closed, would have cost Defendants their positions as directors—and terminated the WPZ Acquisition, as required by ETE. Plaintiff somehow infers from these events that the WPZ Acquisition was a defensive measure designed to thwart the ETE Merger—even though ETE did not make an offer to acquire Williams until *after* the WPZ Acquisition was announced—and seeks damages in the form of the termination fee Williams paid to WPZ after terminating the WPZ Acquisition. Separately, Williams is seeking reimbursement from ETE of this same termination fee, as contemplated by their merger agreement.

Conceding that he did not make a demand on the Board, Plaintiff argues that demand was futile, relying on this Court's decision in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). But the Court of Chancery correctly

held that Plaintiff failed to plead with particularity, as required by Court of Chancery Rule 23.1, that entrenchment was Defendants' sole or primary motivation in approving the WPZ Acquisition.

There were numerous independent reasons to dismiss Plaintiff's Complaint, and the Court of Chancery relied upon just one. While this Court can, and should, affirm on the basis that the Court of Chancery chose—failure to plead demand futility—the record reflects several independent, well-established bases to affirm.

First, the Court can affirm the dismissal based on Plaintiff's failure to plead demand futility—as the Court of Chancery found below. As an initial matter, Plaintiff cannot avail himself of *Unocal*, which was designed to deal with fast-moving, pre-closing injunction actions—not damages claims litigated years after the fact, as here. But, even if *Unocal* could apply to damages claims, the Court of Chancery properly recognized that stating a *Unocal* claim does not automatically plead demand futility. Rather, Rule 23.1—which requires a pleading of futility with "particularity"—imposes a far higher hurdle than Court of Chancery Rule 12(b)(6)—which requires mere notice pleading. And, in all events, Plaintiff failed to plead facts sufficient to trigger *Unocal* scrutiny—or to excuse demand under this Court's decision in *Pogostin v. Rice*, 480 A.2d 619 (Del. 1984). The WPZ Acquisition was not a defensive response to any threat, as *Unocal* requires; and certainly, the WPZ Acquisition was not solely or primarily motivated by

entrenchment, as Plaintiff must show under *Pogostin* to plead demand futility. (Section I.)

Second, the Complaint violates three different procedural bars, each of which alone requires affirmance of the Court of Chancery's judgment. While that court did not resolve the case based on these procedural problems, the court recognized that "[t]he procedural history of this matter is winding, and raises concerns about the viability of the present action". (Op. at 15.)

Indeed, it does. By way of two "nearly identical" lawsuits (*id.* at 16)—*Ryan I* and *Ryan II*, which challenged the same transaction, on the same ground, against the same Defendants, based on the same facts, seeking the same relief, in the same court—Plaintiff dragged out simple pleading-stage proceedings to nearly a year and a half. During that time, the Court of Chancery endured two hearings, three complaints, multiple motions to dismiss and thirteen briefs. Simply put, Plaintiff's decision to pursue *Ryan II* (the case on appeal in this Court) after having pursued *Ryan I* through several motions to dismiss and dismissal with prejudice was a violation of Court of Chancery Rule 15(aaa), *res judicata* and the prohibition against claim splitting. There is no excuse for the quagmire Plaintiff created, which cost the Court and Defendants substantial time and resources. (Section II.)

Each of these points—Plaintiff's failure to plead demand futility and to state a claim, and the procedural deficiencies with the Complaint—provides an independent basis for affirmance of the Court of Chancery's 46-page Opinion.

SUMMARY OF ARGUMENT

The Court of Chancery's judgment dismissing the Complaint with prejudice should be affirmed:

1. Defendants deny Plaintiff's statements in paragraphs 1 and 2 of his Summary of Argument. The Court of Chancery properly held that demand was not excused under *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

2. The Complaint should be dismissed because Plaintiff did not make a demand and failed to plead demand futility under Rule 23.1. *First*, *Unocal* does not apply to a damages claim like Plaintiff's. *Second*, the Court of Chancery correctly held that pleading *Unocal* does not automatically establish demand futility under the higher, particularity standard of Rule 23.1. *Third*, the Complaint does not trigger *Unocal* because it fails to plead that the WPZ Acquisition was a defensive response to any threat; and the Complaint fails to plead demand futility under *Pogostin* because it does not show that entrenchment was Defendants' sole or primary motive in approving the WPZ Acquisition. Plaintiff's arguments to the contrary fail. (Section I.)

3. The Complaint is barred by well-established rules of procedure, which each arise from Plaintiff's serial pursuit in the Court of Chancery of what that court correctly described as "nearly identical" lawsuits—*Ryan I* and *Ryan II*. *First*, the Complaint violates Court of Chancery Rule 15(aaa) because Plaintiff filed it after

answering Defendants' motion to dismiss in *Ryan I*. *Second*, the Complaint is barred by *res judicata* because the Court of Chancery dismissed *Ryan I* with prejudice. *Third*, the Complaint is barred by the prohibition against claim splitting because Plaintiff filed it after bringing a claim against the same Defendants based on the same facts in *Ryan I*. None of Plaintiff's arguments excuses his violation of these rules. (Section II.)

STATEMENT OF FACTS[1]

A. The Board Considers Strategic Alternatives and Unanimously Approves the WPZ Acquisition.

In February 2014, Kelcy Warren, ETE's CEO, contacted Alan Armstrong, Williams' CEO, to "express[] interest in acquiring Williams". (A20-21 ¶ 44.) Armstrong responded that he did not believe Williams was interested but that, "if ETE made an offer, he would take it to the Williams Board". (*Id.*) Eight months later, in November 2014, ETE's CFO approached Barclays with "an informal indication of interest about a potential acquisition of Williams". (A21 ¶ 45.) No offer was made during these initial overtures, which ETE later described as "efforts to reach a friendly, negotiated combination". (A33 ¶ 79.)

In late 2014 and early 2015, the Board, with its advisors, began to evaluate potential strategic opportunities, including the interest expressed by ETE and a potential acquisition of WPZ. (A372.) On January 20, 2015, Barclays gave a presentation to the Board entitled "Board Review of Strategic Alternatives". (A22-23 ¶ 49; A104.) The presentation analyzed numerous potential opportunities, and detailed several possible benefits of a WPZ acquisition: a "large step-up to

[1] The facts below are drawn from the Complaint (A7-45), certain presentations by Williams' financial advisor, Barclays, to the Board (provided to Plaintiff pursuant to a pre-suit books and records demand) (A100-254), and the preliminary proxy filed for the ETE Merger (A255-1077). The Court may consider the presentations and proxy because the Complaint relies heavily on them. (*See* Op. at 9-10); *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1026 (Del. Ch. 2012).

shield future taxable income", possible "accreti[ion] to dividend per share", and a "[s]implified organizational structure". (A127.) Barclays recommended that the Board [redacted] and refrain at that time from acquiring WPZ or implementing *any* of the other potential strategies. (A23 ¶¶ 50-53; A127.) The Board concluded that it would follow this recommendation; it made no offer for WPZ, and directed its advisors and management to further investigate potential opportunities. (A373.) To this end, the Board determined to contact ETE to obtain additional details about its interest. (*Id*.)

On February 13, Armstrong contacted Warren, who informed Armstrong that ETE was interested in a merger only if Williams was supportive of one. (*Id*.) Again, ETE made no offer.

On March 5, the Board again met with its advisors to discuss strategic opportunities, including possible deals with ETE and WPZ. (*Id*.) Barclays reiterated the same benefits of a WPZ acquisition as it had in January, and explained that it now also recognized a "potential for cost savings". (A184.) Barclays concluded that an acquisition of WPZ "could create significant value", but advised the Board again to "[d]efer [its] ultimate decision to [a] later date" [redacted] (*Id*.) The Board again concluded that it would not make an

offer for WPZ at that time, and directed its advisors and management to continue to investigate opportunities. (A373.)

On April 2, the Board again discussed potential strategic transactions. (A374.) Barclays presented its updated analysis of a WPZ acquisition, reiterated the same benefits as before, and explained that such a transaction would "improve Williams' access to and cost-of-capital", [redacted], and would result in "streamlined governance". (A229.) Barclays concluded, "We believe this transaction represents an attractive opportunity to significantly lower the cost of capital and enhance near and long term growth and valuation". (A240.) Barclays no longer advised the Board to defer its decision on a WPZ acquisition. After months of consideration and debate, and numerous presentations and analyses, the Board decided to act.

On April 9, Williams made its initial offer to acquire WPZ. (A28 ¶ 66.) Over the next month, Williams' counsel negotiated and finalized the terms of the WPZ Acquisition with counsel for WPZ's conflicts committee. (*Id.* ¶ 67) On May 12, the Board discussed the proposed acquisition—including the fairness of the consideration, the effect of the termination provisions, and the Board's fiduciary duties—and unanimously approved the WPZ Acquisition. (A374-75.) Williams announced the deal the next day. (A29 ¶ 70; A375.)

The WPZ Acquisition agreement contained certain common deal protections, negotiated by the WPZ conflicts committee for the benefit of WPZ's minority unitholders. Although the agreement did not allow Williams unilaterally to terminate, it permitted the Board to change its recommendation in the event of a subsequent offer to acquire Williams, subject to provisions for the negotiation of amended terms and to a standard termination fee of $410 million, or 3.15% of the $13 billion WPZ Acquisition (the "Termination Fee Provision"). (A11 ¶ 6; A30 ¶ 72; A29 ¶ 70.) The agreement further provided that, if efforts to renegotiate were unsuccessful, the Board could still change its recommendation, subject to a vote of Williams' stockholders (the "Force-the-Vote Provision"). (A31-32 ¶ 74.)

B. ETE Makes Its First Offer To Acquire Williams, and Williams Undertakes a Formal Strategic Review.

On May 19, nearly a week *after* Williams' announcement of the WPZ Acquisition, ETE made its first offer to acquire Williams, conditioned on Williams' terminating the WPZ Acquisition. (A32-33 ¶ 77.) On June 21, Williams issued a press release announcing that it had received an unsolicited offer to acquire the Company and that, in response, Williams was undertaking a process to explore a range of strategic alternatives. (A33 ¶ 78.)

During its strategic review, the Board contacted eighteen potential counterparties (A379-80); signed confidentiality agreements with several of them

(A381-82); and received written indications of interest from three, including ETE (A384). The two non-ETE parties indicated that they would not require Williams to abandon the WPZ Acquisition. (A384-85.)

C. Williams Approves the ETE Merger and Terminates the WPZ Acquisition.

On September 28, 2015, by a vote of eight to five, the Board approved the ETE Merger. (A34-35 ¶¶ 82-83.) As required by ETE, Williams terminated the WPZ Acquisition, thereby triggering the Termination Fee Provision. (A35 ¶ 84.) In order to secure WPZ's consent to waive the Force-the-Vote Provision, Williams agreed to pay an additional $18 million. (*Id.*)

D. Williams Unsuccessfully Seeks To Prevent ETE from Terminating the ETE Merger.

On May 13, 2016, after ETE had made clear its desire to terminate the ETE Merger, the Board unanimously approved Williams' filing of a lawsuit to force ETE to close. On June 24, the Court of Chancery denied Williams' request. *Williams Cos. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017). ETE terminated on June 29.

Williams' lawsuit against ETE continues in the Court of Chancery. After ETE's termination, Williams amended its complaint in that action, C.A. Nos. 12168-VCG and 12337-VCG, to add a claim for the WPZ termination

fee (the same loss that Plaintiff claims here), which ETE is contractually required to reimburse Williams. (*See* Op. at 2.)

E. Plaintiff's Lawsuits

On January 15, 2016, Plaintiff filed the First *Ryan I* Complaint against Defendants, docketed as C.A. No. 11903-VCG. Plaintiff characterized the complaint as asserting two direct claims for damages on behalf of Williams' stockholders. (B41-46 ¶¶ 73-92.) In Count I, Plaintiff asserted that the WPZ Acquisition was a "defensive measure designed to thwart a premium offer from ETE", in breach of the duty of loyalty. (B43 ¶ 81.) As a result, Plaintiff alleged, Williams' stockholders suffered damages directly of $428 million because Williams' payment of that amount to WPZ reduced the merger consideration that ETE was willing to pay. (B21-22 ¶ 6; B42-44 ¶¶ 79-85.) On February 22, Defendants filed a motion to dismiss the First *Ryan I* Complaint under Rules 23.1 and 12(b)(6), arguing, among other things, that Count I was a derivative—not direct—claim that should be dismissed because Plaintiff made no demand. (B48; B73-99.)

In response to Defendants' motion, Plaintiff amended, filing the Second *Ryan I* Complaint on April 22. The Second *Ryan I* Complaint pled substantially the same allegations against the same Defendants, including the same purportedly "direct" loyalty claims for damages. (B137-38 ¶ 95.) On May 6,

Defendants (again) moved to dismiss under Rules 23.1 and 12(b)(6), arguing (again) that Count I was derivative and should be dismissed for failure to make a demand. (B143; B172-201; B253-75.)[2]

On August 12—more than six weeks after ETE terminated the ETE Merger—Plaintiff elected to file a brief answering the May 6 Motion, rather than seek leave to amend. In his answering brief, Plaintiff argued that his claim was direct, *not* derivative. (B216-17; B242-45.) The May 6 Motion was fully briefed on August 29.

Four days later, on September 2, 2016, Plaintiff filed the "nearly identical" *Ryan II* Complaint against Defendants, docketed as C.A. No. 12717-VCG. (Op. at 16.) The *Ryan II* Complaint (or Complaint) made the same duty of loyalty allegations as the *Ryan I* Complaints, with three minor additions: (1) express acknowledgment of the derivative, rather than direct, nature of Plaintiff's claim; (2) allegations attempting to plead demand futility; and (3) allegations concerning ETE's termination of the ETE Merger. (*See* B358; B386-90; B393-94.) No substantive changes were made. On September 28, Defendants moved to dismiss the Complaint under Rules 15(aaa), 23.1 and 12(b)(6).

[2] Plaintiff subsequently withdrew Count II. (B216 n.1.)

On December 23, a week before answering the September 28 Motion, Plaintiff moved voluntarily to dismiss the Second *Ryan I* Complaint pursuant to Court of Chancery Rule 41(a), "without prejudice . . . as to the ability of Plaintiff . . . to bring a derivative claim". (B337 ¶ 9.) Defendants opposed Plaintiff's motion on the ground that a without-prejudice dismissal would be contrary to Rule 15(aaa). (B339-46.) On January 12, 2017, the Court of Chancery held a hearing during which it dismissed the Second *Ryan I* Complaint "with prejudice as to Plaintiff in his individual capacity only", and left it to the parties to argue about what effect that may have on the *Ryan II* Complaint. (B414; *see* B408:16-23.)

On January 31, the Court of Chancery held argument on the September 28 Motion. (A1078.)

On May 15, after two hearings, three complaints, multiple motions to dismiss and thirteen briefs, the Court of Chancery granted Defendants' September 28 Motion and dismissed the Complaint for failing to plead particularized facts sufficient to excuse demand under Rule 23.1. (Op. at 46.) Plaintiff appealed.

ARGUMENT

I. THE COURT SHOULD AFFIRM DISMISSAL OF THE COMPLAINT BECAUSE DEMAND IS NOT EXCUSED.

A. Question Presented

Did the Court of Chancery correctly conclude that the Complaint should be dismissed because Plaintiff made no demand and failed to plead demand futility under Court of Chancery Rule 23.1? (B172-201; B253-75; B323-32; B441-58; A1111:4-1122:22; A1141:14-1150:15; Op. at 28-35.)

B. Standard of Review

This Court's "review of decisions of the Court of Chancery applying Rule 23.1 is *de novo*". *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000).

C. Merits of Argument

Plaintiff failed to plead demand futility. *First*, *Unocal* does not apply to damages claims. (Section I.C.1.) *Second*, even if *Unocal* could apply to damages claims, the Court of Chancery correctly held that stating a claim under *Unocal* does not alone excuse demand. (Section I.C.2.) *Third*, Plaintiff has not pled facts sufficient to trigger *Unocal*, or to show that entrenchment was the Board's sole or primary purpose in approving the WPZ Acquisition, as required by *Pogostin*. (Section I.C.3.) Finally, Plaintiff's remaining excuses for failure to make demand fail. (Section I.C.4.)

1. *Unocal* Does Not Apply Because Plaintiff Seeks Only Damages.

At oral argument below, Plaintiff conceded that he "need[s] *Unocal* to get around the demand requirement". (A1125:4-5.) But *Unocal* does not apply in this damages case. While the Court of Chancery recognized that "*Unocal* enhanced scrutiny is primarily a tool for this Court to provide *equitable* relief", it did not "directly address" the issue. (Op. at 4, 26 (emphasis added).) This Court should affirm on the basis that *Unocal* does not apply to the Complaint.

Unocal applies only to claims for injunctive relief—and not to damages claims. In fact, this Court has recognized that "*Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of *injunctive* relief to *address important M&A decisions in real time, before closing*. They were *not* tools designed with post-closing *money damages* claims in mind . . . ." *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 312 (Del. 2015) (emphases added); *see also In re Riverstone Nat'l, Inc. Stockholder Litig.*, 2016 WL 4045411, at *7 & n.85 (Del. Ch. July 28, 2016) ("[E]nhanced scrutiny is incompatible with a damages action, post-closing."). Here, Plaintiff does not seek "injunctive relief" and does not ask the Court "to address important M&A decisions in real time, before closing". Rather, Plaintiff alleges only a historical injury—that, in

September 2015, Williams paid a termination fee to WPZ (A12 ¶ 8)—and there is no longer the possibility of a closing. *Unocal* was not designed for this situation.

Unocal is limited to claims for injunctive relief because of the nature of a *Unocal* claim. When a defensive measure (such as a poison pill) is put in place, it infringes on shareholders' ability to vote on an actual or potential transaction in the future. But nothing like that is happening here. Plaintiff does not allege that anything impedes his voting rights, and Plaintiff seeks only damages to redress historical alleged loss. The supposed entrenchment mechanism—the announced WPZ Acquisition—was removed nearly two years ago. (A34-35 ¶¶ 82, 84.)

Moreover, because Williams has an exculpatory provision for directors, Plaintiff must demonstrate a breach of the duty of loyalty to state a claim against Defendants. (Op. at 5.)

> "A plaintiff seeking only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct—be it *Revlon*, *Unocal*, the entire fairness standard, or the business judgment rule." *In re Cornerstone Therapeutics, Inc. Stockholder Litig.*, 115 A.3d 1173, 1175-76 (Del. 2015) (citations omitted).

As the Court of Chancery said, Plaintiff's position that *Unocal* continues to apply "in a post-transaction action for damages" is "hard to square with *Cornerstone*". (Op. at 26.)

2. The Court of Chancery Correctly Held That Stating a *Unocal* Claim Does Not Automatically Excuse Demand.

The Court of Chancery held that "an action [that] implicates enhanced scrutiny under *Unocal* is insufficient *on its own* to satisfy Rule 23.1". (*Id*. at 27 (emphasis in original).) This Court should affirm that ruling, which follows from the well-established principle that Rule 23.1 requires a higher pleading standard than Rules 8(a) and 12(b)(6).

Under Rules 8(a) and 12(b)(6), the complaint "need only give general notice of the claim asserted". *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996) (internal quotation marks omitted). Pleading demand futility under Rule 23.1 is considerably more difficult. "[P]leadings [in derivative suits] must comply with stringent requirements of factual particularity that *differ substantially* from the permissive notice pleadings governed solely by Chancery Rule 8(a). *Rule 23.1 is not satisfied by . . . mere notice pleading*." *Brehm*, 746 A.2d at 254 (citation omitted and emphases added). Indeed:

> "Delaware courts have recognized that the standard to be used to evaluate a Chancery Rule 12(b)(6) motion is *less stringent* than the standard applied when evaluating whether a pre-suit demand has been excused in a stockholder derivative suit filed pursuant to Chancery Rule 23.1. Chancery Rule 23.1 requires the pleading of facts with 'particularity' in a shareholder derivative suit. On the other hand, the standard used to review a Chancery Rule 12(b)(6) motion to dismiss . . . is consistent with the notice pleading concept of Chancery

> Rule 8(a)." *Solomon*, 672 A.2d at 39 (citations omitted and emphasis added).

The difference makes sense because the purposes of the rules are different. While Rules 8(a) and 12(b)(6) ensure that the complaint gives "general notice of the claim asserted", *id.* at 38 (internal quotation marks omitted), "Rule 23.1 exists to vindicate director control" (Op. at 2); *see Brehm*, 746 A.2d at 255. The Court of Chancery appropriately recognized the meaningful difference in pleading standards. (*Compare* Op. at 26, *with id.* at 18-19.)

Because Rules 8(a) and 12(b)(6) require less than Rule 23.1, complaints may allege facts sufficient to pass muster under the former but not the latter. The Court of Chancery held that Plaintiff's is one such complaint, containing barely enough facts to give rise to a "reasonably conceivable"—though "relative[ly] weak[]" and "narrowly create[d]"—"bare inference" of entrenchment under Rule 12(b)(6), but not enough facts to allege with "particularity" that demand was excused under Rule 23.1. (*See id*. at 23-24, 27, 29, 41, 44-46.)

In so ruling, the Court of Chancery relied on a number of decisions that "requir[ed] a pleading of specific facts sufficient to conclude that the directors' exercise of business judgment is disabled", and that did *not* in any way suggest that merely pleading *Unocal* excuses demand. (*Id*. at 31-33 (citing *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1189, 1194-95 (Del. Ch. 1998) (analyzing

Rule 12(b)(6) separately from demand futility for entrenchment claim); *In re Chrysler Corp. S'holders Litig.*, 1992 WL 181024, at *4-5 (Del. Ch. July 27, 1992) (finding "the more liberal Rule 12(b)(6) (notice pleading) standard" satisfied "*a fortiori*" after finding that "plaintiffs' entrenchment claims satisfy the more stringent Rule 23.1"); *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1071 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985)).) Pleading defensive conduct, by itself, is insufficient to excuse demand. *See Silverzweig v. Unocal Corp.*, 1989 WL 3231, at *3 (Del. Ch. Jan. 19, 1989) (dismissing derivative claim alleging entrenchment for failure to plead demand futility, despite the fact that *Unocal* was triggered), *aff'd*, 1989 WL 68307 (Del. May 19, 1989) (table).

While some lower court decisions have suggested that pleading *Unocal* excuses demand, *see In re Ebix, Inc. Stockholder Litig.*, 2014 WL 3696655, at *15-16 (Del. Ch. July 24, 2014); *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 81 (Del. Ch. 1999); *Wells Fargo & Co. v. First Interstate Bancorp.*, 1996 WL 32169, at *8 (Del. Ch. Jan. 18, 1996), those cases were ones in which demand futility was clearly pled under the higher Rule 23.1 standard. The cases involved either a traditional anti-takeover device, *see Gaylord*, 747 A.2d at 74, 83-84 (acknowledging that the court previously found demand futile because "the board's adoption of the *shareholder rights plan* [and other circumstances] . . . create an inference of improper purpose" (internal quotation marks omitted and

emphasis added)); *Wells Fargo*, 1996 WL 32169, at *4, 8 (finding demand futile in connection with board's refusal to redeem a *poison pill*), or a transaction that the board *admitted* was a defensive measure, *see Ebix*, 2014 WL 3696655, at *4-5, *15-16 (finding demand futile where board stated that the challenged golden parachute, which involved an excessive change-in-control payment, was partly "a response to its evaluation of 'the potential threat of the [c]ompany itself being an acquisition target'").

Here, by contrast, Williams did not employ an anti-takeover device, and Plaintiff challenges a planned acquisition (the WPZ Acquisition) undertaken for independent reasons, not as a defensive measure. (*See* Op. at 35-46; Section I.C.3.) Demand is not remotely futile here.

The Court of Chancery correctly held that pleading *Unocal* does not automatically excuse demand.

3. Plaintiff Has Failed To Plead Facts Sufficient To Trigger *Unocal*, and Has Failed To Excuse Demand.

Plaintiff fails to make out a claim of entrenchment, under any pleading standard. To trigger *Unocal* review under Rules 8(a) and 12(b)(6), a plaintiff must plead facts sufficient to show that the board "took defensive measures in response to a perceived threat ". *Gantler v. Stephens*, 965 A.2d 695, 705 (Del. 2009) (internal quotation marks omitted). Absent such a showing, *Unocal* cannot apply.

To use a claim of entrenchment to establish demand futility under Rule 23.1, a plaintiff must "allege with *particularity* that . . . perpetuation of self in office . . . was the *sole or primary purpose* of" a majority of the board in taking the challenged action. *Pogostin*, 480 A.2d at 627 (emphases added); (Section I.C.4).

Applying these standards to the Complaint, the Court should find that (i) Plaintiff failed to trigger *Unocal* because he failed to plead under Rule 12(b)(6) that the WPZ Acquisition was a "defensive measure[] in response to [a] threat", *Stroud v. Grace*, 606 A.2d 75, 82-83 (Del. 1992); and (ii) Plaintiff failed to plead under the even more demanding standard of Rule 23.1 that entrenchment was Defendants' "sole or primary purpose" in approving the WPZ Acquisition, *Pogostin*, 480 A.2d at 627.

Simply put, Plaintiff's conclusory assertions of defensive conduct and entrenchment are baseless, and conflict with the facts Plaintiff pleads; they do not satisfy *Unocal* or *Pogostin*. Among other things, the same Board that voted for the WPZ Acquisition (i) initiated a review of strategic alternatives in response to ETE's subsequent written offer (A32-33 ¶¶ 77-78); (ii) invited ETE to participate in that process (A380); (iii) negotiated and executed a merger agreement with ETE that would have cost all Defendants their jobs (A34-35 ¶ 82); and (iv) unanimously

authorized litigation against ETE to force it to consummate the ETE Merger (A37 ¶ 88). These are *not* the actions of entrenched directors fending off a threat.[3]

Further, Plaintiff cannot dispute that:

- The Board did not consider acquiring WPZ until nearly a year *after* ETE first approached Williams in February 2014 (A20-21 ¶ 44; A22-23 ¶ 49);

- The Board reached out to ETE in February 2015 to learn more about ETE's expression of interest (and yet ETE still made no offer) (A373);

- When the WPZ Acquisition was announced in May 2015, ETE had *never* made an offer to acquire Williams (A32-33 ¶ 77); had *never* threatened to take hostile action against Williams, and instead described its overtures as "friendly" (A33 ¶ 79); and had *never* suggested that the WPZ Acquisition would make Williams less attractive to ETE (A20-21 ¶¶ 44-45);

- ETE's CEO expressly told Armstrong that ETE was interested in a merger *only* if Williams was supportive of one (A373);[4]

[3] Although Plaintiff named the same Defendants in *Ryan I* and *Ryan II*, Plaintiff attempts to plead demand futility with respect to the ten-member Board that was in office when he filed the *Ryan II* Complaint (A37-38 ¶ 92)—rather than the full thirteen-member Board that was in office when he filed the *Ryan I* Complaints (B23-24 ¶¶ 10-22; B112-13 ¶¶ 12-24). That is improper. *See Harris v. Carter*, 582 A.2d 222, 228-29, 231 (Del. Ch. 1990) (concluding that "the time of the filing of the original pleading" "is the proper time to measure so-called demand futility where the original pleading does not purport to be brought derivatively" but the amended pleading does). But, in any event, under Plaintiff's own theory, the fact that the later Board includes directors who did *not* vote on the WPZ Acquisition reinforces the *lack* of any entrenchment motive on the part of that later Board.

[4] *See Ryan v. Gursahaney*, 2015 WL 1915911, at *7 (Del. Ch. Apr. 28, 2015) ("[A]bsent an actual (as opposed to possible or theoretical) 'struggle for corporate

- Twelve of the thirteen directors who approved the WPZ Acquisition were independent, outside directors (A13-14 ¶¶ 13-24);[5]

- *None* of Barclays' presentations mentions [redacted] and

- There are *no* facts showing that a majority of the Board ever subjectively perceived ETE as a threat to the Board's control (*see* Appellant's Br. at 32).

And Plaintiff undercuts his argument of entrenchment by asserting repeatedly in his brief (as he did below) that ETE "*was no threat to corporate policy or effectiveness*". (*Id*. at 31; A85); *see Kahn v. Roberts*, 679 A.2d 460, 465-66 (Del. 1996) (holding that *Unocal* was not triggered where the plaintiff "argue[d] . . . that 'the defendants [cannot] establish that they truly perceived a legally cognizable threat to [the company's] corporate policy and effectiveness'").[6]

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control,' the presumption of directorial disinterestedness and independence is not rebutted under the *Aronson* analysis."), *aff'd*, 2015 WL 7302249 (Del. Nov. 19, 2015) (table).

[5] *See Kahn v. Roberts*, 1994 WL 70118, at *6 (Del. Ch. Feb. 28, 1994) (ruling that the fact that "a majority of the directors who voted on the [challenged transaction] were independent, outside directors" "precludes the entrenchment theory" of demand futility).

[6] Plaintiff faults the Court of Chancery for "never identif[ying] any threat to Williams's policies and effectiveness", and argues that, if the WPZ Acquisition was not a response to a threat, it must have been intended to entrench the Board. (Appellant's Br. at 29-33 & n.103, 37-39.) But Defendants' point is that the WPZ Acquisition was not a defensive measure to begin with, as is supported by the absence of any threat. As Barclays repeatedly advised and the Board agreed, the

For all of these reasons, the Board's approval of the WPZ Acquisition does not trigger *Unocal* review. It cannot "reasonably be inferred", *Gantler*, 965 A.2d at 705, from the totality of facts alleged and incorporated into the Complaint that the WPZ Acquisition was a defensive measure. *See Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1152 (Del. 1989) (upholding Court of Chancery's decision to reject *Unocal* and apply business judgment rule to Time board's decision to acquire Warner before Paramount had made a bid for Time); *Doskocil Cos. v. Griggy*, 1988 WL 85491, at *6 (Del. Ch. Aug. 18, 1988) (rejecting *Unocal* review where plaintiff failed to establish a reasonable likelihood of success of showing that target's issuance of preferred shares was in response to acquiror's purchase of target's stock). Accordingly, the Court of Chancery erred in holding that Plaintiff had, even if barely, done enough to state a claim under *Unocal* pursuant to Rule 12(b)(6). (Op. at 21-24.) Plaintiff failed to state a claim.[7]

WPZ Acquisition was designed to create short- and long-term shareholder value. There was no entrenchment motive because there was no struggle for corporate control. *See Grobow v. Perot*, 539 A.2d 180, 188 (Del. 1988) (rejecting plaintiff's "reliance on *Unocal*" to excuse demand because "there was no outside threat to corporate policy of [the corporation]"); *Ryan*, 2015 WL 1915911, at *7.

[7] Because *Unocal* does not apply, Plaintiff must overcome the business judgment rule. *See Kahn*, 679 A.2d at 466. He cannot do so, and barely tries. Defendants are disinterested and independent with respect to the WPZ Acquisition because they are not entrenched; and Defendants acted "in good faith and after reasonable investigation" because they repeatedly met with advisors and determined that legitimate business reasons supported the WPZ Acquisition. *Id.*

But the Court of Chancery correctly held that Plaintiff did not sufficiently plead under Rule 23.1 that entrenchment was Defendants' sole or primary motive. (Op. at 35-46.) Plaintiff tries to overcome the compelling conclusion that the Board approved the WPZ Acquisition for independent, non-entrenchment reasons by attacking its timing, rationale and terms. (*See* Appellant's Br. at 33-37.) These attacks fail.

i. *Timing of the WPZ Acquisition*

Plaintiff argues that "the timing of the transaction beg[s] the question of why the Board was so determined to enter into the WPZ Acquisition when it did, and against the advice of its financial advisor, suggesting a motive of entrenchment". (Appellant's Br. at 33-34.) This is wrong.

The Board engaged in a months-long process during the winter and spring of 2015, during which the Board and its advisors considered many strategic alternatives, including a possible merger with ETE and an acquisition of WPZ. In January, March and April, Barclays identified numerous benefits to acquiring WPZ; and, on April 2—far from "advis[ing] the Board that there was no valid business reason to acquire WPZ at that time" (*id*. at 1)—Barclays advised that "[w]e believe this [WPZ] transaction represents an attractive opportunity to significantly lower the cost of capital and enhance near and long term growth and valuation" (A240). Following this advice, the Board, on April 9—after months of

consideration, debate and analysis—made its initial offer to acquire WPZ. (A28 ¶ 66.) Plaintiff's claim that the Board acted "against the advice of its financial advisor" is nonsense. (Appellant's Br. at 34.)

Plaintiff's other timing argument, that Williams and WPZ "agreed on final deal terms just four days after Williams made its initial offer" (*id*. at 33-34), is contradicted by Plaintiff's own allegations. According to the Complaint, Williams made its initial offer on April 9, and yet Williams and WPZ did not agree on an exchange ratio until May 11 or sign their deal until May 12. (*See* A28 ¶¶ 66-67.) Negotiations between Williams and WPZ lasted over a month. No reasonable reading of the facts supports Plaintiff's claim that Defendants "rushed the WPZ Acquisition" to entrench themselves. (A27 ¶ 65); *see Grobow*, 539 A.2d at 188 (holding that allegations of "the rushed nature of the transaction" "are patently insufficient" to excuse demand based on entrenchment claims).

ii. *Terms of the WPZ Acquisition*

Plaintiff challenges the Termination Fee Provision—which amounted to just 3.15% of equity value (*see* A29 ¶ 70; A35 ¶ 84)—and the Force-the-Vote Provision, as "needless deal-protection measures that *Williams* put in place" for entrenchment purposes. (Appellant's Br. at 34-35 (emphasis added).) But, in fact, it was *WPZ's* conflicts committee (*see* A28 ¶ 66), represented by counsel—and not

Williams—that negotiated for these provisions, so as to protect the minority unitholders of *WPZ* in case the Williams Board changed its recommendation.

Further, these provisions are entirely common and reasonable, which negates any inference that they were defensive or meant to entrench the Board. *See, e.g.*, *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *9 (Del. Ch. June 30, 2014) (dismissing claim challenging termination fee of 4.5% of transaction's equity value); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 593, 613-15 (Del. Ch. 2010) (upholding termination fee of roughly 3.9% of deal's overall value); *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *13 (Del. Ch. Jan. 31, 2013) (ruling that force-the-vote provisions "have routinely been upheld as reasonable"); *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *3 n.25 (Del. Ch. Oct. 11, 2006) (finding "'force the vote' provision permissible"). Accepting Plaintiff's arguments would turn every run-of-the-mill M&A deal into a *Unocal* trigger and result in automatic demand futility for any challenge to a deal. That is not the law.

Moreover, if Defendants designed the Termination Fee Provision and Force-the-Vote Provision to keep themselves in office, they did a terrible job of it. Two other bidders made offers for Williams *without* requiring that Williams terminate

the WPZ Acquisition (A384-85), and Williams in fact *agreed* to terminate it in favor of the ETE Merger (A35 ¶ 84). The provisions did not preclude anyone.[8]

iii. *Rationale of the WPZ Acquisition*

Plaintiff disagrees with the Board and its financial advisor about how much Williams was likely to benefit from the WPZ Acquisition, arguing that the benefits of a step-up in tax basis were insufficiently "near term" for Plaintiff's liking. (Appellant's Br. at 35-36.) But there is no rule that requires boards to consider only immediate gains or to satisfy the hindsight preferences of any single shareholder—or else be found entrenched. And, even if there were such a rule, Barclays advised the Board that the WPZ Acquisition would "enhance *near and long* term growth and valuation". (A240 (emphasis added).)

Plaintiff also contends that Barclays advised that "'simplified organizational structure'" and "potential dividend accretion" "did *not* justify an acquisition of WPZ". (Appellant's Br. at 36 & n.118.) But Barclays did not say that; it identified those benefits, recommended that the Board [redacted]

[8] Plaintiff also complains that the exchange ratio in the WPZ Acquisition "implied a premium [16.8%] substantially higher than recent comparable transactions" and "Barclays's . . . assumed . . . [redacted] premium". (Appellant's Br. at 14 n.38, 34.) Both points are mistaken. [redacted] Regardless, allegations concerning "the giant premium paid" "are patently insufficient" to establish entrenchment. *Grobow*, 539 A.2d at 188; *see Ryan*, 2015 WL 1915911, at *9.

[redacted] and concluded that the "[WPZ] transaction represents an attractive opportunity to . . . enhance near and long term growth and valuation". (A240.)

Plaintiff asserts that, in its March 31, 2015 presentation to the Board (which was discussed in the April 2 Board meeting), "Barclays identified a supposed improved access to capital only *after* the Williams Board already decided to go forward with the WPZ Acquisition". (Appellant's Br. at 36-37.) But Plaintiff points to no facts suggesting that the Board had made up its mind before April 2; in fact, the Board did not make its "initial offer" to acquire WPZ until a week later, on April 9. (A28 ¶ 66); *see Greenwald v. Batterson*, 1999 WL 596276, at *5-7 (Del. Ch. July 26, 1999) (rejecting inference of entrenchment for purposes of demand futility "based merely on plaintiff's unsupported, conclusory allegations").

Finally, Plaintiff has nothing at all to say about the "potential for cost savings" and "streamlined governance" that Barclays identified as likely to flow from the WPZ Acquisition. (A184; A229.)

In sum, the WPZ Acquisition was a good deal for Williams and its shareholders. Barclays advised the Board of the many expected benefits, and the Board acted on that advice—with the goal of creating shareholder value, not entrenchment. *See Kahn*, 1994 WL 70118, at *6 (rejecting claim that challenged transaction "was driven solely or primarily by the desire of the . . . board to perpetuate its own control" because "[t]he [c]omplaint itself shows that the . . .

board had rational business reasons" for approving the challenged transaction). Plaintiff has failed to satisfy the *Pogostin* test for pleading demand futility.

4. Plaintiff's Remaining Arguments Fail.

Plaintiff makes three final arguments aimed at excusing demand: (i) that "the Court of Chancery conflated the first prong of *Aronson* . . . with the second prong" (Appellant's Br. at 39-43); (ii) that the court erred in its analysis under the first prong of *Aronson* (*id*. at 44-49); and (iii) that, "even if the claims against the remaining Defendants did not rise to the level of bad faith, . . . the case should have been allowed to proceed against Armstrong" (*id*. at 42-43). Each argument fails.

First, the Court of Chancery did not err by "conflat[ing]" the *Aronson* prongs. (*Id*. at 39-43.) To determine whether a plaintiff has pled demand futility under *Aronson*, "the Court of Chancery . . . must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment". 473 A.2d at 814. Shortly after *Aronson*, in *Pogostin*, this Court applied the test to an entrenchment claim like Plaintiff's. As noted above, to plead demand futility based on entrenchment under *Pogostin*, a plaintiff must "allege with particularity that . . . perpetuation of self in office . . . was the *sole or primary purpose* of" a majority of the board in taking the

challenged action. *Pogostin*, 480 A.2d at 627 (emphasis added); (*see* Op. at 33, 44 & n.174 (applying *Pogostin* standard); Appellant's Br. at 28, 47 (same)). In other words, under *Pogostin*, the two *Aronson* prongs collapse into this single question.[9]

The court analyzed each prong separately (*see* Op. at 37-42 (prong one), 42-46 (prong two)), and correctly acknowledged, as other courts in this context have done (*see* note 9 above), that "[Plaintiff's] arguments are essentially the same for both" *Aronson* prongs (Op. at 37). Not a single one of Plaintiff's authorities analyzes entrenchment allegations any differently under the two *Aronson* prongs. (*See* Appellant's Br. at 39-43.)

Second, the Court of Chancery correctly applied the *Pogostin* test and therefore correctly held that Plaintiff failed to plead demand futility under either *Aronson* prong. As noted, under *Pogostin*, Plaintiff must plead that entrenchment

[9] *See, e.g., Grobow*, 539 A.2d at 188-89 (rejecting entrenchment allegation under first prong, and ruling under second prong that "[w]e have already determined that plaintiffs have not stated a claim of . . . entrenchment as the compelling motive for the repurchase"); *Ryan*, 2015 WL 1915911, at *6-9 (holding that the same Plaintiff as in this action failed to allege that demand was futile on entrenchment theory under first prong, and that "[p]laintiff's argument as to the second prong of *Aronson* largely consists of a rehash", which "[a]s discussed above . . . is unavailing"); *Greenwald*, 1999 WL 596276, at *5-7 (holding that demand was not excused under *Aronson* because plaintiff failed to allege that entrenchment was the board's "'sole or primary purpose'", as required by both prongs); *Cottle v. Standard Brands Paint Co.*, 1990 WL 34824, at *8 (Del. Ch. Mar. 22, 1990) (holding that entrenchment allegation was insufficient under first prong and, with respect to second prong, that "[t]his is but another version of the same argument that has been rejected in the context of director interest").

was the Board's sole or primary purpose in approving the WPZ Acquisition. Plaintiff's own approach to the *Aronson* prongs acknowledges this, as he tries (unsuccessfully) to use the same supposed rationale from *Pogostin*—that "the only motivation for the WPZ Acquisition was to thwart a takeover by ETE" (*id*. at 6; *see id*. at 7)—to satisfy each *Aronson* prong (*see id.* at 6 ("These allegations provide more than a reasonable doubt that the WPZ Acquisition was not the product of valid business judgment."); *id.* at 7 ("Acting defensively solely for purposes of preventing a change in control is entrenchment, and constitutes a breach of the duty of loyalty . . . .")). Plaintiff cannot plead demand futility unless he pleads with particularity that the Board's sole or primary purpose in approving the WPZ Acquisition was entrenchment; he failed to do that. (Section I.C.3.) Demand is not excused.

Third, Plaintiff cannot proceed based on the theory that only *one* of Williams' thirteen directors—CEO Alan Armstrong—approved the WPZ Acquisition to entrench himself. (Appellant's Br. at 42-43.) To plead demand futility, Plaintiff must allege that a *majority* of the Board was disqualified from considering a demand. *See, e.g.*, *Levine v. Smith*, 591 A.2d 194, 205 (Del. 1991) ("The premise of a shareholder claim of futility of demand is that a *majority* of the board of directors either has a financial interest in the challenged transaction or lacks independence or otherwise failed to exercise due care." (emphasis added));

Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 363-64 (Del. 1993) ("Neither *Aronson* nor *Pogostin* can be fairly read to support [plaintiff's] thesis that a finding of *one* director's possession of a disqualifying self-interest is sufficient, without more, to rebut the business judgment presumption of director/board loyalty; and no Delaware decisional law of this Court supports such a result." (emphasis added)), *modified on reargument*, 636 A.2d 956 (Del. 1994).[10]

[10] *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008) (*see* Appellant's Br. at 41-42), is consistent with this principle of Delaware law. The court in *McPadden* (i) held that demand was excused under the second prong of *Aronson* because the board failed to act with due care; (ii) dismissed the fiduciary duty claims against the directors because the corporation had an exculpatory provision and the directors' conduct did not rise to the level of bad faith; and (iii) refused to dismiss a fiduciary duty claim against a non-director officer who was not protected by the exculpatory provision. 964 A.2d at 1263-64, 1270-76. The court never excused demand based on allegations that demand would be futile as to only *one* of many directors.

II. THE COURT SHOULD AFFIRM DISMISSAL OF THE COMPLAINT ON PROCEDURAL GROUNDS.

A. Question Presented

Should the Complaint be dismissed on the grounds that it is barred by Court of Chancery Rule 15(aaa), *res judicata* or the prohibition against claim splitting? (B306-23; B427-40; A1081:20-1095:12; A1109:19-1111:03.)

B. Standard of Review

The Court of Chancery did not resolve this question. Therefore, review is *de novo*. *See Ceccola v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 3029546, at *2 (Del. July 26, 2012) (table) ("We consider this issue *de novo*, because the Superior Court judge did not address it.").

C. Merits of Argument

The Complaint is barred by Rule 15(aaa) (Section II.C.1), *res judicata* (Section II.C.2) and the prohibition against claim splitting (Section II.C.3)—each of which provides an independent basis for affirmance. *See Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012) ("[T]his Court may affirm" "on any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court."). These procedural bars were fully briefed and argued below. Plaintiff's excuses do not rescue the Complaint. (Section II.C.4.)

1. The Complaint Is Barred by Court of Chancery Rule 15(aaa).

The Court of Chancery recognized that "[t]he procedural history of this matter is winding, and raises concerns about the viability of the present action". (Op. at 15.) Accordingly, Defendants' "Rule 15(aaa) basis [for dismissal] . . . is by no means frivolous". (*Id*. at 17.) But the court did not decide the issue.

Rule 15(aaa) provides:

> "[A] party that wishes to respond to a motion to dismiss under Rules 12(b)(6) or 23.1 by amending its pleading must file an amended complaint, or a motion to amend . . . , no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed. In the event a party fails to timely file an amended complaint or motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) or 23.1, such dismissal shall be with prejudice (and in the case of complaints brought pursuant to Rules 23 or 23.1 with prejudice to the named plaintiffs only) unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances. Rule[] 41(a) . . . shall be construed so as to give effect to this subsection (aaa)."

Under Rule 41(a)(1), "an action may be dismissed by the plaintiff without order of court . . . . However, no such dismissal . . . shall be effective where the complaint is subject to a motion to dismiss and the plaintiff has chosen to file an answering brief rather than seeking to amend. See Rule 15(aaa)."

Rule 15(aaa) "is intended to conserve litigants' and judicial resources by discouraging a party from briefing a dispositive motion before filing an amended complaint". *E. Sussex Assocs., LLC v. W. Sussex Assocs., LLC*, 2013 WL 2389868, at *1 (Del. Ch. June 3, 2013). In other words, a plaintiff cannot amend its complaint once it has filed a brief opposing a motion to dismiss; it is stuck with that earlier complaint. *See Stern v. LF Capital Partners, LLC*, 820 A.2d 1143, 1146-47 (Del. Ch. 2003); *Braddock v. Zimmerman*, 906 A.2d 776, 783 (Del. 2006).

Plaintiff violated Rule 15(aaa) because he filed the *Ryan II* Complaint three weeks after opposing Defendants' May 6 Motion in *Ryan I*. While the Complaint was not *styled* as an amendment, clearly it was one—asserting a claim on the same facts against the same Board for the same relief. A plaintiff cannot end-run Rule 15(aaa) by answering a motion to dismiss, filing a new complaint on a different docket, and seeking to withdraw his earlier complaint under Rule 41(a). *See Stern*, 820 A.2d at 1147 (refusing to permit plaintiffs to "resort[] to a Rule 41(a) dismissal in order to accomplish what Rule 15(aaa) would not allow—the filing of a new complaint").

Following *Stern*, the Chancery Rules were amended to add the final sentence of Rule 15(aaa), which expressly extends the rule to voluntary dismissals, and to add the corresponding second sentence of Rule 41(a)(1). *See In re EZCorp Inc.*

Consulting Agreement Deriv. Litig., 130 A.3d 934, 941 (Del. Ch. 2016). These amendments expressly bar Plaintiff's stratagem.

2. The Complaint Is Barred by *Res Judicata*.

Res judicata bars a subsequent claim "regarding the same matter between the same parties". *Mott v. State*, 49 A.3d 1186, 1189 (Del. 2012). The subsequent claim is barred "[e]ven if a substantive theory of recovery asserted in a subsequent lawsuit is different from that presented in prior litigation". *Wilson v. Brown*, 2012 WL 195393, at *4 (Del. Jan. 24, 2012) (table) (internal quotation marks omitted). "*Res judicata* exists to provide a definite end to litigation, prevent vexatious litigation, and promote judicial economy." *T.A.H. First, Inc. v. Clifton Leasing Co.*, 90 A.3d 1093, 1096 n.9 (Del. 2014) (internal quotation marks omitted).

The Complaint is barred by *res judicata*. The Court of Chancery dismissed the Second *Ryan I* Complaint with prejudice in January 2017. (*See* B414; B408:16-23.) Because the *Ryan II* Complaint challenges the same transaction on the same ground and involves the same parties, the Complaint is barred by *res judicata*. Plaintiff cannot take two bites at the apple. *See Maldonado v. Flynn*, 417 A.2d 378, 380, 382, 384 (Del. Ch. 1980) (holding that "the final adjudication of dismissal in the [prior court of shareholder's direct claims] precludes his prosecution of his common law [derivative] theory of recovery in this Court");

Orloff v. Shulman, 2005 WL 3272355, at *8 (Del. Ch. Nov. 23, 2005) (holding that *res judicata* barred plaintiffs from bringing a derivative claim because they "already had their opportunity to do so" in a prior action where they asserted direct claims).

3. The Complaint Is Barred by the Prohibition Against Claim Splitting.

"Where a plaintiff has had a full, free and untrammeled opportunity to present his facts, but . . . has failed to assert claims which should in fairness have been asserted, he will ordinarily be precluded by the doctrine of claim splitting from subsequently pressing his omitted claim in a subsequent action." *J.L. v. Barnes*, 33 A.3d 902, 918 (Del. Super. Ct. 2011) (internal quotation marks and alterations omitted). This rule ensures that "no person [is] unnecessarily harassed with a multiplicity of suits", and "prevent[s] a litigant from getting two bites at the apple". *Id*. (internal quotation marks omitted).

Plaintiff impermissibly split his claims. The *Ryan I* Complaints and the *Ryan II* Complaint each challenged the Board's approval of the WPZ Acquisition on the same ground, named the same Defendants, sought the same relief, and alleged the same facts. (*See* B354-96.) Nothing prevented Plaintiff from including a derivative count in the *Ryan I* Complaints, as Defendants' motions to dismiss in *Ryan I* suggested he should. (*See* B61; A1109:3-12 (Court: "[Y]our complaint

could have added a derivative [count] ab initio." Plaintiff's counsel: "I guess it could have . . . .").) But Plaintiff chose not to do so, opting—impermissibly—to split his claims across two actions, with supposedly direct claims in *Ryan I* and admittedly derivative claims in *Ryan II*. *See Maldonado*, 417 A.2d at 380, 382, 384 (barring shareholder from bringing derivative claims where he had asserted direct claims in a prior action arising out of the same transaction because "the claim has been split"); *Barnes*, 33 A.3d at 918-20.

4. None of the Excuses Plaintiff Has Offered Justifies His Improper Procedural Approach.

In his 50-page brief, Plaintiff devotes a single footnote to the procedural quagmire he created below. (Appellant's Br. at 2 n.1.) But Plaintiff offered three purported excuses in the Court of Chancery. Each fails.

First, Plaintiff argued that he could violate Rule 15(aaa), avoid *res judicata* and split his claims because "[d]irect and derivative claims are fundamentally different". (A72-74.) But, as Defendants have maintained consistently (B90-97; B191-99; B267-75), Plaintiff's claim is now and always has been *derivative*—meaning that Plaintiff never actually pled any direct claim, but instead pled two successive derivative claims with different labels, which even Plaintiff does not claim is allowed. In *Ryan I*, Plaintiff alleged that, "[b]y causing Williams to pay $428 million to WPZ, . . . Defendants reduced the price that could be demanded in

a sale of the Company" to ETE, which "injured Williams stockholders directly". (B111 ¶ 8.) But such a claim is derivative, as it pleads only injury to *Williams*. *See, e.g.*, *Feldman v. Cutaia*, 951 A.2d 727, 728, 734-35 (Del. 2008); *In re First Interstate Bancorp Consol. S'holder Litig.*, 729 A.2d 851, 861-63 (Del. Ch. 1998). "[T]he Court will independently examine the nature of the wrong alleged and any potential relief to make its own determination of the suit's classification . . . . Plaintiff['s] classification of the suit is not binding." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004) (internal quotation marks omitted).

Even if this Court were to accept Plaintiff's direct-derivative distinction, Delaware courts have repeatedly refused to allow the same plaintiff to assert claims arising out of the same transaction directly in one action and derivatively in another. *See Maldonado*, 417 A.2d at 380, 382, 384; *Orloff*, 2005 WL 3272355, at *8. This makes sense because a derivative action is in substance two lawsuits: "First, it is the equivalent of a suit by the shareholders to compel the corporation to sue. Second, it is a suit by the corporation, asserted by the shareholders on its behalf, against those liable to it." *Aronson*, 473 A.2d at 811. The dismissal of a prior, purportedly direct action by a shareholder cannot bar the second of the two lawsuits wrapped up into a derivative action (*i.e.*, the suit by the corporation). But

it does bar the first of the two lawsuits (*i.e.*, the suit to compel the corporation to sue), when brought by the same shareholder.[11]

Plaintiff's proposed rule—under which a plaintiff can file a claim, label it "direct", skip the demand, and wait to see what happens, all the while holding a backup, identical "derivative" complaint in his back pocket—is plainly inappropriate.

Second, Plaintiff argued that he "could not have known when he brought his direct action that ETE would successfully terminate the [ETE] Merger". (A74-76.) But ETE terminated on June 29, 2016—more than six weeks *before* Plaintiff filed his answering brief in *Ryan I* on August 12. Plaintiff could have sought leave to amend. (*See* A1106:10-14.) Instead, he took his chances with a direct theory. He must live with the consequences.[12]

Third, Plaintiff argued that the Supreme Court's reversal of the Court of Chancery's decision in *In re El Paso Pipeline Partners, L.P. Derivative Litigation*, 132 A.3d 67 (Del. Ch. 2015), constituted a "changed circumstance[]" that

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[11] The same shareholder (Walter E. Ryan, Jr.), through the same counsel, brought both *Ryan I* and *Ryan II*. Any concerns regarding preclusion of *other* shareholders in derivative litigation are not implicated here. *See In re Wal-Mart Stores, Inc. Del. Deriv. Litig.*, 2017 WL 3138201, at *10 (Del. Ch. July 25, 2017).

[12] Even if Plaintiff's argument were factually accurate, Plaintiff should not be excused from complying with these procedural bars on the basis that he was trying to dress a derivative claim in direct clothing just to avoid the well-established rule that derivative claims are extinguished in a merger.

somehow excuses his serial approach to litigation. (A74; A76 n.73; *see* Appellant's Br. at 2 n.1.) But *El Paso* is a red herring and has nothing to do with this case. In *El Paso*, Vice Chancellor Laster held that a claim against a general partner for expropriating value from a partnership and its limited partners was "a dual-natured claim with aspects that are both derivative and direct". 132 A.3d at 75, 107, 112. This Court reversed, ruling that a claim for "expropriation of economic value to a controller"—when "not coupled with any voting rights dilution"—is solely derivative. *See El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016). Plaintiff has never explained how his claim possibly could be considered "dual-natured" under Vice Chancellor Laster's decision—as Plaintiff has alleged injury *only* to Williams, and *no* separate injury to any shareholders. Had Plaintiff really believed while pursuing *Ryan I* that his claim was "dual-natured", then surely he would have cited the Court of Chancery's decision in *El Paso* in defending against Defendants' argument that his claim was only derivative; but Plaintiff never mentioned the decision (B242-45)—perhaps because it still required Plaintiff to plead demand futility. *See El Paso*, 132 A.3d at 75 ("Delaware law can and should treat a dual-natured claim as derivative for purposes of Rule 23.1 and the doctrine of demand . . . ."). *El Paso* changes nothing.

CONCLUSION

The judgment of the Court of Chancery should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2017, a copy of each of the foregoing documents was served via *File and ServeXpress* upon the following attorneys of record:

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