IN THE SUPREME COURT OF THE STATE OF DELAWARE

SIERRA GP LLC,SIERRA RESOURCES, INC., :
THE BANK OF NEW YORK MELLON TRUST :
COMPANY, N.A., SARAH W. BRYANT, :
ROBERT P. GRAY, RICHARD T. HANSON, :
ELIZABETH F. PRINCE, and :
JOHN W. REYNOLDS, :

Defendant's Below, :
Appellant's, :

v. :

NORTH CAROLINA POLICE RETIREMENT :
FUND, individually and derivatively :
on behalf of SIERRA PROPERTIES L.P., :

Plaintiff Below, :
Appellee. :

Court Below:
Court of Chancery of
the State of Delaware

C.A. No. 12871-CS

APPELLANT'S OPENING BRIEF

Team A
Counsel for Defendant's Below
Appellant's
Date Filed: February 3, 2017

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NATURE OF THE PROCEEDINGS

This matter arises out of a common clause in a trust indenture for notes issued by Sierra Properties LP ("Properties"), a Delaware limited partnership. The North Carolina Police Retirement Fund ("NCPRF"), a limited partner in Properties, filed the action derivatively on Properties behalf on January 20, 2016 in the Court of Chancery for New Castle County. The defendants in this matter include Sierra Resources Inc. ("Resources"), its directors ("Board"), and Sierra GP LLC ("Sierra GP"), a general partner in Properties. NCPRF alleges the defendants breached their fiduciary duties by approving the trust indenture with a proxy put. The proxy put has the potential to accelerate Properties' debt should certain conditions occur.

In response to NCPRF's complaint, the defendants moved for dismissal pursuant to Court of Chancery Rule 12(b)(6). However, because the defendants presented evidence outside the complaint in their motion, the Chancery Court treated the 12(b)(6) motion as a motion for summary judgment under Rule 56 and permitted NCPRF limited discovery on the issues prior to ruling.

At the completion of said discovery, NCPRF cross moved for summary judgment, seeking the invalidation of the proxy put provision. The motions were marked fully submitted on November 23, 2016. On January 9, 2017, the Chancery Court denied the defendants motion for summary judgment and granted NCPRF's cross-motion. Two days later, on January 11, 2017, the defendants filed their notice of appeal to this Court.

SUMMARY OF ARGUMENT

The decision by the Board to approve the trust indenture with a proxy put should be analyzed under the business judgment rule. While the Board was unaware the trust indenture contained a proxy put at the time of approval, it reasonably relied on an attorney's assertion that no novel terms required the board's attention. Delaware law permits directors to rely on experts in making business decisions. Further, there is no obligation by directors to review every word of complicated legal documents such as trust indentures. Thus, Resources' board was not grossly negligent in informing itself about the trust indenture, and the business judgment rule is the appropriate standard of review.

The enhanced scrutiny standards of *Unocal* and *Blasius* do not apply to this case. *Unocal* does not apply as the Board was not acting defensively in approving the indenture with the proxy put. *Blasius* does not apply because there was no intent to impact shareholder voting when approving the trust indenture. Resources' directors only intended on securing debt financing for Properties, not perpetuating themselves in office. Therefore, neither *Unocal* nor *Blasius* apply.

Even applying a fairness standard of review, the inclusion of the trust indenture is entirely fair to Properties. Proxy puts are common terms in trust indentures, and Properties attained significant value in return for the inclusion of the clause. Had the proxy put been excluded, Properties could have been liable for an additional $12 million in interest payments over the lifetime of its notes. Thus, Properties' attained significant value in return for the inclusion of the proxy put.

Moreover, Resources' did not owe a fiduciary duty to Properties or NCPRF. In the context of corporations who are controlling shareholders in limited partnerships, fiduciary duties are owed when they use their control at the expense of the partnership. NCRPF and Sierra GP decided to act on the best interest of Properties and seek funding for the underleveraged partnership. Resources' and the Board did not exercise control over Properties. The Indenture was only agreed upon because it would be an advantage for Properties, rather than a disadvantage.

Lastly, to hold the Board personal liable to Properties and NCRPF is to go against the well-established principle of not limited liability. NCPRF cannot pierce the corporate veil because Resources', Sierra GP, and Properties are all separate legal entities, and is attempting to use a fiduciary entity corporate veil that has only been allowed in the context of self-dealing, to forego the standard of gross negligence required by the fiduciary duty of care.

STATEMENT OF FACTS

Sierra Resources Inc. ("Resources") is a nationwide, full-service real estate company incorporated in Delaware. (Op. 3-4). Its Board has five members, all of whom are defendants in this matter. (Op. 1). Resources owns, acquires, develops and manages office, mixed-used, and residential properties. It primarily focuses on premier properties. (Op. 4). In doing so, it occasionally engages in joint ventures through subsidiaries. *Id.* One of those joint ventures is Sierra Properties LP ("Properties"). *Id.* Properties has two partners, Sierra GP LLC ("Sierra GP") and the North Carolina Police Retirement Fund ("NCPRF"). *Id.* Sierra

GP has a 20% interest in Properties and is the general partner, whereas NCPRF has an 80% interest and is the limited partner. *Id.*

Properties was formed in 2008 in the wake of the financial crisis. Id. Sensing an opportunity to capitalize on the down real estate market, Sierra GP and NCPRF entered into a limited partnership agreement to form Properties. *Id.* Properties' purpose is to develop, redevelop, and invest in high-performance sustainable commercial buildings. *Id.*

By 2013, Properties became underleveraged. (Op. 5). Sierra GP, after consulting with NCPRF, then embarked on raising new debt capital. *Id.* This resulted in a public offering of $160 million in principal amount of 2% notes. *Id.* The notes are due in 2028. *Id.* Morgan Stanley was the lead underwriter in the offering and its counsel prepared the original draft of the indenture. *Id.*

At the heart of this controversy is a a common clause in an indenture. (Op. 2). It allows the holders of the notes to require Properties to pay them back in cash the principal amount of the notes plus any accrued interest when there is a "Change of Control". *Id.* A "Change of Control" occurs when either of two things happen: (1) if Sierra GP is removed as the general partner of Properties, or (2) if for a period of 12 consecutive months, a majority of the Board (three of the five members) is comprised of individuals who assume office as the result of actual or threatened solicitation of proxies. *Id.*

The "Change of Control" clause, which is commonly referred to as a proxy put, was added at the insistence of Morgan Stanley. *Id.* A finance committee made up of Resources' directors approved the indenture (the

"Indenture") with the clause. (Op. 5-6). Prior to approving the Indenture, a member of the finance committee asked Resources' outside counsel if there were any novel terms that required the attention of the committee or Resources' board. *Id.* Counsel denied there were. *Id.*

Properties completed the public offering on August 15, 2013. (Op. 5). At that time, there were no indications of takeover threats to Resources. (Op. 6). However, approximately two years later, High Street Partners ("High Street"), an activist hedge fund, filed a 13D with the Securities and Exchange Commission indicating it acquired 6.3% of Resources' shares. *Id.* The 13D also stated High Street's intention to propose strategic changes to Resources: accelerating distributions to shareholders through dividends or stock repurchases, selling real estate assets, and selling the company. *Id.* High Street threatened it would attempt to replace one or more members of Resources' board through a contested solicitation of proxies if its demands were not met. *Id.*

In response to High Street's 13D, Resources issued press releases and made investor presentations indicating that if shareholders elected High Street's nominees, the "Change of Control" clause in the indenture may trigger, requiring Properties to pay off the notes. (Op. 7). That would require Properties to obtain new financing to support the payoff. *Id.* Resources indicates the potential impact to it is $2 - $3 million, although that amount "would not be material" to it. *Id.* NCPRF disputes that figure, but regardless, the potential impact to Properties is five times greater than that of Resources. *Id.*

Although the potential impact to Properties should a "Change of Control" occur is $10 - $15 million, Properties still benefited from the "Change of Control" provision. (Op. 9). Morgan Stanley indicates the interest rates on the notes could have two basis points higher (2.5%) had the clause been excluded. *Id*. Over 15 years, that amounts to $12 million in additional interest payments made by Properties.

NCPRF, in its quest for profits, authorized Sierra GP to act as its general partner. (Op. 4). It now seeks to invalidate the contractual terms it authorized Sierra GP to enter into on its behalf. (Op. 1). The Court of Chancery declared the "Change of Control" clause void. (Op. 12). Resources, the Board, and Sierra GP now appeal.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY HOLDING THERE WAS A BREACH OF FIDUCIARY DUTY ARISING OUT OF THE INCLUSION OF THE PROXY PUT IN PROPERTIES' TRUST INDENTURE.

A. QUESTION PRESENTED

Whether a breach of fiduciary duty occurs when a board of directors approves a trust indenture containing a proxy put, after being told by experienced counsel that the indenture contained no novel terms requiring the board's attention?

B. SCOPE OF REVIEW

When reviewing a party's motion for summary judgment, a court must "determine whether, after viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that no material issues of fact are in dispute and it is entitled to judgment as a matter of law." *Debaldo v. URS Energy & Const.*, 85 A.3d 73, 77

(Del. 2014)(quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.,* 693 A.2d 1076, 1079 (Del. 1997). A trial court's grant of a motion for summary judgment, both as to the facts and the law, are reviewed *de novo*. *Id*.

C. MERITS OF THE ARGUMENT

1. The Decision By Resources' Board To Approve The Trust Indenture With The Proxy Put Should Be Analyzed Under The Business Judgment Rule.

Delaware General Corporation Law entrusts a board of directors with managing the business and affairs of the corporation. 8 *Del.C.* § 141(a). In doing so, directors are "charged with an unyielding fiduciary duty to the corporation and its shareholders." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). The business judgment rule typically applies to decisions made by disinterested directors. *See Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1287 (Del. 1989). The rule is a "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in honest belief that the action taken was in the best interests of the company." *Van Gorkom*, 488 A.2d at 872 (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). "(T)he party attacking a board decision as uninformed must rebut the presumption that its business judgment was an informed one." *Van Gorkom*, 488 A.2d at 872. In doing so, the party must show the directors were grossly negligent in informing themselves regarding the decision. *Brehm v. Eisner,* 746 A.2d 244, 259 (Del.2000) (citing *Aronson v. Lewis,* 473 A.2d 805, 812 (Del.1984)).

a. A board, in Fulfilling Its Fiduciary Duties, May Rely on the Advice of Counsel.

Resources' Board was not grossly negligent in informing themselves regarding the trust indenture. Prior to approving the indenture, Resources' finance committee retained experienced counsel to review the terms of the indenture. (Op. 5-6). When a member of the committee asked counsel if any novel terms appeared in it which would require the board's attention, counsel answered in the negative. *Id.* Under Delaware law, it is permissible for directors to rely on the advice of its expert advisors. *See, e.g., San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc.*, 983 A.2d 304, 318-319 (Del. Ch. 2009) [hereinafter *Amylin I*], *aff'd*, 981 A.2d 1173 (Del. 2009), and *Brehm*, 746 A.2d at 261. In fact, Delaware General Corporation Law Section 141(e) is explicit in this regard. Section 141(e) states directors "shall in the performance of (their) duties, be fully protected in relying in good faith upon ... any other person as to matters the (directors) reasonably believes are within such other person's professional or expert competence ...." 8 *Del.C.* § 141(e). Doing so is "evidence (of) good faith and the overall fairness of the process." *Cinerama, Inc. v, Technicolor, Inc.,* 663 A.2d 1134, 1142 (Del. Ch. 1994), *aff'd,* 663 A.2d 1156 (Del. 1995). Therefore, NCPRF is unable to rebut the presumption of an informed decision by Resources' board since it was reasonable for the directors to rely on the advice of its counsel when approving the terms of the indenture.

The facts in this case closely parallel those in *Amylin I*. *Amylin I* involved the approval of a trust indenture by the Amylin Pharmaceuticals' board ("Amylin Board") with a similar proxy put provision as the one at issue. Amylin's indenture resulted in issuing notes totaling $575 million. Similar to this case, the Amylin Board was unaware the indenture contained a proxy put provision at the time of approval. However, prior to approving it, the board inquired with counsel and was told the indenture contained "nothing unusual or not customary." *Amylin I*, 983 A.2d at 318. In holding the board did not breach its fiduciary duty to the corporation, the Chancery Court stated that consulting with counsel prior to making a decision is not "generally imagined when considering the concept of gross negligence, typically defined as a substantial deviation from the standard of care." *Id*.

The conduct of the Board in approving the trust indenture is nearly identical to the conduct of the Amylin Board. The only significant difference between the two cases is the precise wording of the proxy put provision. However, that is immaterial to the duty of care analysis, which focuses on whether a board acts grossly negligent in informing itself. *Van Gorkom*, 488 A.2d at 872. The reliance on counsel is strong indicia of the opposite. *Cinerama*, 663 A.2d at 1142. In fact, had the board not consulted with legal counsel, regarding a complex legal document such as an indenture, which was drafted by attorneys, NCPRF would have a much stronger argument that Resources' directors did not satisfy their fiduciary duties.

This is not to say reliance on experts is permissible in every situation. For example, this Court has held that a board "may not avoid its active and duty of oversight in a matter as significant as the sale of corporate control." *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1281 (Del. 1989). *See also RBC Capital Markets, LLC v.*

Jervis, 129 A.3d 816, 855–856 (Del. 2015). However, the sale of corporate control and approval of a trust indenture with a common clause such as a proxy put are two very different things. As *Amylin I* and *II* illustrate, there are no enhanced obligations with the latter. Thus, *Mills* and *RBC Capital Markets* are distinguishable from this case, and the Resources' Board satisfied its duties to the corporation by relying on its counsel's expertise.

b. There Is No Duty for Directors to Read Every Word of a Complicated Legal Document Such as A Trust Indenture.

NCPRF's argument that the directors were grossly negligent for not discovering the proxy put provision is misplaced. This Court flatly rejected such a theory when affirming the Chancery Court's holding in *Amylin*. *Amylin II*, 981 A.2d 1173 (Table). Further, "(i)t is well settled in Delaware that a director need not 'read *in haec verba* every contract or legal document that (he or she) approves.'" *In re Walt Disney Co. Derivative Litig.,* 907 A.2d 693(Del. Ch. 2005) (quoting *Van Gorkom,* 488 A.2d at 883). Thus, the board's fiduciary duties do not require it to scrutinize in detail an entire indenture prior to approving it. Relying on counsel's advice will suffice.

c. Proxy Puts Are Not *Per Se* Invalid Under Delaware Law.

Lastly, there is no *per se* rule against proxy puts under Delaware law. As noted above, this Court already upheld the validity of a proxy put in affirming the Chancery Court's ruling in *Amylin II*. This Court stated that the Chancery Court's determination of no breach of fiduciary duty by the Amylin Board were for the "reasons made explicit in the

(Chancery Court's) opinion." *Amylin II*, 981 A.2d at n. 2. Further, this Court added that implicit in that decision was that "no showing was made that approving the 'proxy put'... would involve foreseeable material risk to (Amylin) or its stockholders. That risk materialized only months later, and was aggravated by the unexpected, cataclysmic decline in the nation's financial system..." *Id*. As in *Amylin*, when Resources' finance committee approved the trust indenture, there was no threat to Resources, its shareholders, or Properties. (Op. 6). In fact, there was not threat to Resources for an entire two years. (Op. 6). Resources had no indication that any person or entity planned a proxy contest or that an activist shareholder possessed or had an interest in possessing a significant equity position. *Id*. Since there were no foreseeable risks to Resources at the time the Indenture was approved, the business judgment rule is the appropriate standard of review.

2. *Unocal* Is Inapplicable Since Resources' Board Was Not Acting Defensively When Authorizing the Trust Indenture With The Proxy Put, Nor When Responding To High Street's 13D Filing.

While decisions by boards are typically afforded the business judgment rule presumption, this concept is not always applicable in the context of a corporate takeover. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). This is due to the inherent conflict of interest directors face in takeover situations. Therefore, for the business judgment rule to apply, directors "must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and that the defensive measure chosen by the board was "reasonable in relation to the threat posed." *Unocal*, 493 A.2d at 955.

However, "*Unocal* starts from the premise that the transaction at issue was defensive." *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 271 (Del. Ch. 1989).[1] This is not the case here. In approving the trust indenture, Resources' directors sought to secure debt financing for Properties. (Op. 5). There was no intent by the Board to entrench themselves in their current positions. This is evidenced by the fact the proxy put was included at the insistence of Morgan Stanley, and the Board was unaware the indenture contained a proxy put at the time they approved it. (Op. 2, 5). Further, the Board approved the indenture at a time when no takeover threat existed and more than two years before High Street's 13D filing. (Op. 6). Thus, the decision to approve the trust indenture with the proxy put should not be scrutinized under *Unocal*.

Unocal also doesn't apply to the press releases and investor presentations made by Resources' board in the wake of High Street's 13D. The Chancery Court has analyzed what standard of review to apply when a board is using a proxy put as an entrenchment device in response to a proxy contest. *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 249-250 (Del. Ch. 2013) [hereinafter *SandRidge*]. In *SandRidge*, an activist hedge

[1] *See also Gantler v. Stephens*, 965 A.2d 695, 705 (Del. 2009) and *In re Santa Fe Pac. Corp., S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995)("Enhanced judicial scrutiny under Unocal applies whenever the record reflects that a board of directors took defensive measures in response to a perceived threat to corporate policy and effectiveness which touches on issues of control.")(internal quotation marks omitted)

fund launched a consent solicitation to destagger the SandRidge Board, remove all its directors, and install its own slate. In response, the board made statements indicating that the election of the hedge fund's nominees would trigger a proxy put in SandRidge's credit agreements, resulting in SandRidge possibly having to pay off $4.3 billion worth of notes. The statements also indicated that SandRidge did not have sufficient liquidity to pay off the notes, and mandatory refinancing posed an "extreme, risky and unnecessary financial burden." *Sandridge*, 68 A.3d at 249-250.

In deciding on a *Unocal* standard of review, the Chancery Court stated that *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." *SandRidge*, 68 A.3d at 258. However, *SandRidge* is easily distinguished from this case. First, the SandRidge Board had the option to approve the dissident slate of directors and avoid triggering the proxy put, something it refused to do. *Id.* at 246. Second, the board stated on multiple occasions that the risk posed by the triggering of the put was "extreme" and "risky." *Id.* at 250. Both of those facts signal an intent by the board to use the proxy put as a defense mechanism, when it had yet to analyze whether the dissident slate posed a danger to corporate policy and effectiveness.

The response by Resources' Board to High Street's 13D was the polar opposite. Although the proxy put does not contain an approval option, the Board never threatened to unreasonably withhold such approval while risking "extreme" financial distress to the company. Instead, the Board readily admitted that the triggering of the proxy put is not material to Resources. (Op. 7). Therefore, there was no intent by the Board to use the put as a defensive mechanism, and the *Unocal* standard of review does not apply to Resources' response to High Street's 13D either.

The actions by Resources' Board were not defensive because it faced no real threat. Unlike *SandRidge*, in which the shareholders voted to destagger the board and the directors actively faced a proxy contest, all High Street did was file a 13D advocating for certain strategic changes. There is no indication the 13D posed a threat to Resources or that its shareholders supported the proposed changes. (Op. 6). Thus, the Chancery Court erred when it held that the Board should have completed a *Unocal* analysis. (Op. 9).

Assuming *arguendo* that a *Unocal* was necessary, the Board's response to High Street's 13D was so innocuous, that it should not be construed as disproportionate. Part two of the *Unocal* analysis requires this Court to decide whether the board's response was "reasonable in relation to the threat posed." *Unocal*, 493 A.2d at 955. As noted above, Resources, in its press releases and investor presentations, described the impact of the proxy put being triggered as "not material." (Op. 7). Such benign statements are unlikely to deter High Street's corporate ambitions or discourage it from trying to take control of the company. Thus, the alleged response from Resources' Board is proportionate under *Unocal*, and the business judgment rule applies.

3. The Board Need Not Show a Compelling Justification for The Inclusion of the Proxy Put Under *Blasius.*

The business judgment rule also does not apply to board decisions made with the intent to impact a shareholder vote. "Provisions in corporate instruments that are intended principally to restrain or coerce the free exercise of the stockholder franchise are deeply suspect." *Sutton Holding Corp. v. DeSoto*, Inc., 1991 WL 80223 (Del. Ch.), at *1 (citing *Blasius Industries, Inc. v. Atlas Corp.,* 564 A.2d 651 (Del. Ch. 1988)). Courts will strike down such provisions absent any compelling justification from the board. *Blasius*, 564 A.2d at 661. However, absent an intent to impact shareholder voting, courts will apply the business judgment rule.[2]

Resources' Board need not show a compelling justification for the inclusion of the proxy put because there was no intent to impact shareholder voting. In approving the trust indenture, it was unaware of the presence of the proxy put. (Op. 5). Counsel for the underwriter for the notes, Morgan Stanley, insisted on the inclusion of the term, not the board. *Id*. Therefore, NCPRF is unable to show any intent by Resources' board to coerce shareholders in the exercise of a vote and any impact on the electoral process is incidental.

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[2] See, e.g., *In re MONY Grp., Inc. S'holder Litig.*, 853 A.2d 661, 674-675 (Del. Ch. 2004)("…when the matter to be voted on does not touch on issues of directorial control, courts will apply the exacting *Blasius* standard sparingly, and only in circumstances in which self-interested or faithless fiduciaries act to deprive stockholders of a full and fair opportunity to participate in the matter and to thwart what appears to be the will of a majority of the stockholders. Where such circumstances are not present, the business judgment rule will ordinarily apply in recognition of the fact that directors must continue to manage the business and affairs of the corporation, even with respect to matters that they have placed before the stockholders for a vote.")

The overall weak impact of the proxy put on Resources’ finances is further indicia of a lack of intent by Resources’ directors to influence shareholder voting. If triggered, it would only cost Resources $2 - $3 million. (Op. 7). Such an amount is immaterial to Resources (something it readily shared in press releases and investor presentations), and therefore, an ineffective tool in combating corporate policy changes such as the ones proposed by High Street. *Id*. Thus, the enhanced scrutiny demanded by *Blasius* does not apply.

4. Even If the Business Judgment Rule Does Not Apply, The Inclusion of The Proxy Put in The Trust Indenture Is Entirely Fair.

While Resources, the Board, and Sierra GP vigorously dispute the holding that the business judgment rule does not apply to the approval of the Indenture, this does not automatically invalidate the proxy put. Instead, a court should analyze the corporate action under a fairness standard.[3] In doing so, the court determines if the “transaction was the product of both fair dealing *and* fair price.” *Cinerama,* 663 A.2d at 1163. The defendants bear the burden of proof. *Id.*

a. The Terms of The Trust Indenture Are Entirely Fair to Resources’ Shareholders.

This Court has not completed a fairness analysis in the context of a proxy put in a credit instrument. However, in analyzing other types

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[3] *See Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 271 (Del. Ch. 1989) (“(N)either a board's failure to become adequately informed nor its failure to apply a *Unocal* analysis… will automatically invalidate the corporate transaction. Under either circumstance… the transaction… will be scrutinized to determine whether it is entirely fair.”)

of transactions, courts consider the overall financial impact to shareholders, as well as the transaction's anti-takeover and dilutive effects. *See Shamrock Holdings*, 559 A.2d at 271. Taking these things into consideration, the inclusion of the proxy put was fair to Resources' shareholders. Resources' Board did not intend to entrench themselves in their current board positions by approving the trust indenture. Rather, the purpose was to secure debt financing for a joint venture Resources (and therefore its shareholders) sought to profit from. (Op. 5). In addition, the entrenchment potential is minimal. These facts are evidence of fair dealing. Regarding fair price, the financial impact of the put being triggered is not material to Resources and any potential risk of loss is offset by the lower interest rates attained by Properties. (Op. 7, 9). Thus, the price is fair to Resources' shareholders as well.

b. The Terms of The Trust Indenture Are Entirely Fair To Properties And NCPRF.

The proxy put is also entirely fair to Properties and NCPRF. Again, there is no evidence of bad faith on the part of Resources' Board, which suggest the Indenture was not the result of fair dealing. The Board did not approve the provision for the benefit of itself, to the exclusion of Properties and NCPRF. In addition, the financial impact to each partner should the put trigger is proportional to their equity stakes in the limited partnership. (Op. 7). Regarding fair price, Properties benefited from lower interest rates by the inclusion of the proxy put. (Op. 9). The affidavit by Morgan Stanley, which Properties does not contradict, indicates the interest rates on the notes would have been two basis points higher had the proxy put been excluded. *Id*. Over 15 years, that results in Properties paying an additional $12 million in interest payments. Thus, while there is a potential downside with the proxy put, Properties and its partners gained significant value in return.

II. THE COURT ERRED IN GRANTING NCPRF'S MOTION FOR SUMMARY JUDGMENT BECAUSE RESOURCES' AND THE BOARD DID NOT OWE A FIDUCIARY DUTY TO PROPERTIES OR NCPRF.

A. Question Presented

Whether the sole member of a limited liability company and its directors owe fiduciary duties to a limited partnership, in which the limited liability company is the general partner.

B. Scope of Review

Granting a motion for summary judgment is subject to a *de novo* standard of review on appeal. AeroGlobal Capital Management, LLC v. Cirrus Indus., Inc., 871 A.2d 428(Del. 2005). The determination that a legal duty is owed is a question of law which is reviewed *de novo*. *Naidu v. Laird*, 539 A.2d 1064, 1070 (Del. 1988). When there are "no issues of material fact in dispute, the moving party is entitled to judgment as a matter of law" and summary judgment is proper. Del. Ch. Ct. R. 56(C). Moreover, "facts are viewed in the light most favorable to the nonmoving party." Debaldo v. URS Energy & Const., 85 A.3d 73, 77 (quoting United Vanguard Fund, Inc. v. TakeCare, Inc., 693 A.2d at 1079).

C. Merits of the Argument

This Court should reverse NCPRF's grant of summary judgment below because Resources' and the Board did not owe a fiduciary duty to

Properties'. Here, there are ample facts and precedents to overwhelmingly establish Resources' and the Board are not fiduciaries of Properties'. Moreover, the elements of the fiduciary doctrine is not met. Accordingly, this Court should reverse the lower court's decision.

1. No Fiduciary Duty Was Owed to Properties or NCPRF Because Resources' Did Not Exercise Control.

A general partner in a limited partnership, controlled by a corporate entity has been found to owe a fiduciary duty to the limited partner in a limited partnership. This fiduciary duty arises when (1) the general partner, even through a corporate entity, controlled the limited partnership, and (2) used their control to engage in self-dealing. Here, Resources' and the Board did not exercise control over Properties. Additionally, Resources' and the Board did not engage in self-dealing. Moreover, to hold the Board personally liable, NCPRF and Properties should have to pierce the corporate veil, elements of which are not met here. Consequently, NCPRF's summary judgment motion should not have been granted, and this Court should reverse the Court of Chancery's ruling.

a. Resources' Did Not Exercise Control Over Properties'.

In a limited partnership, general partners who are in control of the partnerships property are considered fiduciaries. *In re USACafes, L.P. Litig.*, 600 A.2d 43, 49 (Del. Ch. 1991) [hereinafter *USACafes*]. This duty is "not as broad as the duty of the director of a corporate trustee." *Id.* Furthermore, "mere ownership of a general partner does not result in the establishment of a fiduciary relationship."

Bigelow/Diversified Secondary P'ship Fund 1990 v. Damson/Birther Partners, 2001 WL 1641239 (Del. Ch.) [hereinafter *Bigelow*]. A limited partner does not participate in control of the business, regardless of having rights or powers, when 1) they consult or advise a general partner with respect to matters of the limited partnership, 2) participate at meetings, 3) consent or disapprove a transaction involving actual or potential conflict of interest, to name a few. 6 *Del. C.* §17-303.

For example, In *USACafes*, the doctrine of fiduciary duty in the context of limited partnerships was imposed when the general partner was a corporation wholly owned by the two shareholders, whom owned 47% of the limited partnership, and served on the board of directors of the general partner, thus the Court of Chancery found there was control of the limited partnership. *USACafes*, 600 A.2d at 48-49. "Affiliates of a general partner who *exercise control* over the partnership's property may find themselves owing fiduciary duties to both the partnership and its limited partners." *Bigelow*, 2001 WL 1641239 at 8.

Moreover, cases such as *Bigelow* suggest that not in every context will the affiliates of a general partner owe fiduciary duties to limited partnerships and their limited partners. The facts surrounding the present case is one of those contexts. Here, the general partner is Sierra GP and the affiliate is Resources'. (Op. 4). Resources' merely owns Sierra GP, which does not create a fiduciary relationship. Additionally, Sierra GP was acting on Properties' best interest, as it was underleveraged, with the permission of the NCPRF. (Op. 5).

Applying the *USACafes* standard in the case before us, Resources' did not exercise control over Properties. In the case at bar, Sierra GP is a direct subsidiary of Resources, and Resources' is the sole member and manager of Sierra GP. (Op. 4). However, unlike *USACafes*, Properties is not owned by two shareholders which serve on the board of the parent company. Properties is a partnership between the subsidiary and the NCPRF. (Op. 4). As such, Properties has been treated as its own legal entity, separate from Resources'. To hold Resources' accountable when it is so far removed and not in control of Properties, is to go against the principles established in *USACafes* which considers control as one of the key elements in finding fiduciary duties. Delaware Limited Partnership Act that recognizes Resources' may approve transactions pose conflicts of interest, call and participate in meetings, and not be considered to have control. 6 *Del. C.* §17-303(b). Thus, under the *USACafes* or the more stringent *Delaware Limited Partnership Act* standard, Resources' was not in control of Properties'.

b. Resources' Did Not Take Advantage of Properties' Property at the Expense of the Partnership.

Fiduciary duties arise in limited partnerships where the general partner use their control to "advantage corporate directors of the general partnership at the expense of the limited partnership." *USACafes*, 600 A.2d at 49. This duty includes the obligation to not engage in self-dealing at the expense of the limited partnership. *Id.* The fiduciary duty does not extend beyond "the clear application [of the fiduciary duty] stated in *USACafes*. *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451 10 (Del. Ch.) [hereinafter *Bay Center*].

Nonetheless, "a partner does not violate a duty or obligation under this chapter or under the partnership agreement solely because the partner's conduct furthers the partner's own interest." 6 *Del. C.* §15-404.

For example, in *USACafes*, the Board agreed to sell all the assets of the limited partnership at a grossly inadequate price, meanwhile the Board would receive $17 million in side payments for accepting the sale. *USACafes*, 600 A.2d at 49-50. Moreover, directors of a general partner who receive preferential treatment in a reorganization were also considered to have breached their fiduciary duties. *See generally In re Boston Celtics Ltd. P'ship S'holder Litig.*, 1999 WL 641902 (Del. Ch.) [hereinafter *Celtics*]. Persons who structure transactions to receive unearned fees and other benefits, breach their fiduciary duties. *Bigelow*, 2001 WL 1641239. Controllers of a general partnership who divert partnership assets to generate personal fees, breach their fiduciary duties. *Wallace ex rel. Cencom Cable Income Partners II, Inc. L.P. v. Wood*, 752 A.2d 1175 (Del. Ch. 1999).

In the present case, Resources' did not exercise control nor take advantage of an opportunity at the expense of Properties. Properties was significantly underleveraged, and with permission of NCPRF, Sierra GP attempted to secure financing through debt. (Op. 5). Unlike *USACafes*, Resources' did not receive side payments or other considerations. Resources' did not structure the transaction to receive unearned fees or benefits as in *Celtics*, if anything the contract was set up with customary and generally accepted loan terms. Additionally, Resources' did not, in any way, divert the partnership assets as in *Wallace*.

NCPRF cannot prove that Resources' gained any advantage or profit from the indenture. Mainly because the indenture was made in the ordinary course of business, for economic reasons, with the consent of the majority shareholder of the limited partnership (NCPRF). (Op. 5-6). Besides, any member at any given election of the Board can be changed. Just because all members of the Board cannot be changed at one time, does not mean that any individual member cannot lose their seat. Alternatively, even if one were to consider that Resources' took advantage of their indirect control over Properties' to maintain Board membership, Delaware law allows such conduct. 6 *Del. C.* §17-303(b)(8)(g). As such, Resources' may partake in conduct that furthers their own interest. Accordingly, Resources' did not gain any advantage at the expense of Properties'.

c. Resources' Does Not Owe Duty of Care of Properties'.

A partner's duty of care is to refrain from gross negligence or reckless conduct, intentional misconduct, or a knowing violation of law. 6 *Del. C.* §15-404. *USACafes* fiduciary duties have been limited to its original articulation- duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership- which does not extend "beyond duty of loyalty claims." *Bay Ctr.*, 62 A.3d at 672-673. Aside from self-dealing, the fiduciary duties do not extend to corporate opportunity, good faith, nor corporate waste. *See generally USACafes*, 600 A.3d at 49-50.

In the case at bar, the foundation for the NCPRF's claim is largely duty of care. NCPRF asserts that in conferring with an attorney concerning the indenture rather than having every director reading through the contract in its entirety, Resources' breached a fiduciary duty. Duty of care is not a fiduciary duty imposed by *USACafes*. Sierra GP, not Resources', was merely acting on the consent of NCPRF in signing the Indenture. (Op. 5). To hold Resources' accountable when 1) NCPRF agreed to financing, 2) NCPRF did not themselves read the contract in its entirety, and 3) NCPRF is the majority unitholder of the limited partnership, runs contrary to the principles of equity. Besides, Resources' was not grossly negligent in approving the indenture. Resources' consulted the finance committee, reached out to competent attorneys which were outside counsel, and nothing unusual was found in the indenture. (Op. 5-6). Approving indentures such as these, are not violations of the law, and there was no intentional misconduct on behalf of the Board.

2. Resources' Board Cannot Be Held Personally Liable to Properties' Because NCPRF Cannot Pierce the Corporate Veil, the Proper Test.

Boards of corporations who are controlling shareholders of other corporations, still have a sole fiduciary duty to the parent corporation and its shareholders. *Trenwick Am. Litig. Trust v. Ernst & Young L.L.P.*, 906 A.2d 168, 194 (Del. Ch. 2006). Delaware Law respects corporate formalities and to pierce the corporate veil plaintiffs need to establish that these formalities were ignored. (*Trenwick*, 906 A.2d at 194). "The separate legal existence of juridical entities is fundamental to Delaware law." *Feeley v. NHAOCG*, 62 A.3d 649, 667 (Del. Ch. 2012). Besides, debts and obligations of limited liability companies ("LLC's") are solely the debts and obligations of the LLC's, not to the member or manager of the LLC. 6 Del. C. §18-303.

Here, Resources' is the parent corporation of a subsidiary (S^1), S^1 is set up as an LLC. (Op. 4). In this context, a derivative claim on behalf of the subsidiary would require a piercing of the corporate veil to hold the directors personally liable for claims. However, another layer must be added to consider the full facts surrounding the present case– S^1 is the general partner of a limited partnership. (Op. 4). Stated differently, the limited partnership is the subsidiary (S^2) of S^1. This context should be no different, NCPRF should be required to pierce the corporate veil to be able to hold the Board, twice removed, accountable. If anything, the veil piercing standard should be higher. Besides, NCPRF cannot meet this burden because all corporate formalities have been observed between the parent, S^1, and S^2. Thus, to hold the Resources' Board personally liable when Resources', Sierra GP, and Properties are all set up as separate legal entities would allow for routine veil piercing.

CONCLUSION

For the foregoing reasons, this Court should reverse the Chancery Court's grant of NCPRF's cross motion for summary judgment and grant the defendants' motion for summary judgment.