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Case Number 488,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAMS FIELD SERVICES GROUP, LLC, Plaintiff Below, Appellant v. CAIMAN ENERGY II, LLC; ENCAP FLATROCK MIDSTREAM FUND II, L.P.; ENCAP ENERGY INFRASTRUCTURE FUND, L.P.; TT-EEIF CO-INVESTMENTS, LLC; UT EEIF SIDE CAR, LLC; LIC-EEIF SIDECAR, LLC; OAKTREE CAPITAL MANAGEMENT, L.P.; HIGHSTAR IV CAIMAN II HOLDINGS, LLC; FR BR HOLDINGS L.L.C.; JACK M. LAFIELD; RICHARD D. MONCRIEF; STEPHEN L. ARATA; WILLIAM R. LEMMONS, JR.; DENNIS F. JAGGI; STEVEN GUDOVIC; and BLUE RACER MIDSTREAM, LLC, Defendants Below, Appellees.	No. 488,2019 Court Below: Court of Chancery of the State of Delaware C.A. No. 2019-0350-JTL PUBLIC VERSION FILED APRIL 3, 2020

CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

Williams' adversity argument is another attempt to control whether Caiman's IPO Issuer (Blue Racer) is subject to geographic restrictions to advance Williams' true purpose: stifle competition between its existing pipeline operations and Blue Racer.[1] Williams' Corrected Answering Brief on Cross-Appeal ("Williams' Answering Brief" or "WAB") confirms that Williams' opposition to the Proposed Amendments has nothing to do with the amendments themselves. Williams concedes that (1) the Proposed Amendments do not modify (or affect) the LLC Agreement clauses addressing whether the IPO Issuer is required to have a Restrictive Purpose Clause and (2) it would approve the Proposed Amendments (which provide undeniable tax benefits to Williams and all other Caiman Members) if the IPO Issuer has a Restrictive Purpose Clause. These facts, which Williams does not deny in its Answering Brief, are fatal to its two primary arguments on cross-appeal.

IPO-related adversity. The trial court erred by comparing Williams' position pre-IPO to Williams' situation post-IPO. Instead, the trial court should have focused on Williams' *rights* per Section 12.2(a)(v)[2] and compared Williams' rights relating

[1] Capitalized terms not otherwise defined have the same meaning as in Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal ("Defendants' Opening Brief" or "DOB").

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

to a Qualified IPO with and without the Proposed Amendments. Had the trial court conducted that analysis, it would have concluded the Proposed Amendments did not adversely affect Williams.

With or without the Proposed Amendments, EnCap has the contractual authority to create an IPO Issuer without geographic limitations (as the trial court held, and Williams does not appeal[3]), so the exercise of this authority cannot serve as a basis for adversity. Thus, it was error for the trial court to adopt Williams' argument that the Proposed Amendments were adverse because the IPO Issuer in the Up-C IPO would not have a Restrictive Purpose Clause.[4]

That theory of adversity expands Williams' right to veto amendments beyond what the LLC Agreement provides. Section 12.2(a)(v) gives Williams an approval right where an amendment "adversely affects the *rights* or obligations of [Williams]."[5] Delaware courts have held in similar circumstances that stockholders cannot rely on "adversely affects" language in approval right provisions where the amendment did not cause the supposed adversity.

This same logic forecloses Williams' argument that the Proposed Amendments are adverse because the IPO will shift Williams from a majority holder

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[3] Op. 53-56.

[4] Op. 59-60; A130, A168, A186-87.

[5] A317 §12.2(a)(v) (emphasis added).

in a private LLC to a minority stockholder in a public corporation. Williams will experience the same changes in any IPO of Blue Racer with or without the Proposed Amendments. If the adversity analysis and step-transaction doctrine apply as broadly as the trial court held, Williams will effectively have a veto right over any amendment to any provision touching upon an IPO.

Williams attempts to defuse these arguments by portraying Defendants' description of a Qualified IPO under the unamended LLC Agreement as an unproven "hypothetical."[6] But the boundaries of Williams' existing rights in a Qualified IPO are evident from the LLC Agreement's plain language and the unappealed portions of the Opinion: (1) Williams must exchange its securities in the private Caiman LLC for the public IPO Issuer's securities, (2) Williams will lose its status as a majority owner of Caiman following an IPO of Blue Racer, and (3) the IPO Issuer need not have a Restrictive Purpose Clause.[7] When the correct test is applied, Williams cannot establish adversity under Section 12.2(a)(v).

Waterfall-related adversity. Williams is also incorrect in claiming that the Proposed Amendments "modify the economic waterfall provisions (by changing the definition of 'IPO Value') to reduce Williams' economics in an Up-C IPO in favor

[6] WAB 41-42.

[7] A304 §9.5(a); Op. 55.

of Caiman Management."[8] Defendants presented evidence at trial that the amendments to the "Pre-IPO Value" definition do not affect Williams' economic position following a Qualified IPO. Williams' attempt to rebut this evidence is unavailing, and Williams offers nothing more than conclusory statements of counsel to support its adversity argument. Most of the record citations it claims demonstrate that it "marshalled additional evidence of adversity" are circular citations to its own briefing.[9] And, of course, this position contradicts Williams' concessions that it would approve the Proposed Amendments if the IPO Issuer had a Restrictive Purpose Clause.[10]

Finally, Williams does not dispute that the trial court's list of amendments was overinclusive and agrees that the Proposed Amendments at issue in this litigation were far narrower than what the trial court described in its opinion. As Williams concedes, the 2019 Proposed Amendments focused on "changes that would allow EnCap to implement the Up-C IPO (including the redefinition of the IPO Exchange) and the amendments that would alter the distribution waterfall in the resulting Up-C IPO."[11] However, Williams parrots the language the trial court used

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[8] WAB 35.

[9] *Infra* §III.B.

[10] *Infra* §III.C.

[11] WAB 39-40.

to describe the Proposed Amendments based on this overbroad list and the incorrect premise that EnCap was unilaterally enacting these Proposed Amendments through its IPO-related powers.[12] Although unclear whether the trial court's analysis of the Proposed Amendments was affected by viewing these amendments through an incorrect lens, it is undisputed the trial court used the wrong lens. To correct this error, this Court should focus solely on the LLC Agreement revisions and purported grounds for adversity identified in the parties' briefing: (1) Williams' changed circumstances post-IPO (*infra* §II) and (2) the replacement of the "Pre-IPO Value" definition with the "IPO Value" definition (*infra* §III).

[12] *E.g. id.* at 34 ("As the Court of Chancery explained in its Memorandum Opinion, EnCap proposed sweeping amendments to the Caiman Agreement under the IPO Facilitation Clause" that "radically" affected Williams' rights).

ARGUMENT

I. The appropriate standard of review is *de novo*.

De novo review applies to the trial court's adversity analysis. The trial court erred because it applied the wrong legal analysis. Had the trial court applied the correct standard, it would have found the Proposed Amendments did not adversely affect Williams' rights. Legal questions and issues of contractual interpretation are subject to *de novo* review. *CompoSecure, L.L.C. v. Card UX, LLC*, 206 A.3d 807, 816 (Del. 2018). Williams cites the standard of review for the trial court's findings of facts. That standard is inapplicable to the legal questions on cross-appeal.

To the extent this Court's legal review also involves the application of law to facts, *de novo* review remains appropriate, as the cases Williams relies on demonstrate. *See, e.g.*, *Bank of New York Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011) (applying *de novo* review to determine "whether the trial court properly concluded that a rule of law is or is not violated"); *DV Realty Advisors LLC v. Policemen's Annuity and Ben. Fund of Chicago*, 75 A.3d 101, 109 (Del. 2013) ("legal determination of good faith will be reviewed by this Court *de novo*"); *see also Sloan v. Segal*, 996 A.2d 794 (Table) (Del. 2010) ("To the extent the conclusions by the Court of Chancery involve mixed questions of law and fact our scope of review is *de novo*."); *Brody v. Zaucha*, 697 A.2d 749 (Del. 1997) (same); *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999) (same); *Zirn*

v. VLI Corp., 681 A.2d 1050, 1055 (Del. 1996) (same). Regardless, the trial court erred under any standard.

II. IPO-related consequences that would occur with or without the Proposed Amendments cannot render those amendments adverse.

The trial court erred by comparing Williams' situation with and without an IPO to judge the Proposed Amendments' adversity, thereby overstating the effect of the amendments:[13]

Williams' current situation	Williams' post-IPO situation
Caiman is 58% owned by Williams	Blue Racer is 29% owned by Williams
Caiman is a private company	Blue Racer is a public company
Caiman is subject to a private-company LLC Agreement	Blue Racer is subject to public-company governance principles
Caiman has a Restrictive Purpose Clause	Blue Racer does not have a Restrictive Purpose Clause

But these IPO-related consequences would occur with or without the Proposed Amendments:

Williams' post-IPO situation (without Proposed Amendments)	Williams' post-IPO situation (with Proposed Amendments)
Blue Racer is 29% owned by Williams	Blue Racer is 29% owned by Williams
Blue Racer is a public company	Blue Racer is a public company
Blue Racer is subject to public-company governance principles	Blue Racer is subject to public-company governance principles
Blue Racer does not have a Restrictive Purpose Clause	Blue Racer does not have a Restrictive Purpose Clause

[13] Op. 58-59.

Under Delaware law, the trial court cannot base its adversity finding on these effects. *Infra* §II.A. Instead, the trial court should have examined how the Proposed Amendments changed Williams' rights and determined whether any of those changes were adverse. *Infra* §II.B. Williams does not dispute that the above-listed grounds for adversity do not depend on the Proposed Amendments, and it fails to justify the trial court's flawed framework. *Infra* §II.C.

A. Under Delaware law, Williams' approval power under Section 12.2(a)(v) is limited to its rights under the LLC Agreement.

Williams' approval right under Section 12.2(a)(v) is limited to amendments that "adversely affect[] the rights or obligations of [Williams]."[14] Delaware courts look to a party's existing rights under an agreement to determine whether an amendment adversely affects those rights and decline to find adversity where the alleged adversity is simply a consequence of existing contractual rights. *See, e.g., Warner Commc'ns Inc. v. Chris-Craft Indus. Inc*., 583 A.2d 962, 967-78 (Del. Ch. 1989); *Benchmark Capital Partners, IV, L.P. v. Vague*, 2002 WL 1732423, at *6 (Del. Ch. 2002). Williams' and the trial court's overbroad characterization of Section 12.2(a)(v) is contrary to Delaware precedent, and Williams' Answering Brief offers no authorities to the contrary.

[14] A317 §12.2(a)(v).

For example, in *Warner*, the Court of Chancery held that amendments were not adverse if the supposed adversity could occur without the amendments. 583 A.2d at 967-78. There, the holders of one class of stock had the right to approve amendments to the company's certificate of incorporation if the amendments would adversely affect their class. *Id*. at 966. The Court of Chancery rejected the plaintiff's arguments that it had the right to approve a merger transaction permitted by the company's entity agreements, though that merger required an amendment, because "it is the merger, not the amendments to the certificate of incorporation, that will (presumably) adversely affect defendants," and the plaintiff had no right to block a merger. *Id*. As the Court of Chancery explained:

> [T]he adverse effect upon defendants is not caused by an amendment, alteration or repeal of any provision of Warner's certificate of incorporation. Rather, it is the conversion of the Warner Series B Preferred into Time Series BB Preferred that creates the adverse effect. But the conversion of the Warner Series B Preferred into the Time BB Preferred does not depend to any extent upon the amendment of the Warner certificate of incorporation….[T]he conversion of the Series B Preferred stock *could occur without any prior or contemporaneous amendment* to the certificate.

Id. at 967-68 (emphasis added). Likewise, in *Benchmark Capital Partners*, the Court of Chancery agreed that analysis of whether amendments would "[m]aterially adversely change the rights, preferences, and privileges of the [series junior

preferred stock]" turned on the adversity of the change itself, not adversity resulting from a permitted corporate action. 2002 WL 1732423, at *7.

Williams attempts to distinguish *Warner* on the basis that the certificate of incorporation did not grant a right to vote on "every merger in which [an] interest would be adversely affected…," but only in "narrowly defined circumstances."[15] But that is precisely Defendants' point. As in *Warner*, it is the ultimate transaction here—an IPO—that changes Williams' rights, not the Proposed Amendments themselves. In such circumstances, "the amendments…can in no event themselves be said to 'affect' [the other party] 'adversely,' even if one assumes…that the [ancillary transaction] does have an adverse [e]ffect." *Id.* at 968. Williams agreed long-ago that its rights would change following an IPO.

The trial court's holding is also against the principle that one member of an LLC cannot use an adversity provision to circumvent another member's express rights. *See Sullivan Money Mgmt., Inc. v. FLS Holdings Inc*., 1992 WL 345453, at *2-3 (Del Ch. 1992). In *Sullivan*, the agreement allowed one class of stockholders to vote on a merger. *Id*. at *3. Another class of stockholders was allowed to vote on amendments if they "affect adversely the rights and preferences" of that class. *Id.* at *2. The court refused to allow the latter class of stockholders to vote, finding

[15] WAB 43-44.

that, since the right to approve a merger was expressly conferred to another class, the drafters did not intend for both classes to vote on such a transaction. *Id.* at *3. The same is true here. As the trial court correctly held, EnCap has the authority under the LLC Agreement to determine whether the IPO Issuer has a Restrictive Purpose Clause.[16] Williams cannot use Section 12.2 to swallow this right by vetoing any amendment that touches upon the IPO provisions based on its fear of an IPO that does not carry forward the Restrictive Purpose Clause.

B. The Court of Chancery erred by comparing Williams' situation before and after an IPO rather than Williams' rights in an IPO with and without the Proposed Amendments.

Based on these authorities, the Court of Chancery erred by comparing Williams' situation before and after an IPO rather than examining how Williams' rights in an IPO would change with and without the Proposed Amendments.[17] Had the trial court performed the proper analysis, it would have found that the Proposed Amendments do not adversely affect any of Williams' rights in an IPO, particularly with respect to the four IPO-related consequences that were the focus of Williams' arguments and the trial court's analysis (italicized below):

[16] Op. 55.

[17] Op. 58-59.

Williams' IPO-related rights (without Proposed Amendments)	Williams' IPO-related rights (with Proposed Amendments)
Williams has no right to control whether the IPO Issuer has a Restrictive Purpose Clause	*No change (undisputed)*
Williams will be a minority stockholder following an IPO of Blue Racer	*No change (undisputed)*
Williams will own equity in a public company	*No change (undisputed)*
Williams will lose its private-company governance rights	*No change (undisputed)*
Williams will receive IPO Issuer stock with a fair market value equal to its share of Pre-IPO Value	No change (*infra* §III.A)
Williams will pay maximum taxes due to the conversion of its Caiman stock into Blue Racer stock	Williams will pay reduced taxes due to this conversion (undisputed)

In short, the Proposed Amendments change Williams' IPO-related rights in only one respect: they make the IPO more tax-advantageous to Williams and the other Caiman Members, which is undisputedly not adverse. The trial court therefore erred by finding the Proposed Amendments adverse to Williams.

C. Williams cannot salvage the trial court's flawed reasoning.

Williams cannot dispute that this supposed IPO-related adversity would occur following an IPO with or without the Proposed Amendments. Williams references the trial court's determination that the Proposed Amendments were adverse because "[a]t present, Williams is a majority investor in a privately held entity that operates within a governance arrangement that provides Williams with significant rights and protections. Through the Up-C IPO, …Williams would be a minority investor

without significant governance rights."[18] But this change is a natural consequence of any IPO of Blue Racer under the present terms of the LLC Agreement. Although Williams is a 58% majority investor in Caiman, Caiman only owns half of Blue Racer.[19] Thus, in any IPO of Blue Racer, Williams would necessarily become a minority investor of a company subject to public-company corporate governance principles (rather than a majority owner in a company governed by a private-company LLC Agreement). The LLC Agreement in its current form undisputedly permits such a transaction.[20] Thus, this "change" to the position "Williams currently enjoys" cannot establish adversity.

For similar reasons, the IPO Issuer's lack of geographic restrictions provides no basis for finding adversity. As the trial court properly found and Williams does not appeal, the LLC Agreement empowers EnCap to create an IPO Issuer without geographic limitations.[21] Because the Proposed Amendments do not change this result, there is no adversity. Williams' three arguments to the contrary are unavailing.

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[18] Op. 58-59; WAB 33.

[19] DOB at 11; B0857; *see also* A58 ¶39 ("Williams indirectly owns approximately 29% of Blue Racer through its direct holdings in Caiman.").

[20] A304-05 §9.5(a).

[21] Op. 55 ("There is nothing in the Caiman LLC Agreement that requires the governing documents of the Affiliate to have a provision analogous to the Purpose Clauses.").

First, Williams notes the trial court declined to decide whether, post-IPO, the IPO Issuer would be subject to the Restrictive Purpose Clause in Caiman's LLC Agreement pursuant to Section 12.8, even without such a clause in the Issuer's governing documents. This is a red herring. The Proposed Amendments do not make any change to Section 12.8 or otherwise affect its operation. Whether the Proposed Amendments are adopted or not, Williams has the same argument that Section 12.8 governs the operations of the post-IPO entity.

Second, Williams argues that the terms of a Qualified IPO under the current LLC Agreement are "hypothetical," such that it is unknown whether the IPO Issuer without the Proposed Amendments would have a Restrictive Purpose Clause. But Defendants' argument that the Proposed Amendments are not adverse to Williams turns on the plain language of Section 9.5(a) and the trial court's unchallenged holding that EnCap can create an IPO Issuer without a Restrictive Purpose Clause under the current LLC Agreement, not a "hypothetical" future IPO.

Third, Williams argues that the step-transaction doctrine supports the trial court's reasoning, but Williams ignores Defendants' argument that "a court should refrain from applying the step transaction doctrine to interpret a contract if doing so would contravene the parties' intent." *Coughlan v. NXP B.V.*, 2011 WL 5299491, at *8 (Del. Ch. Nov. 4, 2011). Applying the doctrine here to find adversity based on any negative consequence of an IPO (however unrelated to the Proposed

Amendments) effectively gives Williams the ability to veto any IPO that involves even a ministerial amendment to the LLC Agreement, which undermines the parties' agreement under Sections 6.8(c) and 9.5. Williams offers no substantive response.

Further, Williams fails to identify authority supporting the trial court's internally inconsistent application of the step-transaction doctrine. In its adversity analysis, the trial court lumped the Proposed Amendments with the Up-C IPO, but for purposes of assessing the scope of EnCap's IPO-related authority, the trial court sliced and diced the Up-C IPO into several individual steps. This was error. Williams' attempt to suggest otherwise highlights why the trial court's application of the step-transaction doctrine to its adversity analysis makes no sense. Williams argues that it was appropriate to apply the step-transaction doctrine to the Proposed Amendments because they were "merely means unto the end of the proposed Up-C IPO."[22] But the transitory steps of the IPO process that Williams challenges in this appeal (*e.g.*, a merger of Caiman and transfer of its assets) are more clearly "merely means unto the end of the proposed Up-C IPO." If Williams' logic were correct, the step-transaction doctrine should collapse those steps into one transaction, too.

Finally, even if the step-transaction doctrine applies to the Proposed Amendments, the trial court must still assess which of Williams' post-IPO

[22] WAB 46.

circumstances would not have existed but for the Proposed Amendments. *Supra* §II.A. Even if the trial court could examine Williams' post-Amendment, post-IPO position under the step-transaction doctrine (as opposed to examining Williams' post-Amendment, pre-IPO situation), the trial court can only find that the amendment "adversely affected" Williams if the complained-of post-IPO position was a consequence of the Proposed Amendments. *Id.* To hold otherwise would grant Williams the power under the step-transaction doctrine to veto any amendment to the IPO provisions—even one that merely fixes an inconsequential typo—by pointing to the effects of an IPO to establish adversity. Because Williams complains about post-IPO circumstances that would exist with or without the Proposed Amendments, the step-transaction doctrine does not salvage Williams' arguments.

III. Other than the IPO itself, there is no basis for Williams' claims of adversity.

In an effort to find a right the Proposed Amendments actually *changed*, Williams argues the amendments "replaced the definition of 'Pre-IPO Value' in the Caiman Agreement with a new definition of 'IPO Value,' which would benefit Caiman Management in an Up-C IPO…at Williams' expense."[23] But this change does not alter Williams' economic position compared to a Qualified IPO under the current LLC Agreement, as the trial record proves. *Infra* §III.A. Williams failed to

[23] WAB 37-38.

offer any evidence to the contrary. *Infra* §III.B. Instead, Williams repeatedly conceded it would accept the Proposed Amendments if the geographic limitations carried forward post-IPO. *Infra* §III.C. Thus, there is no independent basis for finding the Proposed Amendments adverse to Williams.

A. The Proposed Amendments do not harm Williams' economic interests.

The evidence presented at trial demonstrated that replacing the "Pre-IPO Value" definition was not adverse to Williams. Defendants presented calculations comparing "Pre-IPO Value" in the existing LLC Agreement to "IPO Value" in the Proposed Amendments. These definitions represent the value used to determine the percentage of equity allocated to each Caiman Member in an IPO. This comparison demonstrates the Proposed Amendments do not impact Williams' economic interests. The Proposed Amendments did not amend any other provisions impacting the "waterfall" calculations.

As shown in a May 15, 2019 spreadsheet sent to Williams, the value used to calculate Williams' position is the same under the existing agreement (the current "Pre-IPO Value") and the Proposed Amendments (the proposed "IPO Value") under several IPO scenarios.[24] Under Section 9.5(a), the "IPO Securities" a Member receives in an IPO have the Fair Market Value of that Member's proportionate

[24] B2012-13.

interest in the Pre-IPO Value or (as amended) IPO Value.[25] The definitions of "Pre-IPO Value" in the current LLC Agreement or "IPO Value" in the Proposed Amendments simply use the net proceeds from the IPO to extrapolate the value of the entire enterprise, as commonly done in investment banking.[26] For instance, if 20% of the company is sold in an IPO for [redacted], the entire company is worth [redacted]

Contrary to Williams' unsupported assumptions, this commonly-used valuation extrapolation is the same pre- or post-amendment. For example, focusing on the far-right columns of B2012 and B2013:

- In the current "Pre-IPO Value" definition (B2013), Blue Racer would sell [redacted] total shares to the public [redacted]. The new public stockholders would hold [redacted], and the legacy owners would hold [redacted].
- In the new "IPO Value" definition (B2012), Blue Racer is still selling [redacted] to the public for net proceeds of [redacted]. The new public stockholders would hold [redacted] class A shares, and the legacy owners would hold [redacted] class B shares.

[25] *Compare* A304-05 §9.5(a) to B1146-47 §9.5(a).

[26] B1362/146:13-147:3 (Carmichael) ("[redacted]").

The value of the company in both instances is [redacted] ([redacted]), with [redacted] held by the legacy owners:

Excerpts of B2013 and B2012

[redacted]

Further, and contrary to Williams' Answering Brief,[27] it is appropriate to include the class A and B shares in this comparison because the equation is seeking to calculate the percentage of the enterprise sold to generate the IPO proceeds (for example, [redacted]) regardless of the classification of the total existing number of shares. B2013 simply reflects that, pre-Amendment, there would not be a situation where [redacted] were issued to public stockholders and

[27] WAB 38-39.

none to the legacy stockholders; rather, if limited to one class, [redacted] of the same class would have been issued, with [redacted] sold to the public.[28] Thus, Williams attacks a straw man by arguing that the definition amendment "would benefit Caiman Management in an Up-C IPO by taking into account the value of the IPO Issuer's nonpublic securities (that would not be included in value for purposes of the economic waterfall on *an Up-C IPO in the existing definition of Pre-IPO Value*)," [29] as it is undisputed that there could not have been an Up-C IPO (with public and nonpublic classes of stock) under the existing LLC Agreement.

Williams does not explain how an amendment that results in the same outcome is "adverse" to its economic interests. As the spreadsheet demonstrates, with or without the Proposed Amendments, the same number of shares would be sold to the public at the same price, thus resulting in the same net proceeds from the sale.[30] Although the IPO Value definition incorporates changes to reflect two classes of shares rather than one, both equations reach the same valuations for the Members' portion of the IPO Issuer. Because Williams' proportionate share would be calculated from Pre-IPO Value or IPO Value, the fact that these values are the same

[28] Further, the separate class of securities issued to the legacy Members in an Up-C IPO would be exchangeable into and hold the same economic and voting rights as the public class of securities.

[29] WAB 37 (emphasis added).

[30] B2012-13.

shows that Williams' economic interest in the transaction does not change as a result of the Proposed Amendments. Williams offers no evidence or calculation of its own to contradict this conclusion. Without such evidence, the trial court could not have found adversity under Section 12.2 had it applied the correct test.

B. Williams' supposed "evidence" of adversity consists of nothing more than statements of counsel and bare legal conclusions.

Williams did not, as it claims, "present[] substantial evidence of adversity at trial."[31] Williams' effort to prove adversity tied to the Proposed Amendments themselves consisted entirely of a single statement in its post-trial brief stating that the "definition of 'Pre-IPO Value' would be amended to make the distribution 'waterfall' provisions in the [LLC] Agreement benefit Caiman Management in an Up-C structure."[32] This conclusory statement did not include any further explanation or discussion of the relevant contractual language, let alone numerical evidence to support Williams' claim that the amendments benefited Caiman Management at the expense of Williams.

Williams now claims it raised this issue numerous times throughout its briefing,[33] but a review of the record cites in Williams' Answering Brief confirms that its primary argument for adversity was that the Proposed Amendments would

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[31] WAB 35.

[32] A132.

[33] WAB 36.

result in an IPO without geographic restrictions, not because of anything inherent in the Proposed Amendments themselves.[34]

The single piece of "evidence" Williams does cite—an email from Williams' outside counsel—also expresses an unsupported conclusion without providing any evidence that the Proposed Amendments would cause an adverse change in circumstances for Williams. The email states, "We view as adverse any amendments to the LLC Agreement that would incorporate changes to facilitate an Up-C Structure or changes to IPO Value to make the economic waterfall provisions more advantageous to other parties in connection with an Up-C Structure (which changes are adverse on their own because they reduce Williams's share of the economics that would result from the provision as currently drafted)," but it fails to explain how (if at all) the amendments would reduce Williams' economic interests.[35] Williams also points to Curt Carmichael's testimony agreeing with this email, but his mere agreement with a statement of principle provides no factual basis for finding

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[34] *See* A175-76 (Williams noting that Proposed Amendments were "part of a reorganization to strip Williams of its bargained-for property rights," which it identifies as "contractual blocking rights" in a footnote); A177-78 (noting that amendments require Williams' consent under Section 12.2(a) but that Williams will consent only if Pubco's charter includes the Restrictive Purpose Clause); A192 (demonstrative submitted with post-trial brief repeating statement on A132); B1811-12 (noting that Williams will consent to amendments if Pubco's charter includes the Restrictive Purpose Clause); B1841-43 (stating that Proposed Amendments are adverse because they facilitate an IPO without the Restrictive Purpose Clause).

[35] B1765-66.

adversity.[36] Williams failed to elicit any testimony or other evidence where anyone actually compared the old and new provisions or conducted any calculations of Williams' interest under those provisions. Bare conclusions or statements of counsel are not evidence. *Baltimore Trust Co. v. Holland*, 85 A.2d 367, 369 (Del. Ch. 1952).

C. Williams conceded that its only basis for claiming the Proposed Amendments were adverse was the lack of a geographic restriction post-IPO.

Williams' repeated concessions that it would not contest the Proposed Amendments if the IPO Issuer had a Restrictive Purpose Clause conclusively demonstrate that Williams did not find the Proposed Amendments otherwise adverse to its interests. Then, as now, Williams was only ever concerned about the Restrictive Purpose Clause, as shown by Williams' repeated confirmations that it would no longer oppose the Proposed Amendments if the IPO Issuer's charter included a Restrictive Purpose Clause:

- "Williams will not consent to [amendments to the Agreements] without the protection of a Business

[36] Williams also cites an email that is completely irrelevant to the Proposed Amendment's purported adversity. *See* WAB 36 (citing AR1). In the email, Caiman's General Counsel asked outside counsel, "[W]e can't use the IPO reorg to strip Williams of rights it currently has, correct?" The email merely reflects a question, not a conclusion. Further, it refers to the "business purpose clause" and makes no mention of the Proposed Amendments (let alone the waterfall provisions), contrary to Williams' implications.

Purpose Provision in the charter of the IPO Issuer…."[37]

- "Williams will consent to the above steps [including amendments to the Agreements] only if Pubco's charter includes a Business Purpose Provision…."[38]

- "These Proposed Amendments are intended to facilitate the prospective IPO, which currently contemplates removal of the Business Purpose limitations in contravention of Williams's consent rights. *Until Williams is assured that its rights will be protected following the contemplated IPO*, steps toward facilitating the IPO in its proposed form will adversely affect Williams."[39]

- In internal emails among Williams employees, Carmichael states, [redacted]"[40]

As Williams was willing to accept the Proposed Amendments with a geographic limitation post-IPO, it did not consider the Proposed Amendments adverse on the grounds now asserted here.

[37] A125.

[38] A178; *see also* A173.

[39] B1842 (emphasis added).

[40] B0964.

CONCLUSION

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

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CERTIFICATE OF SERVICE

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