IN THE SUPREME COURT 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,

Defendants Below,
Appellants

v.

NORTH CAROLINA POLICE RETIREMENT FUND, individually and derivatively on behalf of SIERRA PROPERTIES LP,

Plaintiff Below,
Appellee.

No. 31, 2016

Court Below:

Court of Chancery
Of the State of Delaware

C.A. No. 12871-CS

APPELLEE'S ANSWERING BRIEF

Date Filed: February 3, 2017

Team B
Counsel for Plaintiff Below,
Appellee

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NATURE OF PROCEEEDINGS

On January 20, 2016, Appellee, North Carolina Police Retirement Fund, individually and derivatively on behalf of Sierra Properties LP ("Sierra LP"), brought suit against Sierra Resources, Inc. ("Sierra Resources"), a Delaware corporation, and its board members, Sarah W. Bryant, Robert P. Gray, Richard T. Hanson, Elizabeth F. Prince and John W. Reynolds ("Individual Defendants"), the Bank of New York Mellon Trust Company, N.A. ("BNY Mellon"), and nominal Appellant, Sierra LP, seeking declaration that Section 11.01 of the Trust Indenture ("Indenture") be found invalid and unenforceable for breach of fiduciary duty.

In response, Appellants filed a 12(b)(6) motion to dismiss the complaint on the grounds that they took no action as a fiduciary. Appellee subsequently filed a cross-motion for summary judgment. The Delaware Court of Chancery determined there was no issue of material fact, and treated Appellee's motion to dismiss as a motion for summary judgment.

On January 9, 2017, Chancellor Snyder of the Delaware Court of Chancery denied Appellants' motions to dismiss, and granted Appellee's cross-motion for summary judgment. On January 11, 2017, Appellants filed a Notice of Appeal, in the Supreme Court of Delaware, seeking reversal of the summary judgment motion. The Supreme Court of Delaware accepted the appeal.

SUMMARY OF ARGUMENT

1. First, this Court should affirm the order for summary judgment, holding Section 11.01 invalid and unenforceable. Defendants failed to make a fully-informed decision in adopting Section 11.01 by undertaking inadequate measures to become aware of the dead hand aspect of the proxy put. Further, Defendants failed to satisfy the burden of proving the entire fairness of the transaction to Plaintiff, which is required for Section 11.01 to be valid and enforceable. The Delaware Court of Chancery's opinion in *Amylin* does not allow Defendants to escape liability for the adoption of Section 11.01 by delegating their duty to act with adequate care.

2. Secondly, this Court should uphold the Court of Chancery's grant for summary judgment because the court correctly decided that Sierra Resources, its Board, and Sierra GP owe fiduciary duties to the North Carolina Police Retirement Fund. Despite broad freedom to contract, fiduciary duties exist unless eliminated specifically through negotiation under principles of trust law and the decision in *USA Cafes* which is consistently followed by Delaware courts.

STATEMENT OF FACTS

In 2008, North Carolina Police Retirement Fund and Sierra Resources formed a limited partnership, Sierra LP, a real estate investment vehicle. In forming Sierra LP, The North Carolina Police Retirement Fund contributed $80 million in capital, while Sierra Resources contributed $20 million through Sierra GP. Sierra GP, LLC, ("Sierra GP") is the sole general partner and exercises exclusive control over Sierra LP. Sierra

Resources is the sole manager and member of Sierra GP. Sierra LP's limited partnership agreement, ("LP Agreement") restricted fiduciary duties only with respect to competition and monetary liability.

In early 2013, Sierra Resources, Sierra GP, and Individual Defendants ("Entity Defendants") decided Sierra LP was underleveraged, and suggested that raising new debt capital would improve Sierra LP's profitability. After obtaining a general endorsement from the North Carolina Police Retirement Fund to obtain additional debt financing, Sierra GP, on behalf of Sierra LP, completed a public debt offering of $160 million. The Indenture connected with that offering was prepared by counsel for Morgan Stanley, the lead underwriter of the offering, and approved by Sierra Resources on behalf of Sierra LP.

In committing Sierra LP to the Indenture, Entity Defendants admit that they did not read, advocate for, or even take notice of Section 11.01, containing the "dead hand proxy put." A member of the finance committee of the Sierra Resources Board of Directors asked outside counsel if there were any "novel" terms in the Indenture. Counsel said there were not.

The dead hand proxy put in Section 11.01 specified that if the General Partner should change, or if Sierra Resources' declassified Board of Directors was taken over by shareholder activists, then repayment of the debt could be triggered with interest. On October 12, 2015, an activist hedge fund, High Street Partners, LP ("High Street"), filed a Schedule 13D as required by the SEC after acquiring 6.3% of shares in Sierra Resources. High Street threatened that if the board of directors of Sierra Resources did not implement the activist's desired strategy,

it would replace one or more directors of Sierra Resources through a contested solicitation of proxies.

While High Street has yet to act beyond a threat, Sierra Resources asserted that if High Street nominees constitute a majority of the elected board, the proxy put in the Indenture would trigger and require Sierra LP to obtain new financing to pay off the $160 million of Notes. Sierra Resources also asserted that the impact of this event would be immaterial to Sierra Resources. The impact on Sierra LP, however, would be substantially greater and potentially catastrophic to Sierra LP's equity holders, notably the North Carolina Police Retirement Fund, in the event of unavailable alternate financing or short notice.

ARGUMENT

I. DEFENDANTS FAILED TO EXERCISE ADEQUATE CARE IN THE ADOPTION OF SECTION 11.01 OF THE INDENTURE, RENDERING IT INVALID AND UNENFORCEABLE.

A. QUESTION PRESENTED

When Defendants adopted the Indenture on behalf of Sierra LP, they failed to become aware of the existence of a dead hand proxy put in Section 11.01. Delaware Courts consistently hold that being informed is an integral piece of exercising adequate care when acting as a fiduciary. The question on appeal is whether the Court of Chancery properly invalidated Section 11.01 because Defendants could not delegate their responsibility of adequate care in its adoption, and the presence of Section 11.01 was not entirely fair to Plaintiffs due to unfair price.

B. SCOPE OF REVIEW

This Court reviews an appeal of summary judgment from the Court of Chancery under a *de novo* standard of review. *Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1276 (Del. 1994). Likewise, this Court has established that questions regarding the formulation of duty of care are questions of law, subject to *de novo* review. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

C. MERITS OF ARGUMENT

The Court of Chancery properly found Section 11.01 invalid and unenforceable because it is not entirely fair to Plaintiffs, and attempting to delegate a duty of care to outside counsel is inconsistent with applicable legal standards regarding business decisions and dead hand proxy puts in debt instruments. A fiduciary decision that does not consider all material information that is reasonably available is not entitled to deference or enhanced scrutiny. Rather, the decision must be judged as to whether it is entirely fair to Plaintiff. In the present case, Defendants failed to become aware and did not adequately consider the presence of a dead hand proxy put in the Indenture. Judged by the appropriate standard of whether it is entirely fair to Plaintiffs, Defendants cannot overcome the burden of proving that Section 11.01 came at a fair price to Plaintiffs. Therefore, this Court should uphold the Court of Chancery's grant of summary judgment finding Section 11.01 invalid and unenforceable.

1. Section 11.01 of the Indenture is Invalid and Unenforceable Because Defendants Breached Their Duty of Care in its Approval.

a. Entire Fairness is the Appropriate Standard to Judge Defendants' Adoption of Section 11.01.

Approving Section 11.01 and the dead hand proxy put therein was a fiduciary act requiring judicial examination under the entire fairness standard. When acting in a fiduciary capacity, there are three levels at which a court may review those actions: the business judgment rule, the enhanced scrutiny standard, and the entire fairness standard. *See Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257 (Del. Ch. 1989). It is an accepted principle that the act of approving a contract is a fiduciary act, to be judged according to the actor's fiduciary duties. *See San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc.*, 983 A.2d 304 (Del. Ch. 2009) (hereinafter "*Amylin*"); *Teachers' Ret. Sys. of La. v. Aidinoff*, 2006 WL 1725572 (Del. Ch. 2006).

The "entire fairness" standard can act as a residual standard when a Plaintiff has successfully rebutted the business judgment rule in favor of a Defendant, and the enhanced scrutiny standard of *Unocal* is inapplicable. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *see also Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 271 (Del. Ch. 1989). The entire fairness standard has been codified and construed by the court many times. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995); Del. Code Ann. tit. 8, § 144(a)(3). Specifically,

> (a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any...partnership...in which 1 or more of its directors...have a financial interest, shall be void or voidable solely for this reason, or solely because the director...authorizes the contract or transaction...,if: (3) the contract or transaction

> is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the stockholders.

Del. Code. Ann. tit. 8, § 144(a)(3). Defendants blind approval of the Indenture is a *per se* violation of Section 144(a)(3) because of its impending catastrophic financial implications on Plaintiff.

In a limited partnership scheme, the corporate general partner and its directors benefit from the presumption that their actions are protected from judicial scrutiny based on the business judgment rule. *Zoren v. Genesis Energy, L.P.*, 836 A.2d 521, 529 (Del. Ch. 2003). The business judgment rule protects general partners by presuming that they "acted on an informed basis and in the honest belief that they acted in the best interests of the partnership and the limited partners." *Id.* (*quoting In re Boston Celtics Ltd. Partners Shareholder Litigation*, 1999 WL 64192 (Del. Ch. 1999)), at 4. In the proceedings below, Defendants argued that their adoption of Section 11.01 is entitled to deference under the business judgment rule. The Court of Chancery correctly ruled in the negative.

It is well established that "[G]eneral partners may not use the business judgment rule as a shield if they are not informed of material information reasonably available to them before making a decision." *Seaford Funding Ltd. P'ship v. M&M Assoc. II, L.P.*, 672 A.2d 66, 70 (Del. Ch. 1995)(*quoting Aronson* 473 A.2d 805, 812 (Del. 1984)). Thus, general partners of a limited partnership cannot claim protection of the business judgment rule if the general partner was uninformed. *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Serv., Inc.*, 1999 WL 743479, 18 (Del. Ch. 1999).

Here, the Defendants themselves iterate the fact they were unaware of the content of Section 11.01 and the dead hand proxy put when they committed the Sierra LP to the Indenture. R. at 9. Thus, the Court of Chancery correctly found that Defendants' privilege to the business judgment rule is removed due to their status of being uninformed of Section 11.01 and the dead hand proxy put.

The Court of Chancery also correctly found that Defendants misinformation and unawareness precludes application of the enhanced scrutiny standard in this case. R. at 8-9. The enhanced scrutiny standard is implicated when a Board of Directors make a decision to undergo "defensive measures." *Unocal*, 293 A.2d at 946; *Gantler v. Stephens*, 965 A.2d 695, 706 (Del. 2009). As the Court of Chancery properly noted in denying application of the business judgment rule, Defendants are precluded from arguing that the *Unocal* standard for defensive measures applies, while also claiming they had no knowledge of the dead hand provision. R. at 8-9. Justice Snyder aptly noted that the *Unocal* standard requires a "reasonable grounds for believing that a danger to corporate policy and effectiveness existed." R. at 8-9. This is incompatible with Defendants' statements and course of conduct claiming ignorance of Section 11.01's presence. Indeed, because Defendants did not make the determinations required by *Unocal*, the "entirely fair" standard is appropriate. R. at 9. *See also Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 271 (Del. Ch. 1989).

b. *Defendants' Approval of Section 11.01 Comes at an Unfair Price to Plaintiff.*

Defendants have the burden of proving their acceptance of Section 11.01 was "entirely fair" to plaintiffs. *Cede & Co. v. Technicolor, Inc.*,

634 A.2d 345, 361 (Del. 1993). They have not satisfied this burden. Two elements are required for a Defendant to prove "entire fairness" to the Plaintiff: fair dealing and fair price. *Id.* The fair dealing element examines timing, initiation, structuring, negotiation, as well as disclosure and approval of the transaction. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). It is undisputed that the Individual Defendants were unaware of the content and presence of Section 11.01 when it was drafted and subsequently adopted. R. at 9-10. Although Defendants now try to "conveniently" take advantage of incumbency-reinforcing effects of Section 11.01, "fair dealing" cannot be found by looking at any of the fair dealing elements. Thus, the crux of Defendants' ability to satisfy the "entire fairness" standard rests on their ability to prove fair price of the Notes issuance.

c. *The Morgan Stanley Affidavit Is Not Reliable or Substantial Enough to Establish that Defendants Obtained a Fair Price Necessary to Secure the Offering Attached to Section 11.01.*

To establish that a fiduciary obtained a fair price, a commitment of the fiduciary actor to obtaining the best value or price reasonably available, as the circumstances allow, is required. *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989), (*citing Weinberger*, 457 A.2d at 710). In addition, courts also consider any other relevant economic and financial details, including "any other elements that affect the intrinsic or inherent value of a company's stock." *Weinberger*, 457 A.2d at 711. Based on the relevant financial and economic considerations, including the risk to the Limited Partnership, Defendants cannot meet the burden of proving entire fairness, because

they cannot establish that the offering of the 2% Notes were obtained at the best value or price reasonably available.

Defendants' affidavit from Morgan Stanley does not successfully establish that the public offering could not be completed without Section 11.01. As the Court of Chancery pointed out, even if the affidavit is accepted, its lack of concreteness, specifically in saying the interest rates of the Notes would have been "up to" 50 basis points higher, would fail to meet the burden of entire fairness. While the incremental price of the Notes with the dead hand proxy put is uncertain, it is undisputable that Defendants concede that the triggering of the dead hand proxy put in Section 11.01 could be devastating to the Limited Partnership. R. at 9. Despite potential devastation to Sierra LP and the Retirement Fund, Defendants' exposure regarding this event would be immaterial. R. at 7. It is well-established that the presence of a dead hand proxy put or "poison put" in a debt agreement can be detrimental to the stakeholders' interests, even analogous to the "Sword of Damocles." *Dead Man or Dead Hand? New Poison Pills in Debt*, 8 J. of Int'l Banking & Fin. 482, (2015); *Pontiac General Employees Retirement System v. Healthways, Inc.*, 9789-VCL (Del. Ch. 2014).

In valuing fair price, the enhanced risk resulting from the dead hand proxy put coupled with the likely change of Sierra Resources Board, must be considered. It is undisputed that if alternative financing were unavailable, or short notice was given, the result would be detrimental to Sierra LP's ability to continue financially, and would result in a total loss of the Retirement Fund's $80 million investment. Given the specific language of Section 11.01 and the nature of Sierra Resources'

Board, the likelihood that the LP would have short notice is high. A single activist could trigger the dead hand proxy put. R. at 2. The credibility of High Street's threat to solicit proxies, highlights the vulnerability exposed to Sierra LP from Defendants' irresponsible contract approval.

Due to Sierra Resources' declassified board, an infiltration of the Board's majority by shareholder activists, such as High Street, could happen suddenly, within one election. R. at 6-7. The detrimental results to Sierra LP and the Retirement Fund, along with the minimal impact on Sierra Resources and Individual Defendants are undisputed. While the Affidavit regarding money saved by the LP due to the presence of Section 11.01 is not concrete or specific, there is irrefutable evidence (as conceded by the Defendants) as to its potential to devastate Sierra LP. Consequently, this Court must affirm the finding of the Court of Chancery that the Defendants have not met their burden of proving fairness to the Plaintiff.

2. Delegation of Section 11.01 to Counsel Does Not Diminish Defendants' Duty.

a. The Contents of Section 11.01 are Material, and Were Reasonably Available to Defendants when they adopted the Indenture.

Defendants cannot escape liability and responsibility for approving the Indenture merely because they conferred with outside counsel. The Court of Chancery properly applied the precedent of *Amylin* when it ruled that Section 11.01 of the Indenture is invalid and unenforceable because the Defendants "failed to exercise adequate care" in its adoption. R. at 10. In making business decisions, the duty of care requires consideration of all material information reasonably available. *Amylin*,

983 A.2d 304, 318 (*quoting Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 1998) (*citing Aronson v. Lewis*, 473, A.2d 805, 812 (Del. 1984))).

The Delaware Court of Chancery has held that provisions like dead hand proxy puts are "material" in considerations regarding a board's failure to be informed when approving an agreement. *See Amylin*, 983 A.2d 304, 318. Additionally, the presence of a clause or contract may be considered material due to sheer economic exposure to the company alone. *Brehm v. Eisner*, 746 A.2d at 259-60. Here, the presence of Section 11.01 and the dead hand proxy put are clearly material as to whether the Indenture should have been approved, as it has a significant bearing on the financial exposure of Sierra LP. Should it be triggered, Section 11.01 and the dead hand proxy put have the propensity to create a "catastrophic" result for Sierra LP and its equity holders. R. at 7. Likewise, the presence of Section 11.01 was reasonably available to the Defendants. The appropriate standard for "reasonably available" is that the information is "within the board's reach." *Amylin* 983 A.2d 304, 318 (*citing Brehm v. Eisner*, 746 A.2d at 259).

Dead hand proxy puts and default triggering provisions in debt financing agreements are the subject of widespread litigation and contention. *See Amylin*, 983 A.2d 304; *Kallick v. Sandridge Energy Inc.*, 68 A.3d 242 (Del. Ch. 2013); *Pontiac General Employees Retirement System v. Healthways*, C.A. No. 9789-VCL, (Del. Ch. 2014) (transcript ruling). The Delaware Court of Chancery has issued a serious warning to parties contracting for debt financing, urging that this type of situation creates a "troubling reality" for decision-makers and stakeholders alike. *See Amylin* 983 A.2d at 319. In its dealings with BNY Mellon, the

availability of awareness of the inclusion of a dead hand proxy put and similar provisions (which are standard for debt financing) were undoubtedly "within the board's reach" when agreeing to Section 11.01 of the Indenture. R. at 9-10.

b. As Decision-Makers Responsible for Obtaining Debt Financing, Defendants Were on Notice of the Likely Presence of the Dead Hand Proxy Put and Its Catastrophic Implications.

Defendants' failure to draft or advocate for Section 11.01 does not diminish the duty of care required for the adoption of Section 11.01. Central to the analysis of Defendants' care in the adoption of Section 11.01 is their "failure to learn of the existence" of the provision. *Amylin*, 983 A.2d at 318. As partners, the appropriate standard of care required by Defendants is refraining from gross negligence or reckless conduct, analogous to the case of *Amylin*. While in *Amylin* the Court of Chancery found relying on outside counsel regarding the existence of a dead hand proxy put to be adequate care, that reasoning cannot be applied here. *Id.* As the Court of Chancery noted, Amylin served as an "admonition" to boards and decision-makers in approving debt financing. R. at 10 (*citing Amylin*, 983 A.2d at 318). In *Amylin*, the court specifically put those in the position of approving and negotiating debt instruments on notice as to the potentially "catastrophic" results to an entity when default is triggered by a debt agreement. *Amylin*, 983 A.2d at 319.

Defendants proffer that their inquiry to outside counsel of any "novel" terms requiring attention of the Indenture is sufficient to meet their burden of care. R. at 10. Novelty implies a concept that is new,

and not formerly known or used. Not only are dead hand proxy puts not "new," but the Court of Chancery has warned that this provision has the propensity to be "catastrophic" to stakeholders, and that boards *must* be aware of them to best protect the stakeholders' interests. R. at 10; *Amylin*, 983 A.2d at 319 (emphasis added).

In the present case, it is significantly more egregious that Defendants were either unaware or unconcerned with the particular terms of debt financing. Sierra Resources and the Individual Defendants have a responsibility to the partners and shareholders of Sierra LP when incurring debt financing. Defendants should not escape liability merely because they consulted with outside counsel and failed to notice the presence of a well-known provision with the potential to be destructive to shareholder interests.

The Court of Chancery properly analogized that allowing Defendants to use outside counsel as a scapegoat for failure to notice a dead hand proxy put is like allowing a board to remain ignorant of an investment banker with a material conflict. *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015). A finding to the contrary would establish alarming precedent. Boards of Directors and decision-makers will choose to remain ignorant, so long as they can delegate their duty of care on outside counsel.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT SIERRA RESOURCES, ITS BOARD, AND SIERRA GP VIOLATED A FIDUCIARY DUTY OWED TO PLAINTIFF.

A. QUESTION PRESENTED

Delaware courts have consistently held that a corporate general partner owes a fiduciary duty to a limited partner. Sierra Resources and Individual Defendants exercised exclusive control over Sierra GP as

manager and sole member. In turn, Sierra GP was the sole general partner of Sierra LP. Do Defendants owe no fiduciary duty to Plaintiff, their limited partner in Sierra LP?

B. Scope of Review

This Court has established that questions regarding the fiduciary duty are questions of law, and thus are subject to de novo review. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1998).

C. Merits of Argument

There is a long tradition in trust law that "one who controls the property of another may not, without implied or express agreement, intentionally use that property in a way that benefits the holder of the control to the detriment of the property or its beneficial owner." R. at 11. Sierra Resources had *exclusive control* of the property of the North Carolina Police Retirement Fund's investment by virtue of the entities' ownership structure. That control placed Sierra Resources in a trust relationship requiring fidelity to fiduciary principles. Further, Sierra Resources took actions that imperiled that property.

1. Sierra Resources, its Board, and Sierra GP owe a fiduciary duty to the North Carolina Police Retirement Fund.

Sierra Resources complete control over the limited partnership by way of complete control over the general partner is, by definition, a trust relationship. The Court of Chancery noted that "Sierra Resources exercises indirect but exclusive control over Sierra LP." R. at 3. The North Carolina Police Retirement Fund entered the limited partnership with Sierra GP acting as sole manager. Sierra GP was, in turn, controlled by the corporate entity, Sierra Resources and its Board of Directors.

Sierra Resources and its Board showed the extent of their control when they significantly increased Sierra LP's debt load after only minimal consultation with the North Carolina Police Retirement Fund. Through Sierra GP, Sierra Resources and its Board encumbered Sierra LP with so much debt that it may sink from the ripple effects of an activated dead hand proxy. It is undisputed that Sierra LP, rather than Sierra Resources and its Board, will be on the hook for the $160 million of debt financing should an activist trigger the dead hand proxy. Sierra LP would immediately be forced to find new funding to support that payoff (R. at 7). If that funding was not forthcoming, the limited partnership would likely fail.

a. Unless contractually eliminated, fiduciary duties remain.

Fiduciary duties remain unless they are contracted away. *See U.S. W., Inc. v. Time Warner Inc.,* C.A. No. 14555, 1996 Del. Ch. LEXIS 55. The concept of fiduciary duty provides "a backdrop protection--the fiduciary duty of loyalty--that reduces the need for investors and managers to attempt to specify through contract the agent's authority in the myriad sets of future circumstances." *Id.* *65.

Undeniably, the Delaware Limited Partnership Act affords partners great freedom and discretion to tailor a partnership agreement. Del. Code Ann. tit. 6, § 17-1101(d). In the event of a conflict and in the absence of express provisions, a court will "look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence." *In re K-sea Transp. Partners L.P. Unitholders Litig.*, No. 6301-VCP, 2012 Del. Ch. LEXIS 67, at *15. Here, the parties agree that Sierra LP's limited partnership agreement does not bar the relief sought in this case, therefore the intent to contract away

fiduciary responsibility as it relates the Indenture is not present. R. at 4-5.

b. Defendant should not be allowed to hide behind a claim of indirect control.

Indirect control can mean direct control when it is exclusive, as in this case. While it is true that Sierra Resources and its Board are not general partners of Sierra LP, they are the managers and sole member of Sierra GP. Further, directors of a corporate general partner owe fiduciary duties to a limited partnership and limited partners. R. at 11. The Chancery Court noted that this follows "long-established precedent and practice." R at 11; *(citing In re USA Cafes L.P., Litig.)*.

More recently, in *Time Warner*, the Court of Chancery addressed an analogous situation where a corporate entity tried to avoid responsibility creating a layer cake of entities. *U.S. W., Inc. v. Time Warner, Inc.*, C.A. No. 1455, 1996 WL 307445. The court stated that a fiduciary's equitable obligations in circumstances of trust and dependency, extend to a corporation as the entity in control, even if "it does so through the intermediation of several wholly owned subsidiaries that serve as the general partners of that enterprise." *Id.* Exclusive control effectively flows from Sierra Resources to Sierra LP. Sierra Resources makes all decisions for Sierra GP, which subsequently is the decision maker for Sierra LP. Therefore, Sierra Resources, its Board, and Sierra GP owe a fiduciary duty to the North Carolina Police Retirement Fund. To allow a corporate defendant to manipulate entity formation and thereby avoid fiduciary duties would undermine long-honored traditions of trust law.

2. Default Fiduciary Duties are Valuable for Public Policy Reasons.

Freedom to contract does not mean freedom from all ethical principles that have developed in common law. Potential problems and costly litigation can arise when there is control on one side of a partnership and a lack of information on the other. Fiduciary duties are embedded in principles of equity and common law and exist in the absence of contractual modification by the parties. *See Auriga Capital Corp. v. Gatz Props.*, 40 A.3d 839 (Del. Ch. 2012).

The tradition of fiduciary duty guards against mismanagement and opportunism. *See* Deborah A. DeMott, Fiduciary Preludes: Likely Issues for LLCs. It is crucial because unequal parties cannot always realize the "contingencies that would enable opportunistic conduct" *Id*. Furthermore, contract ambiguity is common. *Id*. Fiduciary duties provide the "moral pulse of our society." *See* Myron T. Steele, *The Moral Underpinnings of Delaware's Modern Corporate Fiduciary Duties*, 26 Notre Dame J. Law, Ethics & Pub. Policy 3 (2012).

Here, the fact that the North Carolina Police Retirement Fund had much more to lose as an 80-percent limited partner, cannot be ignored. Without the safeguard of a fiduciary relationship, a sophisticated corporate general partner with a low-stakes investment could be given license to play with pension fund assets. The Plaintiff testified that the fallout from the proxy put could be catastrophic if alternative financing was unavailable or prohibitively costly. R. at 7. Because the parties to a limited partnership are frequently unequal, a fiduciary duty of the general partner must be maintained in the absence of an unambiguous contract eliminating all fiduciary responsibility.

Finally, while the Delaware legislature allows parties to eliminate fiduciary duties by contract, what the legislature has <u>not</u> said is

equally important. *See* Del. Code Ann. tit. 6, §§ 17-1101(d), 18-1011(c) (2005) (emphasis added). It has not said that fiduciary duties are hereby extinguished. It has not said that a limited partner must be careful to take action to put them back into a contract. Therefore, fiduciary duties remain and should be honored in this case.

Delaware leads the nation in corporate law, and its courts influence legal thinking. That makes the outcome of this case important because it shows how a chain of fiduciary duty tethers corporate actions to affiliates and ultimately to consequences for a retirement pension fund. Under this analysis, the clear violation of a fiduciary duty owed warrants Section 11.01 void and unenforceable.

CONCLUSION

For the foregoing reasons, Plaintiff requests this Court uphold the Court of Chancery's order granting summary judgment.

Respectfully Submitted,

Team B

Counsel for Appellees