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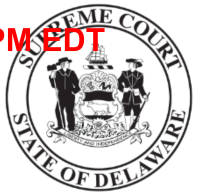

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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NATURE OF THE PROCEEDINGS

In mid-March 2020, The Williams Companies, Inc. ("Williams" or the "Company") faced unprecedented challenges arising from simultaneous global crises—the COVID-19 pandemic and an oil price war. Despite the fact that Williams, unlike its peers, is a natural gas-based company, and that natural gas remained unaffected by the price war or the pandemic, Williams' stock price was dragged down with the broader energy sector, plunging 65% in just two months. Yet Williams' business fundamentals remained unchanged, leaving it as the only energy company in its peer group that neither pulled its guidance nor revised its guidance downward. Williams' board of directors (the "Board") discussed the concern that these circumstances made Williams a ripe target for opportunistic activist investors looking to rapidly acquire a large position in the Company at unjustifiably depressed prices and to use that position to seek short-term gain at the expense of Williams' and its stockholders' long-term interests. The Board adopted a shareholder rights plan (the "Plan") with a 5% trigger and one-year term to ensure an orderly process in the event such an activist (or group of activists) emerged and to limit the influence of any such activist, so that Williams' management could focus, during a time of crisis, on ensuring the safe delivery of natural gas throughout the country.

This lawsuit was filed over five months later—less than seven months before the Plan was already set to expire. The complaint alleged that the Board breached

its fiduciary duties because the Plan improperly chilled stockholder activism. After a three-day trial, the Court of Chancery invalidated the Plan and enjoined its enforcement for the three weeks then remaining in its term. The court concluded that, in adopting the Plan, the Board acted in good faith and conducted a reasonable investigation, aided by outside advisors. But the court held that the Plan was not proportional to the "hypothetical" threat facing Williams, given its supposed potential to chill stockholder activism more broadly. In so holding, the court failed to identify any evidence that any stockholder had in fact been chilled by the Plan from doing anything. Nor did the court adequately consider the once-in-a-lifetime storm facing Williams at the time of the Plan's adoption. This Court should reverse the decision below for several reasons.

First, the Court of Chancery erroneously applied *Unocal*. Even though there was no evidence that the Board adopted the Plan for self-interested reasons or that the Plan had any effect on a potential takeover, the court found that the Plan had an entrenchment effect because it shielded the Board and management from stockholder "influence." The court's reasoning expanded the concept of entrenchment far beyond its established meaning under Delaware case law—*i.e.*, perpetuation of directors in office. Because the Plan did not present the "omnipresent specter" of director self-interest that justifies *Unocal* scrutiny, the

court should have reviewed the Plan's adoption under the more deferential business judgment standard. Its failure to do so is reversible error.

Second, even if *Unocal* applied, the Court of Chancery erred in concluding that the Plan was not a reasonable response to the legitimate corporate objective identified by the Board. The court artificially separated the unitary danger identified by the Board into three separate and disconnected threats of (1) general stockholder activism, (2) short-termism/management distraction, and (3) undetected stock accumulation. The court then held that the first two of these were not legally cognizable threats because they were merely hypothetical. But that conclusion disregarded long-standing Delaware law—starting with this Court's decision in *Moran v. Household International*—that boards do not have to wait for a specific, concrete threat to materialize to take defensive action.

The Court of Chancery likewise erred in not giving proper deference to the Plan's chosen terms. This Court has made clear that boards should be afforded substantial latitude in deploying rights plans, and are not required to select the most perfect or least restrictive option, but only an option that is "reasonable." The court disregarded that directive and improperly criticized the Plan as being more restrictive than certain rights plans proposed in years prior by academics. The court also erred in its analysis of the Plan's supposed *potential* harms, which were unsupported by the record.

The decision below effectively prevents directors from pre-planning for the possibility of opportunistic and potentially harmful stockholder activism—even at a time of unprecedented crisis and turmoil. In so ruling, the Court of Chancery has dramatically weakened the tools available to boards and tilted the balance of power towards opportunistic actors to the detriment of companies' and investors' long-term interests. For all these reasons, and as detailed below, the decision should be reversed and vacated.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in reviewing the Board's adoption of the Plan under *Unocal*. Enhanced *Unocal* scrutiny is justified to address the "omnipresent specter" that boards are acting in their own self-interest to perpetuate themselves in office in the face of a potential takeover. The court below acknowledged that the Plan was not designed or implemented to address a potential takeover, and the evidence showed that it would not have been effective to achieve that goal. The court nonetheless found that the Plan was subject to *Unocal* because it had an "entrenchment" effect. The court's definition of entrenchment finds no support in Delaware law and constitutes an improper expansion of that well-understood term. Because the Plan had no entrenchment effect and did not present any concerns of director self-interest, it should have been evaluated under the more deferential business judgment standard.

2. Even if *Unocal* applied, the Court of Chancery erred in concluding that the Board breached its fiduciary duties in adopting the Plan. The court's conclusion that the Board could not adopt a Plan to address "hypothetical" threats of stockholder activism or short-termism is contrary to this Court's decision in *Moran*. Further, under *Unocal*'s second prong, the Court of Chancery applied an improper standard, substituting its own judgment for the Board's in concluding that the Plan was disproportionate because "less extreme" options were purportedly available. The

court likewise improperly concluded that the Plan was disproportionate because it was "likely" to have a chilling effect on stockholder communications and because the Board "could" misuse the Plan, even though there was no evidence of any such effect or misuse.

STATEMENT OF FACTS

A. Williams and Its Experience with Activists

Williams, a Delaware corporation headquartered in Tulsa, Oklahoma, owns and operates natural gas assets, including over 30,000 miles of pipeline, delivering approximately 30% of the nation's daily natural gas. (Ex. A, Memorandum Opinion and Order (the "Opinion" or "Op.") 4.) At all relevant times, Williams had approximately 1.2 billion shares of outstanding common stock. (*Id.*) As of March 2020, Williams' Board comprised twelve members—CEO Alan Armstrong and eleven independent directors. (*Id.* 5.) Shareholders elect directors annually and can remove directors without cause by written consent. (*Id.* 4.)

Williams has been a target of shareholder activists. In late 2011, Soroban Capital Partners and Corvex Management each acquired less than 5% of Williams' stock and later disclosed that they were working together to seek Board seats. (*Id.* 5, 31; A.0081.) In February 2014, through a settlement, the firms' leaders, Eric Mandelblatt and Keith Meister, joined the Board. (Op. 5.)

The activists' tenure was disastrous to the long-term interests of Williams' stockholders. They impeded management's ability to run Williams and harmed long-term value, including by pursuing an agenda emphasizing short-term gain and foregoing long-term strategic opportunities. (*Id.* 6; A.2012–15; A.1159.) The activists were instrumental in pressing Williams to merge with Energy Transfer

Equity LP in 2016 (Op. 5), a transaction that ultimately fell apart and remains subject to litigation in Delaware courts. After the merger failed, the activists tried to replace Mr. Armstrong as CEO. (*Id.* 5–6.) When that failed, six of the Company's thirteen directors (including Mandelblatt and Meister) abruptly resigned. (*Id.* 6.) Meister threatened a proxy contest to replace the remaining directors with Corvex employees, but abandoned that idea. (A.0081.)

Following the activist campaign, Williams reconstituted its management team. (Op. 6.) By early 2020, management had implemented an effective strategic plan to create long-term stockholder value (A.1837–40; A.2017–19), and Williams' stock price had reached $24.04 per share. (Op. 6.)

B. Williams Confronts Unprecedented and Simultaneous Global Crises

In early 2020, the Board faced simultaneous global crises—COVID-19 and an oil price war between Saudi Arabia and Russia, which devastated the oil market and sent energy sector stocks plummeting. (*Id.* 6–7.) The pandemic hit first; between mid-January and the end of February, Williams' stock price fell from $24.04 to $18.90 on outsized and volatile trading volumes. (*Id.* 7.) The Board met on March 2, 2020 to consider a share repurchase program proposed by management to support the Company's stock but rejected the idea to preserve liquidity. (*Id.*)

Days later, as deaths from the pandemic increased, lock-downs proliferated, and global oil demand fell, Saudi Arabia launched an oil price war, causing energy

stocks to plummet to their lowest levels in 15 years. (*Id.* 7–8.) Despite operating in the natural gas industry and strong business fundamentals that were not impacted by the pandemic or the oil price war, Williams' stock was dragged down with the broader energy sector and, by March 19, hit an intra-day low of $8.41 per share—a decline of 65% in just two months. (*Id.* 8; A.0068.)

C. The Board Considers and Adopts the Plan

As the pandemic worsened and market uncertainty grew, the Board became concerned that the disconnect between the Company's strong business fundamentals and falling stock price made Williams an attractive target for opportunistic activists to acquire a large stake at artificially depressed prices and influence control of the Company to the detriment of stockholders' long-term interests. (Op. 9–10 & n.55.) In that context, Casey Cogut, one of Williams' directors and a long-time M&A lawyer, suggested that management consider proposing a shareholder rights plan. (*Id.* 8–10.) Mr. Cogut outlined some basic terms—a 5% trigger, a one-year duration, and an exclusion for passive investors. (*Id.* 10.) Mr. Cogut understood the proposed terms would be novel, but believed them necessary and appropriate under the circumstances. (*Id.* 9–10; A.1770–71.)

Williams' General Counsel consulted with outside counsel at Davis Polk & Wardwell LLP ("Davis Polk"), who provided a draft rights plan on March 11, 2020.

(Op. 11.) The Board met on March 18 and 19, 2020, together with management, Davis Polk, and Morgan Stanley, to discuss the rights plan. (*Id.* 11–13, 17.)

During the meetings, the Board received a presentation on the purposes and mechanics of rights plans. (Op. 13–14, 58; A.0231.) Among other things, the presentation made clear that a rights plan would not prevent an acquisition of the Company, proxy contests for Board seats, or investors from acting together so long as their aggregate ownership was below the plan's trigger threshold. (Op. 14.)

Morgan Stanley advised that it expected activist campaigns to continue (and potentially increase) despite market conditions (Op. 18; A.0391), and that the pandemic was causing high volatility and trading volumes, which might prevent Williams from detecting a large stock accumulation by an activist, particularly given gaps in federal disclosure rules (Op. 14–15; A.1794–95; A.2255–56).[1]

Morgan Stanley advised that a rights plan would deter activists from taking advantage of the dislocation in Williams' stock price and market volatility to rapidly accumulate a large and influential position in Williams' stock. (Op. 17–18; A.0387.)

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[1] Under Section 13(d) of the Securities Exchange Act, investors generally must report on Schedule 13D beneficial ownership of 5% or more of a company's stock, but have a ten-day window after crossing that threshold to do so. (Op. 22.) A "Passive" investor—who acquired his securities "in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer"—can report beneficial ownership exceeding the 5% threshold on a more streamlined Schedule 13G. *See* 17 C.F.R. § 240.13d-1(b)(1)(i).

That was consistent with the Board's desire to ensure that management remained focused on navigating the once-in-a-century pandemic, substantial energy market volatility, and general market upheaval—while ensuring the safety of its employees and the continued delivery of 30% of the U.S. natural gas supply—rather than have to deal with the distraction of an activist with an outsized ownership position seeking to change or influence control of the Company and disrupt its long-term business plans. (A.0155–56; A.1842–44; A.2022; A.2038.)

The Board discussed the proposed plan's 5% trigger in comparison to other potential thresholds, the plan's proposed one-year term, the desire to exempt passive investors, and the desire to protect stockholders' long-term interests. (Op. 14–15, 18–19; A.1002; A.2031; A.2248.) With respect to the trigger, Morgan Stanley explained that, outside the context of protecting net operating losses ("NOLs"), rights plan triggers were typically higher. (Op. 18.) But the Board concluded that a trigger higher than 5% would not adequately address its concerns at the time. (A.2035–36; A.2255–58; A.2263–64.)[2] The Board also discussed the concept of

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[2] Notably, given Williams' substantial market capitalization, a 5% trigger would still permit an activist to acquire a significant amount of Williams' stock on a dollar basis—over $650 million based on Williams' March 19, 2020 closing price. (Op. 22–23.) Indeed, on a dollar-value basis, the toehold permitted under the Plan was larger than the toehold permitted under 95% of all rights plans, including those with higher triggers (*id.* 83 (citing A.2070–72); A.2079–80), and greater than 95% of the toeholds held by activists at the time they launched campaigns, based on more than 7,000 campaigns identified by Defendants' expert (A.2080–82).

aggregating beneficial ownership under the rights plan to address activists working together. (Op. 19; A.0387; A.1796–97; A.2248–50.) This possibility was particularly acute, given the number of short-term investors known to work together in the midstream space in which Williams operates. (A.2249.)

The directors understood that proxy advisory firms like Institutional Shareholder Services ("ISS") might react negatively to a rights plan, and that stockholders might vote against their re-election at Williams' upcoming annual meeting in April. (Op. 14–15, 19; A.0387.) But the Board felt that protecting stockholders' long-term interests took precedence over such a risk. (Op. 15.)

At the end of the meeting on March 19, the Board unanimously adopted the Plan and disclosed it the next day. (*Id.* 20.)

D. The Plan's Key Terms

Pursuant to the Plan, the Board declared a dividend of one preferred stock purchase right for each outstanding share of Williams' common stock as of March 30, 2020. (A.0475.) The Plan was set to automatically expire on the one-year anniversary of its adoption—March 20, 2021. (A.0476.) Prior to expiration, the rights would become exercisable if and when a stockholder became an "Acquiring Person," defined as any person who individually or collectively obtained beneficial or economic ownership of 5% or more of Williams' stock. (Op. 22; A.0475.) As is common, the Plan defined beneficial ownership to include interests created by

derivative instruments. (Op. 23; A.0476; A.0492.) If a stockholder became an "Acquiring Person," there was a ten-day window before the rights became exercisable. (Op. 22.) During that time, the Board retained authority to amend or redeem the Plan. (A.0476.) At all times, the Board had final interpretive authority over the Plan's terms. (A.0526.)

The Plan exempted "Passive Investors" from the definition of Acquiring Person—meaning the rights would not become exercisable if an investor who owned or acquired 5% or more was a "Passive Investor" within the Plan's meaning. (Op. 26–27.) The exemption was intended to apply to any investor who lacked intent to change or influence control of the Company (A.0475; A.0549; A.0553; A.0620), including Williams' three largest stockholders—BlackRock, Vanguard, and State Street—the only stockholders who owned more than 5% of Williams' stock, each of which filed on Schedule 13G (Op. 29; *supra* n.1).

Under the definition of "Acting in Concert" (the "AIC Provision"), the Plan aggregated beneficial ownership of stock by persons who knowingly acted in concert or in parallel, or towards a common goal, relating to changing or influencing control of Williams, subject to certain other criteria being satisfied. (Op. 23–24; A.0491.) By its terms, the AIC Provision did not apply to stockholders working together in the context of public proxy solicitations or tender offers; any investor or group of investors could initiate a proxy contest, and communicate freely with other

stockholders to solicit their proxies, without triggering the Plan, regardless of how much stock the investors collectively held. (*Id.* 26.)

E. Reaction to the Plan

After the Plan's adoption, management and certain directors engaged with Williams' major stockholders to explain the Board's rationale for the Plan, and most stockholders were understanding of the Board's decision in light of the circumstances facing the Company. (A.0553.) Williams' two largest stockholders—who together held almost 20% of Williams' stock—voted in favor of all directors at Williams' annual meeting (A.0622).

The two major proxy advisory firms had differing reactions to the Plan. Glass Lewis supported it, recommending that stockholders vote in favor of each director at the annual meeting. (A.0588; A.0597.) Glass Lewis acknowledged that the Plan's purpose was to "protect the interests of long-term stockholders in light of the extreme market conditions stemming from the impact of COVID-19" and explained that, while it typically opposes rights plans, it believed that "this case warrant[ed] an exception," especially given the Plan's "limited duration." (A.0096–97; A.0597.) ISS, by contrast, recommended that stockholders vote against the Board's chairperson (Steve Bergstrom) because of the Plan, and recommended cautionary votes for the remaining directors. (Op. 29–30.)

On April 28, 2020, five weeks after the Plan's adoption, stockholders reelected each of Williams' director nominees. (A.0098.) Over 67% of shares were voted in favor of Mr. Bergstrom and 89% to 93% were voted in favor of the other directors. (Op. 32; A.0098.)

F. Williams' Performance Post-Plan

A primary concern in the weeks preceding the Plan's adoption was that, although Williams' stock price was plummeting, its business fundamentals remained unchanged. (Op. 32.) That concern proved accurate. (*Id.* 34–35.) After the Plan's adoption, Williams' management navigated the Company to a strong 2020 performance despite the disruption caused by the pandemic and oil pricing war. (*Id.*) Indeed, as two academics found, Williams "experienced a positive stock price effect" following the Plan's adoption,[3] and by the issuance of the court's opinion, Williams' stock price had rebounded to $22.84 per share.[4]

G. The Wolosky Litigation and the Opinion

Plaintiff Steven Wolosky is a prominent stockholder activist lawyer with 30 years of experience representing activists. (A.1713–14.) Despite being aware of the Plan's adoption in March 2020, he did not file this litigation until August 27, 2020—

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[3] Ofer Eldar & Michael D. Wittry, *Crisis Poison Pills*, 10(1) REV. OF CORP. FIN. STUDIES 204 (2021), at 31, *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583428 (part of record below as JX-147).

[4] YAHOO! FINANCE, https://finance.yahoo.com/quote/WMB.

more than five months later. (Op. 35; A.0637.) Defendants opposed expedition and appointment of Mr. Wolosky as class representative based in part on the concern that he was using this action to advance the interests of his clients rather than the interests of Williams' stockholders, but the Court of Chancery rejected those arguments. (Op. 35.)

The court consolidated Mr. Wolosky's action with an action filed a week later by City of St. Clair Shores Police & Fire Retirement System, and designated Mr. Wolosky's complaint as operative. (*Id.*) Following expedited discovery, the Court of Chancery held a three-day trial in January 2021. (*Id.* 36.)

The court issued its Memorandum Opinion on February 26, 2021, holding that the Plan was invalid under *Unocal*. (*Id.* 89.) The court held that the Board's adoption of the Plan was subject to *Unocal* enhanced scrutiny because "all poison pills, 'by . . . nature,' have a potentially entrenching 'effect.'" (*Id.* 46–48 (citations omitted).) Despite acknowledging that the Williams directors did not adopt the Plan to protect their Board seats (*id.* 53–54), the court concluded that "insulating the Board and management from stockholder influence during a time of uncertainty" constituted a sufficient "entrenchment" motive (*id.* 48 & n.240).

Applying *Unocal*'s first prong, the Court of Chancery found that the Board was comprised of "nearly all independent, outside directors" and had "conducted a good faith, reasonable investigation" when adopting the Plan, including by engaging

in “genuine deliberation” and seeking advice from outside advisors. (*Id.* 62–63.) But the court held that the Board failed to identify any cognizable threat that justified the Plan’s terms. (*Id.* 70–73.) The court identified three purportedly separate corporate objectives of the Board in adopting the Plan: (1) “deter[ring] stockholder activism”; (2) “insulat[ing] the board from activists pursuing ‘short-term’ agendas and from distraction and disruption”; and (3) addressing concerns “that a stockholder might stealthily and rapidly accumulate large amounts of stock.” (*Id.* 63.) After characterizing all three as “purely hypothetical,” the court determined that the first two were not cognizable threats under Delaware law, at least in the abstract. (*Id.* 63–64, 70–71, 73.) The court also questioned the validity of the third objective, but assumed for purposes of its analysis that it was a valid objective of a rights plan to serve as an “early-detection devi[c]e to plug the gaps in the federal disclosure regime.” (*Id.* 74.)

Having artificially narrowed the scope of the Board’s objectives in adopting the Plan solely to “gap filling,” the court then evaluated the Plan under *Unocal*’s second prong and held that its features were not reasonable to address the narrowed threat. (*Id.* 82–83, 88–89.) In reaching that conclusion, the court compared the Plan’s terms to certain alternative plans that had been proposed by academics and determined that the Plan was unreasonable because the Board “might have considered” one of these “less extreme options.” (*Id.* 82.) The court also ruled that

the Plan "raised concerns" because it was "likely to chill a wide range of anodyne stockholder communications." (*Id.*)

There was no evidence showing that any Williams stockholder—including the class representatives—was in fact chilled by the Plan or refrained from taking any action between the Plan's adoption on March 19, 2020 and the Opinion's issuance on February 26, 2021. To the contrary, the court acknowledged the absence of such evidence, but explained that it "is not incumbent on a class representative to prove a negative" and that it was enough that the Plan "could" have caused the absence of stockholder activism. (*Id.* 45–46 & n.233.) Moreover, despite the absence of evidence of any chilling impact or attempt by the Board to wield the Plan for such a purpose, the court suggested that the Board might misuse the Plan in the future to chill beneficial stockholder activism and held that stockholders "must regulate their behavior based on what the Board *could* do." (*Id.* 88 (emphasis added).)

Based on these concerns, the Court of Chancery declared the Plan unenforceable and permanently enjoined its continued operation for the approximately three weeks remaining in its term. (*Id.* 88–89.) The Court of Chancery entered an Order Implementing February 26, 2021 Memorandum Opinion on March 4, 2021 (Ex. B) and a Final Order and Judgment, which included an award of $9.5 million in attorneys' fees, on April 23, 2021 (Ex. C). Defendants timely filed a notice of appeal on May 6, 2021.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN APPLYING *UNOCAL* AS THE STANDARD OF REVIEW

A. Question Presented

Did the Court of Chancery err in reviewing the Board's adoption of the Plan under *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), rather than the more deferential business judgment standard when the evidence showed the Plan had neither the purpose nor effect of entrenchment, as that term is understood under Delaware law? (A.0157–60; Op. 46–48.)

B. Scope of Review

This Court reviews the formulation and selection of the standard of review *de novo*. *Stroud v. Grace*, 606 A.2d 75, 91 (Del. 1992).

C. Merits of the Argument

The Court of Chancery should have reviewed and upheld the Board's adoption of the Plan under the business judgment standard because the core rationale for enhanced scrutiny under *Unocal* was absent. As this Court has explained, the fundamental premise underlying *Unocal* enhanced scrutiny is the inherent conflict presented during contests for corporate control, due to "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." *Unocal*, 493 A.2d at 954. The court found that no such motivation was present here, and critically, the evidence demonstrated that

the Plan was *incapable* of such an effect, rendering enhanced scrutiny improper.

In holding that *Unocal* applies as a matter of law to *all* shareholder rights plans, the Court of Chancery paraphrased this Court's decision in *Versata Enterprises v. Selectica, Inc.*, 5 A.3d 586 (Del. 2010), and stated that all rights plans, "'by . . . nature,' have a potentially entrenching 'effect.'" (Op. 47–48 & n.238 (citing *Selectica*).) In *Selectica*, the board adopted a 4.99% rights plan for the primary purpose of preventing inadvertent forfeiture of NOLs under the tax code. 5 A.3d at 599–600. Applying *Unocal*, the Court stated that "any" rights plan, "by its nature, operates as an antitakeover device" and that the plan at issue triggered enhanced scrutiny "because of its effect and its direct implications for hostile takeovers." *Id.* at 599. *Selectica*, however, did not consider whether *Unocal* would apply where, as here, a rights plan was adopted on a clear day, not in response to any specific action already taken, and where the plan was not designed to operate, and could not effectively operate, as an antitakeover device.

That is the critical distinction. Crediting the "unadorned" and "candid" testimony from the Williams director who "conceived of" the Plan, the Court of Chancery expressly found that the Plan was neither "adopted with the objective of deterring takeover attempts" nor "designed for" that purpose. (Op. 8, 52–53, 57.) The court also credited defendants' corporate governance expert, Professor Guhan Subramanian, who opined that the Plan "'was not meant to be a hostile takeover

deterrent'" and, critically, "'would have been virtually irrelevant for that kind of hostile bid' because the company was vulnerable to takeover activity for other reasons" (*id.* 53 n.255 (quoting A.2216)), including stockholders' ability to remove directors without cause by written consent (*id.* 4; A.2074–75). *See Kidsco, Inc. v. Dinsmore*, 674 A.2d 483, 493 (Del. Ch.), *aff'd and remanded*, 670 A.2d 1338 (Del. 1995) (even where a defensive measure "*might* possibly 'perpetuate' the board in office" it would "not 'entrench' the board in any meaningful sense" where shareholders would have ability to remove the existing board at upcoming meeting). The Plan's duration was also limited to a single year (Op. 31)—further limiting any possible takeover impact. *See Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 94 (Del. Ch. 2011) ("[I]n order to have any effectiveness" as a takeover defense, rights plans "do not—and can not—have a set expiration date.").

This combination of factors distinguishes the Plan from every other rights plan considered by Delaware courts under *Unocal*. For example, in *Moran v. Household International*, 500 A.2d 1346 (Del. 1985), although the rights plan was similarly adopted on a clear day—not "in reaction to a specific threat" but "to ward off possible future advances"—it was indisputably adopted to prevent a hostile takeover (given the company's "vulnerability to a raider") and had a *ten-year* term. 500 A.2d at 1349–50, 1355 & n.12. In *Selectica*, the rights plan at issue was likewise implemented in the context of a potential takeover threat (despite its primary purpose

being to protect the company's NOLs) and had a *three-year* term. 5 A.3d at 599–600, 603. Although the plan in *Third Point LLC v. Ruprecht* had a one-year term, that case involved an active proxy contest following a rapid accumulation of shares by various hedge funds intending to pursue "[a]n extraordinary corporate transaction," 2014 WL 1922029, at *4 (Del. Ch. May 2, 2014)—directly implicating the "omnipresent specter" of an entrenchment animus.[5]

The Court of Chancery identified no similar circumstance here or, consequently, any actual or potential "entrenchment" motive by the Board as that term is defined under Delaware law—*i.e.*, director intent "to perpetuate themselves in office" or to "retain[] the 'powers and perquisites' of board membership." *Airgas*, 16 A.3d at 94 & n.307 (citations omitted); *see also In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 474 (Del. Ch. 2000). To the contrary, the evidence demonstrated that the directors adopted the Plan despite believing that it might *hasten* their removal. *Supra* at 12.

As a result, in order to fit this case within *Unocal*, the court expanded the concept of entrenchment: The court reasoned—relying solely on dictionary

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[5] In *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010), the defendant directors had voting control over Craigslist and thus faced no threat of removal. The court nonetheless evaluated the rights plan under *Unocal*, but only where the plan's purpose and effect was to ensure control over Craigslist *even after the defendants' deaths*—guaranteeing that no minority owner could *ever* acquire control. *Id.* at 31–32.

definitions—that the directors' conduct "seem[ed] to fit the definition of entrenchment" simply because the Board "acted with the purpose of insulating the Board and management from *stockholder influence* during a time of uncertainty." (Op. 47–48 & n.240 (emphasis added).) This Court should reject such a broad view of "entrenchment," which goes well beyond the term's established meaning and the core rationale underlying *Unocal*.

Delaware courts have been cautious in applying heightened scrutiny to director decision-making that does not implicate the core concern of director self-interest underlying *Unocal*. *Cf. Stroud*, 606 A.2d at 83 (refusing to apply *Unocal* because "there was no threat to the board's control"); *eBay*, 16 A.3d at 36 ("It would be inappropriate to apply *Unocal*" where "there is no 'omnipresent specter' that the [board actions] are being used for entrenchment purposes."). As set forth above, the evidentiary record makes clear that no such concern is implicated here—either based on the Board's motives or the Plan's potential effects.

Under business judgment review, which the court should have applied, the Plan easily withstands scrutiny. As the court found, Plaintiffs did not meet their burden to show that the Board failed to act "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *see* Op. 62–63 (concluding that Board conducted "good faith, reasonable investigation when adopting the Plan").

The judgment below should therefore be reversed.

II. THE COURT OF CHANCERY ERRED IN CONCLUDING THAT THE BOARD BREACHED ITS FIDUCIARY DUTIES UNDER *UNOCAL*

A. Question Presented

Assuming the applicability of *Unocal*, did the Court of Chancery err in concluding that the Board breached its fiduciary duties in adopting the Plan, given that it was adopted after a reasonable investigation, to achieve legitimate corporate objectives, and fell within the range of reasonable responses to those objectives, particularly in the context of unprecedented global crises? (A.0160–74; Op. 62–89.)

B. Scope of Review

"The Court of Chancery's legal conclusions are subject to *de novo* review by this Court. The Court of Chancery's factual findings will be accepted if 'they are sufficiently supported by the record and are the product of an orderly and logical deductive process.'" *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) (citations omitted).

C. Merits of the Argument

Even if the Plan were properly subject to *Unocal* scrutiny, the decision below should be reversed because the Court of Chancery failed to follow this Court's precedents in analyzing the existence of a legitimate corporate objective and evaluating whether the Plan fell within a range of reasonableness in relation thereto.

1. *The Court of Chancery Erred in Parsing the Board's Objective in Adopting the Plan into Independent, Disconnected Reasons*

Under the first prong of *Unocal*, directors bear the burden of showing that "they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person's stock ownership." *Unocal*, 493 A.2d at 955. Directors "satisfy [this] burden by showing good faith and reasonable investigation," *id.* (quotation omitted)—*i.e.*, that they "engaged in a rational deliberative process to define the threat [they] faced." *Gaylord*, 753 A.2d at 479; *see Airgas*, 16 A.3d at 92. This showing is "materially enhanced" where a rights plan was approved by a majority of independent directors. *Unocal*, 493 A.2d at 955.

In analyzing this first prong, the Court of Chancery correctly found that the Board—comprised of "nearly all independent, outside directors"—demonstrated a good faith, reasonable investigation, including by engaging in "genuine deliberation" over the course of two meetings, advised by outside legal and financial advisors. (Op. 62–63.) The court erroneously concluded, however, that the threat identified by the Board was largely illegitimate.

As an initial matter, the Court of Chancery erred in artificially parsing the Board's rationale for adopting the Plan into three, supposedly independent objectives. After summarizing testimony from Williams' directors regarding their

reasons for adopting the Plan (Op. 56–61), the court noted that three "themes" emerged:

> First, they all expressed the sentiment that the Plan was intended to deter stockholder activism. Second, they desired to insulate the board from activists pursuing 'short-term' agendas and from distraction and disruption generally. Third, they were concerned that a stockholder might stealthily and rapidly accumulate large amounts of stock.

(*Id.* 62.) Defendants do not dispute that such themes are supported by the evidence. The court erred, however, in treating these "themes" as three independent objectives that were divorced from each other.

As the evidence demonstrated, the Board defined the "threat" facing Williams as a unitary danger. In the Board's view, the global pandemic and oil price war had caused a dislocation between Williams' stock price, which was rapidly falling, and the Company's business fundamentals, which remained strong. (*Id.* 31–32.) As a result, the Board was concerned that activists (acting individually or as a group) might rapidly accumulate a significant stake in Williams at depressed prices (which might go undetected due to market volatility) and then use that influential position to disrupt the Company's long-term plans, for short-term gain—disrupting management's ability to focus, at a time of crisis, on safely delivering natural gas to customers—at the expense of the long-term interests of the Company and its stockholders. (*Id.* 18, 56–61.)

Rather than analyze this objective holistically, as the Board had done, the court erroneously broke the connected themes in the Board's reasoning apart and analyzed them as three wholly distinct threats. (*Id.* 63–64.) By severing the threat of a rapid, undetected stock accumulation from the potential consequences of such an accumulation—*e.g.*, disruption of long-term value creation by an opportunistic activist seeking short-term gain—the court improperly minimized the true threat facing Williams, as identified by the Board.

In that regard, the court did precisely what this Court has cautioned should not be done under *Unocal*—rather than give any deference to the Board's determination, it substituted its own business judgment in assessing the nature of the threat. *See Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1153 (Del. 1989) (rejecting argument that court is permitted, under first prong of *Unocal*, to "substitut[e] its judgment" for the board's); *see also Airgas*, 16 A.3d at 57 (explaining that court "may not substitute [its] business judgment for that of the Airgas board," despite finding that "there seems to be no threat here"); *Gaylord*, 753 A.2d at 478–80 (deferring to board's articulation of threat after finding that board "engaged in a rational deliberative process to define the threat").

2. *The Court of Chancery Erred in Finding that the Board Lacked a Legitimate Purpose in Seeking to Limit Certain Potential Activism*

Even if it were appropriate for the Court of Chancery to parse the danger perceived by the Board into independent threats, the court committed legal error in rejecting two of those three threats—which improperly and artificially narrowed the objective to which the Plan was directed.

The court improperly concluded that stockholder activism and short-termism/distraction were not cognizable threats under Delaware law because they were "purely hypothetical" or "abstract"—*i.e.*, "the Board was not aware of any specific activist plays afoot." (Op. 63–64, 73.) But this Court has made clear that a board need not wait until it faces a specific threat before adopting defensive measures. *See Moran*, 500 A.2d at 1349–50. *Moran* involved "a defensive mechanism adopted to ward off *possible future advances* and not a mechanism adopted in reaction to a specific threat." 500 A.2d at 1350 (emphasis added); *see also id.* at 1349.

In the 35 years since *Moran*, Delaware courts have repeatedly endorsed the validity of prophylactic defensive mechanisms. Former Chief Justice Strine, writing as Vice Chancellor, explained it succinctly: "Delaware law does not require a board to wait until the eve of battle to consider the erection of sound defensive barriers. In fact, our law recognizes that such a requirement would encourage haste rather than

due care." *Gaylord*, 753 A.2d at 478; *see Unitrin*, 651 A.2d at 1388 & n.38 ("The fact that a defensive action must not be coercive or preclusive does not prevent a board from responding defensively *before a bidder is at the corporate bastion's gate*." (emphasis added)); *Moran*, 500 A.2d at 1350 (explaining that "pre-planning for the contingency of a hostile takeover might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise reasonable judgment"); *Nomad Acquisition Corp. v. Damon Corp.*, 1988 WL 383667, at *5 (Del. Ch. Sept. 20, 1988) (holding that "a board need not be faced with a specific threat before adopting a rights plan").

The Court of Chancery offered two bases for departing from this long line of cases in the context of stockholder activism or short-termism/distraction. Neither withstands scrutiny.

First, the court reasoned that the "broad category of conduct referred to as stockholder activism" could not constitute a cognizable threat because Delaware law does not permit directors to "justify their actions by arguing that 'without their intervention, the stockholders would vote erroneously out of ignorance or mistaken belief' in an uncoerced, fully informed election." (Op. 65 (quoting *Pell v. Kill*, 135 A.3d 764, 788 (Del. Ch. 2016)); *see also* Op. 73 ("[S]hort-termism and distraction concerns boil down to the sort of we-know-better justification that Delaware law eschews in the voting context.").) But in doing so, the court erroneously relied on

language from cases considering whether actions taken to impact director elections withstood scrutiny under the "compelling justification" standard of review set forth in *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

That standard of review (which Plaintiffs never argued applied here) focuses on the "fit" of the measures adopted—*not* the antecedent question of whether the measures respond to a cognizable threat. The court claimed that the Plan imposed a "we-know-better" approach to director elections and then reasoned backwards into the threat analysis. But, as the court found, Williams' stockholders *could* initiate proxy contests and solicit proxies without triggering the Plan (Op. 26)—refuting any notion that the Plan sought to affect director elections in a manner that would implicate *Blasius*. Indeed, Delaware courts have made clear that, under *Unocal*, directors can permissibly enact defensive measures even if they might have incidental impacts on proxy contests, *see, e.g.*, *Gaylord*, 753 A.2d at 482 (noting that "it would, of course, be surprising if defensive measures did not" make it "more difficult for an acquirer to obtain control of [a company's] board"), and even if the measures are intended to avoid the outcome of an uninformed stockholder decision, *see, e.g.*, *Airgas*, 16 A.3d at 56–58 (upholding plan addressing threat of inadequate offer price even though "there seems to be no threat here – the stockholders know what they need to know . . . to make an informed decision").

Second, although the court acknowledged that several Delaware cases have upheld defensive measures adopted in response to activists, the court found that those cases did not "support the notion that generalized concern about stockholder activism" and short-termism could be cognizable threats because the cases supposedly presented "different scenarios and more specific threats" involving takeover attempts. (Op. 65–73.) The court acknowledged that "[r]easonable minds can dispute whether short-termism or distraction [posed by activist stockholders] could be deemed cognizable threats under Delaware law," but held that such concerns can *never* be a legitimate threat absent a "specific, immediate" activist play underfoot. (*Id.* 72–73.) That analysis misses the point: If "concrete action" (*id.* 70) by activists can be a cognizable threat, then a board can pre-plan for the possibility that an activist might emerge and take such action—particularly where the corporation finds itself in a vulnerable position as a result of unanticipated external events. *See Moran*, 500 A.2d at 1350; *Gaylord*, 753 A.2d at 478.[6]

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[6] Moreover, contrary to the court's description, the relevant cases did not turn on the existence of a specific *takeover* threat by activists. (Op. 68–70.) For example, in *Yucaipa American Alliance v. Riggio*, 1 A.3d 310 (Del. Ch. 2010) (Strine, V.C.), the activist expressed an intention to pursue several "plays" in its playbook, including seeking governance changes and adding independent directors, proposing M&A transactions and commercial arrangements, and revamping the company's products. *Id.* at 313. The court explained that the board was entitled in such circumstances to implement measures to ensure that the activist could not "amass, either singularly or in concert with another large stockholder, an effective control bloc that would allow it to *make proposals under conditions in which it wielded*

(Continued . . .)

Indeed, absent the ability to pre-plan and take action to *prevent* an activist (or group of activists) from acquiring a significant block of stock in the first place, boards would be precluded from effectively addressing concerns about the potential harms of activism, including short-termism and distraction: By the time activists show up on a company's doorstep to demand action, they generally will have already purchased a significant stake in the company (A.2215), rendering moot any subsequent attempt to prevent such an occurrence.

Moreover, the Court of Chancery's determination that "hypothetical" short-termism and its attendant distractions can *never* be cognizable threats disregards the real-world circumstances facing Williams in March 2020. As the court acknowledged, rights plans are "situationally specific defenses" that must be evaluated "under the unique circumstances" presented. (Op. 76.) Here, the circumstances facing Williams were unprecedented—a global pandemic, coupled with a global energy crisis, that caused a 65% decline in Williams' stock price in two months, despite no change in the Company's business fundamentals. Rather than address meaningfully the uniqueness of the situation in its *Unocal* analysis,

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great leverage to seek advantage for itself at the expense of other investors." *Id.* at 350 (emphasis added). Similarly, *Third Point* focused on the threat of activists, collectively owning less than 20% of the company's stock, exercising "disproportionate control and *influence over major corporate decisions,* even [without] explicit veto power." 2014 WL 1922029, at *21 (emphasis added).

however, the court instead announced a one-size-fits-all rule—effectively choosing one side of a policy debate that had long sought to declare "anti-activist" rights plans *per se* invalid. (*Id.* 72–73.)

In doing so, the court ignored the maxim that directors must "maximize the value of the corporation over the long-term," *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013); *see also TW Servs., Inc. v. SWT Acquisition Corp.*, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989), numerous cases upholding defensive measures to protect long-term corporate and stockholder interests, *see, e.g.*, *Airgas*, 16 A.3d at 124–25; *Unitrin*, 651 A.2d at 1376; *Williams v. Geier*, 671 A.2d 1368, 1377 (Del. 1996), and cases acknowledging that the distraction of short-term activism can cause significant harm, *see Polk v. Good*, 507 A.2d 531, 533, 537 (Del. 1986) (recognizing "disruptive effect and the potential long-term threat" caused by stockholder's substantial accumulation of stock during a critical period when "management was consumed with [other] tasks"); *Cheff v. Mathes*, 199 A.2d 548, 551–52, 556 (Del. 1964) (describing "substantial unrest" and management distraction caused by stockholder activist).

As this Court cautioned in *Paramount*, "precepts underlying the business judgment rule militate against a court's engaging in the process of attempting to appraise and evaluate the relative merits of a long-term versus a short-term investment goal for shareholders." 571 A.2d at 1153 ("To engage in such an exercise

is a distortion of the *Unocal* process."). Yet by stripping boards of the ability to address the potentially deleterious impact of activists *before* they arrive—even at a time of unprecedented crisis—the Court of Chancery effectively put a permanent thumb on the scale in favor of short-termism, in violation of those very precepts.

3. The Court Erred in Holding that the Plan Did Not Fall Within a Range of Reasonableness

Unocal's second prong is a "proportionality test" under which the Court must evaluate whether the Board's actions were "reasonable" in relation to the threat or corporate objective identified. *Unitrin*, 651 A.2d at 1373; *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 807 (Del. Ch. 2007). Defensive measures that are neither preclusive nor coercive withstand scrutiny if they fall within the "range of reasonableness." *Gaylord*, 753 A.2d at 480 (quotations omitted). As this Court has explained, Delaware law affords boards "substantial latitude in defending the perimeter of the corporate bastion against perceived threats," and courts should exercise "judicial restraint" by granting boards that latitude. *Unitrin*, 651 A.2d at 1388 & n.38.

Plaintiffs conceded that the Plan was neither preclusive nor coercive, as it did not prevent an activist from running an effective proxy contest. (Op. 77 & n.353.) Thus, the only question before the Court of Chancery was whether the Plan fell within a range of reasonableness. The court's conclusion that it did not was erroneous for at least three reasons.

First, the court's proportionality review was improper because it was limited to whether the Plan was reasonable in relation "to the lightning-strike threat posed." (Op. 77.) As discussed above, the Board was not focused *solely* on lightning strikes or a need to *detect* a large stock accumulation by activists; the Board was also concerned with the broader risks of an opportunistic activist (or group of activists) acquiring more than 5% of Williams' stock and seeking to advance their short-term interests at the expense of long-term stockholder value—consuming management resources at a time of crisis. *See supra* at 1, 11–12. By assessing the proportionality of the Plan through an unduly narrow lens, the Court of Chancery committed legal error. *See Versata*, 5 A.3d at 606 ("[I]t is the specific nature of the threat that 'sets the parameters for the range of permissible defensive tactics' at any given time." (citation omitted)).

Second, the court erred in suggesting that the Board was obligated to enact the least restrictive plan available. In particular, the court concluded that the Plan was unreasonable in part because it was more restrictive than "less extreme" plans proposed in two academics articles written years earlier. (Op. 79–82.) But such reasoning runs contrary to this Court's directive that, under *Unocal*'s second prong, the question is whether directors made a "reasonable" (not "perfect") decision and that as long as the "board selected one of several reasonable alternatives," "a court

should not second guess that choice." *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45–46 (Del. 1994); *see also Unitrin*, 651 A.2d at 1388 & n.38.

Accordingly, the fact that the Board "might have considered . . . less extreme options" (Op. 82) does not mean the Plan was unreasonable. *See Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, at *24 (Del. Ch. Feb. 26, 2010) ("Ultimately, *Unocal* and its progeny require that the defensive response employed be a proportionate response, *not the most narrowly or precisely tailored one*." (emphasis added)).[7] That is particularly true given that the proportionality analysis is necessarily situation-specific. The court's comparison of the Plan to potentially narrower, hypothetical rights plans proposed in years past by academics improperly failed to take into account the extreme and unprecedented circumstances facing the Board in March 2020.[8]

Third, the Court of Chancery's conclusion that the Plan was unreasonable because it might have some incidental chilling impact on stockholder

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[7] *See* A.2413 ("[Under *Unitrin*], [a]n action will be sustained if it is attributable to *any* reasonable business judgment. It will not matter if the court would have regarded some other action as more reasonable." (emphasis in original)).

[8] The Opinion appeared to express a concern that, if the Plan were upheld, companies might adopt similar rights plans any time there were "a precipitous stock drop, which is not an uncommon occurrence." (Op. 76.) But the Board was not responding to any ordinary stock drop; it was addressing the threat posed by a global pandemic and oil price war that caused a nearly 65% drop in less than two months, despite no change in business fundamentals.

communications, including in the lead-up to a proxy contest (without actually precluding a proxy contest), is likewise erroneous. (Op. 84, 87 n.401.)

As an initial matter, the stockholders challenging the Plan conceded that they had not been prevented, and could not identify anybody else who had been prevented, from doing *anything* by the Plan. (A.1735–36.) Instead, Plaintiffs argued that the Plan infringed on the "stockholder franchise," even though there was nothing for them to vote on and, at the time the Court of Chancery issued its decision, the director nomination window for the 2021 annual meeting had closed and the Plan was set to expire by its terms in just three weeks. (A.0089; A.0103; A.0270.)

Recognizing the absence of any actual harm, the court stated that it was not a class representative's burden to "prove a negative" because "the absence of stockholder activism could be a consequence of the Plan." (Op. 45 & n.233.) The court concluded that the Plan raised "concerns" because the combination of the 5% trigger, the AIC Provision, and the Passive Investor definition were "likely to chill a wide range of anodyne stockholder communications" (*id.* 82), including beneficial forms of stockholder engagement, such as "ESG" (environmental, social and governance) activism. (*Id.* 85.) That conclusion is unsupported by the record. Indeed, Plaintiffs' own proxy solicitation expert conceded that it was "equally possible" that the Plan would not have *any* chilling effect on routine stockholder

activism and engagement. (A.1933.) A review of the Plan's key features challenged in this action confirms that conclusion.

5% Triggering Threshold. The Court of Chancery expressed concern that the Plan's 5% trigger was a "marked departure" from market norms. (Op. 83.) But a trigger cannot be assessed in a vacuum. As the court acknowledged, given Williams' sizable market capitalization, the Plan's 5% trigger (which allowed a stockholder to buy between $650 million and $1.16 billion during the 49 weeks it was in place) was actually significantly *less* restrictive, on a dollar-value basis, than the "vast majority" of rights plans with *higher* thresholds. (*Id.*; A.2071; A.2077–78; *see also supra* n.2.)

Moreover, the 5% trigger was not arbitrary. It was based on federal disclosure rules, which require disclosure of stakes at or above 5%—in recognition of the significant influence that can arise from such an ownership level. (Op. 79.)[9] This lends further credence to the reasonableness of the trigger in this context. *See Selectica*, 5 A.3d at 601 (explaining that rights plan's 4.99% trigger, "as low as it is, was measured by reference to an external standard"). Indeed, to the extent the Court of Chancery "assume[d] for the purposes of analysis that gap filling to detect lightning strikes at a time when [the] stock price undervalues the corporation is a

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[9] Plaintiffs' proxy solicitation expert opined, based on his experience, that an activist with an ownership stake between 5% and 10% could wield "the power to direct or cause the direction of the management and policies of [a] company." (A.1944.)

legitimate corporate purpose under the first prong of *Unocal*" (Op. 77), it necessarily follows that a 5% trigger was reasonable because a higher threshold would not actually fill the relevant gap.

AIC Provision. The AIC Provision likewise did not render the Plan unreasonable. Since *Moran*, Delaware courts have recognized that if a triggering threshold were "limited to individual ownership," the plan "would fall short of the intended goal" and, therefore, it is appropriate to extend the triggering event to groups of stockholders "acting in concert." 490 A.2d 1059, 1080 (Del. Ch. 1985). In *Moran* and later cases, plans borrowed from the "group concept" under Section 13(d) of the Exchange Act. *Moran*, 490 A.2d at 1080; *Yucaipa*, 1 A.3d at 312–13, 338. As activist conduct evolved, however (including the development of "wolf packs," whereby activists work in parallel and avoid any express agreement to form a "group"), rights plans have likewise evolved. (A.2086–88.) Under the Plan—like many modern rights plans (A.2089–90)—if two or more stockholders collectively holding 5% or more of Williams' stock knowingly act together or in parallel "relating to changing or influencing control of Williams" and certain other criteria are met, the shareholders could be deemed to be acting-in-concert and trigger the Plan based on their collective ownership. (A.0491; A.0549.)[10]

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[10] As Professor Subramanian testified at trial, these criteria imposed important guardrails on the AIC Provision. (A.2088–89; A.2093–94.) Moreover, the AIC

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The Court of Chancery expressed concerns that terms like "relating to" and "influencing" control in the AIC Provision are "nebulous and broad" (Op. 87) and, thus, might have had an undue chilling effect on "potentially benign stockholder communications" (*id.* 83), such as ESG activism (*id.* 85). But Plaintiffs' own expert conceded that stockholder engagement on ESG issues would *not* be considered "changing or influencing control," as that term is understood (A.1962), and, accordingly, could not have triggered the AIC Provision. Notably, the "changing or influencing control" language in the Plan is drawn directly from well-known and long-standing federal securities regulations governing whether an investor holding at least 5% of a company's stock has to file a Schedule 13D or may instead file a Schedule 13G (reflecting passive investor intent). *See* 17 C.F.R. § 240.13d-1. The SEC has issued specific guidance on what constitutes "changing or influencing control" (A.0065–66), and as Plaintiffs' own expert testified, the term is well understood by investors (A.1485–86).[11] Accordingly, the court's conclusion that the

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Provision expressly carved out from its application any conduct undertaken in connection with public proxy or consent solicitations. (A.0491.) That is a significant factor in assessing the Plan's reasonableness, as courts evaluating rights plans have always focused on the proxy contest "safety valve." *See Yucaipa*, 1 A.3d at 353 ("key issue" in determining proportionality of rights plan is whether it "unreasonably inhibits the ability of [stockholders] to run an effective proxy contest").

[11] Similarly, "relating to" is found repeatedly throughout the DGCL, *see, e.g.*, DGCL §§ 109, 141, belying any notion that it is unduly vague or nebulous.

Plan was unreasonable because the supposed vagueness of the AIC Provision might have a potential chilling effect on stockholder communications was erroneous. *See, e.g.*, *Yucaipa*, 1 A.3d at 338 (rejecting argument that rights plan was ambiguous and would therefore have chilling effect where language was "based on a well-recognized standard" found in Section 13(d) of the Securities Exchange Act).

Likewise, the court's concern that stockholders might be chilled by a fear that the Board would "misuse" the AIC Provision (Op. 87) was also improper. Delaware law has made clear that mere conjecture that a board might misuse its authority under a rights plan in response to a specific, later threat supplies no grounds to declare a rights plan *per se* invalid. *Moran*, 490 A.2d at 1083. To the contrary, "[t]he ultimate response to an *actual* takeover bid must be judged by the Directors' actions *at that time*," and a board's "*use* of the Plan will be evaluated *when and if the issue arises*." *Moran*, 500 A.2d at 1357 (emphasis added).

Passive Investor Carveout. Any suggestion that the Passive Investor carveout rendered the Plan unreasonable was likewise erroneous. As a limitation on the Plan's scope, the carveout was necessarily a positive attribute, and the market interpreted it as such. (A.0571.) The court criticized the carveout as being unduly "narrow" and "an easily activated tripwire" likely to chill stockholder communication (Op. 2, 26–29, 88), but that is incorrect.

Although the evidence reflects that the carveout was intended to exclude from the Plan any investors who lacked an intent to change or influence control of Williams, including Williams' three Schedule 13G filers (Op. 29; A.0475; A.0549; A.0553; A.0620; A.1807; A.2267–68; A.2306), the court determined that the Passive Investor definition failed to achieve that goal. In particular, subclause (ii) of the definition required that any Passive Investor have acquired their shares "not with the purpose nor the effect . . . of exercising the power to direct or cause the direction of the management and policies of the Company or of otherwise changing or influencing the control of the Company." (A.0495.) The court interpreted this requirement to capture a "broad[] range of activity"—*e.g.*, sending emails to a company on ESG issues. (Op. 28.) Accordingly, the court found that the definition was likely to chill stockholders from engaging in such activities for fear of losing the protection of the carveout and triggering the Plan. The court's conclusion is erroneous.

First, "the power to direct or cause the direction of the management and policies of the Company" tracks almost verbatim the definition of "control" in the federal securities laws and Section 203 of the DGCL. *See* 17 C.F.R. § 240.12b-2; 8 *Del. C.* § 203(c)(4). In other words, it simply requires that a shareholder not have acquired their shares with the purpose or effect of exercising "control" over

Williams—consistent with the certification that any Schedule 13G filer would be required to make. 17 C.F.R. § 240.13d-102 (Item 10(a)); A.2121–25.

Second, the evidence refutes any contention that Williams' Schedule 13G filers were in fact chilled from engaging in routine stockholder engagement for fear of falling outside the Passive Investor definition. For example, as the court acknowledged, shortly after the Plan was adopted, BlackRock sent an email to Williams criticizing management for adopting the Plan without seeking stockholder approval. (Op. 88.) Plaintiffs argued, and the court concluded, that sending the email resulted in BlackRock losing its status as a "Passive Investor" under the Plan. (*Id.*) But that makes no sense. If that were true, the Plan would have been triggered. But that never happened, and there was no evidence that the Board or anyone else at Williams ever even considered the idea. Nor is there any evidence that BlackRock itself had any concern about such a possibility. To the contrary, Plaintiffs' expert testified that BlackRock never would have sent the email if it thought it would trigger the Plan. (A.1905–06.)

The court dismissed these facts, reasoning that it was "probably true" that the Board "would exempt" BlackRock from the Plan to avoid "angering a major stockholder player, other stockholders may not be so fortunate." (Op. at 88.) But that, too, makes no sense. By definition, only "major" stockholders holding more

than 5% of Williams' stock would ever need to rely on the Passive Investor carveout; stockholders owning less would not trigger the Plan.

CONCLUSION

For the foregoing reasons, this Court should reverse the Opinion and Order of the Court of Chancery in its entirety.

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