



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SELECTICA, INC.,)
))
Plaintiff,)
))
v.)
))
VERSATA ENTERPRISES, INC., and)
TRILOGY, INC.,)
))
Defendants.)
))
and)
))
VERSATA ENTERPRISES, INC., and)
TRILOGY, INC.,)
))
Counterclaim-Plaintiffs,)
))
v.)
))
SELECTICA, INC., JAMES ARNOLD, ALAN B.)
HOWE, LLOYD SEMS, JIM THANOS, and)
BRENDA ZAWATSKI,)
))
Counterclaim-Defendants.)

C.A. No. 4241-VCN
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**PLAINTIFF/COUNTERCLAIM DEFENDANTS'
POST-TRIAL REPLY BRIEF**

OF COUNSEL:
Jonathan S. Kitchen
Christian H. Cebrian
Cox, Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco, California 94104
(415) 392-4200

Gregory V. Varallo (#2242)
Lisa A. Schmidt (#3019)
John D. Hendershot (#4178)
Ethan A. Shaner (#4650)
Scott W. Perkins (#5049)
Jill M. Grob (#5097)
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
*Attorneys for Plaintiff and Counterclaim Defendants
Selectica, Inc., James Arnold, Alan B. Howe, Lloyd
Sems, James Thanos and Brenda Zawatski*

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PRELIMINARY STATEMENT

Selectica's directors acted reasonably to protect the Company and its stockholders from a clear threat. At trial, they presented evidence establishing that they complied with *Unocal* in adopting the NOL Pill, implementing the Exchange and approving the Amended NOL Pill. Based on the trial record, they and the Company are entitled to judgment.

Trilogy – which bought its shares in October 2008, with full knowledge of the Company's past performance – appears to recognize that it can only prevail by showing that the directors' actions were outside the bounds of reason. Trilogy therefore offers a highly selective (and multifariously erroneous) recitation of the facts, comprising several conflicting and ultimately inconsistent accounts of the Board's conduct, and makes remarkably little effort to address or overcome Selectica's affirmative case.

Trilogy's main theory appears to be that the NOLs had little or no value to Selectica, that any reasonable and well-informed director would have known that (regardless of the expert advice the Board actually received), and that the Board therefore acted irrationally (or at least on a culpably ill-informed basis) in adopting the NOL Pill, approving the Exchange and adopting the Amended NOL Pill. But the trial record made clear that this theory is at best a disagreement with the Board about the wisdom of those actions, not a well-founded claim of action without a reasonable basis. The value of a corporation's NOLs is not amenable to objective or generally accepted calculation, and any approximation of the value of NOLs depends on numerous assumptions about the business's future profitability. Tr. 540-42 (Erickson); Tr. 1331-32, 1362-63 (Porter). The directors believed in good faith that the Company's future performance may allow the NOLs to be used in the future. They also believed (in reliance on the advice of an expert whose qualifications are not in question) that a change of ownership was imminent, that

the change of ownership would lessen the Company's ability to use the NOLs in the future, and that the change of ownership could be prevented. The directors further believed that the NOL Pill has had and will have none of the adverse effects on the Company and its stockholders that Trilogly claims to fear. Trilogly may disagree with the directors on any or all of these points, but the law inquires into reasonableness at the time, not correctness in hindsight, and it is evident that the directors informed themselves on the issues before taking action.

Moreover, Trilogly offers no real criticism of the process leading up to the Exchange and the adoption of the Amended NOL Pill on January 2. *See* SPTOB 26-37. There is no dispute about the demands Trilogly made and no dispute that Trilogly deliberately triggered the NOL Pill when the Board refused to accede to those demands.¹ As a consequence of Trilogly's tactical decision to trigger the rights, the Board (and the Committee, exercising the Board's power by delegation) had to choose one of exactly three contractual options – allowing the rights to flip in, exchanging the rights for common stock, or granting Trilogly an exemption. Three times the Board offered Trilogly an exemption in exchange for an agreement to stand still and hold its threat to the NOLs in abeyance, and three times Trilogly refused. The Board and the Committee met 6 times in just over two weeks, requested and received an updated study on the imminence of a change of ownership, and considered whether the NOLs had enough potential value to the Company to justify action to protect them. The directors went to great lengths to inform themselves before they made the decision that Trilogly now seeks to overturn. The trial record

¹ Trilogly's recitation of the facts, in contrast, skips from the November 16 meeting (at which the Board adopted the NOL Pill) to the December 29 meeting (at which the Board resolved to offer Trilogly its third and final chance to avoid dilution) with barely a pause to acknowledge that in the interim, Trilogly had deliberately triggered the pill. *See* TPTAB 22. Trilogly studiously avoids any attempt to justify its own conduct or even to dispute Selectica's

compels the conclusion that the Board and the Committee reasonably perceived a threat to corporate policy and effectiveness and took a reasonable action in response to that threat.

Trilogy argues alternatively that the directors consciously acted for some purpose other than a good faith effort to protect what they believed could be a valuable corporate asset. According to Trilogy, the directors' true purpose could have been a desire to accede to the wishes of Steel Partners, or it could have been a desire to entrench themselves in office, or perhaps it could have been a desire to harm or ward off Trilogy. Trilogy's brief makes no effort to argue that any of these supposed motivations were the sole or primary purposes of the Board's actions, and the trial record will not support any such conclusion.

The claim that the Board acted on Steel's orders is obviously wrong. Steel did not suggest the NOL Pill or ask the Board to adopt it. There is not a shred of proof that any of the directors ever acted at the behest of Steel rather than on the basis of their honest assessment of the corporate merits. None of the directors was beholden to Steel Partners or had any financial or other personal interest in favoring Steel over other stockholders. Nor has there been any claim that Steel – which is not a party to this action – has acted improperly or received special favorable treatment. Trilogy speculates darkly about Steel's supposed "intentions" for the Company, but has presented no proof about what those intentions might be, much less proof that Steel's supposed plans (if implemented) would benefit Steel at the expense of the Company or the other stockholders. And Trilogy's claim that Steel pushed the Board to protect the NOLs points up a key inconsistency in Trilogy's approach: If Steel wanted the NOLs preserved, then

showing that Trilogy intentionally triggered the NOL Pill in an effort to coerce the Board into paying out a third of the Company's remaining cash to Trilogy.

at least one rational investor with a significant stake thought, as the Board did, the NOLs had a value worth preserving.²

Trilogy's entrenchment theory likewise lacks factual support. Trilogy appears to recognize that the Board did not act for the sole or primary purpose of entrenchment, and therefore shifts back to arguing that the Board was not careful enough, because the NOL Pill potentially has entrenchment effects that the Board never considered. Those purported effects are trivial or non-existent in Selectica's case, as the evidence at trial revealed. The NOL Pill was not a preclusive defensive device, and it plainly fell within a range of reasonable responses to the threat to corporate policy and effectiveness posed by Trilogy's emergence as a 5%-or-greater holder and Trilogy's stated intent to continue to accumulate shares.

Finally, Trilogy has failed to substantiate its claim that the directors acted out of some affirmative ill-will or other form of bad faith toward Trilogy. Trilogy does not even attempt to argue that the "animus" it cited repeatedly in its pre-trial brief, TPTB 1-2, 4, 19, 37, 44-45, was the sole or primary purpose of the Board's actions. The NOL Pill did not treat Trilogy differently than other 5%-or-greater holders. Even after November 16 the Board retained the powers to redeem or amend the rights or to grant Trilogy an exemption. Even after Trilogy triggered the pill in December, the Board went to great lengths to offer Trilogy three separate opportunities to step back from the brink and avoid the dilution that Trilogy's conduct had

² Steel is not the only one. Lloyd Sems, who through his funds is one of the Company's largest stockholders, is another. And Trilogy is a third. Trilogy spent time and effort trying to discover a way to extract value from Selectica's NOLs following a potential transaction. Tr. 1157-58; SPTOB 10, n.9. Trilogy eventually came to the conclusion that structuring a deal to preserve Selectica's NOLs from limitation would not be worth the effort to Trilogy. Price Dep. 128-29. But Trilogy nevertheless pitched its July 30, 2008 offer to acquire the Company's assets on the theory that the transaction structure would enable Selectica to keep the corporate shell and use the NOLs. *See* PX 83, Tr. 162-63.

deliberately invited. The directors have an obligation to protect the corporate enterprise from potential harm regardless of its source, even if that source is a stockholder, and regardless of the directors' subjective feelings toward that stockholder. The Board and the Committee treated Trilogy more than fairly in defending the Company against the threats that Trilogy's conduct posed.

The Court has heard extensive evidence about the investigation underlying the Board's decision to adopt the NOL Pill and the Committee's decisions to implement the Exchange and to adopt the Amended NOL Pill. The question for the Court is not whether the directors apprehended every fact correctly, marked off every box on Trilogy's litigation-driven checklist, or made a perfect decision. Rather, the question is whether the directors identified a threat to corporate policy and effectiveness in good faith and acted within a range of reasonableness in response to that threat. The answer to that question is yes, and that conclusion entitles the Board's decisions to deference under the business judgment rule. SPTOB 54-66. Indeed, on this record, the Court should find that even the entire fairness standard has been met. *See, e.g., Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 269-71 (Del. Ch. 1989) (upholding board decision to establish employee stock ownership plan after trial on the basis of entire fairness, and declining to decide whether business judgment review or *Unocal* scrutiny would apply). Selectica and its directors are entitled to final judgment on all their claims and all of Trilogy's remaining counterclaims.³

³ Trilogy does not appear to contest that its counterclaims must be dismissed in their entirety as to Alan Howe, who did not become a director until after the events at issue, has not been accused of any wrongdoing, has not been deposed, and did not testify. Howe is not subject to personal jurisdiction in this action and has not been served with process. *See* SPTOB 66 n.66.

NATURE AND STAGE OF PROCEEDINGS

This is the post-trial reply brief of Selectica and the individual counterclaim defendants.

REPLY STATEMENT OF FACTS

Trilogy's discussion of the facts, TPTAB 4-29, is highly selective, devoted largely to irrelevant issues,⁴ and in many places misleading or outright false. The following discussion of facts highlights only some of the more egregious examples of Trilogy's rhetorical overreaching.

First, Trilogy's theory that Steel Partners is seeking to take advantage of the Company's NOLs for its private benefit, to the exclusion of the benefit of the Company and all stockholders, has no evidentiary support. Apart from a single email (DX 431, sent in early July 2008 and cited at TPTAB 7), in which Howard suggested that the Company pursue an asset sale rather than a sale of the whole Company, so as to protect the usability of NOLs (a strategy that Sean Fallon echoed at the end of the same month, Tr. 163, and that Freier admitted at trial was at least potentially viable, Tr. 1311-14), Trilogy has not even identified what Steel Partners' investment goals are, nor proven that implementation of those goals would be inconsistent with the interests of the Company and other stockholders. Steel is not a controlling stockholder and does not even have a Board representative.⁵ There is nothing wrong or suspicious about Steel trying to

⁴ For example, Trilogy spends several pages discussing the quality of the Company's disclosures, even though Trilogy dismissed its duty of candor claims on the eve of trial. *See* TPTAB 4-5 & n.8. And Trilogy's interpretation of the Company's disclosures is, to say the least, strained: Trilogy repeatedly cites the Company's disclosure (which has appeared in every 10Q and 10K since 2003) that the pill and certain provisions of the charter and bylaws may have an entrenchment effect, TPTAB 2, 30 n.57, 63, as evidence of entrenchment motivation or at least as an admission of an entrenchment effect.

⁵ Trilogy makes light of the evidence that the Board has repeatedly demonstrated its independence from Steel, TPTAB 35-37, but simultaneously tells the Court that the Board only declined to elect Howard to an open Board seat because his presence would have constituted a conflict of interest. TPTAB 36. Although the nature of that supposed conflict is far from clear,

persuade the Board to take actions that Steel believes are advisable.⁶ Nor would there be anything wrong with the Board agreeing with Steel's suggestions, if the Board were to conclude in good faith that those suggestions would be in the best interests of the Company and all stockholders.

Second, Trilogy's theory that the Board acted out of malice toward Trilogy, and manifested that malice by "excluding" Trilogy from the sale process, TPTAB 16-17, 46-47, is inconsistent with the evidence. SPTOB 14-15, 17-18. The Court heard at length from the directors about the reasons for rejecting Trilogy's overtures in July and October. Tr. 116-17, 162-72. Trilogy's offers were unacceptably low, and Fallon indicated in mid-November that Trilogy's offer would only go down. Tr. 173-75; SPTOB 18. Selectica put forward undisputed evidence that Zawatski repeatedly invited Fallon to get in touch with Needham and to participate in the sale process. Tr. 171-72, 1151-54; SPTOB 14-15, 17-18. Trilogy made a conscious choice to stay out of the Needham process and instead to exert pressure on the Board to "accelerate" the process, a constant refrain in Fallon's discussions with Zawatski during the summer and fall. Tr. 1128-30, 1132-33, 1156, 1163-64. And by December, Trilogy gave up on trying to buy Selectica's businesses, and focused its efforts exclusively on extracting greenmail.

the fact that the Board avoided the conflict by electing Alan Howe instead of Jack Howard surely suggests that the Board acted independently of Steel.

⁶ In a similar vein, the suggestion that Steel had some sort of privileged access to confidential Company information is without merit. First, Trilogy has not raised a claim that Steel has misappropriated or made improper use of Selectica's information, and it is far from clear that Trilogy would have standing to pursue such a claim in any case. Second, the bulk of this claim concerns information that Brogan sent to Howard long before the Board adopted the NOL Pill, and it is undisputed that (i) Brogan believed the Company's prior CEO Bennion had authorized the communications, and (ii) Brogan ceased those communications when Heaps asked him to do so. Third, there has been no showing that the information that went to Steel was in any sense material. Indeed, contrary to Trilogy's claim, TPTAB 14-15, Howard at deposition

Finally, Trilogy's treatment of Brogan's iterative revision of the Section 382 calculation is misleading. Trilogy suggests in effect that the Board should have disbelieved Brogan's advice about the proximity of a change of ownership solely because his calculations changed as he acquired new information. The trial record established that the change-of-ownership calculation is complicated and data-dependent, that the calculation involves the exercise of professional judgment, and that Brogan's calculations were reasonable. PX 123; Tr. 668, 681-92, 701. Trilogy makes no attempt to argue that there was anything so obviously wrong about Brogan's calculation that the Board acted culpably by relying on Brogan's advice. *Compare Brehm v. Eisner*, 746 A.2d 244, 261-62 (Del. 2000). Moreover, the suggestion that Trilogy's emergence as a 5%-or-greater stockholder made no difference to the Section 382 calculation because Brogan, at nearly the same time, corrected an instance of double-counting, TPTAB 48, is manifestly false. That is especially so given Trilogy's stated intention to continue to buy shares. There is no basis to question the good faith of Brogan's calculations or the good faith of the Board's reliance on Brogan's advice.

expressly denied that he had received any material non-public information relating to Selectica. Howard Dep. 102-04.

ARGUMENT

I. THE BOARD HAS MET ITS BURDENS OF PROOF UNDER UNOCAL AND THE BUSINESS JUDGMENT RULE.

A. Trilogy's Request For "Stricter Scrutiny" Is Unfounded.

Although Trilogy appears to accept that the "compelling justification" standard of *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988), does not apply here, Trilogy asks the Court to invent a new standard of review, a "stricter scrutiny," TPTAB 31, intermediate between *Unocal* and *Blasius*, because the 5% pill has, in comparison to a pill with a 15% or higher trigger, "a greater impact ... on shareholders' ability to elect new directors." TPTAB 31. That request has no basis in the Court's precedents and would serve only to confuse the law. The Court historically has applied *Unocal* scrutiny to board decisions adopting poison pills, and reserved *Blasius* scrutiny for actions specifically directed at an exercise of the shareholder franchise, such as an impending vote. *See Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1355 (Del. 1985); *see also MM Cos. v. Liquid Audio*, 813 A.2d 1118, 1130 (Del. 2003) (*Blasius* standard is appropriate "only where 'the primary purpose of the board's action is to interfere with or impede exercise of the shareholder franchise and the shareholders are not given a full and fair opportunity to vote.')" (citation omitted). The *Unocal* standard is a "flexible paradigm that jurists can apply to the myriad of 'fact scenarios' that confront corporate boards." *Unitrin Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1374 (Del. 1995) (citation omitted). The purported effect of a pill on potential exercises of the stockholder franchise may be relevant to the Court's evaluation of reasonableness, but it does not by itself call for any tinkering with the *Unocal* standard. Indeed, adopting Trilogy's proposed "stricter" standard of review would lead in principle to an infinite multiplication of standards. If a 5% pill is subject to stricter scrutiny than

a 15% pill, then what about supermajority bylaws? Is a two-thirds supermajority requirement subject to stricter scrutiny than a three-fifths supermajority, but less exacting scrutiny than a three-fourths requirement?

B. The Board And The Committee Consisted Entirely Of Independent, Outside Directors.

The parties agree that the Board's and the Committee's showings of reasonable investigation are "materially enhanced" if the actions taken were approved by a majority of outside, independent directors. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985); TPTAB 32-33, SPTOB 53-54. Trilogy appears to concede that Jamie Arnold was an outside, independent director, but disputes the independence of Brenda Zawatski, Jim Thanos and Lloyd Sems. TPTAB 32-36. All four directors were independent outsiders.

1. Zawatski And Thanos Are Independent.

Trilogy argues that Zawatski and Thanos should, for purposes of the "material enhancement" standard, be considered insiders due to their temporary service as co-chairs. The Court heard extensive evidence at trial concerning the circumstances under which Zawatski and Thanos assumed the co-chair roles and the intended temporary nature of those roles. *See* SPTOB 7 n.4; Tr. 33-34, 152-53, 188-89, 214-15, 929-30, 949. The Court has further heard unrebutted evidence that the sums Zawatski and Thanos have received in consideration for their additional work in the co-chair roles are immaterial to them personally.⁷ Tr. 188-89, 215 (Zawatski); 949-

⁷ Trilogy makes a great deal of the absolute sums paid to Zawatski and Thanos between July 2008 and the end of Selectica's fiscal year on March 31, 2009, or up until the time of trial, but the relevant time for determining their status as independent outsiders is November 16, 2009, the date on which the Board adopted the NOL Pill. (Neither Zawatski nor Thanos serves on the Review Committee, and neither participated in the Committee's decisions to approve the Exchange and adopt the Amended NOL Pill.) There has been no showing of the amounts they

50 (Thanos). And it is undisputed that the Company has hired an investment banker to oversee a sale process, and that the Board intends, at the end of that process, either to recruit a CEO or to sell the Company (obviating the need for a CEO). Zawatski and Thanos had no reason to seek to maintain themselves in the co-chair roles.

Trilogy's basic response is that Zawatski and Thanos should be considered members of management (and not independent outsiders) because, under SEC regulations and NASDAQ rules, they are now treated as named executive officers. But now that the Court has conducted trial, the independence inquiry depends, not on presumptions or inferences or definitions taken from very different contexts, but on an actual examination of the directors' subjective motivations. *See, e.g., In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 941 & n.62 (Del. Ch. 2003) ("By taking into account *all* circumstances, the Delaware approach [to determining independence] undoubtedly results in some level of indeterminacy, but with the compensating benefit that independence determinations are tailored to the precise situation at issue."); *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995) (director independence determined using a subjective "actual person" standard). Even if Trilogy's argument might have been meritorious at the motion to dismiss stage, the Court now has the benefit of a full factual record. In determining whether Zawatski and Thanos were independent, outside directors, the Court should rely, not on presumptions or inferences, but on what the preponderance of the evidence submitted at trial actually shows about the directors' motivations. *See, e.g., Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 177-78 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006).

received up to that time, much less a showing that those amounts actually compromised their independence.

The trial evidence reflects that Zawatski and Thanos had no interest in keeping themselves in the co-chair roles any longer than necessary to complete the Needham process. Tr. 188-89, 949-50. The compensation they have received for their work as co-chairs is not material to them now and was not material to them in November 2008, when they participated in the approval of the NOL Pill. Trilogy characterizes the directors' testimony on the issue of materiality as "self-serving," TPTAB 35, but presented no countervailing evidence and indeed never even questioned either co-chair about the issue at deposition or at trial.⁸ The evidence demands the conclusion that Zawatski and Thanos were independent outside directors.

2. **Sems Is Independent.**

Trilogy's attack on Sems's independence is even less persuasive. Sems indisputably was an outsider who received no income from Selectica apart from customary director fees. Trilogy seizes on a handful of emails between Sems and Jack Howard, most of which occurred before Sems even joined the Board, and asks the Court to infer that Sems could not have acted free from Howard's influence.⁹ TPTAB 36-37. This theory too is inconsistent with the great weight of the evidence. Trilogy appears to concede that there is no proof that Sems had any financial interest in acceding to Steel's wishes, whatever those may have been. That is, he was not beholden to

⁸ Trilogy's argument relies on cases decided on motions to dismiss, a procedural stage at which the Court is bound to assume the truth of well-pleaded facts in the complaint and to grant all reasonable inferences from those facts in favor of the plaintiff. *See, e.g., In re American Int'l Group, Inc.*, 965 A.2d 763, 806 (Del. Ch. 2009). At the post-trial stage, however, Trilogy must show that the directors' independence was actually compromised, not that facts exist that might lead the Court to doubt their independence at the pleading stage. *See Benihana*, 891 A.2d at 174-75, 177-78.

⁹ Trilogy's actual assertion is that Sems lacked independence "with respect to the NOLs," which presumably represents a concession that Sems was independent on other issues. TPTAB 35-37. Trilogy offers no legal support for this attempt to narrow the Court's inquiry artificially, nor any factual support for a theory that Sems was under Howard's influence with respect to the NOLs.

Steel in any ordinary sense, nor was he (contrary to Trilogy’s rhetorical claims, TPTAB 36) an “affiliat[e]” of Steel. On the contrary, Sems testified without rebuttal that his own funds (which represent a material part of his personal wealth) are invested in the Company’s stock. Tr. 730, 738. This fact strongly suggests that Sems’s personal interests lie in promoting the interests of the Company and all stockholders in general, not the interests of Steel or any other stockholder in particular. *See, e.g., In re Oracle Corp.*, 867 A.2d 904, 930 n.116 (Del. Ch. 2004) (listing cases in which “greater credence has been given to the judgment of directors because their equity interests aligned them with the interests of other stockholders”). Sems and Howard were among Selectica’s largest stockholders for several months before Sems joined the Board. That they communicated with one another, and with other major investors, concerning the appropriate direction for the Company is neither surprising nor suspicious. Trilogy takes these innocuous communications as evidence that Sems and Howard were scheming to maintain Steel’s position as the largest stockholder and eventually to “gain[] control over the Company’s large NOLs” for the benefit of Steel Partners.¹⁰ TPTAB 9. Trilogy has never explained how such a scheme would benefit Sems (or, for that matter, Steel), and in fact Trilogy argues elsewhere in its brief that Sems did not even know how Steel planned to use the NOLs. TPTAB 42-43. The suggestion that Sems and Howard were scheming to allow Steel to use the NOLs in a way inconsistent with the interests of Selectica and all its stockholders also fails because there is no evidence that Steel ever had such a plan. Howard testified at deposition that REDACTED

¹⁰ The fact that Howard supported Sems’s appointment to the Board – without Sems’s knowledge at the time, Tr. 728-29, 761-62 – does not get Trilogy any closer to the conclusion that Sems lacked independence from Steel Partners. *See Benihana*, 891 A.2d at 177 (independence of a director not called into question after trial due to fact that director joined another corporation’s board on the recommendation of a fellow director); *cf. Gilbert v. El Paso*

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Howard Dep. 56-57. The evidence presents no basis on which the Court may infer that Sems and Howard were engaged in any kind of nefarious plot against the stockholders' interests.

Similarly, there is no evidence that Sems, after he joined the Board, became subservient to Howard's will or conspired with Howard. Sems explained at length at trial that, before joining the Board, he had come to the conclusion that the NOLs were a valuable corporate asset in need of protection, and that the Company would benefit from a change of leadership and a change of strategy.¹¹ Tr. 721-25, 731-33. That major stockholders like Jack Howard and Lloyd Miller had

Co., 575 A.2d 1131, 1146 (Del. 1990) (director's addition to the board at the behest of a stockholder, even a controlling stockholder, does not compromise that director's independence).

¹¹ Trilogy's attitude toward Jurkowski is also inconsistent. On the one hand, Trilogy attacks the Company for failing to make money (during Jurkowski's tenure as well as his predecessors') and accuses the Company of misconduct because Jurkowski (in the spring of 2008) made forecasts that turned out to be over-optimistic, and that the Board directed Jurkowski not to make publicly. TPTAB 4-5; Tr. 298-99. On the other, Trilogy paints Jurkowski's

similar views on those subjects does not imply that they controlled, dominated or directed Sems when Sems (as a director) acted to protect the NOLs and to cause the Company to restructure.

Finally, the claim that Sems “participat[ed] in leaking confidential information to Howard and continuing to receive directions from him,” TPTAB 37, is baseless. What Trilogy is complaining about is that Sems was copied on emails sent by Brogan to Howard. The evidence shows that Brogan both believed he had Selectica’s permission to correspond with Howard, Tr. 565, and that Heaps put a stop to the communications when he learned of them. Tr. 421-22; SPTOB 15 n.20. Moreover, there is no evidence that Howard ever directed Sems to do anything, nor that Sems ever gave Howard any material confidential information. Much less is there any proof that Sems based any decision he made on anything other than the corporate merits. Quite the opposite, Trilogy’s slanted discussion of Sems’s long-standing interest in protecting the NOLs strongly suggests an independent, good-faith belief that the NOLs were in fact valuable and in need of protection. The evidence demands the conclusion that Sems too was an independent director, and that the directors’ showing of good faith and reasonable investigation are entitled to material enhancement.

C. The Directors’ Identification Of Threats Was Reasonable And In Good Faith.

Regardless of the Court’s determination about material enhancement, the directors have sustained their burden under *Unocal* of showing that they reasonably and in good faith identified a threat to corporate policy and effectiveness. The trial record leaves no doubt that the Board in November 2008 confronted a situation that directors acting in good faith could have determined

dismissal and the contemporaneous restructuring as a serious mistake and as evidence that Sems and Howard had hatched a plot to extract private value for Steel out of Selectica. TPTAB 9-12

warranted a defensive response. *Compare In re Gaylord Container Corp. S'holder Litig.*, 753 A.2d 462, 478 (Del. Ch. 2000). The Court has heard undisputed testimony that NOLs always have economic value, except in the extreme case in which it is certain that the NOLs will expire unused. *See* SPTOB 9 n.8; Tr. 503. Trilogy repeatedly attempts to confuse this point by pointing to Selectica's financial statements, which take a 100% valuation allowance against the deferred tax assets created by the NOLs, as if to suggest that the accounting treatment represents a concession that the NOLs have no economic value. TPTAB 6, 41-42; *see also* Tr. 507-08. But as Selectica explained in its Opening Brief, SPTOB 8-9 n.7, this accounting treatment is proper because the Company's management currently believes it is more likely than not that the NOLs will not be used, a belief that management reevaluates each quarter. Tr. 507. A conclusion that a potential cash flow is currently less than 50% likely to materialize is not a conclusion that the potential cash flow has no economic value, nor a conclusion that a board that acts to protect that potential cash flow acts irrationally merely because it cannot say (and chooses not to spend time and money finding out, assuming that finding out is possible at all) whether the likelihood that the cash flow will materialize is 40%, or 5%, or some other probability. Selectica's Board concluded, and had a rational basis to conclude, that the NOLs had some economic value. For purposes of the first prong of *Unocal*, nothing more is necessary.

The large bulk of the NOLs at issue in this case expire many years from now, and there has been no showing that it is certain that they will expire unused. There is no dispute that the Board was aware of the magnitude of the NOLs, nor that the Board was advised that an ownership change under Section 382 was imminent if Trilogy or other 5%-or-greater holders

Trilogy even relies on Jurkowski's supposed opinions about the value of the NOLs and the prudence of the restructuring. TPTAB 8-9 & n.21.

continued to accumulate shares.¹² Nor is there any dispute that the Board had a reasonable basis to believe that Trilogy intended to continue to buy shares – Sean Fallon told Brenda Zawatski so on November 13, and Trilogy’s 13D said it again. Tr. 173-74; PX 102. The Board plainly had a reasonable informational basis on which to identify a threat to corporate policy and effectiveness.¹³

Trilogy’s response to the essentially undisputed factual record is inventive, but it bears no relation to the Court’s inquiry under the “reasonable investigation” prong of *Unocal*. Trilogy relies principally on its purported rebuttal expert, Dr. Porter, who came up with a new method – one that, as far as the trial record suggests, nobody had ever employed before Dr. Porter prepared his rebuttal report, several months after the Board adopted the NOL Pill – for valuing NOLs.¹⁴

¹² Trilogy’s contention that a change of ownership under Section 382 might not really have been imminent, TPTAB 18, 48-49, is largely beside the point. There is no dispute that the Board believed that such a change of ownership could be imminent, no dispute that Brogan so advised them, and no dispute that Brogan’s conclusion was reasonable on its face, even if that conclusion changed as he obtained better information. SPTOB 44-45. And even if a change of ownership were not imminent, that would not matter, because a board is not required to wait until the last possible moment before adopting measures to ward off threats to corporate policy and effectiveness. *See Gaylord Container*, 753 A.2d at 478 & n.51.

¹³ There can be no question that the Review Committee had a reasonable informational basis to identify Trilogy’s deliberate triggering of the NOL Pill and its repeated refusal to agree to a standstill as a threat. Trilogy deliberately purchased enough shares to trigger the rights, and that trigger by itself required the Board (or the Committee, exercising the Board’s authority by delegation) to choose among granting Trilogy an exemption, allowing the rights to flip in, or implementing the Exchange. The NOL Pill, a valid and binding contract, compelled the Board (or the Committee, exercising the Board’s power by delegation) to make that choice. SPTOB 31-37.

¹⁴ Even assuming the Court does not exclude Dr. Porter’s testimony and report as improper rebuttal (as Selectica has requested) his proffered method is of no analytical value. The value of NOLs is unknowable because that value depends heavily on unknown future events. Dr. Porter avoids that problem by making probability-weighted assumptions about those unknown future events. *See* Tr. 1363 (“Q: [S]o, effectively, it’s just a personal assessment of the likelihood that these assets are going to be realized in the future. A: It’s a matter of judgment, in the eye of the preparer.”). That method cannot produce results better than the assumptions that go into it, and there has been no showing that any set of inputs could be sufficiently reliable to

Trilogy then faults the Board for failing to commission a valuation study using a methodology that did not even exist at the time the Board had to act, on the ground that the Board could, presumably, have hired someone (perhaps Porter) to invent it.¹⁵ TPTAB 40.

This argument misses the point entirely. The Court evaluates the reasonableness of the Board's investigation and identification of a threat against the standard of gross negligence. *See* SPTOB at 42-43, 55; *Moran*, 500 A.2d at 1356. (Trilogy makes no effort to dispute this point, and indeed offers no discussion of the applicable standard at all.) The information of which Trilogy claims the Board was ignorant – the purported “true value” of the NOLs – was neither knowable nor reasonably available to the Board. There has been no showing that an estimate prepared along the lines proposed by Porter would have been material, even had it been reasonably available. Trilogy cannot prevail without persuading the Court, not only that the NOLs had no value to Selectica in November 2008 (which Trilogy has not shown) but that the Board acted *irrationally*, with “an indifference to duty amounting to recklessness,” *see Gelfman v. Weeden Invs., L.P.*, 859 A.2d 89, 114 (Del. Ch. 2004), in believing (even if incorrectly) that the NOLs had a potential value worth protecting. The inquiry under *Unocal* is not whether the directors might have reached a different conclusion on different information, or whether they

generate a reliable output. There has been no showing that the result of any study prepared using Dr. Porter's method would have been sufficiently meaningful to be material to the Board's decision.

¹⁵ Trilogy also repeats its claims that the Board supposedly had no rational basis to believe that the Company would earn a profit during the NOLs' usable life and had no concrete plan for using the NOLs in the near term. TPTAB 41-43. Selectica has dealt with these claims previously. SPTOB 42-46. The Company's future profits are unknowable, and even the probability that those profits will be great enough to allow a material part of the NOLs to be used is unknowable. Unless the Court is prepared to conclude with certainty, as Trilogy claims to believe (notwithstanding its decision to invest over a million dollars in the Company in October 2008), that there is no chance that the NOLs will ever be used, then the Board had discretion to act to protect the NOLs.

marked off all the items on a checklist invented after the fact by a litigation adversary, but rather whether they had a rational basis to believe that a threat existed. The Board clearly had such a basis, and satisfies the corresponding prong of *Unocal*.

Trilogy then suggests almost in passing and without any attempt to discuss the applicable legal standards, TPTAB 46-49, that the Board lacked a good faith belief that Trilogy's conduct posed a threat to the potential value of the NOLs. That is so, on Trilogy's telling, because the Board allowed Steel Partners to increase its ownership from just under 8% at the time it filed its original Schedule 13D (DX 184) in February 2007, to just under 9% at the end of calendar 2007 (DX 242) to just over 10% in February 2008 to just under 15% in October 2008 (at which point the pill adopted in 2003 barred further purchases by Steel). TPTAB 47-49. On the basis of these facts and little more, Trilogy suggests that the Board consciously delayed adoption of the NOL Pill so that Steel could buy up to 15%, then adopted the NOL Pill to stop Trilogy from doing the same.

To the extent this theory has any logical or legal coherence, it appears to be a claim that the Board acted in bad faith for an illicit primary purpose, a claim that Selectica has already addressed. SPTOB 60-62. Trilogy has not disputed Selectica's discussion of the applicable legal standards, nor made any effort to connect the directors' conduct with any recognizable definition of bad faith. The trial record reflects that Selectica treated Steel and Trilogy differently because the two investors had different purposes for their purchases and different goals for their investments, and because circumstances had changed between the time Steel accumulated just under 15% in October and the time Trilogy filed its 13D in mid-November. The Board's awareness of the change of ownership calculation had developed in the interim, in part because of the efforts of the new director Sems and the new CFO Heaps. And as Zawatski testified, the

sale process had developed in such a way that the NOLs had assumed greater significance in the Board's deliberations. Tr. 160-61, 184-85. There is no basis on which the Court can conclude that the directors acted for the primary or sole purpose of favoring Steel and/or harming Trilogy, rather than out of a good faith belief that the NOLs were potentially valuable and in need of protection.

D. The Board's Actions Were Not Preclusive.

Trilogy's argument that the NOL Pill and the Amended NOL Pill are preclusive, TPTAB 49-58, ignores the trial record almost completely in favor of a restatement of Prof. Ferrell's arguments, with which Selectica has dealt previously.¹⁶ See SPTOB 46-54, 65; see also PX 122. Although Prof. Ferrell admitted at trial that the NOL Pills were not preclusive in the sense that they do not absolutely prevent a stockholder from obtaining control through one or more proxy contests, Tr. 1085, Trilogy has chosen to argue that the NOL Pills render such a change of control "realistically unattainable."¹⁷ TPTAB 49.

¹⁶ As Selectica argued in its Opening Brief, this Court has recognized that adoption of a poison pill in the absence of a concrete takeover proposal is non-preclusive as a matter of law. See SPTOB 46-47; *Gaylord Container*, 753 A.2d at 481. Trilogy takes issue with this reading of *Gaylord Container*, TPTAB 50, but offers no coherent argument against it. The indisputable point is this: The Court will review a board's decision to maintain pre-existing defensive measures (such as a pill) in the face of a takeover bid independently of the decision to adopt those measures in the first place. Bidders know this. Consequently, to argue that a defensive measure that is not adopted in opposition to a takeover bid is "preclusive" is inherently speculative. The NOL Pill, like any other standard poison pill, does not stop a potential buyer from negotiating a deal with the Board, or from making a hostile tender offer conditioned on redemption of the rights. The Board has hired an investment banker precisely to negotiate with potential buyers (including Trilogy, if Trilogy is willing to make an adequate offer) over a potential sale of the Company, and Trilogy demonstrated during the trial itself that it is capable of making a hostile tender offer to acquire a company that has a rights plan and a staggered board. See PX 144-46.

¹⁷ Trilogy's difficulty with using words precisely continues on this point. Trilogy, recognizing in light of Prof. Ferrell's concession that it cannot argue that success in a proxy contest is impossible, claims instead that success is "realistically unattainable," but Prof. Ferrell

Trilogy's preclusion claim suffers from a basic logical problem: The NOL Pill is undoubtedly a defensive measure that makes potential takeovers more difficult at the margin, but all defensive measures do that, and not all defensive measures are unlawfully preclusive. Trilogy's attempt to show preclusion (and its reliance on rhetoric such as "substantial preclusive effect") comes to nothing more than a hand-waving assertion that "more difficult at the margins" means "realistically unattainable." That is not true as a factual matter and it is not the law.¹⁸ See *Unitrin*, 651 A.2d at 1388 n.38; *Gaylord Container*, 753 A.2d at 482. And Trilogy chose not to present trial evidence from an experienced proxy solicitor, who might have opined about what is or is not realistically attainable in a proxy contest.

Trilogy complains that the NOL Pills, by preventing new investors from buying 5% or more of Selectica's outstanding stock, prevent potential insurgents from being able to "signal credibly" the superiority of their proposals. TPTAB 53-54. As Selectica has previously shown (SPTOB 48-49; see also Tr. 1020-21, 1032-33, 1429, 1433-35), the trial record demonstrates that

never said that either, at trial or in either of his reports. Prof. Ferrell's report simply does not support the conclusions for which Trilogy proffers it. See *Gaylord Container*, 753 A.2d at 482 n.72 (granting motion to dismiss claim that defensive measures were preclusive where plaintiff's expert chose words carefully and was "unwilling to opine that the [defensive measures were] preclusive [but was] only willing to say that they make a takeover attempt 'more difficult' and 'less attractive' and that the measures significantly raise [the company's] 'contestability index.'").

¹⁸ Trilogy's reliance, TPTAB 51 n.78, on *In re Chrysler Corp. S'holders Litig.*, 1992 WL 181024 (Del. Ch. July 27, 1992), is curious, and misstates the holding of that case. The claim in *Chrysler* was that the board of directors had adopted a 10% pill for the sole or primary purpose of entrenchment; that claim, not a claim that the pill was unlawfully preclusive under *Unocal*, was allowed to proceed to discovery. The Court did not hold that the pill "could effectively eliminate the exercise of proxy rights," as Trilogy claims, TPTAB 51 n.78. Trilogy has not attempted to argue that the directors took any of the actions at issue here for the sole or primary purpose of entrenchment. Finally, as both parties acknowledge, *Chrysler* was a decision on a motion to dismiss. Trilogy has had a full opportunity to present evidence for its claims at trial. The record after trial will not support any claim of entrenchment, nor any claim that success in a proxy contest is realistically unattainable as a result of the NOL Pill or the Amended NOL Pill.

proxy contests can be and are won by insurgents starting with 5% or less of the stock. Whatever the validity of Prof. Ferrell's general and theoretical claims about a "credible signaling" function, an insurgent's inability to buy over 5% of the stock does not render success in a proxy contest realistically unattainable in general.¹⁹ Furthermore, Selectica's stockholder base is highly concentrated; an insurgent *at Selectica* need only convince a relatively small number of stockholders to support his slate or proposal in order to prevail in a proxy contest. A large equity stake is not necessary.²⁰ See Tr. 1031-33.

Trilogy additionally complains, TPTAB 56-57, that the NOL Pill renders a proxy contest impractically expensive, but Selectica has already refuted that claim.²¹ SPTOB 48-49. As a factual matter, Trilogy's estimate of the likely cost of a proxy contest is unreliable. SPTOB 48 n.52. More importantly, Trilogy's argument does not suggest, let alone show, that an insurgent

¹⁹ Trilogy's expert's near-exclusive reliance on academic studies renders any application to the real world – to what is or is not "realistically attainable" at Selectica – highly doubtful. That is especially so when the studies are, for the most part, many years or even decades old; the world has changed and the takeover market has changed. See Tr. 1426-29 (Harkins).

²⁰ For similar reasons, Trilogy's complaint that the combination of the NOL Pill and the classified Board makes it less likely that an insurgent could mount a proxy contest coupled with a takeover proposal that is contingent on election of his proposed slate, TPTAB 54-56, does not demonstrate preclusion. This argument too depends on the assumption that an insurgent needs to "signal" the credibility of his proposal, an assumption that is inaccurate at Selectica due to the concentrated stockholder base. Tr. 1022-23; *compare* TPTAB 54 n.87 & 56 n.91 (Trilogy's characterization of Prof. Coates's writings) *with* Tr. 836-39 (Prof. Coates's trial testimony concerning the same writings).

²¹ Trilogy's claim, TPTAB 57 n.93, that Harkins's testimony on the likely cost of a proxy contest was "speculative" is yet another exercise in equivocation. The cost of any potential or future proxy solicitation is uncertain or speculative in some degree. But Harkins clearly has the professional experience necessary to estimate the likely cost of a proxy contest at Selectica responsibly, and his estimates are plainly a far more reliable indicator than the average on which Ferrell relies. Tr. 1030-31, 1419-24. The fact of Selectica's concentrated shareholder base supports Harkins's view as well. Relatively few investors control a large majority of the stock and practically speaking control the outcome of any proxy contest or election. Prof. Ferrell, in contrast, relied solely on a published average of dubious validity, and did not even consider Selectica's stockholder base in reaching his conclusions. Tr. 1083-84.

could not realistically expect to win if he chose to wage the fight.²² Indeed, Trilogy's own "three legged stool" metaphor for Selectica illustrates this point – Trilogy was prepared to act in an economically irrational manner with respect to its equity investment in Selectica in order to extract value from the other two "legs" of the "stool."²³ Similarly, potential future insurgents or buyers may have considerations that would make running a proxy contest worthwhile, even if the proxy contest likely would cost more than the insurgent could expect to recoup.

Trilogy's final "preclusion" claim, the assertion that the NOL Pills "lock in" the existing ownership structure, is both speculative and irrelevant. Prof. Ferrell simply speculates that the Board might grant exemptions selectively to investors perceived to be friendly to management. That contention impermissibly asks the Court to assume that the Board would act inconsistently with its fiduciary obligations in granting potential future exemptions. More significantly, as Harkins testified without rebuttal at trial, today's pro-management investor can easily become tomorrow's dissident. Tr. 1435; *see also* Tr. 763 (Sems wished to replace all the directors before he joined the Board). This claim asks the Court to assume, against the evidence, that investors

²² Trilogy's argument, here as in other places, also assumes that the only reason an insurgent might wish to wage one or more proxy contests would be to take control. That is not a valid assumption, as Harkins testified. Tr. 1429-31.

²³ Trilogy's behavior in late December is an excellent example of an investor acting in an economically irrational manner on one point for the sake of an expected benefit on other points. Trilogy had no economically rational reason to reject the Board's repeated offer of a standstill; the Board could only choose to dilute Trilogy by half (with the Exchange), by potentially much more than half (with the flip-in) or not at all (by granting an exemption). An exemption in exchange for a standstill would have cost Trilogy nothing and would have guaranteed zero dilution while the Court considered the validity of the NOL Pill. Yet Trilogy chose to run the risk of dilution by rejecting the standstill. Trilogy has chosen not to try to explain its reasons to the Court, but the likeliest explanation is that Trilogy was betting that the Board would back down and pay up.

with millions of dollars on the line would remain blindly loyal to management even in the face of a value-creating proposition from an insurgent.²⁴

For the foregoing reasons and those set forth in Selectica's prior submissions, the NOL Pills are not unlawfully preclusive defensive measures under *Unocal*.

E. The Board's Response Was Proportional.

Trilogy's attack on the proportionality of the Board's actions suffers from similar defects. The "range of reasonableness" prong of the Court's inquiry is not a second inquiry into the procedural adequacy of the Board's decision-making, as Trilogy appears to believe it is, TPTAB 62-65. Rather, the "range of reasonableness" inquiry contemplates a substantive evaluation of the correspondence between the threat identified and the action taken to ward off the threat, but an evaluation conducted with judicial restraint, with respect to the directors' need for latitude in

²⁴ The Answering Brief continues Trilogy's mystifying insistence on using the expression "*per se* invalid" to mean merely "impermissible for some reason." As Selectica previously demonstrated, SPTOB 38-39, and as Trilogy (to judge by the absence of any argument to the contrary in any of its papers to date) apparently accepts, the DGCL does not prohibit a corporation (with or without a classified board) from adopting a rights plan with a 4.99% flip-in trigger, although the directors' decision to do so may, in an appropriate case, be subject to review under fiduciary principles. Compare TPTB 5 ("The question here is not whether any pill with a 4.99% trigger is consistent with Delaware law. It is whether the adoption by Selectica directors of the [NOL Pill] was consistent with their fiduciary duties."). Trilogy claims, TPTAB 50 n.75, that the pills have two features that supposedly "contribute to their *per se* illegality," to wit, that the NOL Pill was "of unlimited duration," and that both NOL Pills, by prohibiting the Board from redeeming the rights after a "Flip In Event," impermissibly tie the Board's hands. The first of these contentions is wrong factually; the NOL Pill would have expired on February 4, 2013, the same expiration date as the pre-existing pill adopted in 2003. *See* PX 98 § 7 (expiration date of the original rights agreement); PX 99 § 2 (providing that other than as expressly amended, the original rights agreement's provisions "remain in full force and effect"). Moreover, the Board established the Review Committee for the express purpose of tracking the Section 382 ownership change calculation and reporting periodically to the Board on whether the NOL Pill continued to be necessary and advisable. *See* PX 132 at 8-12; Tr. 56-57. The second contention is wrong legally, as many (if not most) poison pills prohibit redemption following a trigger. Selectica's 2003 plan included such a prohibition. *See* PX 98 § 23. So did the pill approved by the Supreme

fulfilling their fiduciary obligations to the corporation and the stockholders, and with care to preserve corporate boards' flexibility and freedom of action against erosion or loss by slow degrees. *See Unitrin*, 651 A.2d at 1388; *Paramount Commc'ns, Inc. v. Time, Inc.*, 1989 WL 79880, at *29 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

Selectica has previously demonstrated that the directors' actions were proportional to the identified threats, SPTOB 46-54, 64-66, and Trilogy's counterargument does nothing to overcome the directors' showing. Trilogy again argues at length, TPTAB 59-62, that protecting the NOLs was not really an important corporate objective, because the NOLs purportedly had "minimal, if any, value." TPTAB 61. The Board indisputably believed otherwise, and had well-informed grounds for believing otherwise.²⁵ SPTOB 40-46. But even if Trilogy's myopic evaluation of the facts is correct, to say that a corporate objective is of relatively small importance is not to say that the objective is of no importance, or that a board of directors cannot legitimately pursue the objective through proportional means. On the contrary, the directors have an affirmative obligation to protect the corporate enterprise from potential harm regardless of its source. *See Unocal*, 493 A.2d at 954. The Board acted promptly, and chose a defensive measure that was tailored to protect the identified corporate interest, that cost little to adopt, that had minimal negative effects, and that was subject to easy redemption in appropriate circumstances. Even if the NOLs were not of great value, the NOL Pills are proportionate means of protecting them.

Court in *Moran*. *See Moran*, 500 A.2d at 1349. ("If 20 percent of Household's shares are acquired by anyone, the Rights are issued and become non-redeemable....").

²⁵ On this point, Trilogy also attempts to use Dr. Porter's submissions for precisely the purposes the Court excluded, to show that the directors' conclusions about the value of the NOLs and the propriety of protecting them were unreasonable. *See* TPTAB 61-62; Tr. 1327-28.

Trilogy then reprises its attack on the Board's investigative process, claiming that the Board failed to consider the purported negative consequences of its actions,²⁶ TPTAB 62-64, or alternative means of protecting the NOLs, TPTAB 64-65. The negative consequences of the NOL Pill are largely speculative, and the negative consequences to Trilogy of the Exchange are wholly self-inflicted. SPTOB 51, 64-65, 68-69. And Trilogy's discussion of the purported alternatives is disconnected from reality. As Selectica previously pointed out, a charter amendment imposing transfer restrictions would not have been an effective means of protecting the NOLs.²⁷ SPTOB 52-53. Trilogy has presented no evidence that the Board could have protected the NOLs by any other realistically available means, let alone that the Board's choice of the NOL Pill was outside the range of reasonableness. And Trilogy's suggestion that the Review Committee could, perhaps, have chosen to dilute only that portion of Trilogy's interests that "exceeded the pill threshold," TPTAB 65, lacks any basis in the text of the NOL Pill. Any

²⁶ In the process, Trilogy mischaracterizes Selectica's argument in the same way for the third time in its brief. Selectica wrote in its Opening Brief that it is "obvious, that at the margin and holding other factors equal, a company with a 5% pill is more difficult to take over than a company with a 15% pill or no pill." SPTOB 49. At three separate places in its answering brief, *see* TPTAB 2, 32, 62-63, Trilogy edits out "at the margin and holding other factors equal" and presents the quotation as an admission about the purported effect of the NOL Pill. That repeated misstatement speaks volumes about the good faith of Trilogy's actions in this case.

²⁷ Trilogy appears to concede this point in a footnote, TPTAB 65 n.100, suggesting that the Board, instead of imposing transfer restrictions under 8 *Del. C.* § 202 (whether unilaterally by bylaw amendment or with stockholder approval by charter amendment) and accepting the reality that those restrictions would not have been enforceable against non-consenting stockholders, could have merged the Company with a subsidiary that had such restrictions in its charter already. That is a possibility as a matter of corporation law, but, first, it is a prohibitively expensive possibility for a nano-cap public company that is subject to SEC and NASDAQ regulation (especially one engaged in a sale process); second, Trilogy has presented no evidence that it was a viable alternative for Selectica; and third, in any event, it is difficult to see how imposition of transfer restrictions (whether via merger or through some other means) would have been a less harmful or more benign alternative by Trilogy's lights. Although transfer restrictions would not present investors like Trilogy with the option of wreaking havoc through a deliberate

attempt to pursue such a course would have violated the contractual rights of all other shareholders under the NOL Pill.

Trilogy's "range of reasonableness" argument finally invites the Court to indulge in the "structured, mechanistic, mathematical exercise" that the Supreme Court has rejected, of deciding whether the Board has "demonstrate[d] that any benefit of the pills outweighs the impact on Trilogy and other shareholders." TPTAB 66-67. Again, as Selectica has previously argued (SPTOB 40, 50-51) and as Trilogy does not bother to dispute, *Unocal* scrutiny does not call for the Court to evaluate whether the directors made the right decision, the economically optimal decision, or a perfect decision. The directors are required to show that they acted within a range of reasonableness, and it is manifest that the directors have made that showing. Accordingly, the directors' actions are subject to business judgment rule review, and should be sustained. SPTOB 54-66.

II. SELECTICA IS ENTITLED TO THE REMEDIES IT SEEKS; TRILOGY IS NOT ENTITLED TO ANY REMEDY.

Trilogy has abandoned any claims for a damage remedy. Trilogy failed to present any quantification of damages at trial and did not argue in its brief that the Court has any reasonable basis on which to assess damages. *See* SPTOB 67-69. Trilogy does not dispute Selectica's assertion, SPTOB 68, that the individual directors are immune from monetary liability as a result of their good faith reliance on the advice of experts selected with reasonable care and because of the exculpatory provision in Selectica's charter.²⁸ *See* 8 *Del. C.* §§ 102(b)(7), 141(e).

trigger of the pill, the so-called "preclusive" effects on proxy contests, potential takeovers and the like would be identical, regardless of the method of enforcing the 4.99% cap.

²⁸ Trilogy makes no effort to distinguish between purported breaches of the duty of care and purported breaches of the duty of loyalty, but it is manifest that Trilogy's main line of attack concerns the directors' care in taking the actions they did. There has been no suggestion of

Trilogy instead seeks injunctive relief against the Exchange and against the Amended NOL Pill. That is, Trilogy asks the Court to order Selectica to issue new shares to Trilogy (thereby undoing the dilution effected by the Exchange), to invalidate the Amended NOL Pill adopted on January 2, 2009, and to enjoin Selectica from adopting a similar pill in the future. Any relief requiring issuance of new shares to Trilogy or invalidation of the current pill is barred by Trilogy's acquiescence and unclean hands.²⁹ See SPTOB 67 n.68. Trilogy had three chances to avoid the dilutive effects of the Exchange, but refused those opportunities in an effort to ratchet up the pressure on Selectica. And Trilogy has not even attempted to argue that its showing meets the standard for permanent injunctive relief – including a showing of irreparable harm and balance of hardships – against future adoption of a 4.99% pill. See SPTOB 69. Trilogy is not entitled to the relief it seeks.

Finally, the record supports an award of attorneys' fees as damages to Selectica, and no award of attorneys' fees to Trilogy, for the reasons discussed in Selectica's opening brief. See SPTOB 65-66, 70. Selectica has expended substantial sums on this expedited litigation, which became necessary only because Trilogy took the unprecedented step of deliberately triggering a poison pill rights plan in an admitted effort to force Selectica to resolve unrelated disputes, and refusing to agree even to a temporary standstill that would have allowed this Court to decide the

director interest, no showing of disloyalty in the conventional sense, and no showing of any illicit primary purpose.

²⁹ It should also be noted that the current pill – which was adopted on January 2, 2009 – is analytically distinct from the original NOL Pill adopted in November. As Selectica discussed at length in its opening brief, the Board and the Committee undertook an intensive process between the Las Vegas meeting on December 17 and the meeting on January 2 at which the Committee approved the Exchange and adopted the Amended NOL Pill. SPTOB 27-37. That process and its results were clearly appropriate under *Unocal* and under the business judgment rule. SPTOB 62-66. Trilogy's answering brief makes no effort to argue that the Board's and the Committee's processes during that time were deficient.

merits of the claims relating to the NOL Pill without imposing unnecessary costs on the Company, its stockholders and the Court. Trilogy's effort to extract greenmail from the Company, or to destroy the Company if the Board resisted Trilogy's demands, constitutes egregious overreaching and justifies an award of attorneys' fees as an element of damages. *See Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997).

CONCLUSION

In 1985, the Supreme Court of Delaware first approved the adoption of the shareholder rights plan under *Unocal* and the business judgment rule. Twenty-four years later, this Court is called upon to take up the development of the law where *Moran* left off. The trial record demonstrates that the Board identified as a threat the potential loss of what all the directors honestly believed was a potentially valuable asset. The Board's response, an amendment of the Company's existing rights plan designed to deal directly with the threat of rapid accumulation of shares and concomitant loss of the tax asset, parried the threat and was the best option available given the impracticability of other options, such as a charter amendment.

Trilogy's response, which trial clearly revealed as a brazen attempt to shake down the Company, was to buy through the NOL Pill, knowing full well that the pill itself would force the Board to focus on Trilogy and its actions in short order. The only rational reading of the evidence is that Trilogy expected the Board to buckle under the pressure and pay Trilogy a meaningful portion of the Company's cash resources (again) to make peace (again). The Board, recognizing that it was being held up, nonetheless made every reasonable effort to resolve the matter without harm to Trilogy, offering no fewer than three times an exemption from the effects of the pill in exchange for a standstill pending this Court's determination of the validity of the NOL Pill. For reasons it has never explained, Trilogy refused that offer three times, and decided

instead to “double down” and to force the Board to make a decision. The Board, acting through a committee of two outside directors whose independence is not open to serious question, settled on the Exchange only after repeated meetings and the receipt of detailed expert advice on highly technical tax and legal issues.

Unsupported conspiracy theories and niggling complaints about what the Board did not do will not suffice to carry the day for Trilogy. The Board did precisely what it was supposed to do under *Unocal* and this Court should award it judgment as it writes the next chapter of the evolving Delaware law.

OF COUNSEL:

Jonathan S. Kitchen
Christian H. Cebrian
Cox, Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco, California 94104
(415) 392-4200

/s/ Gregory V. Varallo

Gregory V. Varallo (#2242)

Lisa A. Schmidt (#3019)

John D. Hendershot (#4178)

Ethan A. Shaner (#4650)

Scott W. Perkins (#5049)

Jill M. Grob (#5097)

Richards, Layton & Finger, P.A.

920 North King Street

Wilmington, Delaware 19801

(302) 651-7700

*Attorneys for Plaintiff and Counterclaim Defendants
Selectica, Inc., James Arnold, Alan B. Howe, Lloyd
Sems, James Thanos and Brenda Zawatski.*

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