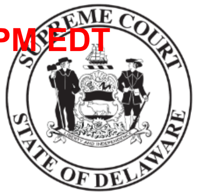
EFiled: Aug 06 2021 04:55PM EDT
Filing ID 66827912
Case Number 139,2021



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.	

APPELLANTS' REPLY BRIEF

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
William M. Lafferty (#2755)
Kevin M. Coen (#4775)
Lauren K. Neal (#5940)
Sabrina M. Hendershot (#6286)
1201 North Market Street
Wilmington, DE 19801
(302) 658-9200

Counsel for the Williams Appellants

OF COUNSEL*:*

Andrew Ditchfield
Brian M. Burnovski
Mari Byrne
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

PINCKNEY, WEIDINGER, URBAN
& JOYCE LLC
Michael A. Weidinger (#3330)
Patricia R. Urban (#4011)
Megan Ix (#6721)
3711 Kennett Pike, Suite 210
Greenville, DE 19807
(302) 504-1497

Counsel for Appellant Computershare Trust Company, N.A.

August 6, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES II

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. THE COURT OF CHANCERY ERRED IN ASSESSING THE ADOPTION OF THE PLAN UNDER *UNOCAL* 4

II. THE COURT OF CHANCERY MISAPPLIED *UNOCAL* IN CONCLUDING THAT THE BOARD BREACHED ITS FIDUCIARY DUTIES 9

A. The Court of Chancery Improperly and Artificially Parsed the Board's Objective in Adopting the Plan 9

B. The Board Identified a Legitimate Objective in Seeking to Limit Certain Potential Activism During a Period of Unprecedented Volatility 11

C. The Plan Fell Within the Range of Reasonable Responses to the Board's Identified Objective 18

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Air Prods. & Chems., Inc. v. Airgas, Inc.,
16 A.3d 48 (Del. Ch. 2011) 7, 10, 15

Blasius Indus., Inc. v. Atlas Corp.,
564 A.2d 651 (Del.Ch. 1988) 15

Coster v. UIP Cos., Inc.,
2021 WL 2644094 (Del. June 28, 2021) 7-8, 13

In re Gaylord Container Corp. S'holders Litig.,
753 A.2d 462 (Del. Ch. 2000) 5, 11, 12-13

Kallick v. Sandridge Energy, Inc.,
68 A.3d 242 (Del. Ch. 2013) 7

Mentor Graphics Corp. v. Quickturn Design Sys., Inc.,
728 A.2d 25 (Del. Ch. 1998) 10

MM Cos., Inc. v. Liquid Audio, Inc.,
813 A.2d 1118 (Del. 2003) 14

Moran v. Household Int'l, Inc.,
500 A.2d 1346 (Del. 1985) 5, 12, 13

Paramount Commc'ns, Inc. v. QVC Network, Inc.,
637 A.2d 34 (Del. 1994) 19

Paramount Commc'ns, Inc. v. Time, Inc.,
571 A.2d 1140 (Del. 1989) 10-11, 12

Pell v. Kill,
135 A.3d 764 (Del. Ch. 2016) 14-15

In re PLX Tech., Inc. S'holders Litig.,
2018 WL 5018535 (Del. Ch. Oct. 16, 2018) 16

Polk v. Good,
507 A.2d 531 (Del. 1986)..16

In re Santa Fe Pac. Corp. S'holder Litig.,
669 A.2d 59 (Del. 1995)..8

Selectica, Inc. v. Versata Enters., Inc.,
2010 WL 703062 (Del. Ch. Feb. 26, 2010)...19

Third Point LLC v. Ruprecht,
2014 WL 1922029 (Del. Ch. May 2, 2014) 5-6, 16

Unitrin, Inc. v. Am. Gen. Corp.,
651 A.2d 1361 (Del. 1995)...12

Versata Enters. v. Selectica, Inc.,
5 A.3d 586 (Del. 2010)...*passim*

Yucaipa Am. Alliance Fund II, L.P. v. Riggio,
1 A.3d 310 (Del. Ch. 2010) 5, 6, 16

PRELIMINARY STATEMENT[1]

As this Court has long recognized, context matters. The circumstances surrounding a board's decision are critical to determining whether a board has properly exercised its fiduciary duties. Here, it is undisputed that the Williams Board adopted the Plan in the most challenging of circumstances—the simultaneous global crises of the COVID-19 pandemic and an oil price war. Williams' stock fell 65% in just two months, notwithstanding that (unlike its peers) its strong business fundamentals remained unchanged. In that context, the Board determined that Williams was uniquely exposed to opportunistic activist investors seeking to capitalize on Williams' market price dislocation for short-term profit at the expense of stockholders' long-term interests.

Despite finding that the Board adopted the Plan in good faith, to protect the long-term interests of stockholders—during this period of extreme uncertainty—the Court of Chancery nonetheless held that the Board breached its fiduciary duties. In doing so, the court misapplied well-settled Delaware law and committed clear error by failing to give adequate deference to the threat identified by the Board and improperly finding that the Plan was unreasonable based on nothing more than the

[1] Terms not defined in this Reply Brief have the meanings ascribed to them in Defendants' Opening Brief ("Def. Br."). All emphasis is added.

speculative possibility that the Plan *might* chill *some* limited set of stockholder communications.

Rather than offer any valid defense of the court's decisions, Plaintiffs' opposition rests principally on the mistaken notion that stockholder activism—which they erroneously equate with the "stockholder franchise"—should be protected as sacrosanct. Under Plaintiffs' logic, and the Court of Chancery's ruling, directors, even when indisputably acting in good faith, are prohibited from imposing ***any*** *ex ante* limitations on activists' ability to accumulate a significant stake in a company for the purpose of changing or influencing control of that company—even at a time of unprecedented disruption—because the harms of activism are purportedly not a cognizable threat. But that is not, and should not be, the law of Delaware. Since *Moran*, this Court has recognized the ability of boards to ward off potential threats proactively and that some limitations on stockholder communications—including preventing activists from working together to evade the triggering thresholds of rights plans—are perfectly appropriate.

By holding that the Board lacked a proper purpose in seeking to address the threat of activism, and in finding the Plan *per se* invalid, the Court of Chancery effectively ruled that boards are powerless to address the potential harms of activism, even in the most extreme circumstances, unless an activist is already knocking down the door—by which time it may well be too late to act. In doing so, the court

inexorably tilted the balance of power toward opportunistic activists and short-termism versus long-term value creation. Consistent with that conclusion, one Lead Plaintiff tellingly described the court's decision not as a victory for Williams' stockholders but rather as "a significant win" "for *stockholder activists*." (AR.208.) This Court should not let this power shift stand. The judgment below should be reversed.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN ASSESSING THE ADOPTION OF THE PLAN UNDER *UNOCAL*

Given the absence of any entrenchment motive by Williams' directors in adopting the Plan—or any entrenchment *effect* of the Plan itself—the court should have reviewed and upheld the Plan under the business judgment standard, rather than *Unocal*. (Def. Br. 19–24.) Plaintiffs' arguments to the contrary are unavailing.

Plaintiffs principally argue that *Unocal* applies because every rights plan purportedly operates as an anti-takeover device and, therefore, necessarily implicates the "omnipresent specter" of director self-interest underlying *Unocal*. (Pl. Br. 32–33.) Although this Court made such an observation in *Versata Enterprises v. Selectica, Inc.*, 5 A.3d 586 (Del. 2010) ("*Selectica II*"), the Court had no occasion in that case (or any other) to consider critical aspects of the Plan here, and the circumstances of its adoption, that distinguish it from other rights plans.

Among other things, the Plan was not only adopted on a clear day—outside any proxy contest or contest for control—but had a limited one-year term that, in combination with stockholders' ability to remove directors without cause by written consent, rendered the Plan incapable of having any anti-takeover effect. (Def. Br. 20–21.) That distinguishing combination of factors, along with the express finding that the Plan was not adopted or designed to thwart a takeover (Op. 8–9, 52–53, 56–57), is critical.

Plaintiffs fail to address these distinctions. Instead, they rely on the fact that Delaware courts have previously applied *Unocal* to rights plans adopted "before an actual takeover threat emerged" and to so-called "anti-activist" plans. (Pl. Br. 33–34 & nn.170–71.) But the cases on which Plaintiffs rely are readily distinguishable.

In *Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985), and *In re Gaylord Container Corp. Stockholders Litigation*, 753 A.2d 462 (Del. Ch. 2000), the rights plans, although adopted on a "clear day," were indisputably intended and designed to impede a future takeover and resulting change-in-control. In *Moran*, the board adopted a plan with a ten-year term due to the company's "vulnerability to a raider" (and after the plaintiff himself had threatened a takeover). 500 A.2d at 1349–50, 1355 & n.12. In *Gaylord*, the board adopted the plan because the company's dual-class voting structure—which "had insulated the company from the threat of a coercive takeover"—was about to expire, leaving the company open to a takeover and the "possibility that the board and management will lose their positions after the acquisition." 753 A.2d at 464, 474. And, in *Third Point LLC v. Ruprecht*, 2014 WL 1922029 (Del. Ch. May 2, 2014), and *Yucaipa American Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310 (Del. Ch. 2010), there were active contests for control or proxy contests underway.[2] In other words, the rights plans in

---

[2] In *Third Point*, the activist hedge fund plaintiff sought a waiver of the plan, claiming it was adopted by the board to "obtain an impermissible advantage in an

(Continued . . .)

each of these cases directly implicated the entrenchment concerns underlying *Unocal*. Here, there is no such concern. Indeed, the record demonstrates the opposite: The Plan was neither designed to prevent a takeover (and, thus, potential removal of the directors) nor capable of such an effect (Def. Br. 20–21), and the Director Defendants understood that adopting it could hasten their *removal* (*id.* 22).

Plaintiffs' reliance on this Court's observation that *Unocal*'s utility "derives from 'the flexibility of its application in a variety of fact scenarios'" (Pl. Br. 34 & n.172 (citation omitted)) is likewise misplaced. The fact that *Unocal* can be applied to scenarios other than takeovers does not alter the fundamental rationale underlying its application—the "omnipresent specter" that defensive mechanisms might be adopted out of director self-interest to perpetuate themselves in office. (Def. Br. 21–22.) For example, although the rights plan in *Selectica II* was adopted for the primary purpose of protecting NOLs, it nonetheless was adopted in the context of an active contest for control, and its three-year term would have prevented any takeover for a significant period, creating the risk that the directors may have been motivated

---

ongoing proxy contest." 2014 WL 1922029, at *1. In *Yucaipa*, the plan was adopted in response to an activist hedge fund, which held nearly 20% of the corporation's stock, was threatening to acquire more, and had announced plans to run a proxy contest against the incumbent directors and pursue M&A transactions. 1 A.3d at 313.

to insulate themselves from removal. 5 A.3d at 597, 599–600. Again, that is not the case here. (*Supra* at 3–4.)

Unable to find any actual entrenchment animus or effect, the court relied on a novel conception of "entrenchment" that departs from its well-established meaning—"to perpetuate [directors] in office." *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 94 & n.307 (Del. Ch. 2011). Plaintiffs deny that the court improperly expanded the concept of entrenchment but offer no support for the proposition that the mere intent to "insulate" management from distraction (Op. 62) implicates the "omnipresent specter" that *Unocal* was designed to police.

Plaintiffs attempt to gloss over that omission with rhetoric about *Unocal*'s focus on protecting "corporate democracy" and the "stockholder franchise." (Pl. Br. 34–35 & nn.174–76.) But the cases they cite only prove the point: In each, the concern was board action designed to interfere directly with a stockholder vote or otherwise prevent a change in control, thereby perpetuating the directors in office. *See Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 244–46, 257 (Del. Ch. 2013) (addressing board's refusal to approve dissident director slate advanced by activist in proxy contest, in connection with coercive "proxy put" in company's credit agreements); *Coster v. UIP Cos., Inc.*, 2021 WL 2644094, at *9–10 (Del. June 28, 2021) (addressing directors' approval of stock sale undertaken to dilute plaintiff's

stock ownership to block her attempt to elect new directors).[3] The evidence here reflects nothing of the sort. Notwithstanding the court's conclusory assertion that "stockholder activism is intertwined with the stockholder franchise" (Pl. Br. 36 (citing Op. 65)), the record is bereft of any evidence that the Plan had any actual impact on the "franchise"—*i.e.*, stockholder voting rights (*infra* at 18–19).

For these reasons, application of *Unocal* constituted legal error, and the judgment below should be reversed because Plaintiffs do not, and cannot, show that the Plan failed to meet the business judgment rule's requirements.

---

[3] *See also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995) (addressing defensive measures, including rights plan, adopted "in the context of a battle for corporate control" to thwart competing bidder).

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

Even if the Plan were subject to *Unocal*, the decision below should be reversed because the court misapplied Delaware law in analyzing the objectives underlying the Plan (Def. Br. 25–35) and evaluating whether it was reasonable in relation thereto (*id.* 35–45). Plaintiffs' opposition fails to show otherwise.

A. The Court of Chancery Improperly and Artificially Parsed the Board's Objective in Adopting the Plan

As an initial matter, the court erred in artificially parsing the Board's rationale for adopting the Plan into three supposedly independent threats—*i.e.*, stockholder activism, short-termism/distraction, and the rapid, undetected accumulation of Williams' stock. (Def. Br. 26–28.) Plaintiffs contend that the court acted appropriately because it purportedly found "that the Board made no . . . unitary determination" of the threat. (Pl. Br. 41.) But that characterization is belied by the court's own factual findings.

The court found—and Plaintiffs do not challenge—that "the Board conducted a good faith, reasonable investigation when adopting the Plan" (Op. 62–63) and that, in doing so, there was a single "catalyst" for the Plan's adoption—"the Company's declining stock price . . . in the wake of the market disruption caused by COVID-19 and the oil pricing war" (*id.* 56). Specifically, in the Board's view, the pandemic and oil price war had caused a severe dislocation between Williams' stock price and

the Company's strong business fundamentals. (*Id.* 31–32.) Consequently, the Board was concerned that opportunistic activists might rapidly and without detection accumulate a significant stake at depressed prices and use that position to interfere with the Company's long-term interests, for short-term gain, while disrupting management's ability to focus on safely delivering natural gas, during a period of unprecedented crisis. (*Id.* 18, 56–61.)

Consistent with that conclusion, after surveying the directors' testimony, the court found that "they *all*" expressed an intent to deter activism, a desire to insulate the Company from activists pursuing short-term agendas and causing distraction and disruption, and a concern that a stockholder might rapidly accumulate large amounts of stock undetected. (*Id.* 62.) That each of the directors might have added their own "gloss" (Pl. Br. 41 (quoting Op. 57)) does not undercut the Board's determination of a unitary threat. *See Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 728 A.2d 25, 46 (Del. Ch. 1998) (despite "diverse characterizations of the threat, the evidence, viewed as a whole," showed single threat).

In concluding otherwise, the court improperly "substitut[ed] [its] business judgment for that of [the] board." *Airgas*, 16 A.3d at 57. The court's failure to defer to the Board's articulation of the threat was inconsistent with *Unocal* and constitutes legal error. *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); *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").

B. The Board Identified a Legitimate Objective in Seeking to Limit Certain Potential Activism During a Period of Unprecedented Volatility

After improperly parsing the danger identified by the Board into three distinct threats, the court committed further error in holding that two of the threats—stockholder activism and short-termism/distraction—were not legally cognizable because they were merely "hypothetical" and not "concrete." (Def. Br. 29–35.) Plaintiffs fail to show otherwise.

Plaintiffs argue that the court "correctly determined that thwarting the hypothetical specter of stockholder activism, short-termism or distraction were not 'legitimate corporate objectives' warranting adoption of a 'nuclear missile' Plan." (Pl. Br. 43 (citing Op. 64).) They claim, when it comes to activism, that the threat must be "specific," "clear" or, as the court put it, "concrete" before a board may act. (*Id.* 43–44.) In other words, the proverbial wolf must already be knocking down the corporate door before a board may erect any defensive barrier. Not so.

As an initial matter, Plaintiffs improperly conflate whether the Board identified a legitimate threat with whether the Board's response was proportionate.

Plaintiffs' repeated references to a "'nuclear missile' Plan" (*see, e.g.*, *id.* 43, 47) are irrelevant to whether the Board identified a legitimate corporate objective.

In any event, the Court of Chancery's assertion that a threat (at least when it comes to activism) must be "concrete" to be cognizable (Op. 68) finds no support in Delaware law, nor should it be the law. Plaintiffs argue that prior cases have held that any cognizable threat must be "specific" or "clear" (Pl. Br. 43–44 & nn.218–19), but the cases on which they rely say no such thing. The quoted language from those cases relates solely to the proportionality assessment under *Unocal*'s second prong—not to the threat analysis under its first prong. *See Selectica*, 5 A.3d at 606 (addressing whether "specific nature of the threat" identified was within the "range of permissible defense tactics"); *Paramount*, 571 A.2d at 1154 ("reasonableness of a defensive action" is assessed in relation to "clear identification of the nature of the threat"). Nothing in these cases suggests that a board must identify some "concrete" or presently existing harm before the board may act. To the contrary, since *Moran*, this Court has made clear that a board need not wait until it faces a "concrete" threat before adopting defensive measures. *Moran*, 500 A.2d at 1349–50 (acknowledging board's ability to pre-plan "to ward off possible future advances"); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1388 & n.38 (Del. 1995) ("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*."); *accord Gaylord*,

753 A.2d at 478 ("Delaware law does not require a board to wait until the eve of battle to consider the erection of sound defensive barriers.").

Plaintiffs criticize as "misguided" Defendants' reliance on *Moran* and *Gaylord* for the proposition that a board may act proactively (Pl. Br. 44), but offer no basis for that contention.[4] Equally unavailing is Plaintiffs' suggestion that stockholder activism merits different treatment. (*Id.* 43–44.) Citing no legal authority to support that position, Plaintiffs instead argue that activism is "intertwined" with the "stockholder franchise" and that franchise rights are "sacrosanct." (*Id.* 43 (citing *Coster*, 2021 WL 2644094, at *7 n.43).) Conflating activism with the franchise, Plaintiffs claim that the potential harms of activism can never be deemed a cognizable threat under *Unocal* absent identification of a "specific, clear or concrete" harm. (*Id.* 45 (internal quotations and citations omitted).) Such specious logic supplies no basis to overturn decades of Delaware law by creating special protections for activists that would put them beyond the reach of directors acting in good faith to proactively protect the long-term interests of *all* stockholders.

---

[4] Instead, Plaintiffs cross-reference an earlier footnote in their brief (Pl. Br. 44), standing for the proposition that *Unocal* was applied in *Moran* and *Gaylord* (*id.* 34 n.170). But that fact only *supports* Defendants' position that a threat need not be "concrete" to be cognizable. (*Supra* at 11.)

That the "stockholder franchise" is sacrosanct is irrelevant to whether the potential harms of activism, including distraction and short-termism at the expense of long-term interests, can constitute a cognizable threat. Despite Plaintiffs' attempts to equate activism with the franchise, the two are not the same. To the contrary, Delaware law defines the "franchise" as synonymous with stockholder voting rights. *See, e.g.*, *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1130 (Del. 2003) (equating "'shareholder franchise'" with "'opportunity to vote' effectively" (citation omitted)). While activism can implicate the franchise—*e.g.*, where an activist runs a proxy contest against incumbent directors—activism may not, and generally does not, implicate the "franchise" at all.

The court ignored this distinction, erroneously concluding that *potential* harms of activism can never 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 id.* 73 (concluding that "short-termism and distraction concerns boil down to the sort of we-know-better justification that Delaware law eschews in the voting context").) But as the cases Plaintiffs cite make clear, that rule applies only where board action is taken for the express purpose of impeding the stockholder vote in contested director elections. *See Pell*, 135 A.3d at

790 ("[T]he belief that directors know better than stockholders is not a legitimate justification *when the question involves who should serve on the board of a Delaware corporation*."). Such a situation is simply not present here: There is no allegation that the Plan was adopted for the purpose of interfering with director elections, nor was there any evidence or factual finding that the Plan would have such an effect. (*Supra* at 3–5.)

Importantly, *outside* the limited circumstance of board action taken to impede voting on directors, Delaware courts have long recognized that a board may adopt defensive measures that prevent stockholders from taking action the board deems in its business judgment to be a mistake. *See, e.g.*, *Airgas*, 16 A.3d at 56–58 (upholding rights plan where board was concerned stockholders would tender into an inadequate offer, even where "the stockholders know what they need to know . . . to make an informed decision," and, thus, "there seems to be no threat here"); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988) (explaining that although the "premise" that "the board knows better than do the shareholders" is "irrelevant . . . when the question is who should comprise the board of directors," it "is no doubt true for any number of [other] matters").

Moreover, unlike the franchise, which Delaware law rightly protects as an unalloyed good, Delaware courts have repeatedly recognized the harms that activism may entail and the potential need for defensive action to prevent such consequences.

See, e.g., *Third Point*, 2014 WL 1922029, at *21 (recognizing threat of activists exercising "disproportionate control and influence over major corporate decisions, even [without] explicit veto power"); *Yucaipa*, 1 A.3d at 313 (recognizing threat of activist, acting singularly or in concert with another stockholder, amassing a stake that would give it "great leverage to seek advantage for itself at the expense of other investors").[5] There is no basis in law or logic to recognize that activists can impose harm on the long-term interests of stockholders, but impose a rule precluding a board from ever taking action to address that threat proactively, simply because activism can *sometimes* be value enhancing.

Indeed, such a rule would be particularly inappropriate here, where the Board adopted the Plan in the face of some of the most extreme and unprecedented market conditions ever seen. At that time, as a result of a rampaging global pandemic and simultaneous oil price war, the Board believed that Williams' stock price was fundamentally disconnected from the Company's intrinsic value, creating a situation ripe for opportunistic activists. (Def. Br. 27.) Plaintiffs argue that the court

[5] *See also Polk v. Good,* 507 A.2d 531, 537 (Del. 1986) (recognizing as "entirely consistent with the principles stated in *Unocal*" for a board to act "where dissident shareholders threaten to interfere with the day-to-day business operations of a company"); *In re PLX Tech., Inc. S'holders Litig.*, 2018 WL 5018535, at *41 (Del. Ch. Oct. 16, 2018) (recognizing "particular types of investors," including "[a]ctivist hedge funds," "may espouse short-term investment strategies and structure their affairs to benefit economically from those strategies, thereby creating a divergent interest in pursuing short-term performance at the expense of long-term wealth").

adequately considered these circumstances because other energy companies purportedly facing the same circumstances adopted rights plans that were "less restrictive" and only "in response to live activist engagements." (Pl. Br. at 45–46 & n.232.) But responses by other corporations say nothing of whether the *Williams* Board perceived a cognizable threat. In any event, context matters. Plaintiffs ignore that Williams, unlike those other companies, operates in the natural gas sector, which was generally unaffected by the pandemic or the oil price war. Notwithstanding this, Williams' stock price was dragged down with the broader energy sector, even though its business fundamentals remained unchanged. (Def. Br. 9.) That is precisely why the Board believed it was important to protect against an activist play and why Williams' situation merited a different response. (*Id.* 33–35.)

Plaintiffs' assertion, based on supposedly unequivocal testimony from Mr. Cogut, that "the Plan was *not* a response to . . . the market-wide dislocation or the impact thereof on Williams' stock" (Pl. Br. 17) is belied by the record. Mr. Cogut testified several times that such dislocation *was* the impetus for the Plan (A.1849; AR.35; AR.63; AR.94–95), and the court found the record "clear that the Company's declining stock price was the initial catalyst for the Board's decision" (Op. 54).

Contrary to Plaintiffs' bald suggestion, and notwithstanding the court's acknowledgment that rights plans are "situationally specific defenses" that must be evaluated "under the unique circumstances" presented (Op. 76), the court gave no

meaningful consideration to these circumstances (Def. Br. 33–34). That was error. As one leading critic of so-called anti-activist rights plans acknowledged at the height of the pandemic, spring 2020 was "no ordinary moment." (AR.1–3.) Rather, it was "a time to put the ordinary debate [about rights plans] aside" and "provide boards with space to respond to the multiple challenges of protecting firms, employees, consumers and the country" without "worrying that they will soon find an activist on their doorstep demanding answers." (*Id.*) That is precisely the sort of concern animating the Board's decision—a desire to avoid or mitigate the threat of activists taking advantage of the market situation to seek short-term profit at the expense of Williams stockholders' long-term interests and, in doing so, distracting management from its number one priority of continuing to deliver natural gas safely while the Company navigated a global catastrophe.

The court committed reversible error in holding, under these circumstances, that the Board's concerns over the potential harm of activism, including short-termism and distraction, were not legally cognizable threats.

C. The Plan Fell Within the Range of Reasonable Responses to the Board's Identified Objective

As set forth in Defendants' Opening Brief, the court also erred in concluding that the Plan—which Plaintiffs conceded was neither preclusive nor coercive—did not fall within the range of reasonable responses to the Board's identified corporate objective. (Def. Br. 35–45.)

As an initial matter, the court's proportionality analysis was improperly limited to whether the Plan was reasonable in relation to the court's narrowly articulated threat of "lightning-strikes." (*Id.* 36 (citing Op. 77).) Plaintiffs make no attempt to argue that the Plan was unreasonable in relation to the broader objective of the Board, instead suggesting that the court's analysis was "properly framed" and that Defendants should be grateful that the court identified any cognizable threat at all. (Pl. Br. 49–52.) Plaintiffs' glib and conclusory argument fails for the reasons above. (*Supra* Part II.A–B.)

In any event, the court independently erred by analyzing the Plan's reasonableness in comparison to two "less extreme" hypothetical plans (proposed by academics) that "the Board might have considered." (Def. Br. 36–37 (citing Op. 79–82).) That analysis flies in the face of well-settled law that a rights plan need only be "reasonable"—not the "most narrowly or precisely tailored" option. *Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, at *24 (Del. Ch. Feb. 26, 2010); *see also Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45–46 (Del. 1994) (question is whether directors made a "reasonable," not "perfect," decision). Rather than offer any real defense of the court's analysis, Plaintiffs instead contend that "'the Plan's features also raise concerns when evaluated independently and divorced from comparisons.'" (Pl. Br. 53 (quoting Op. 82).) That argument likewise fails.

The court's finding that the Plan was unreasonable, independent from comparisons, rested solely on its conclusion that the Plan *might* have some incidental chilling impact on stockholder communications. (Op. 84–85, 87 n.401.) That conclusion likewise constitutes reversible error.

To begin, there is no evidence that any stockholder was in fact chilled in any way by the Plan. (Def. Br. 38.) To the contrary, Plaintiffs conceded at trial that the Plan did not impede their own activities in any way, and they were not aware of any other stockholder whose communications were chilled. (*Id.* 18, 38.) Unable to claim otherwise now, Plaintiffs assert that Defendants "understate[] the Plan's 'extreme, unprecedented collection of features.'" (Pl. Br. 54.) But conclusory assertions cannot substitute for evidence of any *actual* chilling effect.

Although Plaintiffs contend that the court's factual findings are entitled to deference (*id.*), the court, at most, found that the Plan was "*likely* to chill a wide range of anodyne stockholder communications" (Op. 82)—not that it *actually* had such effect. Unable to refute this, Plaintiffs rely on the court's passing assertion, in analyzing whether Plaintiffs' claims were direct or derivative, that the Plan "restrict[ed] the stockholders' ability to nominate directors," "limit[ed] the act of communicating itself, whether with other stockholders or management," and "infringe[d] on the stockholders' ability to communicate freely in connection with the stockholder franchise." (Pl. Br. 18, 52 (citing Op. 45).) But the court cited no

evidence to support these contentions—the only citation was to the testimony of Plaintiffs' expert that much of his work as a proxy solicitor occurs outside the context of proxy fights. (A.1890–91.) Accordingly, the court's conclusions—unsupported by the record (and contrary to the court's later findings)—are not entitled to any deference. The court's hypothetical concerns about potential, incidental chilling impacts supply no basis to conclude as a matter of law that the Plan was *per se* unreasonable and that the Board breached its fiduciary duties. A review of the Plan's *actual* impact demonstrates the clear error in such a conclusion.

5% Trigger. Plaintiffs assert that the Plan's 5% Trigger was disproportionate not because of the situation facing Williams at the time, but simply because it was "an extreme outlier compared to other rights plans." (Pl. Br. 49–50.) But, as the court acknowledged and as Plaintiffs do not dispute, given Williams' market capitalization, the 5% Trigger—which would have permitted an investment of $650 million to $1.16 billion—was significantly *less* restrictive, on a dollar-value basis, than the "vast majority" of rights plans with higher thresholds.[6] (Op. 83; Def. Br. 39.) Indeed, the evidence showed that the vast majority of activist campaigns have been conducted with dollar-value holdings far lower than permitted by the Plan. (A.2080–82.) Moreover, even accepting the court's unduly narrow view that the

[6] As Defendants' expert testified, the 5% Trigger permitted a toehold stake larger than 95% of other rights plans. (A.2071.)

Plan was adopted for the purpose of "gap filling to detect lightning strikes" (Op. 77), a trigger higher than 5% would not have addressed the relevant gap or the Board's concerns (Def. Br. 11, 39–40).

AIC Provision. The AIC Provision was likewise reasonable. (Def. Br. 40–42.) As the evidence showed, the provision was consistent with the approach found in many modern rights plans, designed to address the evolving tactics of activists who, in the absence of such a provision, could work together in parallel to avoid the triggering threshold. (*Id.*)

The court's stated concerns regarding the AIC Provision were belied by the evidence, which demonstrated that any (purely hypothetical) impact of the provision would be limited to communications among stockholders, collectively owning 5% or more of Williams stock, who had the intent of "changing or influencing control" of Williams—a well-understood concept that did not encompass routine engagement on ESG issues. (*Id.*) Plaintiffs do not even attempt to address this argument. Instead, they contend that the court's factual findings are entitled to substantial deference. (Pl. Br. 50–51, 53–54.) But the court did not make any contrary factual finding; it merely relied on conclusory statements of Plaintiffs' expert regarding the generalized, *potential* impact of the AIC Provision (Op. 82 n.378), while ignoring contrary testimony of that same expert making clear that the impact was limited (A.1959–61; A.1974–75). Indeed, despite initially testifying that the Plan *might*

have a negative impact on routine stockholder communications, the same expert later conceded that it was “equally possible” the Plan would not have any such chilling impact. (A.1933.) Such speculative evidence of harm supplies no valid basis to deem the Plan unreasonable. Nor does the court’s equally speculative concern that stockholders might be chilled because the Board would “misuse” the AIC Provision—an argument contrary to well-settled law that the ultimate use of a rights plan must be judged by the circumstances at that time. (Def. Br. 42.)

Any concern about the AIC Provision’s “daisy chain” language (Pl. Br. 50–52; *see also id*. 21) fails for the same reasons. Such provisions are both “critical” and common—appearing in over 90% of acting-in-concert provisions and preventing stockholders from coordinating actions through a third person to avoid triggering rights plans. (A.2105–07.) As Plaintiffs’ expert acknowledged, aggregation under the provision can only apply where the stockholders in each binary section of the “daisy chain” meet the definition of “Acting in Concert”—substantially limiting its applicability. (A.1974–75.) Moreover, any assertion that the provision would have a chilling effect on stockholders, out of fear of being aggregated with other unidentified stockholders, defies reason. For example, if Mr. Wolosky’s 5,500 shares were aggregated with other similarly-sized stockholders, one would need to aggregate the holdings of over 11,000 stockholders to reach the Plan’s 5% threshold. (A.0662.)

Passive Investor Carveout. Contrary to the court's conclusion, the Passive Investor Carveout likewise did not render the Plan unreasonable. (Def. Br. 42–45.) Plaintiffs argue that the provision "carved out at most three investors." (Pl. Br. 51.) But those three investors (BlackRock, State Street, and Vanguard) were the only stockholders who owned more than 5% of Williams stock and, thus, could have triggered the Plan in the absence of an exemption. (Def. Br. 13, 43–45.) Plaintiffs also argue that the court appropriately found that the carveout's exclusions "far exceed[ed] the influence-control default of federal law." (Pl. Br. 51.) But Plaintiffs, like the court, ignore that the relevant language in the carveout tracks almost verbatim the definition of "control" in both the federal securities laws and Section 203 of the DGCL. (Def. Br. 43–44.) Accordingly, the court's comparison to federal law—and the resulting conclusion that the carveout had the potential to "impede[] a wide range of socially beneficially and/or value-enhancing behavior" (Pl. Br. 51 (citing Op. 29 n.257, 88))—is clearly erroneous. Indeed, the only evidence in the record regarding investors' understanding of the carveout uniformly demonstrated that it was viewed as a positive provision and had no chilling effect on passive investors such as Blackrock. (Def. Br. 42, 44.)

CONCLUSION

For these reasons, the final judgment of the Court of Chancery should be reversed, and judgment entered in Defendants' favor.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

OF COUNSEL:

Andrew Ditchfield
Brian M. Burnovski
Mari Byrne
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

<u>/s/ William M. Lafferty</u>
William M. Lafferty (#2755)
Kevin M. Coen (#4775)
Lauren K. Neal (#5940)
Sabrina M. Hendershot (#6286)
1201 North Market Street
Wilmington, DE 19801
(302) 658-9200

Counsel for the Williams Appellants

PINCKNEY, WEIDINGER, URBAN & JOYCE LLC

<u>/s/ Patricia R. Urban</u>
Michael A. Weidinger (#3330)
Patricia R. Urban (#4011)
Megan Ix (#6721)
3711 Kennett Pike, Suite 210
Greenville, DE 19807
(302) 504-1497

Counsel for Appellant Computershare Trust Company, N.A.

August 6, 2021

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, copies of Appellants' Reply Brief were caused to be served upon the following counsel of record via File & ServeXpress:

Michael J. Barry, Esq.
Christine M. Mackintosh, Esq.
Kelly L. Tucker, Esq.
GRANT & EISENHOFER P.A.
123 Justison Street, 7th Floor
Wilmington, DE 19801

Gregory V. Varallo, Esq.
BERNSTEIN, LITOWITZ, BERGER & GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801

/s/ Lauren K. Neal
Lauren K. Neal (#5940)