EFiled: Jan 28 2021 04:58PM EST
Transaction ID 66287467
Case No. 2020-0707-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES STOCKHOLDER LITIGATION	Consolidated C.A. No. 2020-0707-KSJM

PLAINTIFFS' POST-TRIAL BRIEF

OF COUNSEL:

Mark Lebovitch
Thomas G. James
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Jeremy S. Friedman
David F.E. Tejtel
FRIEDMAN OSTER & TEJTEL PLLC
493 Bedford Center Road, Suite 2D
Bedford Hills, NY 10507
(888) 529-1108

Counsel for Plaintiffs

Gregory V. Varallo (Bar No. 2242)
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3061

Michael J. Barry (Bar No. 4368)
Christine M. Mackintosh (Bar No. 5085)
Kelly L. Tucker (Bar No. 6382)
GRANT & EISENHOFER P.A.
123 Justison Street, 7th Floor
Wilmington, DE 19801
(302) 622-7000

Counsel for Plaintiffs

Dated: January 28, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

I. INTRODUCTION

"Gee, I wish we had one of them doomsday machines!"[1]

From the outset, Plaintiffs knew Williams' Board[2] did something extraordinary: they adopted a 5% pill with a highly aggressive "Wolfpack" provision. What Plaintiffs did not fully appreciate until discovery was that the Board's publicly disclosed reason for adopting the Pill (the rapid, and short-lived, decline in the Company's stock price) was a charade. Instead, the challenged Pill was the brainchild of Williams director Casey Cogut, a well-known (retired) corporate lawyer, who decided it would be a good idea to take a year off from having to deal with activism to allow management to navigate the COVID-19 crisis unimpeded by pesky investors, trying to assert their views. And at trial we learned that Cogut viewed his creation as a "nuclear" weapon, with such *in terrorem* effect that it constituted the corporate equivalent of the cold war doctrine of "Mutually Assured Destruction."[3] In short, within a few months, this case went from *Ferris Bueller's Day Off* to *Dr. Strangelove*.

---

[1] Gen. Buck Turgidson, *Dr. Strangelove*.

[2] Capitalized terms not defined herein shall have the same meaning as in Plaintiffs' Pre-Trial Brief. Trans. ID 66224916. References to "TT" refer to the transcript of the January 12-14, 2021 trial of this Action.

[3] TT (Cogut) 114:10-18 ("Let's not forget that the shareholder rights plan is the nuclear weapon of corporate governance….The same way nuclear weapons are deterrents and force people to talk to one another, that would be the same situation.").

Faced with a highly inconvenient discovery record, in pre-trial briefing, Defendants simply ignored the record in claiming that: (i) their adoption and maintenance of the Pill should be reviewed under the business judgment rule; (ii) a *Unocal* analysis would reveal a well-recognized threat and a proportional response (in part because all passive investors were carved out of the Pill); (iii) the case should be dismissed for failure to assert it derivatively; and (iv) entrenchment could not possibly be in play here given the Pill's limited duration.

Facts are stubborn things. No amount of 'saying so' can make this "nuclear" Pill less subject to *Unocal*'s omnipresent specter. Whether or not the Board was subject to removal before or after the Pill is not the question: instead, it is whether the Defendants have carried *their* burden of showing that a pill adopted specifically to foreclose stockholders' ability to evaluate *whether* to seek to influence the "management and policies" or control of the Company, let alone to communicate with other stockholders on the subject, satisfies *Unocal*'s high standard.

To say that the record here satisfies *Unocal* is remarkable. To find as much, the Court must find that hypothetical, unnamed and unknown activists engaging with the Board during the COVID-19 crisis constituted a "threat to corporate policy and effectiveness" and that the "novel" and "unprecedented" non-NOL 5% "nuclear" pill with its highly aggressive wolfpack provisions was a measured and proportional response to that "threat." There is no legally cognizable threat here and, in any event,

the response was draconian and non-proportional. Defendants fail both prongs of *Unocal*.

Defendants' belated Rule 23.1 argument fares no better. Putting aside that Defendants did not raise the argument in a pre-trial motion and fully litigated ***class*** certification without ever mentioning it, it is simply wrong to say the corporate franchise is not implicated here. The Pill undisputedly restricts stockholders' right to communicate. And there is not likely to be a ***vote*** on a contested matter if activist investors are precluded from communicating by way of diligence. To act ***with the intent*** to shut down activism and then claim there is no harm because no votes were precluded is reminiscent of the famous definition of "chutzpah": the child who kills his parents and throws himself on the mercy of the Court because he is an "orphan."

But the franchise implications alone are not the only reason this Action was properly certified as a ***class*** action. Defendants indisputably comprised an overwhelming Board majority when the suit was filed and the facts proven here, including the Board's stubborn refusal even to consider redeeming the Pill notwithstanding learning about stockholder demands for redemption and a full stock price recovery, prove the Board would not have evaluated a pre-suit demand objectively.

Defendants likewise deny the Pill's entrenchment effect by arguing that any effect is limited to a year and thus not of concern. But this "logic" compels the

inescapable conclusion that Defendants could have adopted a 1% trigger, or even a .001% trigger, so long as it was "only" for a year.

In *Versata Enterprises, Inc. v. Selectica, Inc.*,[4] Versata—represented by Morris Nichols Arsht & Tunnell—argued for a "*per se*" rule precluding a 5% pill as a matter of Delaware law. That argument failed then, and Plaintiffs do not make it now. Rather, Plaintiffs argue sustaining a 5% pill against challenge requires proof of a truly remarkable, specific and pressing need for it, such as the existence of an extremely valuable asset indisputably imperiled by an applicable statute. *Selectica* proved that a hostile acquiror's insistence on rendering NOLs comprising the great majority of a company's value worthless was a cognizable threat under *Unocal*. The Delaware Supreme Court nonetheless cautioned: "The fact that the NOL Poison Pill was reasonable under the specific facts and circumstances of this case, should not be construed as generally approving the reasonableness of a 4.99% trigger in the Rights Plan of a corporation ***with or without NOLs***."[5] In other words, the only case ***ever*** to approve a 5% trigger, made crystal clear that future 5% triggers would rise or fall on

---

[4] 5 A.3d 586 (Del. 2010) ("*Selectica II*").

[5] *Id*. at 607 (emphasis added).

the facts as scrutinized under *Unocal*, and not even the presence of substantial NOLs would ***necessarily*** justify such a pill.[6]

The evidence and decades of evolving policy compel the conclusion that activism unrelated to takeover attempts is not a "threat" but instead a stockholder right and a necessary and valuable part of modern corporate governance. To suggest that the COVID-19 pandemic changed the rules by transforming activism and other stockholder speech into a sufficiently major "distract[ion]" to qualify as a "threat to corporate policy and effectiveness" is, simply put, dangerous.

Likewise, the ability to use the most restrictive Pill ever conceived—including its pernicious wolfpack provision—to address such a non-threat turns the governing *Unocal* proportionality review on its head.

Finally, and perhaps most strangely, there is the ineffective "passive investor" carve-out that purportedly mitigated the Pill's extreme nature. The provision carves out ***at most*** three stockholders, but probably fails to do even that. A one-word change would have fixed most of the errors that multiple defense-side witnesses

---

[6] Here, any beneficial presumptions flowing from reasonable investigation are unavailable because the Board adopted the unprecedented Pill: (i) one day after Williams management first proposed it, and after receiving a draft of the Pill for the first time the previous evening; (ii) after two telephonic meetings totaling fewer than two hours (and which included discussion of unrelated topics); (iii) having disclaimed reliance on counsel; and (iv) in many cases, ***without even reading the Pill***.

admitted were facially evident. Notwithstanding being aware of this "error" in their publicly filed documents for months, this Board has steadfastly refused to "fix" the provision. The testimony that this provision was "important" to the Board compounds the absurdity of this refusal. The Court is left with a provision that is more chimera than carve-out, supporting—rather than contradicting—an entrenchment finding.

Trial is over and the evidence is in. Now is the time for Equity to remedy these clear fiduciary breaches. The Court must grant relief and permanently enjoin the Pill.

II. STATEMENT OF FACTS

A. Cogut Devises the "Nuclear Weapon"

In the six months preceding March 2020, the stock price of Williams—an energy company that owns and operates natural gas infrastructure assets[7]—was relatively stagnant.[8] Beginning in March 2020, two "global" factors—neither of which was Williams-specific—began influencing stock prices: (i) the COVID-19 pandemic; and (ii) volatility in the oil market relating to the pricing war between Saudi Arabia and Russia.[9]

---

[7] PTO ¶14.

[8] PTO ¶32, Ex. A.

[9] PTO ¶83; JX0144, Response to Interrogatory No. 1; TT(Buese) 603:2-14.

Sometime between February 28 and March 2, 2020,[10] Casey Cogut proposed to Williams management "something that was germinating in [his] mind"[11]—*i.e.*, a "novel concept, using the technology of shareholder rights plan ***to provide insulation [for] management***[.]"[12] As Cogut explained, he was "trying to put a halt for a year to ***any activism*** that distracted the board from their job of managing the company through the uncertainty associated with COVID," regardless of the nature or benefits of that activism.[13]

As a former corporate partner at Simpson Thacher who helped clients adopt pills roughly a dozen times beginning in the 1980s, Cogut understood the genesis and evolution of poison pills.[14] He recognized that the original "concept" for pills was to protect against unsolicited "hostile transaction[s] that could be completed in 20 business days"—sometimes referred to as "Saturday night specials."[15]

---

[10] TT(Cogut) 66:4-10.

[11] TT(Cogut) 65:16-24.

[12] TT(Cogut) 69:4-11 (emphasis added).

[13] TT(Cogut) 71:6-72:20 (emphasis added); Cogut Tr. 116:16-23 (emphasis added). Buese agreed that the amount of Board activity at Williams has not meaningfully changed as a result of COVID-19. TT(Buese) 610:19-22; Buese Tr. 26:15-27:2, 28:15-19.

[14] TT(Cogut) 53:5-17.

[15] TT(Cogut) 53:18-54:4; *see also* Cogut Tr. 16:14-18 ("The threat that the shareholder rights plan really protected against was the so-called 'Saturday night special' [where] somebody comes at you hostilely and 20 business days later you could be toast.").

Cogut confirmed at trial, however, that the Pill was never intended or designed to deal with a takeover risk.[16] Rather, Cogut's "novel rights plan"[17] was "a different type of pill,"[18] designed to insulate Williams from activism for a year:

> Q. So as far as you were concerned, up until the time this pill was put in, there's ***no precedent for the idea of having a rights plan that was focused not on a potential change of control but, instead, on limiting activity of potential activists***; is that right?
>
> A. ***Correct***[…]
>
> Q. So you conceptualized this as sort of a ***new step in the evolution of pills***; right? Just like the 5 percent pill is used to protect NOLs, your idea was that ***this was a new use to protect against activists during COVID***; correct?
>
> A. ***Right***.
>
> Q. And you thought it was ***so novel that everybody should consider doing it***; right?
>
> A. ***Yes***.[19]

---

[16] TT(Cogut) 64:19-23 ("Q. …[Y]ou weren't facing a traditional change-of-control situation and that's not what you were concerned about at the time? A. Yes."); 93:16-19 ("Q. And the pill wasn't intended or designed to deal with the risk of a takeover at all; correct? A. That would be my view, yes.").

[17] TT(Cogut) 146:2-5.

[18] TT(Cogut) 64:24-65:8.

[19] TT(Cogut) 69:12-70:4 (emphasis added).

To put a halt to all activism for a year,[20] Cogut armed the Pill with a 5% trigger despite "full[y] knowing that the 5 percent [trigger] was novel."[21] Indeed, Cogut explained that the data regarding prior pill triggers "was irrelevant" because "this was not a traditional shareholder rights plan,"[22] and that the "5 percent [trigger] was part of [his] concept from day one."[23]

Cogut volunteered at trial that his Pill was a "***nuclear weapon of corporate governance[.]***"[24] And yet, despite admitting that "there is nothing inherently wrong with ***most*** activism"[25] and that some activism is socially useful,[26] Cogut confirmed that the Pill drew no distinctions between different kinds of activism.[27] Trial also revealed ***why*** Cogut felt comfortable deploying his nuclear weapon indiscriminately to foreclose all activism: he was not "actually sure, as a lawyer, whether or not the

---

[20] TT(Cogut) 71:6-72:20; Cogut Tr. 116:16-23.

[21] TT(Cogut) 155:10-23; *see also id.* at 55:11-56:2 (Cogut had no "precedent" for a 5% trigger outside the NOL context); 80:8-12 (same).

[22] TT(Cogut) 89:20-90:1.

[23] Cogut Tr. 29:15-21.

[24] TT(Cogut) 114:10-20 (emphasis added); *see also id.* at 114:21-24.

[25] TT(Cogut) 74:7-24 (emphasis added).

[26] TT(Cogut) 73:7-10.

[27] TT(Cogut) 73:3-6.

notion of *Unocal* and the necessity for a threat [was] applicable to the 5 percent pill."[28]

The Pill was substantially more restrictive than any the Board had previously considered. Williams had considered "on-the-shelf" pills since at least 2015, including a "refreshment" in October 2019, but those pills were "geared towards a traditional change of control situation, and that's not what [Cogut] was suggesting that there should be a concern about."[29] Rather, Cogut's Pill was a "novel concept,"[30] and the 5% trigger used to achieve his "one-year moratorium"[31] on activism sharply departed from the prior pills' higher threshold, which Cogut believed was 15%.[32] The lone potentially mitigating Pill feature contemplated by Cogut was an intended exemption for "all passive institutional investors[.]"[33]

---

[28] TT(Cogut) 91:24-92:10; *see also id.* at 92:24-93:15 (testifying that "to put in this particular pill did not necessarily require there to be an [sic] *Unocal* standard"). As the record shows, no Delaware counsel helped the Board adopt this Pill. TT(Buese) 590:14-591:1.

[29] TT(Cogut) 58:2-22; Cogut Tr. 31:7-11; *see also* JX0027; JX0029; JX0066.

[30] TT(Cogut) 69:4-70:4.

[31] TT(Cogut) 118:11-18.

[32] TT(Cogut) 58:23-59:5.

[33] TT(Cogut) 145:20-146:1; *see also id.* at 106:11-20; JX0041.

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

Cogut proposed his anti-activism Pill to Williams General Counsel Lane Wilson around the time of the Board's March 2, 2020 meeting, at which the Board considered a potential stock buyback that Cogut opposed.[34] Following Cogut's suggestion, Wilson approached Williams litigation counsel Davis Polk & Wardwell LLP, who "tuned up" Williams' on-the-shelf pill.[35] On March 17, Wilson forwarded the "tuned up" pill to Cogut, along with Davis Polk's "explanation of changes."[36] Cogut never actually read the Pill before adopting it, other than to confirm Davis Polk included his chosen 5% trigger.[37]

Upon receiving the "tuned up" Pill from Davis Polk, Wilson socialized it among senior Williams management including CEO, President and director Alan Armstrong—who had "barely survived" a prior activist's "attempt to get him fired"[38]—and Williams' Chief Financial Officer John Chandler,[39] who were "all supportive of moving forward proactively."[40] Wilson also socialized the Pill with

---

[34] TT(Cogut) 64:24-66:22.
[35] JX0176; JX0042.
[36] JX0042.
[37] Cogut Tr. 86:12-18.
[38] TT(Cogut) 137:8-15.
[39] JX0174; JX0040.
[40] JX0042; *see also* JX0175.

Board Chairman Stephen Bergstrom, who lacked any experience with poison pills.[41] Given Bergstrom's concerns regarding the "novel" Pill (including specifically the 5% trigger[42]), he "had not joined the enthusiasm of management to proceed."[43] Cogut therefore reached out to Bergstrom to express his "view that [Williams] should adopt a shareholders' rights plan with a 1 year term, a 5% threshold, and an exception for 13g holders."[44] Cogut sought to do a "good job" describing to Bergstrom the purported advantages of the Pill, but could not recall detailing any of the Pill's downsides,[45] or disclosing to Bergstrom that he was not aware of any 5% pill outside the NOL context.[46]

C. The Board Reflexively Adopts the Anti-Activist Pill

On March 17, 2020, Williams sought to schedule "an urgent special telephonic board meeting to discuss the possibility of a shareholder rights plan."[47] Although the scheduling email suggested the Board needed only one hour-long meeting on *either* March 18 or 19, Wilson recommended "hav[ing] a second board

---

[41] TT(Cogut) 77:15-17; JX0176.
[42] TT(Cogut) 82:8-20.
[43] TT(Cogut) 76:14-21.
[44] JX0041.
[45] TT(Cogut) 83:3-10.
[46] TT(Cogut) 80:17-20.
[47] JX0045.

meeting to approve, at least a day later, ***to show appropriate consideration by the Board***."[48]

The Board met to consider the Pill twice: (i) a 75-minute meeting on March 18, at which Williams management first proposed the Pill in concept and the Board discussed certain non-Pill related issues;[49] and (ii) a 40-minute meeting on March 19, at which the Board approved the Pill.[50] The Board did not receive a draft of the Pill until the evening of March 18, ***after*** that day's meeting.[51]

Williams management led both meetings,[52] with Davis Polk and Morgan Stanley & Co. present to "help answer questions" as Wilson belatedly requested on the morning of the March 18 meeting.[53] The only presentation delivered by those advisors—who management unilaterally selected and the Board never retained[54]—was Morgan Stanley's March 19 presentation,[55] and the Board never consulted with

---

[48] JX0043 (emphasis added).

[49] JX0056; TT(Cogut) 83:23-84:3; TT(Buese) 594:13-595:4.

[50] JX0067.

[51] TT(Buese) 596:7-17; JX0059; JX0065.

[52] TT(Buese) 554:4-9, 597:16-21.

[53] JX0050.

[54] TT(Buese) 589:2-16.

[55] TT(Cogut) 84:14-17; TT(Smith) 346:6-9; JX0067. That lone presentation from Morgan Stanley underscored the Pill's uniqueness, observing that "15-20% Thresholds are Common for Non-NOL Rights Plans" and that "No precedents exist

either advisor regarding the Pill outside of formal meetings.[56] The Board never received any advice from Delaware attorneys.[57]

In sum, the Board—many of whom lacked experience with pills[58]—approved the unprecedented Pill (i) one day after Williams management first proposed it,[59] and after receiving a draft of the Pill for the first time the previous evening;[60] (ii) after two telephonic meetings[61] totaling fewer than two hours (including discussion of unrelated topics);[62] and (iii) without any other Board discussions or meetings.[63] Consistent with that whirlwind process, several directors never read the

---

below 5%[,]" and demonstrating that fewer than 2% of all pills (including in the NOL context) have a sub-10% trigger. JX0065 at WMB_00010131.

[56] TT(Buese) 591:20-592:19.

[57] TT(Buese) 590:14-591:1.

[58] TT(Cogut) 77:15-17; TT(Smith) 343:5-10; Bergstrom Tr. 29:16-30:7, 34:13-21, 125:25-126:6, 127:7-11.

[59] TT(Buese) 594:13-595:4.

[60] TT(Smith) 344:22-345:1; TT(Buese) 596:7-17.

[61] TT(Buese) 597:13-15.

[62] JX0055; JX0067; TT(Cogut) 83:23-84:3; TT(Smith) 344:6-9. The Board Resolutions adopting the Pill identify the Pill's express purpose as warding off "accumulations of large positions by ***persons not having a passive intent***," a clear—if euphemistic—reference to activism. JX0067 (emphasis added); Chandler Tr. 292:14-293:2.

[63] TT(Smith) 344:1-5.

Pill, and remained oblivious to critical aspects thereof until preparing for their depositions in this Action.[64]

The Board never considered the clear alternative of simply installing an "on-the-shelf" pill,[65] which would have been "easily capable of being implemented"[66] and deployable within mere "hours"[67] if an actual threat emerged.

The Board also failed to consider subjecting the Pill to a stockholder vote, despite conceding that nothing prevented such a vote.[68] For example, Cogut admitted there was no reason "[l]egally" why Williams "couldn't have simply put off [its] proxy and/or [its] meeting to add [the Pill] for shareholder vote," but did not believe "the idea was raised[.]"[69] In hastily deploying the anti-activism Pill, however, the Board never considered or discussed any such possibility, and now cites time exigency as the culprit.[70] Cogut acknowledged that the Board would have

---

[64] TT(Cogut) 86:4-18, 87:1-15, 95:6-16, 106:21-107:2; TT(Smith) 345:2-7, 345:11-21; TT(Buese) 605:19-606:1; Fuller Tr. 74:5-75:7, 80:18-81:17, 167:16-19, 175:6-21; Cogut Tr. 54:3-8, 148:12-16; Bergstrom Tr. 254:5-22, 272:6-19, 273:3-9, 293:10-294:10; Buese Tr. 93:8-10.

[65] TT(Buese) 574:11-576:9.

[66] TT(Buese) 573:12-574:6.

[67] TT(Buese) 574:7-10; Bergstrom Tr. 87:20-88:9.

[68] TT(Cogut) 117:7-118:18; TT(Buese) 604:6-24.

[69] Cogut Tr. 133:1-12.

[70] TT(Buese) 563:10-16; *see also* TT(Cogut) 117:7-13; Fuller Tr. 175:22-176:8.

considered a vote on the Pill "[i]f either our legal advisors or financial advisors…had suggested it,"[71] but the advisors never raised the issue.[72] Director Stephen Chazen admitted that failing to put the Pill to a stockholder vote was a mistake, and that he "knew better" but "was preoccupied at the time and didn't think it through."[73]

And since adopting the Pill on March 19, 2020, the Board has never considered whether to put the Pill to a post-adoption ratification vote, notwithstanding that any purported time exigency has abated.[74]

D. The Pill Was Adopted to Stop Unspecified Potential Activism, Not Defend Against an Identified Threat to Williams

Trial has eliminated any conceivable doubt as to the Pill's anti-activist purpose and function.

Cogut testified that the Pill was intended to "provide insulation [for] management during the uncertainty created by the pandemic"[75] by "prevent[ing] an activist buying a toehold of 5 percent or more or acting in concert with other activists

---

[71] Cogut Tr. 133:1-12.

[72] TT(Cogut) 119:4-8.

[73] JX0126.

[74] JX0091 at WMB_00002541 ("When ISS asked the company whether it had considered…using its upcoming annual meeting to seek shareholder ratification of its 5 percent plan, the answer appeared to be 'no.'"); Bergstrom Tr. 78:6-16; Fuller Tr. 179:19-180:10.

[75] TT(Cogut) 69:9-70:4.

so that our management could be freed up…. to use their time to run a company during COVID,"[76] regardless of whether such activism might be value-enhancing and/or socially useful.

Similarly, despite testifying that "there can be a lot of benefit gained by [activist] shareholders taking certain positions and pushing for certain types of agendas,"[77] director Nancy Buese confirmed that the Pill's existential purpose was to address activism:

> Q. And the primary concern of the [B]oard when adopting the [P]ill was stockholder activism. Correct?
>
> A. Yes.
>
> Q. And the [B]oard's concern wasn't the purchase of shares by stockholders but, rather, actions stockholders would take after purchasing those shares. Correct?
>
> A. That is correct.
>
> Q. And fundamentally, the [B]oard adopted the [P]ill as a remedy for and reaction to concerns about stockholder activism. Correct?
>
> A. Yes.

---

[76] TT(Cogut) 114:21-115:22; *see also* TT(Smith) 320:14-321:5 (Pill's purpose was to "protect the company from more outside pressures so we can get our job done"), 321:1-18 (Pill would allow Williams to "continue to focus on our job").

[77] TT(Buese) 536:2-16; *see also id*. at 577:15-18 (shareholder activism is not inherently improper); TT(Mills) 188:6-20 ("[I]t's fair to say [shareholders] welcome activist involvement with underperforming companies. And, you know, whether they support them or not, ultimately, I think they prefer to have a choice."); TT(Subramanian) 477:1-10 (testifying that activism is "not inherently bad").

> Q. So essentially, the [B]oard adopted the [P]ill in response to a general concern that certain unnamed and unknown stockholders might attempt to influence the policy or management of the corporation. Correct?
>
> A. Yes.[78]

The documentary record is in accord, as Board updates acknowledged the Pill was "designed to prevent an activist from acquiring 5% or more of the Company's common shares[.]"[79] Further, Bergstrom—who, along with director Vicki Fuller and Williams' 30(b)(6) witness, Chandler, Defendants elected not to call at trial—testified that the Pill and its "five percent trigger would hopefully avoid activist [] shareholders coming in and being disruptive to the company in a time where we needed the management team to focus[.]"[80] And Chandler confirmed that "[t]he pill was designed to prevent an activist from acquiring five percent or more of the company's shares[.]"[81] Indeed, Defendants' expert Professor Guhan Subramanian expressly conceded that "[b]ecause the pill isn't really any meaningful deterrent to

---

[78] TT(Buese) 600:4-22.

[79] JX0072 at WMB_00017185.

[80] Bergstrom Tr. 103:4-9.

[81] Chandler Tr. 131:7-23.

a hostile bid for the full company, it must have been for the purpose of creating an orderly voice of prospective ***activists***."[82]

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

- Chandler candidly told investors: "[W]e did not adopt that rights plan in response to any specific threat."[83]
- The Board was not trying to protect any NOLs.[84]
- The Board was not aware of any threatened takeovers, activist activities or proxy contests.[85]
- The Board was not aware of any activist in Williams' stock.[86]

---

[82] TT(Subramanian) 376:13-22 (emphasis added); *see also id*. at 384:22-385:1 ("So that's kind of the idea of the AIC provision, is to essentially achieve the original purpose of the [Pill] against activists who are very sophisticated.").

[83] JX0078 at WMB_00014800; *see also* JX0187 at WMB_00018040 ("Plan was not adopted in response to any known / specific threat"). Fuller perceived no "current threat" to Williams when the Pill was adopted. Fuller Tr. 234:22-235:5.

[84] TT(Smith) 346:19-22; TT(Buese) 598:23-599:2; Chandler Tr. 195:17-21; Smith Tr. 130:7-15; Buese Tr. 140:16-20.

[85] TT(Smith) 353:6-10; Chandler Tr. 195:22-196:12; Bergstrom Tr. 52:13-16; Smith Tr. 128:21-129:3.

[86] JX0073 ("[T]his was solely a proactive effort, that we monitor our positions frequently and that we have no indication of anyone being in our stock."); *see also* TT(Cogut) 68:17-20, 93:20-94:1; TT(Smith) 353:11-14; TT(Buese) 544:8-15, 599:3-6; Chandler Tr. 288:24-289:1; Fuller Tr. 191:7-192:12; Bergstrom Tr. 169:25-170:10, 181:23-182:9; Buese Tr. 140:21-141:1.

- The Board was not aware of any person or group seeking to take control of, harm or exploit the Company, or otherwise opportunistically capitalize on then-present conditions.[87]

Trial has conclusively refuted the notion that the Pill was a response to—or justified by—the market-wide dislocation or the impact thereof on Williams' stock. Indeed, Cogut testified unequivocally:

> You know, I wasn't really concerned that the price was low. I was concerned about taking management's eye off the challenges of managing the company in the pandemic and having to deal with activists looking to influence control should they arise[.][88]

Indeed, the two causes of the "global"[89] "market dislocation"—COVID-19 and the Russo-Arabian oil price war—applied to numerous other companies, none of which adopted pills with 5% triggers even though several faced live engagements with activists.[90] As Buese testified:

> Q. So the market dislocation, that wasn't attributable to any Williams-specific condition or issue. Correct?
>
> A. That's right.

---

[87] TT(Smith) 353:15-354:2; TT(Buese) 599:7-14, 599:19-600:3; Bergstrom Tr. 180:5-181:6; Smith Tr. 129:10-130:6; Buese Tr. 141:3-142:13; Chandler Tr. 195:22-196:7.

[88] TT(Cogut) 143:9-24; *see also id*. at 93:11-15 ("Q. So it wasn't market dislocation and fundamental undervaluation of the stock itself that were the threat to corporate policy and effectiveness the board relies on; right? A. That would be my view, yes.").

[89] TT(Buese) 603:2-14.

[90] JX0091 at WMB_00002541; JX0092 at WMB_00003711; JX0155, ¶34.

> Q. And the conditions that caused the decline of Williams' stock price around March 2020 also applied to all other oil and gas companies. Correct?
>
> A. Yes.
>
> Q. It was a sector-wide concern. Correct?
>
> A. I'd say it's a global concern but certainly the sector as well, yes.[91]

Trial also dispelled any suggestion that Williams' prior experience with activist investors Soroban Capital Partners LLC and Corvex Management LP reinforced the Board's decision to adopt the Pill. Reaffirming his earlier testimony that prior activism "wasn't the basis of why I made the proposal,"[92] Cogut testified that the prior activism was not the reason for the Pill[93] or its 5% trigger.[94] Buese likewise confirmed that the Board never discussed or considered that prior activism in connection with adopting the Pill,[95] and acknowledged that the addition of three independent directors due to the prior activism ***benefited*** Williams and its stockholders.[96] And Murray Smith—one of the only two current Williams director

---

[91] TT(Buese) 603:2-14.

[92] Cogut Tr. 101:21-22; *see also id.* at 101:23-102:3.

[93] TT(Cogut) 68:21-69:3.

[94] TT(Cogut) 169:5-12.

[95] TT(Buese) 548:23-549:3, 549:8-15, 578:7-11, 578:24-579:8.

[96] TT(Buese) 581:17-23; *see also id*. at 580:3-581:16.

who was on the Board during the prior activism[97]—acknowledged his unequivocal prior testimony that there was no discussion of the prior activism whatsoever when the Board adopted the Pill.[98]

Although the prior activism did not factor into the Board's decision to adopt the Pill, it ***did*** factor into the "enthusiasm"[99] of Williams ***management***—including Armstrong, who was nearly ousted by that activism and "had a very unpleasant time when activists were on the scene before"[100]—for adopting the Pill.[101]

E. The Terms and Features of the Pill

Trial has confirmed that the Pill contains three deeply problematic features: (i) the 5% Trigger; (ii) the AIC Provision; and (iii) the Passive Investor definition.

1. The 5% Trigger

The Board adopted the Pill with the understanding that its 5% triggering threshold was unprecedented outside of the NOL context.[102] As Plaintiffs' expert—

---

[97] TT(Smith) 349:5-13; *see also* TT(Cogut) 52:11-12; TT(Buese) 577:23-578:6, 579:9-12.

[98] TT(Smith) 352:7-24.

[99] TT(Cogut) 76:14-21.

[100] TT(Cogut) 144:1-2.

[101] TT(Cogut) 168:8-169:4; JX0104.

[102] TT(Cogut) 55:11-56:2, 80:8-12, 89:20-90:1; TT(Smith) 346:10-13, 347:13-348:5; JX0065 at WMB_00010131; JX0187 at WMB_00018034 (investor Q&A document stating: "We acknowledge that 5% is unusual"); Cogut Tr. 87:20-88:3,

experienced (typically board-side)[103] proxy advisor Joseph Mills—testified, this 5% cap, particularly in combination with the AIC Provision, makes it substantially more difficult for stockholders to obtain the support needed to seek change at Williams.[104]

Nevertheless, to achieve Cogut's desired "one-year moratorium"[105] on activism, the Board approved the unprecedented trigger. Bergstrom testified that "the five percent trigger would hopefully avoid activist [] shareholders coming in and being disruptive to the company in a time where we needed the management team to focus," and that the Board chose the 5% trigger to give the Pill "teeth."[106]

The market recognized the 5% trigger's extraordinary nature, with ISS characterizing it as a "hair-trigger" and declaring it: (i) "problematic, as it is highly restrictive and could negatively impact the market for the company's shares as the market recovers";[107] and (ii) "also low in a relative sense; 14 companies (including The Williams Companies) adopted poison pills between March 13 and March 31 in

---

118:1-22; Bergstrom Tr. 195:15-22, 251:15-19; Buese Tr. 173:25-174:7, 217:20-218:1; Fuller Tr. 53:4-54:2. When the Pill was adopted, only one other non-NOL pill with a trigger this low had ***ever*** been deployed by a U.S. company. That pill was adopted in the face of a campaign launched by an activist holding approximately 7% of the company. JX0155, ¶47.

[103] TT(Mills) 179:23-181:1.

[104] TT(Mills) 192:21-193:24; JX0155, ¶70.

[105] TT(Cogut) 118:11-18.

[106] Bergstrom Tr. 103:4-9, 191:9-20.

[107] PTO ¶92; JX0091 at WMB_00002538.

response to the pandemic. Boards at the other 13 companies all adopted triggers ranging from 10 to 20 percent."[108]

An April 8, 2020 ISS "Research Note" regarding poison pills adopted in response to the COVID-19 pandemic identified 21 pills (including Williams' Pill), ***20*** of which had triggers between 10% and 32%; Williams' 5% Pill was the only outlier.[109] Further, 13 of the 20 non-Williams pills—including those adopted by Williams peer companies Delek US Holdings and Occidental Petroleum, which faced the same disruptive market forces confronting Williams[110]—were adopted in response to live activist engagements.[111]

2. The AIC Provision

The Pill's sweeping AIC Provision deems a "Person"[112] to be "Acting in Concert" if:

> such Person knowingly acts (whether or not pursuant to an express agreement, arrangement or understanding) at any time after the first public announcement of the adoption of this Right Agreement, in concert or in parallel with such other Person, or towards a common goal with such other Person, relating to changing or influencing the control of the Company or in connection with or as a participant in any transaction having that purpose or effect, where (i) each Person is

---

[108] PTO ¶91; JX0091 at WMB_00002541.

[109] JX0092 at WMB_00003711.

[110] JX0091 at WMB_00002540.

[111] JX0092 at WMB_00003711.

[112] "Person" means "an individual, firm, entity or organization."

> conscious of the other Person's conduct and this awareness is an element in their respective decision-making processes and (ii) at least one additional factor supports a determination by the Board that such Persons intended to act in concert or in parallel, which additional factors may include exchanging information, attending meetings, conducting discussions, or making or soliciting invitations to act in concert or in parallel[.][113]

Cogut explained that the provision is "meant to control behavior"[114] by "prevent[ing] people from getting together and working together in a manner that's meant to be prevented by the 5 percent threshold…you know, working together to change or influence the control of the company…. The way it's supposed to work is to not have people knowingly do that."[115] The Pill gives the Board and management "very broad" latitude for determining whether stockholders are "acting in concert."[116] As Subramanian stated, the AIC Provision "necessarily leaves the discretion in the [B]oard's hands."[117]

Notably, the AIC provision carves out Williams' management, stating: "[T]he additional factor required shall not include actions by an officer or director

---

[113] PTO ¶70.

[114] Cogut Tr. 136:13-16.

[115] Cogut Tr. 136:17-24.

[116] Smith Tr. 231:3-6, 232:4-16.

[117] TT(Subramanian) 401:7-16; *see also* TT(Goldfarb) 667:15-22 ("The [B]oard determines who would be acting in concert" under the Pill).

of the Company acting in such capacities."[118] When asked the purpose of that carve-out, the Defendant Directors did not know.[119] Indeed, Fuller was unaware it existed.[120] As Cogut testified, the management carveout allows Williams executives to freely campaign against an activist's agenda,[121] or otherwise promote the Board's agenda, as they did in campaigning for Bergstrom's reelection despite public rebuke of the Pill.[122]

The AIC Provision also contains a "daisy chain" provision, stating: "A Person who is Acting in Concert with another Person shall be deemed to be Acting in Concert with any third party who is also Acting in Concert with such other Person."[123] This gives the Board effective license to trigger the Pill any time they perceive stockholders collectively holding over 5% acting in parallel, regardless of whether those stockholders are even aware of each other's existence—making it

---

[118] PTO ¶70.

[119] Cogut Tr. 144:16-23; Fuller Tr. 114:6-18.

[120] Fuller Tr. 107:13-19.

[121] TT(Cogut) 98:14-23.

[122] TT(Cogut) 164:20-166:3.

[123] PTO ¶70.

virtually impossible for stockholders to determine with whom the Board might decide they were acting in concert.[124]

Buese testified that it would not make sense for two stockholders who do not even know one another to be aggregated under the Pill,[125] but acknowledged that the Pill does precisely that.[126] When Smith was asked how stockholders can know when they are potentially acting in concert, he admitted: "They don't."[127] Cogut agreed that there is no realistic way for stockholders to determine—let alone with any certainty—with whom they are acting in concert under the Pill.[128] Cogut further acknowledged that it is the Board itself that determines whether parties are acting in concert under the AIC Provision, and that the Board's determination is necessarily *post hoc*.[129] As multiple Defense witnesses confirmed at trial, the AIC Provision is sufficiently broad that even a proxy solicitor owning no Williams shares could be

---

[124] TT(Mills) 195:8-196:15; JX0155, ¶¶59. 60; TT(Goldfarb) 691:18-692:3; TT(Subramanian) 405:13-17; TT(Cogut) 102:18-103:2, 103:14-18.

[125] TT(Buese) 608:4-8, 608:23-609:7.

[126] TT(Buese) 608:9-14, 609:16-610:14.

[127] Smith Tr. 245:4-9.

[128] TT(Cogut) 102:18-103:2, 103:14-18. Similarly, Smith testified at deposition that the Board would not determine whether stockholders were acting in concert "until after the fact," that he did not know how the Board or management would go about determining whether the AIC Provision had been triggered, and that "courts would be making a judgment on some of this acting in concert, because a lot of it is broad and subject to…interpretation." Smith Tr. 228:13-17, 236:22-237:16.

[129] TT(Cogut) 96:19-22.

"acting in concert" under the Pill.[130] And as Mills testified, the Pill "creates a deterrent, which makes [pre-proxy contest] conversations more difficult" and thus deters potential proxy contests from ever happening.[131]

In sum, as Buese conceded, the AIC Provision imposes limitations and restrictions not only on stockholder communication rights, but also stockholder voting rights:

> Q. And shareholder rights plans create restrictions around stockholder communications. Correct?
>
> A. The acting in concert provision does create some limitations on that, yes.
>
> Q. And you're referring to the acting in concert provision in the Williams pill. Correct?
>
> A. Yes.
>
> Q. And shareholder rights plans create restrictions around voting rights. Correct?
>
> A. Yes.
>
> Q. And the Williams pill creates restrictions around voting rights. Correct?
>
> A. Yes. [132]

---

[130] TT(Cogut) 103:19-24, TT(Subramanian) 497:20-23; TT(Goldfarb) 694:11-695:16, TT(Goldfarb) 696:12-21.

[131] TT(Mills) 230:21-231:14, 276:14-277:10.

[132] TT(Buese) 584:13-585:2.

And yet, the Board rendered itself largely ignorant of these issues when it adopted the Pill. Cogut never even looked at the AIC provision when he voted to adopt the Pill, and did not review it until after learning about this lawsuit.[133] Similarly, Smith had not even heard of the AIC Provision until preparing for his deposition in this Action in November 2020.[134] Fuller did not recall "seeing" or discussing the AIC Provision or anyone explaining it to the Board.[135] Indeed, she did not even know the AIC Provision was in the Pill when voting to approve it and could only "guess"—based on information learned in deposition preparation—why it was included in the Pill.[136] Bergstrom confirmed "there was never any discussion" about the AIC Provision, and that the Board—and he specifically—"left [the AIC Provision] to the legal people" as a matter of "legal implementation."[137]

Confronted at trial with the problems and perils posed by the AIC Provision, Cogut defaulted to a startling refrain: Stockholders must simply trust the Board. For example, despite acknowledging that stockholders should ***typically*** be cautious of corporate boards,[138] Cogut testified:

---

[133] TT(Cogut) 87:1-7, 95:6-16.

[134] TT(Smith) 345:11-21.

[135] Fuller Tr. 74:5-75:7.

[136] *Id*. at 74:5-12, 80:18-81:17.

[137] Bergstrom Tr. 254:5-22, 293:10-294:10.

[138] TT(Cogut) 100:10-101:1, 101:19-24.

Q. And it's the [B]oard who determines whether parties are acting in concert under this provision, and that's always post hoc, right?

A. That's correct.

Q. And you believe that shareholders should trust the [B]oard to make determinations that are in good faith under this provision; true?

A. True.

* * *

Q. ….I guess that comes back to your "trust us" answer; right, sir? We should trust you?

A. Yeah.

* * *

Q. We talked about [the daisy chain provision] at your deposition; do you recall?

A. Yes.

Q. If I'm trying to navigate this, I should rely on the good faith of the [B]oard that they are not trying to punish folks with it; right?

A. Yes.[139]

As Chandler explained, stockholders reviewing the Pill cannot know whether the Board will allow them to pursue their agenda, placing stockholders at the Board's "mercy."[140] Thus, the same Board that deployed an anti-activist "nuclear weapon" without even bothering to first read the instruction manual responds to the

---

[139] TT(Cogut) 96:19-97:2, 99:10-13, 102:12-17.

[140] Chandler Tr. 57:18-58:3.

"catastrophic"[141] risks presented by the Pill by demanding Williams stockholders' blind trust and submission to their "mercy."

3. The Passive Investor "Exception"

The Pill carves "Passive Investors" out of the definition of "Acquiring Persons" subject to the Pill:

> "**Passive Investor**" shall mean a Person who (i) is the Beneficial Owner of Common Shares of the Company and either (a) has a Schedule 13G on file with the Securities and Exchange Commission pursuant to the requirements of Rule 13d-1(b) or (c) under the Exchange Act with respect to such holdings (and does not subsequently convert such filing to a Schedule 13D) or (b) has a Schedule 13D on file with the Securities and Exchange Commission and either has stated in its filing that it has no plan or proposal that relates to or would result in any of the actions or events set forth in Item 4 of Schedule 13D or otherwise has no intent to seek control of the Company or has certified to the Company that it has no such plan, proposal or intent (other than by voting the shares of the Common Shares of the Company over which such Person has voting power), (ii) acquires Beneficial Ownership of Common Shares of the Company pursuant to trading activities undertaken in the ordinary course of such Person's business and not with the purpose nor the effect, either alone or in concert with any Person, 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, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to Rule 13d-3(b) of the Exchange Act, and (iii) in the case of clause (i)(b) only, does not amend either its Schedule 13D on file or its certification to the Company in a manner inconsistent with its representation that it has no plan or proposal that relates to or would result in any of the actions or events set forth in Item 4 of Schedule 13D or otherwise has no intent to seek control of the Company (other than

---

[141] TT(Mills) 182:8-10, 185:17-21.

> by voting the Common Shares of the Company over which such Person has voting power).[142]

The Board purportedly intended to exclude ***all*** passive investors from the Pill, whether or not they filed a Schedule 13G.[143] And the Board viewed the Passive Investor definition as a key mitigating feature of the Pill.[144] Indeed, Cogut testified that he was "especially upset" that ISS's summary "failed to mention the exclusion for the passive investors," a "material omission" he considered "unconscionable[.]"[145]

And yet, the Board failed to actually consider the Passive Investor definition when adopting the Pill. Cogut never looked at it before adopting the Pill, and did not review it until he was preparing for his deposition in this lawsuit.[146] Smith similarly never read the Passive Investor definition before voting to adopt it.[147] Bergstrom was completely unaware there was a Passive Investor definition in the

---

[142] PTO ¶69.

[143] TT(Cogut) 106:11-16; TT(Buese) 605:1-3, 605:15-18; *see also* JX0041.

[144] TT(Buese) 546:17-547:9, 605:4-14.

[145] TT(Cogut) 157:12-20.

[146] TT(Cogut) 87:8-15, 106:21-107:2.

[147] TT(Smith) 345:2-7.

Pill.[148] Fuller never "focused" on it and had no recollection of it being presented to the Board.[149] And the Board never specifically discussed it in detail, if at all.[150]

Had the Board read the Passive Investor definition, they would have realized it contains the word "and" before romanette (iii), making the requirements listed in romanettes (i) through (iii) ***conjunctive***,[151] *i.e.*, a stockholder must satisfy all three.[152] Defendants' expert, Bruce Goldfarb—who has a Columbia law degree and practiced law for many years (including seven at Cravath, Swaine & Moore)[153]—expressly and unequivocally testified that the Passive Investor definition is conjunctive.[154] Having finally read the definition, Cogut recognizes it erroneously fails to carve out all passive investors[155] because there is "a typo that 'and' should have been 'or.'"[156] Similarly, Buese conceded that if the word "and" indeed means "and," then the

---

[148] Bergstrom Tr. 272:6-19, 273:3-9.

[149] Fuller Tr. 167:16-19, 175:6-21.

[150] TT(Buese) 605:19-606:1.

[151] Goldfarb Tr. 129:25-130:5.

[152] JX0159, ¶29.

[153] TT(Goldfarb) 628:2-16; *see also id*. at 629:8-13.

[154] TT(Goldfarb) 698:10-699:5.

[155] TT(Cogut) 107:3-7.

[156] TT(Cogut) 108:18-24; *see also id*. at 109:11-15 ("I would think that anybody who would look to construct this appropriately would realize that there's a typo.").

definition is not consistent with the Board's intent.[157] Subramanian is the only dissenting voice, and believes the provision should be read as '(i) *or* (ii) and (iii),'[158] yet concedes that even under his (clearly mistaken)[159] interpretation, the provision exempts ***at most*** three investors.[160]

Despite acknowledging that the error in the Passive Investor definition could be easily fixed by replacing the word "and" before romanette (iii) with the word "or,"[161] the Board has taken no action whatsoever to address the issue.[162] As Cogut testified:

> Q. And even though you came to the view that there is a mistake in this document, it's correct, isn't it, that the board has not taken action to fix the mistake in its publicly filed document?
>
> A. To the best of my knowledge, that's correct.[163]

* * *

---

[157] TT(Buese) 607:2-6; *see also id*. at 606:13-18 (testifying that the Board did not intend to make the definition conjunctive).

[158] TT(Subramanian) 421:16-422:5.

[159] TT(Subramanian) 505:6-506:1.

[160] TT(Subramanian) 506:21-507:8. This strained construction also ignores that romanette (iii) explicitly places conditions on those stockholders who satisfy romanette (i)(b) and, therefore, simply would not make sense if the definition were read to separate the clauses in the way that Professor Subramanian suggests.

[161] TT(Goldfarb) 607:7-13.

[162] TT(Goldfarb) 607:24-608:3.

[163] TT(Cogut) 110:11-16.

> Q. So you got what you claim is a mistake in your pill. You've known about it for some time. Are you telling me there hasn't been circulated written consent to just fix this? It would simply be a matter of sending around a consent to the members of the board to sign up and fix it; right?
>
> A. That's correct.
>
> Q. All right. And that hasn't happened; correct?
>
> A. No.
>
> * * *
>
> Q. You know there's an error in [the Pill], you know it's publicly filed, but you haven't done anything about it; true?
>
> A. True.[164]

F. Stockholders and the Market Rebuke the Pill

Williams correctly anticipated that the market and stockholders would react negatively to the Pill.[165] As to the Board, Buese testified that "each one of us also recognized" that ISS might condemn the Pill and that "there was a risk that shareholders could vote out a director with the annual meeting proceedings."[166]

---

[164] TT(Cogut) 111:5-21.

[165] TT(Buese) 550:20-551:10; JX0063 at WMB_00016847 (Williams investor relations team recognizing and anticipating negative stockholder reaction to Pill).

[166] TT(Buese) 550:20-551:10.

Between March 24 and April 1, 2020, Williams and ISS communicated regarding the Pill.[167] On April 1, ISS sent Williams its draft report recommending stockholders vote against Bergstrom due to the Pill, and solicited Williams' comments.[168] Williams requested just two revisions: that ISS (i) "remove references to a 'hurried' process" (ISS did), and (ii) change its recommendation regarding Chairman Bergstrom to "'For'" (ISS did not).[169] Those requests were "the extent of [Williams'] comments on [ISS's] draft[.]"[170]

On April 8, ISS released its report recommending that stockholders vote against Bergstrom's re-election at the Company's April 28, 2020 annual meeting:

> Votes AGAINST Chairman Stephen Bergstrom…are warranted. The board's adoption of a poison pill with a 5 percent trigger is problematic, as it is highly restrictive and could negatively impact the market for the company's shares as the market recovers.
>
> Cautionary votes FOR all other directors are warranted given the above-stated reasons.[171]

ISS noted, "the pill was not a reaction to an actual threat – real or perceived – of an activist investor or hostile bidder."[172] ISS further opined that "the board did not

---

[167] JX0086.

[168] *Id.*; *see also* JX0087.

[169] JX0089.

[170] *Id.* at WMB_00007288.

[171] JX0091 at WMB_00002538.

[172] *Id.* at WMB_00002539.

appear to consider other alternatives," that "[w]hen ISS asked the company whether it had considered a shorter term, the answer appeared to be 'no,'" and that "[w]hen ISS asked the company whether it had considered adopting a more standard pill with a higher trigger and using its upcoming annual meeting to seek shareholder ratification of its 5 percent plan, the answer appeared to be 'no.'"[173]

After recognizing on April 7, 2020, that "initial votes [were] trending against" Bergstrom due to anti-Pill backlash,[174] Williams launched an extensive stockholder outreach campaign to preserve his Board seat.[175] After engaging Okapi Partners, Williams executives and directors met with stockholders in an attempt "to turn around some of the votes that ha[d] been cast and shore up the vote[.]"[176] Nevertheless, nearly a third of the votes cast—over 321 million—were against Bergstrom.[177]

---

[173] *Id*. at WMB_00002541.

[174] *Id.* at WMB_00002524.

[175] JX0088; JX0090; JX0091.

[176] JX0091 at WMB_00002524; JX108.

[177] JX0123; JX0124.

G. The Board's Failure to Even Consider Terminating the Pill Early

The Board has the authority to redeem (or amend) the Pill at any time,[178] and Williams stockholders have asked it to do so.[179] And yet, despite not identifying any new threat since adopting the Pill,[180] and further notwithstanding that the "market dislocation" in Williams shares had entirely reversed itself, ***the Board has seemingly never even discussed*** redeeming it.[181] As Smith testified:

> Q. But there has been no [B]oard-level discussion about redeeming the Pill…. Correct?
>
> A. That is correct.
>
> Q. And management could have put redeeming the pill on the [B]oard's agenda. Correct?
>
> A. Yes, they could have.
>
> Q. Any director could have put redeeming the pill on the [B]oard's agenda. Correct?

---

[178] TT(Buese) 611:3-6; JX0144, Response to Interrogatory No. 19; s*ee also, e.g.*, Buese Tr. 282:7-11.

[179] JX0131 ("Terminating early would require Board approval. This issue was raised by several of our shareholders during our recent engagements with them.… I have not seen or heard of any appetite to terminate early."); JX0116 at WMB_00017751 (Maple Brown Abbott asked Williams to "consider terminating [the Pill] now").

[180] TT(Buese) 611:7-12.

[181] TT(Buese) 611:13-20; Fuller Tr. 183:19-184:13, 185:9-14, 202:16-203:17, 208:6-20; Smith Tr. 24:14-24; Bergstrom Tr. 85:14-18. As summarized by the Court, Cogut "testified that other than in the context of discussing litigation the board never had a business discussion of whether or not to redeem the pill, and he answered that the board had not had that discussion." TT 125:5-18.

A. That is correct.

Q. And no one has done that to date? Correct?

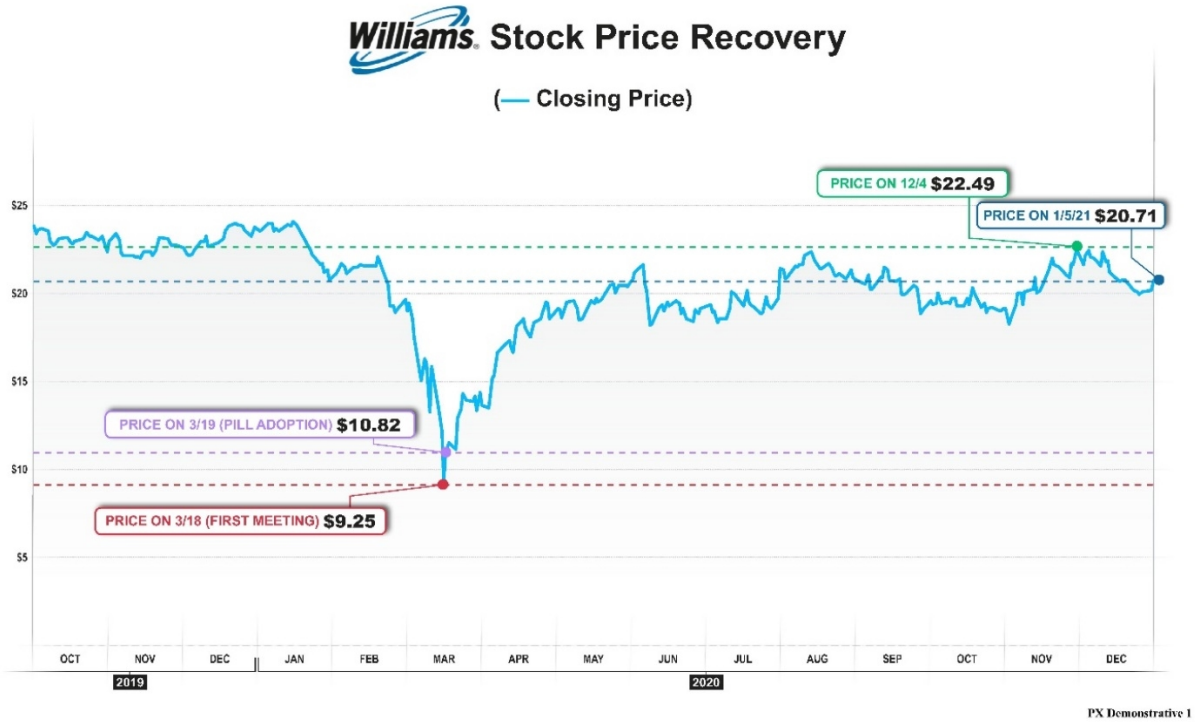
A. That is correct.[182]

The Board's categorical refusal to even ***consider*** whether to redeem the Pill is particularly startling given Williams' financial performance and the fact that, as Cogut testified, "the market has clearly corrected itself and our stock is selling in the neighborhood that it was selling for at the beginning of last year…"[183]:

---

[182] TT(Smith) 355:21-356:9. The lone proffered purported justification for the failure to redeem the Pill is Buese's theory that doing so could send a signal regarding the value of Williams' shares. TT(Buese) 611:21-612:14. And yet, Buese confirmed that (i) the Board has never discussed this theory, (ii) Buese has never discussed it with any other director, and (iii) no advisor has ever opined on it. *Id.*; *see also* Buese Tr. 288:15-21 ("Q. Do you know of any other director of Williams that shares your views regarding the potential impact on…share price based on terminating the pill early? A. Not specifically.").

[183] TT(Cogut) 125:23-126:4; *see also* TT(Subramanian) 511:8-12 (agreeing that Williams' stock has substantially recovered).



The stock price recovery reflects Williams' stable and largely unaffected performance. Indeed, on November 2, 2020, Williams reported Third-Quarter 2020 financial results, disclos[ing] that "[s]trong 3Q 2020 results demonstrate stability and predictability of business," and "[n]atural gas focused strategy delivers strong, predictable results."[184] Armstrong further stated that "[t]he ongoing stability of our financial performance continues to distinguish Williams during a year marked by disruption and uncertainty[.]"[185] Buese confirmed the same, and agreed that Williams has ***distinguished*** itself from its peers through its stable, strong, predictable

[184] PTO ¶105.

[185] *Id*.

performance.[186] At trial, Buese confirmed that the Company has ***exceeded*** its pre-COVID financial guidance for 2020.[187]

Any so-called "market dislocation" reversed itself long ago.

III. ARGUMENT

A. *Unocal* Provides the Proper Standard of Review

"[T]he intermediate standard of enhanced scrutiny, typically referred to as the *Unocal* test,"[188] applies to the Board's decisions to adopt and maintain the Pill. "Enhanced scrutiny has been applied universally when stockholders challenge a board's use of a rights plan as a defensive device."[189] Since *Moran*, which undertook a *Unocal* analysis,[190] "both this Court and the Supreme Court have used *Unocal* exclusively as the lens through which the validity of a contested rights plan is analyzed."[191] Contrary to Defendants' suggestion that *Unocal* review is limited to potential or actual contests for control raising entrenchment concerns,[192] its

---

[186] TT(Buese) 610:5-18, 610:23-611:2; *see also* Buese Tr. 279:1-19, 280:2-12.

[187] TT(Buese) 537:12-538:4; *see also* TT(Smith) 317:16-318:1, 319:19-24.

[188] *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 28 (Del. Ch. 2010).

[189] *Id*.

[190] *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985) (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985)).

[191] *Third Point LLC v. Ruprecht*, 2014 WL 1922029, at *15 (Del. Ch. May 2, 2014).

[192] The Williams Defendants' Pre-Trial Brief (Trans. ID 66227726) at 28-29. Defendants' myopic focus on entrenchment misses the mark. *See* Section III.E, *infra*.

application "includes cases in which a rights plan has been used outside of the hostile takeover context."[193] Indeed, *Unocal* "was explicitly designed to give this court the ability to use its equitable tools to protect stockholders against unreasonable director action that has a defensive or entrenching *effect*" and applies with "special sensitivity towards the stockholder franchise."[194] "Thus, it is settled law that the Board's compliance with their fiduciary duties in adopting and refusing to amend or redeem the [Pill] in this case must be assessed under *Unocal*."[195]

"Because of the omnipresent specter that directors could use a rights plan improperly, even when acting *subjectively* in good faith, *Unocal* and its progeny require that this Court also review the use of a rights plan *objectively*."[196] To receive the business judgment rule's protection, the "directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person's stock ownership" and the defensive response "must be reasonable in relation to the threat posed."[197]

---

[193] *Third Point*, 2014 WL 1922029, at *15.

[194] *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 258 (Del. Ch. 2013) (emphasis added). *Lerman v. Diagnostic Data, Inc.* further confirms that Plaintiffs need show only that the challenged action had the purpose ***or effect*** of entrenchment. 421 A.2d 906, 912-13 (Del. Ch. 1980).

[195] *Third Point*, 2014 WL 1922029, at *15.

[196] *eBay*, 16 A.3d at 30.

[197] *Unocal*, 493 A.2d at 955.

B. The Possibility that Hypothetical, Unnamed and Unknown Activists Might Engage with the Board Is Not a Valid "Threat"

"The first part of *Unocal* review requires a board to show that it had reasonable grounds for concluding that a threat to the corporate enterprise existed,"[198] which may be shown through "good faith and reasonable investigation."[199] Defendants made no such showing at trial.

Defendants concede in their Pre-Trial Brief[200]—as they have from the outset[201]—that the Pill was not adopted in response to any specific threat. The evidence marshalled in discovery and proven at trial conclusively demonstrates that, in adopting the Pill, the Board was not trying to protect NOLs, and was not aware of any: (i) threat related to Williams' business results; (ii) activist accumulating shares, trying to exploit market conditions, or otherwise seeking to harm Williams; (iii) activist in Williams' stock; or (iv) takeover threat or rapid accumulation of Williams stock suggesting a potential hostile bid.[202] And Williams' prior experience

---

[198] *Selectica II*, 5 A.3d at 599.

[199] *Unocal*, 493 A.2d at 955 (citation omitted).

[200] Trans. ID 66227726 at 29.

[201] JX0187 at WMB_00018040.

[202] *See supra* notes 84-87.

with Corvex and Soroban was neither the reason why Cogut proposed the 5% trigger[203] nor discussed during the Board's two meetings before it adopted the Pill.[204]

Remarkably, Cogut testified he was "not actually sure, as a lawyer, whether or not the notion of *Unocal* and the necessity for a threat is applicable to the 5 percent pill" challenged here.[205] He similarly confirmed that "it wasn't market dislocation and fundamental undervaluation of the stock itself that were the threat[s] to corporate policy and effectiveness" that prompted the Board to adopt the Pill.[206] Rather, Cogut agreed that his concern in proposing the Pill was not so much the stock price but, instead, the idea that activists might distract the Board by seeking to influence the Company's policy.[207]

To that end, Cogut conceived of the Pill as a "nuclear weapon" designed "to prevent against an activist buying a toehold of 5 percent or more or acting in concert with other activists so that [Williams] management could be freed up… to use their

---

[203] TT(Cogut) 169:5-12; *see also* TT(Buese) 578:24-579:8.

[204] TT(Smith) 352:12-24; TT(Buese) 548:23-549:3, 549:8-15, 578:7-11.

[205] TT(Cogut) 91:24-92:10; *see also id*. at 92:24-93:8.

[206] TT(Cogut) 93:11-15; *see also supra* note 88.

[207] TT(Cogut) 68:11-16, 69:9-70:4, 71:6-72:20, 118:11-18. Buese confirmed the Board adopted the Pill in response to a general concern that certain unnamed and unknown stockholders might attempt to influence the policy or management of the corporation. TT(Buese) 600:17-22.

time to run a company during COVID."[208] This "was a novel concept, using the technology of shareholder rights plans to provide insulation [for] management during the uncertainty created by the pandemic."[209] It was designed to "limit[]…the ability of opportunistic investors…who were interested in influencing control of the company" and "limit their voice over this period of uncertainty."[210] Cogut drew no distinction between socially useful activism or purely self-interested money-making[211] and agreed that "there's nothing inherently wrong with most activism."[212] This single-minded focus on insulating the Board and management—amplified by the Board's refusal to consider redeeming the Pill (or even correct a conceded "mistake" in the Pill) despite the abatement of the supposed threat and

---

[208] TT(Cogut) 114:21-115:22; *see also* Bergstrom Tr. 103:4-9; Chandler Tr. 131:7-23; JX0072 at WMB_00017185. Subramanian agreed the Pill targeted activism. *See supra* note 82.

[209] TT(Cogut) 69:4-11.

[210] TT(Cogut) 155:10-23.

[211] TT(Cogut) 72:21-73:19.

[212] TT(Cogut) 74:7-24. Subramanian agreed that stockholder activism is not "inherently bad." TT(Subramanian) 477:1-10. So did Buese (TT(Buese) at 577:15-18), who testified "that in certain circumstances, there can be a lot of benefit gained by shareholders taking certain positions and pushing for certain types of agendas." TT(Buese) 536:2-16.

stockholder requests to do so—betrays an entrenchment motivation[213] and suggests bad faith.

Plaintiffs know of ***zero*** authorities—and Defendants' Pre-Trial Brief cites none—holding that the perceived inconvenience of hypothetical unnamed and unknown pesky stockholders seeking to influence Williams' policies or challenge the Board's or management's views constitutes a "threat" under *Unocal*. This is unsurprising considering stockholders' fundamental rights to vote,[214] communicate with other stockholders,[215] nominate directors,[216] and communicate with (and even oppose) management and the Board.[217] Indeed, "shareholder democracy often brings" benefits including "new management, new investment, [and] new ideas,"[218] a phenomenon Buese acknowledged.[219] The Board may have *subjectively* believed

---

[213] *Cf. Phillips v. Insituform of N. Am.*, 1987 WL 16285, at *7 n.7 (Del. Ch. Aug. 27, 1987) (applying *Unocal* to "actions which tend to insulate the board from the potential discipline that would flow from the [challenged] charter provisions").

[214] *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012); *see also Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1378 (Del. 1995).

[215] *B.F. Goodrich Co. v. Nw. Indus., Inc.*, 1969 WL 2932, at *2 (Del. Ch. Mar. 26, 1969).

[216] *Harrah's Entm't, Inc. v. JCC Hldg. Co.*, 802 A.2d 294, 310-11 (Del. Ch. 2002).

[217] *Abajian v. Kennedy*, 1992 WL 8794, at *6 (Del. Ch. Jan. 17, 1992).

[218] *Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, at *24 n.216 (Del. Ch. Feb. 26, 2010) ("*Selectica I*"), *aff'd*, 5 A.3d 586 (Del. 2010).

[219] TT(Buese) 536:2-16.

the pandemic warranted a "one-year moratorium"[220] on these fundamental rights to allow management to "focus,"[221] but "*Unocal* and its progeny require that this Court also review the use of a rights plan *objectively*"[222] and "with a special sensitivity towards the stockholder franchise."[223]

The Board's so-called "investigation" was also unreasonable. *Selectica* demonstrates what a board considering whether to adopt a 5% pill must undertake to pass scrutiny under *Unocal*'s first prong. The Selectica board met repeatedly over several years with carefully selected outside advisors before concluding Selectica's NOLs were a "significant asset" warranting protection via a 5% pill.[224] Moreover, the 5% trigger in *Selectica* was driven by Section 382 of the Internal Revenue Code, "an external standard, one created neither by the Board nor by the Court [of Chancery]," and the board identified a threat "that a longtime competitor sought to increase the percentage of its stock ownership…to intentionally impair corporate

---

[220] TT(Cogut) 118:11-18.

[221] TT(Smith) 321:1-18; *see also* TT(Cogut) 69:4-11, 71:6-72:20; Bergstrom Tr. 103:4-9.

[222] *eBay*, 16 A.3d at 30.

[223] *Sandridge*, 68 A.3d at 259.

[224] *Selectica II*, 5 A.3d at 600; *see also Selectica I*, 2010 WL 703062, at *3-*7.

assets, or else coerce Selectica into meeting certain business demands under the threat of such impairment."[225]

The Board here did nothing of the sort. The Board acted on fewer than two hours consideration[226] and never discussed the Pill or consulted their advisors—who management unilaterally selected at the eleventh-hour[227] and the Board never retained[228]—outside of formal meetings.[229] The Director Defendants were more than merely "not conversant with all the implications of the [Pill]."[230] Cogut did not read the Pill before the March 19 meeting beyond confirming the 5% trigger and never read the AIC Provision or Passive Investor definition until after this Action's filing.[231] Smith—who had no experience with pills outside of Williams[232]—similarly never read the Pill before the March 19 meeting and had not heard of the AIC Provision until deposition preparation.[233] Fuller neither recalled "seeing" or

---

[225] *Selectica II*, 5 A.3d at 600, 606-607 (citation omitted).

[226] JX0055; JX0067.

[227] TT(Buese) 589:2-16; JX0050.

[228] TT(Buese) 590:6-13.

[229] TT(Smith) 344:1-5; TT(Buese) 591:20-592:19.

[230] *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1068 (Del. Ch. Jan. 29, 1985), *aff'd*, 500 A.2d 1346 (Del. 1985).

[231] TT(Cogut) 86:4-18, 87:1-15, 95:6-16, 106:21-107:2.

[232] TT(Smith) 343:5-10.

[233] TT(Smith) 345:2-4, 345:11-21.

discussing the AIC Provision nor anyone explaining it and ***did not know*** it was in the Pill when voting on the Pill, and could only "guess" why it was in the Pill.[234] Bergstrom confirmed "there was never any discussion" about the AIC Provision and he was unaware of the Passive Investor definition.[235] Perhaps most egregiously, Cogut failed to explain the downsides associated with the Pill to Bergstrom,[236] who had no experience with pills[237] but had concerns about implementing one Pill.[238]

Defendants tout the presence of advisors in the two Board meetings. But Defendants have disclaimed reliance on counsel[239] and the Board never received advice from Delaware counsel.[240] Fuller denied relying on Morgan Stanley's advice at all[241] and Cogut viewed their advice as "irrelevant."[242] Indeed, the Board intentionally deferred its preordained approval of the Pill to "a second board meeting [], at least a day later, ***to show appropriate consideration by the Board***,"[243] and

---

[234] Fuller Tr. 74:5-12, 80:18-81:17.

[235] Bergstrom Tr. 254:5-22, 272:6-19, 293:10-294:10.

[236] TT(Cogut) 83:3-10.

[237] *See supra* notes 41 & 58.

[238] *See supra* note 42.

[239] Trans. ID 66208789, ¶2.

[240] TT(Buese) 590:14-591:1.

[241] Fuller Tr. 284:3-13.

[242] TT(Cogut) 89:9-90:1.

[243] JX0043 (emphasis added).

Morgan Stanley was only asked to participate in that second meeting "to help build the record regarding the plan."[244] Finally, the Board was not aware of any 5% pills outside the NOL context and Morgan Stanley identified none.[245] Indeed, as discussed below, no one provided a justification for the 5% trigger other than to "avoid activist [] shareholders coming in and being disruptive to the [C]ompany in a time where we needed the management team to focus."[246]

An ostensibly independent Board majority "coupled with a showing of reliance on advice by legal and financial advisors" can "materially enhance[]" the Board's good faith and reasonable investigation in other circumstances,[247] but Defendants must "actually articulate some legitimate threat to corporate policy and effectiveness."[248] They did not.

---

[244] JX0047.

[245] TT(Cogut) 55:11-56:2, 80:8-12, 89:9-90:1; TT(Smith) 346:10-13, 347:13-348:5; Buese Tr. 173:25-174:7; *see also* JX0065 at WMB_00010131.

[246] Bergstrom Tr. 103:4-9 ("[T]he five percent trigger would hopefully avoid activist [] shareholders coming in and being disruptive to the company in a time where we needed the management team to focus[.]").

[247] *Selectica I,* 2010 WL 703062, at *12.

[248] *Air Prod. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 92 (Del. Ch. 2011).

C. The Concededly "Nuclear" Pill Is a Disproportionate Response to the Supposed "Threat"

Under *Unocal*'s second prong, defensive measures must be "reasonable in relation to the threat posed."[249] "It is the specific nature of the threat that 'sets the parameters for the range of permissible defensive tactics'" and a "reasonableness analysis 'requires an evaluation of the importance of the corporate objective threatened; alternative methods for protecting that objective; impacts of the 'defensive' action and other relevant factors.'"[250]

Trial demonstrated that the only "threat" the Board identified was the possibility that an unidentified, hypothetical opportunistic stockholder might seek to acquire Williams stock at a discount during a market-wide downturn and subsequently "distract" Williams.[251] Given Cogut's testimony that he was "not actually sure, as a lawyer, whether or not the notion of *Unocal* and the necessity for a threat [was] applicable to the 5 percent pill" challenged here,[252] his choice of a "nuclear" response to a non-existent threat is unsurprising. But *Unocal* ***is*** applicable and the Pill is a wildly disproportionate response to the supposed "threat."

---

[249] *Unocal*, 493 A.2d at 949.

[250] *Selectica I*, 2010 WL 703062, at *19 (quoting *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989) and *Unitrin*, 651 A.2d at 1386).

[251] *See* notes *supra* 78 & 207.

[252] TT(Cogut) 91:24-92:10; *see also id*. at 92:24-93:8.

1. The 5% Trigger Is Unreasonable

Trial demonstrated that the 5% trigger is unreasonable. As the only case upholding a 5% trigger cautioned: "that the NOL Poison Pill was reasonable under the specific facts and circumstances of [that] case should not be construed as generally approving the reasonableness of a 4.99% trigger in the Rights Plan of a corporation with or without NOLs."[253] The Pill was ***not*** designed to protect NOLs[254] and the sole presentation the Board received from an outside advisor demonstrated that 5% triggers were virtually unheard of outside of the NOL-context, which the Board acknowledged.[255] Further, of the 21 COVID-related pills identified by ISS—13 in response to live activist engagements, including pills adopted by two energy companies facing the same market conditions as Williams (Delek and Occidental)—only Williams' Pill had a sub-10% trigger.[256]

And yet Defendants identified no specific or pressing need for the 5% trigger. Cogut—who agreed there was "no precedent for the idea of having a rights plan that was focused not on a potential change of control but, instead, on limiting activity of

---

[253] *Selectica II*, 5 A.3d at 607.

[254] *See supra* note 84.

[255] *See supra* notes 55 & 102.

[256] JX0092 at WMB_00003711.

potential activists"[257]—"thought [5%] was a reasonable and meaningful number, *given the purpose of this novel rights plan*."[258] Having decided to "us[e] the technology of shareholder rights plans to provide insulation [for] management during the uncertainty created by the pandemic"—an unprecedented use of a pill[259]—Cogut simply chose a comparably unprecedented trigger. Bergstrom put it more bluntly:

> Once you cross the threshold of you think it makes sense to put a rights plan in place, then you might as well put it in place with enough teeth to actually get it so that it works.[260]

Said differently, upon deciding to adopt a pill, the Board chose the most extreme version. And the Board apparently gave higher triggers little consideration.[261]

2. The AIC Provision Is Unreasonable

Trial also demonstrated that the AIC Provision is unreasonable for several reasons. *First*, it contains insidious and vague language sweeping up potentially anodyne stockholder communications "relating to changing *or influencing* the control of the Company." As Mills testified, the AIC Provision "goes beyond having

---

[257] TT(Cogut) 69:4-70:4.

[258] TT(Cogut) 146:2-5 (emphasis added).

[259] TT(Cogut) 69:4-70:4.

[260] Bergstrom Tr. 191:16-20.

[261] *See e.g.*, Fuller Tr. 272:9-273:24.

an agreement and covers parallel conduct and then gives the board the discretion to determine what that is."[262] Where stockholders are "conscious of the other Person's conduct and this awareness is an element in their respective decision-making processes," even innocuous activities like "exchanging information, attending meetings, conducting discussions, or making or soliciting invitations to act in concert or in parallel" can trigger the Pill. This broad language encompasses routine activities such as attending investor conferences and advocating for the same corporate action.[263] It interferes with all manner of "normal" stockholder dialogue[264] by "creat[ing] this blind spot about whether [stockholders] could potentially be aggregated for engaging in speech that [they] typically do," which "creates risk and deters speech."[265]

This is not an empty threat. As Wolosky testified, "[s]hareholders tend to like to talk to each other generally about companies and investments without necessarily wanting to work together," which "conversations would be severely impacted by the

---

[262] TT(Mills) 191:20-24; *see also id*. at 194:1-10.

[263] JX0155, ¶¶58-59; *see also* TT(Mills) 195:20-196:8 ("[S]hareholders are speaking to other professional colleagues. They bump into each other at conferences…. So commiserating about a company that's underperforming and whether the CEO is up to the task, that's something that is not unusual at all.").

[264] JX0155, ¶¶64, 68; JX0159, ¶22.

[265] TT(Mills) 194:24-195:7.

[Pill]."[266] The AIC Provision also impedes stockholders' ability to launch proxy contests—"a very expensive proposition"—by limiting their ability to communicate privately with one another before doing so.[267] As Mills testified: "Multiples of the activity" between activists on the one hand and management and a board on the other, "occur[s]…behind the scenes before proxies are solicited."[268] And, contrary to Defendants' arguments, the 5% cap makes it "***more***" important for investors to speak with one another before investing in a proxy fight.[269]

Second, the AIC Provision contains a "catchall"[270] daisy chain provision, meaning a stockholder can be "Acting in Concert" with other stockholders even if that stockholder has no idea the other stockholders even exist.[271] Cogut agreed that stockholders have no way to know with any certainty with whom they are

---

[266] TT(Wolosky) 24:14-25:2.

[267] TT(Wolosky) 30:2-12; JX0155, ¶64; JX0159, ¶¶20-24, 58; TT(Mills) 276:14-277:10. Goldfarb conceded that stockholders deciding whether to launch a campaign would find it "helpful to communicate with other investors" (TT(Goldfarb) 656:15-23; *see also id*. at 678:4-679:6) but agreed that the Pill "can restrict a stockholder's ability to engage in discussions with or engage support from other stockholders before launching a proxy contest." *Id*. at 668:20-669:2; *see also id*. at 669:17-670:14.

[268] TT(Mills) 189:13-190:2.

[269] TT(Mills) 278:18-22 (emphasis added); *see also id*. at 277:24-278:7.

[270] Smith Tr. 248:15-24.

[271] JX0155, ¶45; TT(Mills) 195:11-19; TT(Buese) 608:9-14.

aggregated.[272] So did Subramanian, who justified the provision's inclusion because without it "it would just be too easy…to avoid the AIC."[273] Even proxy solicitors could be aggregated under the daisy chain.[274] Stockholders' inability to know with whom the Board might aggregate them thus deters rational stockholders from engaging in routine activities.[275]

Finally, the AIC Provision exempts management and the Board, allowing insiders to engage with stockholders for any reason,[276] including opposing stockholder proposals.[277] As Mills testified, the carveout "creates an unlevel playing field," allowing management to communicate with stockholders while precluding stockholders from doing the same.[278] In practice, the Board and management

---

[272] TT(Cogut) 103:14-18; *see also id*. at 102:18-103:2. So did Fuller (Fuller Tr. 139:24-140:6) and Buese, the latter of whom acknowledged that would not make sense. TT(Buese) 608:4-14, 608:23-609:7, 609:16-610:14.

[273] TT(Subramanian) 405:6-12.

[274] TT(Cogut) 103:19-24; 196:16-197:10. Goldfarb, who suggested stockholders might avoid the AIC Provision by using a proxy solicitor as an intermediary, acknowledged it would actually "limit the ability of a proxy solicitor to have direct communications on behalf of an activist stockholder with other stockholders." TT(Goldfarb) 694:11-695:16.

[275] JX0155, ¶¶45, 64; TT(Mills) 185:17-21, 193:7-24.

[276] JX0155, ¶46.

[277] TT(Cogut) 98:14-23.

[278] TT(Mills) 197:16-24.

actually took advantage of the carveout when communicating with investors to shore up support for Bergstrom's re-election despite anti-Pill backlash.[279]

As discussed above, the Defendant Directors neither discussed the language of the AIC Provision nor individually examined it.[280] But trial confirmed that any application and implementation would necessarily be *ex post facto* and entirely within the discretion of Williams' Board and management.[281] When pressed, Cogut testified that stockholders must "trust the [B]oard" would not actually use the AIC Provision to trigger the Pill.[282] But even Cogut acknowledged he would not have advised clients to completely trust counterparties.[283] And of course, the Pill's mere existence, even if never triggered, is itself the harm.[284] As Cogut articulated: "[T]he shareholder rights plan is the nuclear weapon of corporate governance, and nobody

---

[279] TT(Cogut) 164:20-166:3.

[280] *See supra* notes 119-120 & 133-137.

[281] TT(Cogut) 96:19-22; *see also* TT(Wolosky) 19:1-15; TT(Mills) 195:8-10, 284:12-18; TT(Subramanian) 401:7-16, 494:3-16.

[282] TT(Cogut) 96:19-97:2, 99:10-13, 102:5-17.

[283] TT(Cogut) 100:10-101:1, 101:19-24. Indeed, Buese testified that it would be improper for stockholders to communicate with one another before speaking with the Company "if there is an action that's being taken that is inconsistent with the strategic view of the board." TT(Buese) 576:10-577:9.

[284] JX0155, ¶¶64-66; JX0159, ¶¶24, 30-33, 48-51; TT(Mills) 185:17-21; *see also, e.g.*, *Carmody v. Toll Bros.*, 723 A.2d 1180, 1188 (Del. Ch. 1998) (discussing the "*present* depressing and deterrent effect" of a rights plan "upon the shareholders' interests").

wants to see it exploded….The same way nuclear weapons are deterrents and force people to talk to one another, that would be the same situation."[285] And as Mills testified: "It's hard to envision somebody firing nuclear weapons. But the language is in there. They have the discretion."[286]

3. The Passive Investor Definition Fails to Mitigate the Pill

Finally, the Passive Investor definition, which the Board erroneously thought "mitigated"[287] the Pill, made the Pill ***more*** disproportional. As discussed above, the Passive Investor definition contains three criteria connected by the word "and." The only way to read this definition is conjunctively,[288] an interpretation Defendants' Columbia law-educated and Cravath-trained expert confirmed,[289] meaning qualifying stockholders must meet all three requirements.

Williams has three 13G-filers—BlackRock, State Street, and Vanguard—and no 13D-filers.[290] Romanette one of the Passive Investor definition, which

---

[285] TT(Cogut) 114:10-20.

[286] TT(Mills) 254:22-255:12.

[287] TT(Buese) 546:17-547:9, 605:4-14.

[288] *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2008 WL 902406, at *7 (Del. Ch. Apr. 3, 2008) (noting that "[u]sually, one would interpret 'and' only in the conjunctive, joining two or more elements in a list and requiring all of those elements" and that the presence of "or" elsewhere meant the term "and" was conjunctive).

[289] TT(Goldfarb) 627:21-628:5, 698:10-699:5.

[290] TT(Cogut) 109:2-10.

encompasses 13G and qualifying 13D-filers, is a necessary condition by dint of the word "and" before romanette three. Thus, the Passive Investor definition ***at most*** carves out ***only*** those three 13G-filers.[291] However, BlackRock, State Street, and Vanguard routinely engage with issuers regarding ESG issues, for example, which "implicates management and policies and even control."[292] They would not, therefore, satisfy the Passive Investor definition if the Board in its discretion retroactively deems them to have been seeking to "direct or cause the direction of the management and policies of the Company,"[293] thereby potentially triggering the Pill or requiring them to "sell down or shut up."[294] In sum, the Passive Investor definition "impedes a wide range of socially beneficial and/or value-enhancing behavior common to many of the largest institutional investors, as well as routine discourse between and engagement among stockholders and management."[295]

In proposing the Pill, Cogut claims to have intended to carve out all passive investors whether or not they filed a schedule 13G and Williams told stockholders

---

[291] JX0155, ¶56. *Cf.* TT(Subramanian) 506:21-507:8.

[292] TT(Mills) 201:1-9; *see also id*. ("To the extent that you are asking for change at the board level, where we're going to add a woman and perhaps subtract a man or add women and subtract men, it's potentially implicated.").

[293] JX0155, ¶¶53-55; TT(Mills) 198:17-24.

[294] TT(Mills) 254:22-255:12.

[295] JX0155, ¶39.

the Pill exempted all passive investors.[296] But Cogut neither read the Passive Investor definition before voting to adopt the Pill nor looked at it until deposition preparation.[297] Indeed, no Director Defendant recalled reading the Passive Investor definition closely, if at all, before voting on the Pill.[298] These failures underscore that the Board's actions fall outside the range of reasonableness, as "[a]ny determination of a reasonable investigation or an adjudication that a board's action falls within a range of reasonableness, at minimum, would require that the board be apprised of all relevant and reasonably available facts."[299]

Worse, Cogut agreed that the Passive Investor definition contains an "error" and "thought that there was a typo that 'and' should have been 'or.'"[300] Buese agreed that if the word "and" means "and"—which it does—the language of the Passive Investor is inconsistent with the Board's intention.[301] Both Cogut and Buese agreed that fixing this error would be relatively easy, a simple matter of sending

---

[296] TT(Cogut) 106:11-20.

[297] TT(Cogut) 87:8-15, 106:21-107:2.

[298] *Id.*; *see also* TT(Smith) 345:2-4; Bergstrom Tr. 272:6-19, 273:3-9; Fuller Tr. 167:12-19, 175:6-21. Per Buese, the Board "would not have discussed the exact words in the definition." TT(Buese) 605:19-606:1.

[299] *In re Dairy Mart Convenience Stores, Inc.*, 1999 WL 350473, at *15 (Del. Ch. May 24, 1999).

[300] TT(Cogut) 107:3-7, 108:18-24.

[301] TT(Buese) 607:2-6.

around a consent to the Board.[302] Despite having known for months of this glaring error in what Cogut suggested was a "material" component of the publicly filed Pill,[303] the Board has ***taken no action*** to fix it.[304] This failure betrays not only the unreasonableness of the Board's response to the purported "threat," but the Board's underlying entrenchment motivations.

* * *

The Board's failure to "underst[an]d the effects of their actions"[305] extends beyond misunderstanding the Passive Investor definition. Trial demonstrated that the Board not only acted unreasonably in adopting the Pill, it breached its duty of care in doing so. The vast weight of the evidence shows that the Board failed to read, much less understand, the Pill's most critical and troubling features. Indeed, Buese failed to understand the potential financial penalty that the Pill imposed on stockholders, claiming it was "not [her] role as a board member."[306] This was not a routine Board action: the Board adopted a concededly "nuclear" defensive device. Having done so, the Board "at minimum" should be have "be[en] apprised of all

---

[302] TT(Cogut) 111:5-11; TT(Buese) 607:7-13.

[303] TT(Cogut) 157:12-20.

[304] TT(Cogut) 110:11-16, 111:5-21; *see also* TT(Buese) 607:24-608:3.

[305] *Dairy Mart*, 1999 WL 350473 at *14.

[306] TT(Buese) 587:8-23.

relevant and reasonably available facts,"[307] including the "catastrophic"[308] impact of the "nuclear" Pill. They were not.

D. The Board's Unreasonable Failure to Terminate the Pill

Delaware courts "have upheld the adoption of Rights Plans in specific defensive circumstances while simultaneously holding that it may be inappropriate for a Rights Plan to remain in place when those specific circumstances change dramatically."[309] Even assuming *arguendo* that the Pill's adoption "was reasonable under the specific facts and circumstances of this case," it is "inappropriate for [the Pill] to remain in place [because] those specific circumstances [have] change[d] dramatically."[310]

Plaintiffs proved at trial that the market volatility and stock price decline that purportedly justified the Board's disproportionate response has dissipated. Williams is on track to meet its pre-COVID financial and volume guidance[311] and delivered

---

[307] *Dairy Mart*, 1999 WL 350473, at *15.

[308] TT(Mills) 182:8-10, 185:17-21.

[309] *Selectica II*, 5 A.3d at 607; *see also Unitrin*, 651 A.2d at 1378 (same).

[310] *Selectica II*, 5 A.3d at 607.

[311] TT(Smith) 317:16-318:1, 319:19-24, 355:12-20; TT(Buese) 537:12-538:4; *see also* PTO ¶105.

strong, predictable financial results despite the COVID-19 pandemic.[312] And Williams' stock price has more than doubled since its nadir in March.[313]

Multiple stockholders explicitly requested that the Board redeem the Pill.[314] Remarkably, the Board has never discussed or considered doing so, other than a single privileged conversation about this Action that Cogut recalled but the other directors denied occurred.[315] That failure not only breaches the Board's duties; it betrays an entrenchment animus.

E. Any Rule 23.1-Based Argument Fails

Finally, Defendants' adoption of the Pill injures Williams stockholders directly, giving rise to a direct cause of action.

First, the Board's adoption and continued maintenance of the Pill directly impairs the stockholder franchise. A claim is direct where "'the entrenching activity directly impairs some right [they] possess[] as shareholder[s].'"[316] "One of the basic

---

[312] TT(Buese) 610:15-18, 610:23-611:2.

[313] *See* PX Demonstrative 1.

[314] JX0131; JX0116 at WMB_00017751; *see also* TT(Cogut) 119:9-24.

[315] TT(Cogut) 125:5-18, TT(Smith) 355:21-356:9; TT(Subramanian) 511:19-512:4; TT(Buese) 611:13-20; Fuller Tr. 183:19-184:13, 185:9-14, 202:16-203:17, 208:6-20; Bergstrom Tr. 85:14-18. Buese now theorizes that redeeming the Pill might put a ceiling on Williams' share price but never discussed that view with any other Board member nor sought an advisor's opinion on it. TT(Buese) 611:21-612:14.

[316] *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 83 (Del. Ch. 1999) (quoting *Carmody*, 723 A.2d at 1188-89) (internal quotations omitted).

rights of a stockholder is to be able to communicate with his fellow stockholders on matters germane to such stock, and, if necessary, to organize other stockholders for corporate action."[317] As Mills testified, "it's just common that shareholders are speaking to one another"[318] and much of that communication between stockholders and with management occurs outside the proxy contest context.[319] But the Pill, especially the AIC Provision, "creates risk and deters speech,"[320] and limits stockholders' ability to communicate privately with one another before launching proxy contests,[321] thus directly impeding the stockholder franchise.[322] Indeed, expressly asked at trial whether the Pill "creates restrictions around voting rights," Buese unequivocally responded: "Yes."[323]

By contrast, *Unocal* cases grappling with the direct/derivative distinction involved defensive actions taken in response to actual or perceived takeover

---

[317] *B.F. Goodrich*, 1969 WL 2932, at *2.

[318] TT(Mills) 228:10-19.

[319] TT(Mills) 189:13-190:2.

[320] TT(Mills) 194:24-195:7; *see also id*. at 280:18-281:6. Wolosky agreed that stockholders "would have to be very careful about what they speak about" to avoid tripping the Pill. TT(Wolosky) 22:11-20.

[321] *See supra* note 267.

[322] Similarly, all stockholders will receive the same remedy—permanently enjoining the Pill's operation—regardless of the taxonomy of the claim.

[323] TT(Buese) 584:13-585:2.

threats.[324] There, "claims arising from transactions which operated to deter or defeat offers to purchase the subject company's stock, [namely] entrenchment claims, are generally found to be derivative in nature" because "the company suffers the harm, having been precluded from entering into a transaction that would have maximized the return on its assets."[325] Claims involving defensive actions that "reduce[] the voting power of stockholders," however, "state a direct claim."[326] The record demonstrates the Board adopted the Pill with the express "purpose and effect of reducing the voting power of stockholders," giving rise to the direct claim asserted here.[327]

Third, assuming Plaintiffs' claim is derivative, the record demonstrates demand would have been futile.[328] Under *Aronson*'s first prong, Plaintiffs need only

---

[324] *See, e.g.*, *Gottlieb v. Duskin*, C.A. No. 2019-0639-MTZ, at 10 (Del. Ch. Jun. 16, 2020) (TRANSCRIPT); *Ryan v Armstrong*, 2017 WL 2062902, at *4 (Del. Ch. May 15, 2017), *aff'd*, 176 A.3d 1274 (Del. 2017); *In re Gaylord Container Corp. S'holders Litig.*, 1996 WL 752356, at *1 (Del. Ch. Dec. 19, 1996).

[325] *Gottlieb*, C.A. No. 2019-0639-MTZ, at 30 (alterations in original) (citations omitted).

[326] *Gaylord*, 747 A.2d at 79.

[327] *Id*. at 83.

[328] *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984). *Aronson* "pre-dated the Delaware Supreme Court's open recognition of enhanced scrutiny" and, as Vice Chancellor Laster has noted, "a natural reading of *Aronson*'s second prong would suggest that demand becomes futile when enhanced scrutiny applies." *United Food & Com. Workers Union v. Zuckerberg*, 2020 WL 6266162, at *12 (Del. Ch. Oct. 26,

show "particularized facts demonstrating that the directors had…an entrenchment motive in" adopting the Pill.[329] The record demonstrates that entrenchment was the Board's "primary"—and likely "sole"—purpose in adopting the Pill.[330] The Pill was devised and adopted to insulate the Board and management from any and all stockholder influence.[331] That is quintessential (and impermissible) entrenchment. Trial also demonstrated that the Pill was not the product of valid business judgment under *Aronson's* second prong. The Pill, which contains disproportionate features "so egregious on [their] face that board approval cannot meet the test of business judgment,"[332] was concededly designed to shut down all activism—even socially useful and/or value-enhancing activism—and insulate management and the Board.

2020); *see also id*. ("'So long as the plaintiff states a claim implicating the heightened scrutiny required by *Unocal*, demand has been excused under the [*Aronson*] demand excusal test.'" (quoting *Gaylord*, 747 A.2d at 81)). However, "subsequent case law developed in a different direction, and [*Armstrong*] now holds that demand is not futile simply because enhanced scrutiny applies," while applying *Aronson*. *United Food*, 2020 WL 6266162, at *12.

[329] *In re Chrysler Corp. S'holders Litig.*, 1992 WL 181024, at *4 (Del. Ch. July 27, 1992); *see also Ryan*, 2017 WL 2062902, at *13 ("specific pleadings that a majority of directors were motivated primarily by entrenchment or other non-corporate considerations will show demand futility").

[330] *Chrysler*, 1992 WL 181024, at *5.

[331] *See supra* notes 12-13, 19-20, 75-76, 78-82 & 88.

[332] *Aronson*, 473 A.2d at 815.

Trial also made abundantly clear that the Board could not have properly exercised independent and disinterested business judgment in responding to a demand under the broader *Rales* analysis. Indeed, stockholders ***did*** functionally demand that the Board redeem the Pill. On April 14, 2020, Williams General Counsel Wilson recounted to Bergstrom, Fuller, Chazen, Creel, Cogut, and Armstrong (a then-Board majority) a call with MBA, "an Australian investor holding roughly 6.7 million shares," during which MBA stated Williams "should consider terminating [the Pill] now."[333] Although six directors were aware of this—any of whom could have put redemption on the Board's agenda—the Board has never discussed or considered redeeming the Pill, other than a single privileged conversation about this Action.[334] This demonstrates the Board could not exercise their business judgment with respect to a demand.

Finally, Defendants' failure to timely raise this defense, including during class certification, speaks volumes. Respectfully, this failure further exposes the hollowness of any 23.1-based argument.

---

[333] JX0116 at WMB_00017751; *see also* TT(Cogut) 119:15-24.

[334] TT(Cogut) 125:5-18; TT(Smith) 355:21-356:9; TT(Buese) 611:13-20; Fuller Tr. 183:19-184:13, 185:9-14, 202:16-203:17, 208:6-20; Bergstrom Tr. 85:14-18.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter judgment in favor of the certified class, permanently enjoining the continued operation of the Pill.

Dated: January 28, 2021

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ *Gregory V. Varallo*
Gregory V. Varallo (Bar No. 2242)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3061

GRANT & EISENHOFER P.A.

/s/ *Christine M. Mackintosh*
Michael J. Barry (Bar No. 4368)
Christine M. Mackintosh (Bar No. 5085)
Kelly L. Tucker (Bar No. 6382)
123 Justison Street, 7th Floor
Wilmington, DE 19801
(302) 622-7000

Counsel for Plaintiffs

WORDS: 13,691

OF COUNSEL:

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Mark Lebovitch
Thomas G. James
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

FRIEDMAN OSTER & TEJTEL PLLC
Jeremy S. Friedman
David F.E. Tejtel
493 Bedford Center Road, Suite 2D
Bedford Hills, NY 10507
(888) 529-1108

Counsel for Plaintiffs