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	:	No. 31, 2016
Defendants Below, Appellants,	:	Court Below:
v.	:	Court of Chancery of the State of Delaware
NORTH CAROLINA POLICE RETIREMENT FUND, individually and derivatively On behalf of SIERRA PROPERTIES LP,	:	C.A. No. 12871-CS
Plaintiff Below, Appellee	:	

APPELLANTS' OPENING BRIEF

Team I
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February 3, 2017

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NATURE OF PROCEEDINGS

Appellee, plaintiff below, filed a complaint on January 20, 2016, derivatively in the right of Sierra Properties LP. The appellants, defendants below, did not assert that pre-suit demand was required under Court of Chancery Rule 23.1, because the appellee is a limited partner, and as such, is entitled to bring an action on behalf "of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." The appellee claimed that the approval of the Indenture containing Section 11.01 violated appellants' fiduciary duties to the appellee and Sierra Properties LP. The appellee sought a declaration that Section 11.01 of the Indenture is invalid and unenforceable. The appellants moved to dismiss the complaint pursuant to Court of Chancery Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The appellants presented matters not included in the complaint, which invoked Court of Chancery Rule 12(b), and the court determined to treat the appellants' motion to dismiss as a motion for summary judgment.

Appellee was then allowed discovery limited to the additional matters presented by the appellants. The parties agreed that there were no genuine issues of material fact, and the appellee filed a cross-motion for summary judgment in its favor. The Court of Chancery issued a Memorandum Opinion on January 9, 2017, denying the appellants' motions and granting summary judgment to the appellee's cross-motion.

Appellants timely filed a Notice of Appeal in the Supreme Court of the State of Delaware on January 11, 2017. Appellants request that this Court reverse the decision of the Court of Chancery and deny the appellee's motion for summary judgment. Appellants further ask that this Court reverse the denial of their motion for summary judgment and instead grant summary judgment in their favor.

SUMMARY OF ARGUMENT

The appellants did not breach their fiduciary duties owed to the appellee, and Sierra Properties LP ("Sierra LP"), because their actions are protected by the business judgment rule since they acted on an informed basis, in good faith, and with honest belief the actions they took were in the best interest of the company. Under Delaware Corporate Law, the board of directors is charged with the management of the business and affairs of the corporation. In carrying out this responsibility, directors owe the fiduciary duties of care and loyalty to the corporation and the shareholders, and when making business decisions, directors are permitted to rely upon the expert advice of properly informed third parties.

The business judgment rule is a presumption that, when directors make business decisions, they act on an informed basis, in good faith, and in the honest belief that the action taken is in the best interests of the company. When a court applies the business judgment rule, the business decisions of disinterested directors will not be disturbed if they can be attributed to any rational business purpose. Additionally, the court will not substitute its own notions of what is or is not sound business judgment.

In this case, the appellants entered into an indenture, which contained a "dead hand proxy put" provision, Section 11.01, to provide financing for Sierra LP. The directors were not intimately involved with structuring the agreement, but they relied upon the expert advice of a third party attorney who assured them that there were no novel terms requiring their specific attention included in the Indenture.

Furthermore, while the appellants owe a fiduciary duty to their shareholders, they do not owe a duty to the appellee. The appellee is a limited partner of Sierra LP, the general partner who is owned by appellants. Without greatly expanding the already far-reaching *USACafes* doctrine, the appellants do not owe any fiduciary duties to the appellee because Delaware has never imputed a duty of care between the corporate controller and a limited partner, and the actions of appellants were not egregious enough to warrant an equitable application of the duty of loyalty. And, even if this Court were to find such a duty existed, because appellants' actions satisfy the statutory requirements of Delaware General Corporation Law Sections 141 and 144, the breach of alleged duty is not actionable by the appellee.

For these reasons, this court should reverse the decision of the Court of Chancery of the State of Delaware granting summary judgment in favor of the appellee, reverse the denial of the appellants' summary judgment, and grant summary judgment in favor of the appellants.

STATEMENT OF FACTS

Sierra Resources, Inc. ("Sierra Resources") is a Delaware corporation whose common stock is traded on the NASDAQ Global Market. Mem. Op. at 3. It is a full-service real estate company that owns, acquires, develops, and manages primarily office, as well as mixed-use and residential, properties on a nationwide basis. *Id*. at 4. It primarily focuses on the acquisition and ownership of premier properties, both on a consolidated basis and through strategic joint ventures. *Id*. The board of directors is not classified; therefore, members are elected each year. *Id*. at 6. Sierra Resources is the manager and sole member of Sierra GP, LLC, a Delaware limited liability company. *Id*. at 3. Sierra GP, LLC, and the appellee, a public pension fund, formed a joint venture, Sierra Properties, LP ("Sierra LP"), in 2008, to serve as an investment vehicle for a joint venture to develop, redevelop, and invest in high performance, sustainable commercial buildings. *Id*. at 3-4. Sierra Resources contributed $20 million in capital on behalf of Sierra GP, LLC, and the appellee contributed $80 million, making Sierra GP, LLC a 20 percent general partner, and the appellee an 80 percent limited partner. *Id*. As a result of this structure, Sierra Resources exercises indirect but exclusive control over Sierra LP. *Id*. at 3.

In 2013, the appellants believed Sierra LP to be underleveraged, and determined that raising new debt capital would be relatively cheap and could significantly improve profitability. *Id*. at 5. The appellants, with the general endorsement of the appellee, began seeking debt financing in the range of $150 - $175 million. *Id*. On

August 15, 2013, Sierra LP completed a public offering of $160 million in principal amount of 2% Notes. *Id.*

The Indenture associated with that offering, and in question in this case, was prepared by counsel for Morgan Stanley, the lead underwriter in the offering. *Id.* Outside counsel for Sierra LP and Sierra Resources reviewed the draft and provided comments and edits, but Section 11.01 remained unchanged throughout the process. *Id.* The finance committee of the board of directors of Sierra Resources reviewed the Indenture, and one of the directors explicitly asked the company's outside counsel if there were any novel terms requiring special attention. *Id.* at 5-6. The counselor responded negatively. *Id.* at 6.

At the time of the Indenture, there was no indication that any person was planning an election contest to replace one or more of the directors of Sierra Resources. *Id.* In fact, there was no indication that any potential "activist" investor was specifically interested in acquiring a significant equity position in Sierra Resources. *Id.*

On October 12, 2015, High Street Partners, LP ("High Street"), an activist hedge fund, filed Schedule 13D with the Securities and Exchange Commission ("SEC"), indicating that it had acquired approximately 6.3% of the outstanding shares of Sierra Resources. *Id.* The filing stated that High Street intended to propose that Sierra Resources implement a strategy to accelerate distributions through dividends or stock repurchases or both, to sell selected real estate assets, and to explore other strategic alternatives, including a possible sale of the company. *Id.* Further, the filing indicated that

if the board of Sierra Resources declined to implement this strategy, or a similar strategy, High Street might attempt to replace one or more of the directors through a contested solicitation of proxies. *Id.* Presently, High Street has neither begun the contested solicitation process, nor has it identified or proposed nominees to the Sierra Resources board of directors; however, it has recently suggested it would consider doing so if progress is not made to implement the proposed strategies. *Id.* at 6-7.

Sierra Resources has asserted in press releases and investor presentations that if enough High Street nominees are elected to the board to constitute a majority, the proxy put in the Indenture would require Sierra LP to pay off the Notes, which in turn would require Sierra LP to obtain new financing to support that payoff. *Id.* at 7. Sierra Resources has emphasized that the cost of refinancing the Notes would fall in the range from $2 to $3 million, depending upon interest rates and other factors, but that this impact would not be material to Sierra Resources. *Id.* These assertions have been reaffirmed in the current litigation. *Id.* The appellee contends that the financial impact to Sierra LP could be substantially greater than Sierra Resources's estimates, and could even be catastrophic to Sierra LP's equity holders, if alternative financing is not available or prohibitively expensive if required on short notice. *Id.*

ARGUMENT

I. THIS COURT SHOULD REVERSE THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE BECAUSE THE APPELLANTS DID NOT BREACH THEIR FIDUCIARY DUTIES OWED TO THE APPELLEE BECAUSE THEIR ACTIONS ARE PROTECTED BY THE BUSINESS JUDGMENT RULE.

A. QUESTION PRESENTED

Under Delaware Corporate Law, the board of directors are charged with the management of the business and affairs of the corporation, and in doing so, they owe the fiduciary duty of care and the duty of loyalty, of which the duty of good faith is a subsidiary, to the corporation and the shareholders, and when making business decisions, directors are permitted to rely upon the expert advice of properly informed third parties. The appellants entered into an indenture, which contained a "dead hand proxy put" provision, to provide the best terms of financing for Sierra GP, while relying on the expert advice of a third party attorney. Did the board of directors breach their fiduciary duties by approving the inclusion of Section 11.01, the "dead hand proxy put" provision, in the trust indenture?

B. SCOPE OF REVIEW

This Court reviews a Court of Chancery decision to grant summary judgment de novo. *See, e.g. Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1152 (Del. 2002). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428 (Del. 2005) (citation omitted). Because both parties agree on the material facts of this case, the only issue before this Court is whether, as a matter of law, Sierra GP LLC, Sierra Resources, Inc.,

The Bank of New York Mellon Trust Company, N.A., and the board of directors for Sierra Resources, Inc., as Individual Defendants, collectively "appellants," breached their fiduciary duties owed to Sierra LP, as the sole general partner, when they entered into the trust indenture dated August 16, 2013 ("the Indenture"), containing Section 11.01.

C. MERITS OF THE ARGUMENT

"The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." 8 Del. C. § 141(a) (2016). Title 8, Section 141(a) of the Delaware General Corporation Law ("D.G.C.L.") grants to the board of directors of a corporation the power to manage the business and affairs of the corporation. In pursuit of this responsibility, "the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders." *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989) (citation omitted). "The failure [of the directors] to act in good faith may result in liability because the requirement to act in good faith 'is a subsidiary element[,]' i.e., a condition, 'of the fundamental duty of loyalty.'" *Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006). Title 8, Section 141(e) of the D.G.C.L. protects board members who rely in good faith upon "information, opinions, reports, or statements presented to the corporation" by any person knowledgeable of the issue at hand, and who has been determined to possess expert or professional competence

and is "selected with reasonable care by or on behalf of the corporation." 8 Del. C. § 141(e) (2016).

1. Appellants did not breach the fiduciary duties of care or loyalty owed to Sierra LP, and as such, their decision to enter into the trust indenture is protected by the business judgment rule because they acted on an "informed basis," "in good faith," and with the "honest belief" their action was taken in the "best interests of the company."

The business judgment 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 the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Under the business judgment rule, "a court will not interfere with the judgment of a board of directors unless there is a showing of gross and palpable overreaching." *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). Additionally, when the board's decisions can be attributed to any rational business purpose, "[a] court . . . will not substitute its own notions of what is or is not sound business judgment." *Id*. The facts of this case show that the appellants did not breach their fiduciary duty of care because their actions were protected by the business judgment rule.

(a) The appellants' actions are protected by the business judgment rule because they acted on an "informed basis," as they reasonably informed themselves prior to making a business decision, of all material information reasonably available to them.

In *Smith v. Van Gorkom*, this Court held that the directors of Trans Union breached their fiduciary duty by failing to "inform themselves of all information reasonable available to them and relevant to their decision" to recommend the merger of their company. 488 A.2d 858, 893 (Del. 1985). Additionally, the Court noted that

"[t]he determination of whether a business judgment is an informed one turns on whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.'" *Id.* at 872 (citation omitted). In this case, the Chairman and Chief Executive Officer, Van Gorkom, engaged in negotiations with a third party for a cash-out merger. *Id.* at 865. Prior to the negotiations, Van Gorkom roughly estimated the value of the company's stock, with no evidence as to how he came up with this estimate, other than the current stock price, and agreed in principle on a merger prior to receiving authorization from the board. *Id.* at 865-70. Van Gorkom first presented the merger to the senior managers, who reacted very negatively, and then to the board of directors, who approved the merger, based mostly on an oral presentation by Van Gorkom. *Id.* The meeting was very brief and the board was not given an opportunity to review the merger agreement before or during the meeting, and they had no documents summarizing the merger, nor did they have any justification for the sales price per share. *Id.*

The appellants in this case were vastly more informed about the terms of the Indenture than the board of directors in *Van Gorkom* were about the terms of their merger. The initial draft of the Indenture was prepared by the counsel for Morgan Stanley, but Sierra Resources' outside counsel reviewed the draft and provided a variety of comments and suggested edits. Section 11.01 was not altered during this process, and it is clear that no representative of the appellants encouraged or suggested its inclusion, nor was it ever a topic of communication.

A member of the Sierra Resources finance committee specifically asked the outside counsel if there were any novel terms in the indenture that demanded special attention, and the counsel responded that there were not. Section 141(e) of the D.G.C.L. explicitly states that committee members may rely on another person's professional or expert competence when making good faith decisions for the entity. 8 Del. C. § 141(e). Therefore, the appellants acted on an "informed basis" with regard to the terms of the Indenture, as they apprised themselves of all material information reasonably available to them.

(b) The appellants' actions are protected by the business judgment rule because they acted in "good faith," and because they acted with the "honest belief that the action taken was in the best interests of the company."

In *In re Walt Disney Company Derivative Litigation*, this Court noted that the duty to act in good faith is essentially the duty to not act in bad faith, and there are at least three separate categories of "bad faith." 906 A.2d 27, 63-64 (Del. 2006). The first category includes "fiduciary conduct motivated by an actual intent to do harm," called "subjective bad faith." *Id.* at 64. The second category includes fiduciary action "taken solely by reason of gross negligence and without any malevolent intent." *Id.* This court has concluded that gross negligence, which includes a failure to inform one's self of available material facts, without more, does not constitute bad faith. *Id.* at 64-65. The third category lies between the first two, and fits the definition of an "intentional dereliction of duty, a conscious disregard for one's responsibilities." *Id.* at 66. This court has held that this misconduct is to be treated as a "non-exculpable, nonindemnifiable violation of the fiduciary duty to act in good

faith." *Id*. This rule is to protect the interests of corporations whose directors have "no conflicting self-interest in a decision, yet engage in misconduct that is more culpable than simple inattention or failure to be informed of all facts material to a decision." *Id*. Additionally, the Delaware legislature has recognized an intermediate category of fiduciary misconduct by exculpating directors for conduct only amounting to gross negligence in Section 102(b)(7) of the D.G.C.L., and expressly denying exculpation for "acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law." 8 Del. C. § 102(b)(7) (2015).

In this case, the appellants do not fall into any of these three categories of "bad faith" action as they did not possess "actual intent to do harm," nor did they act with an "intentional dereliction of duty" or a "conscious disregard for their responsibilities." Finally, their action falls outside the second category of gross negligence without malevolent intent. The appellants were personally unaware of the intricate specifications contained in Section 11.01, yet they specifically inquired about any novel terms included in the Indenture. As such, they are protected from gross negligence because they relied upon the expert competence of the outside counsel, as permitted by Section 141(e) of the D.G.C.L. 8 Del. C. § 141(e). Therefore, the appellants' actions are protected by the business judgment rule because they acted in "good faith."

Additionally, the board acted with the "honest belief that the action taken was in the best interests of the company." This is proven by their reasonable belief that the interest rate on the indenture

would have increased by up to 50 basis had Section 11.01 not been included. Mem. Op. at 9.

II. This Court should reverse the grant of summary judgment because the appellants do not owe the appellee fiduciary duties, and even if they did, compliance with sections 141(e) and 144(a) of the D.G.C.L. holds the appellants blameless for any alleged violation.

A. Question Presented

Whether Sierra Resources and the Individual Defendants owe a fiduciary duty to the North Carolina Police Retirement Fund under the *USACafes* doctrine, when the doctrine has been avoided by the Court of Chancery in cases except those of the most egregious actions by the general partner; and, whether there could have been a violation of fiduciary duties when Sierra Resources acted with care under D.G.C.L. 141(e) and without knowledge of the clause that is the base of the alleged loyalty violation?

B. Standard of Review

Summary judgment is granted where there is no genuine issue of material fact, and the moving party, when the facts are view most favorable to the nonmoving party, is entitled to a judgment as a matter of law. *In re Krafft-Murphy Co., Inc.,* 82 A.3d 696, 702 (Del. 2013) and Super. Ct. Civ. R. 56(c). Both the facts and law in a grant of summary judgment by the Court of Chancery is reviewed by this Court *de novo. LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 190 (Del. 2009). Because both parties agree there is not an issue of material fact, the only issue to be reviewed before the Court is whether, as a matter of law, the appellants owed fiduciary duties to the appellee.

C. Merits of Argument

1. Sierra Resources and its directors do not owe fiduciary duties to a limited partner inside a limited partnership in which Sierra Resources is not directly involved.

The Supreme Court of Delaware has never found fiduciary duties to be owed from an outside controller of a general partner to the limited partners inside of their limited partnership. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 671 (Del. 2012). The Court of Chancery has found, in some unique cases, that there may be fiduciary obligations placed on directors of a corporation, that serves as the general partner, when those directors utilize the limited partners' assets to benefit themselves at the expense of the limited partners. *In re USACafes, L.P. Litig.*, 600 A.2d 43, 49 (Del. Ch. 1991). However, the decision has received much backlash, particularly when the Court of Chancery has distinguished and limited this ruling on multiple occasions, and it has even noted this Court's ability to overturn "the tensions created by *USACafes*." *Feeley*, 62 A.3d at 671.

In the case at bar, the appellee has listed many defendants, much more than just the general partner, Sierra GP, to be held liable for the alleged breach of fiduciary duties. Appellee is arguing that Sierra Resources, the parent company of the general partner, and its directors should be held liable as if they were the general partner themselves. In asking the court to do this, they relied heavily on *USACafes*, where this Court held that a corporation's directors, when the corporation is the general partner, owe fiduciary duties to the limited partner(s). 600 A.2d at 48-49. However, *USACafes* does not factually resemble the case at bar in more than one controlling way.

The parties in *USACafes* were a limited partnership with a corporate general partner, USACafes, Inc. *Id.* at 45. Metsa Acquisition Corp. was a corporation who sought to purchase the assets of the limited partnership USACafes L.P. *Id*. USACafes, Inc.'s stock was owned by the Wyly brothers, who also made up one-third of the six director board for the corporation. *Id.* at 45-46. Thus, under the operation of limited partnerships, the Wyly brothers and other directors had complete control of USACafes LP's assets, as they were the directors of USACafes, Inc., the general partner. Furthermore, under corporate law, the Wyly brothers were dually culpable, as they retained complete control of USACafes, Inc., by being the sole shareholders, allowing them to elect the full board of directors, thereby ensuring that those elected were individuals willing to do their bidding alongside them.

The limited partners of USACafes LP sued for a breach of fiduciary duties, naming in the suit USACafes, Inc. and its directors, who were all directly involved with the limited partnership. *Id.* at 46. The breach of duty was based on the fact that the sale of the assets occurred at an unreasonably low price and the limited partners attributed this low price to the fact that the directors all received side payments from Metsa Acquisition Corp, the purchaser, totaling fifteen to seventeen million dollars. *See Id. and McGowan v. Farrow,* No. CIV.A. 18672-NC, 2002 WL 77712, at *3 (Del. Ch. Jan. 11, 2002).

This constituted a payment to the directors of the corporate general partner totaling nearly 25% of the total asset purchase payment. *Id*. The court found this to be an egregious and "grossly excessive" payment that was not linked to any consideration. *USACafes*,

600 A.2d at 56. The court concluded that "[t]hese alleged activities amount[ed] to more than simple arm's-length negotiations involving conventional collateral agreements." *Id.* Never before had Delaware extended a fiduciary relationship in this context. *See Id.* at 48. But because the corporate general partner, USACafes, Inc., and its directors so flagrantly self-dealt, essentially liquidating USACafes LP's assets while taking a massive cut solely for themselves, that the court created this legal fiction, ruling that there were fiduciary duties owed by the general partner's corporate directors to the limited partners and that these duties had been breached.

USACafes, while is has not been widely praised doctrine in corporate law, has been follow and expanded by the Delaware Court of Chancery as "a particularly odd pattern of routine veil piercing." Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, RESEARCH HANDBOOK ON P'SHIPS, LLCS AND ALT. FORMS OF BUS. ORGS. 11, 21 (Robert W. Hillman & Mark J. Loewenstein eds., 2015). Chancellor Allen realized the necessity for the court to act equitably in *USACafes*, but knew that his ruling was one that stretched the norms of Delaware law as evidenced by declining "to delineate the full scope of [the] duty." USACafes, 600 A.2d at 49. Only that it "surely entails the duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership." *Id.* To promote the interests of justice, the chancellor created an equitable doctrine that, at most, should only be applied in the most serious of cases.

While it is in tension with "corporate separateness and the application of fiduciary principles," the court has continued applying the *USACafes* doctrine. *Feeley*, 62 A.3d at 671. However, the only duty necessarily imputed from *USACafes* is a duty of loyalty. *Id.* at 670-71. "[W]hile the parties in control of a corporate general partner are fiduciaries, the duties they owe 'may well not be so broad as the duty of the director of a corporate trustee.'" *Id.* at 671 (quoting *USACafes,* 600 A.2d at 49). Using the greatly needed wiggle room provided by Chancellor Allen, the Court of Chancery has continued to reject plaintiff's requests to extend *USACafes* beyond the duty of loyalty claims. *Id.* at 672. "[A general partner] cannot be sued in [a] capacity of breach of the duty of care." *Ciaola Family Tr. v. PWA*, No. CV 8028-VCP, 2015 WL 6007596, at *26 (quoting *Feeley,* 62 A.3d at 667)(citation omitted)(Del. Ch. Feb. 3, 2016).

In the case before the court, the appellants failed to notice the dead hand proxy put clause that has brought about this claim. In the Court of Chancery opinion, Chancellor Snyder stated that "[i]t is unnecessary for the Court to determine whether [Sierra Resources] breached a fiduciary duty of care or loyalty, or both. At a minimum, [Sierra Resources] failed to exercise adequate care. . . ." Mem. Op. at 10. The duty of care can be an inviting breach to settle on as simply not informing themselves of reasonably available information can result in a breach of care. *Smith*, 488 A.2d at 893. This was where Chancellor Snyder ended his analysis on the claims made by the appellee, at the breach of the duty of care. But, as stated above in *Feeley*, the duty of care is imputed onto the directors of a corporate

general partner. 62 A.3d at 667. For this reason, the Chancellor mistakenly found a duty of care which he determines was breached by Sierra Resources. There had never been a duty of care owed to the appellee from the appellants. And furthermore, under the innocent facts of this case, there is not an actionable breach of loyalty to the appellee either.

The Court of Chancery has heard cases where plaintiffs have relied on *USACafes* to establish a fiduciary duty and the court has found the facts to not necessitate any fiduciary protections. In one such case, the court strayed from applying the *USACafes* doctrine to a less egregious self-interested action. In *2009 Caiola Family Trust v. PWA, LLC*, the Caiola Family Trust (CFT) invested with PWA, LLC (PWA) in a real estate venture in Kansas. 2015 WL 6007596, at *1. PWA held 10% of the investment but was the managing member of the limited liability company, and thus held control of CFT's assets, making up 90% of the venture. *Id.* While the *Caiola Family Trust* case involves a Delaware limited liability company, the applicable law is relevant to the limited partnership in question. Del. Code. Ann. Tit. 6, §18-1101(b); *id.* § 17-1101(c). Further establishing a relation between the two business entities is this Court's analysis in *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1998) (stating that limited liability companies and limited partnerships are similar in fiduciary regards), which instructs that the duties of a managing member of a limited liability company mirrors that of the general partner in a limited partnership.

In the aforementioned trust case, the Caiola Family Trust entrusted PWA with their investment as PWA held the decision making power. *Caiola Family Tr.* 2015 WL 6007596, *at *1.* Katz was the managing member—the decision maker—of PWA, thus he individually controlled the Caiola Family Trust's investment. *Id.* at *1-2. Katz had hired an asset manager, NDC, to assist in managing this investment and they had set forth guidelines on when NDC was to get paid for its services. *Id.* at *2, 6. The alleged breach of fiduciary duties comes into play with NDC, the asset manager, being partners with Katz in another property. *Id.* at *1.

As time went on, the CFT became disgruntled with some of the dealings and brought suit, alleging that, among other things, Katz was improperly paying NDC. *Id.* at *26. CFT believed this to be self-dealing, as Katz was paying NDC, his partner in a separate venture, out of CFT's funds unnecessarily so that Katz could keep a good relationship with NDC. *Id.* CFT claimed that, under *USACafes*, Katz owed them a fiduciary duty of loyalty as he controls their property and that he breached it when he paid his business partner, in which he has a separate interest in, out of the funds containing CFT's investment. *Id.* at *25. However, the Court of Chancery did not find that these payments—even with Katz's knowledge of being on both sides of the transaction—to be a breach of fiduciary duty. *Id.* at *26.

There is a clear factual difference between Katz's actions and those of the general partner in *USACafes*. The *USACafes* partner usurped millions of dollars' worth of the limited partner's assets. Whereas Katz, in *Caiola Family Trust*, albeit knowingly, acted with self-

interest in a far less egregious manner. Even though Katz's actions were beneficial to him while being detrimental to the limited liability company, the Court of Chancery did not apply the *USACafes* doctrine as the actions of Katz were not as grossly self-interested, allowing the court to distinguish the case from the *USACafes* doctrine. This case, and others, show that the test for applying *USACafes* is not just a question of if there were self-interested actions, but also a question of the degree in which the controlling party self-dealt. *See Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963 (Del. Ch. 2000); *McGowan*, 2002 WL 77712 (the Court of Chancery agreed that a promised salary was not the same as the "large and egregious" side payments of *USACafes*).

In the case between Sierra Resources and the appellee, the fact pattern is even more innocent than that of *Caiola Family Trust*. In the present case, the wrongful act in question is all over a convoluted clause in a contract, the dead hand proxy put. This clause was inserted into Section 11.01 of a loan agreement that was written by the counsel of Morgan Stanley and not noted as a novel term by Sierra Resources board of directors. This is not an act that suggests an egregious or "grossly excessive" abuse of power by the appellants.

The directors' failure to take action against the dead hand proxy put is lesser of a loyalty violation than that of Katz's knowingly paying the asset manager, and it does not even slightly resemble the actions of *USACafes* corporate general partner. Because the actions of Sierra Resources do not amount to a loyalty violation, and because a duty of care is not imputed to the controlling entity of a general

partner under Delaware's limited partnership law, Sierra Resources' actions did not violate any fiduciary duties owed to the appellee.

2. Sierra Resources could not have violated a fiduciary duty of care as they fulfilled the requirements set forth in DGCL 141(e) and they could not have violated a duty of loyalty without knowing that they were acting self-interested.

While Delaware's limited partnership law does not recognize a fiduciary duty between the controller of a general partner and the limited partners, if this Court finds that there are fiduciary duties owed, Sierra Resources did not breach them.

The Delaware legislature has provided an incentive for directors to consult experts and counsel from individuals who the directors have a reasonable belief that what they are discussing falls within the individual's professional competence. 8 Del. C. § 141(e). So long as a director reasonably relies on one of these experts, they are presumed to have met their fiduciary obligation of care. *Id.* Actors who commonly fall underneath D.G.C.L.'s section 141(e) are officers and attorneys making up the corporation's counsel. In this case, the directors of Sierra Resources asked their "outside counsel if there were any novel terms that required attention from the committee or board." Mem. op. at 6. With the counsel replying no to Sierra Resources inquiry, the directors are shielded from fiduciary duty of care claims. This is an extremely important protection, as without it, "[directors would be snowed under with paper . . . [and] directorship would become an extremely hazardous job." Rokas, Alexandros, *Reliance on Experts from a Corp. Law Perspective*, Am. Univ. Bus. L.R. 2, no. 2 (2013) at 329(internal quotations omitted and citation omitted).

D.G.C.L. 141(e) states that directors will "be fully protected" if they reasonably rely on these experts. 8 Del. C. § 141(e). This Court did rule in *Brehm v. Eisner*, 746 A.2d 244, 262 (Del. 2000), that to reject a director's protection from this reliance a complaint with particularized facts must show that there was something wrong with the director's reliance. Because the presumption is that the directors properly relied on the experts, *Ash v. McCall*, No. CIV.A. 17132, 2000 WL 1370341, at *9 (Del. Ch. Sept. 15, 2000), it was up to the appellees to prove that the reliance was misplaced. Because they have failed to do so, Sierra Resources has met any fiduciary duty of care that could be imposed by meeting the reliance requirements set forth in D.G.C.L. 141(e).

The duty of loyalty, the second duty that has been established to not be owed, is further rebutted by D.G.C.L. 144(a)(3). 8 Del. C. §144(a) (2016). In relevant part, this statute states, "No contract or transaction . . . shall be void or voidable solely for [reason of a conflict of interest] . . . if: (3) The contract or transaction is fair as to the corporation as of the time it is authorized . . . ." *Id*. There are exemplary points as to why the loan agreement, including the dead hand proxy put, was fair to the corporation at the time of its passing.

The first reason as to why the loan agreement was fair is that the board of directors had no reason to agree to it if it was not wholly beneficial to the corporation. It is clear from the memorandum opinion that the Sierra Resources directors did weigh in or account for any potential benefit to them from agreeing to the loan

provisions, except for those benefits that would come from helping the corporation. Had the directors known of opportunity to self-deal, it would be easier to argue that they approved an unfair agreement to help ensure their re-election, but this is not the case.

Secondly, evidence submitted to the Court of Chancery has shown that the loan rate would have been up to fifty basis points higher had the board fought the dead hand proxy put clause. With Sierra Resources being a fairly stable company, with no history of turnovers, the board would have likely chosen to include the dead hand proxy put out of a disinterested motive to save Sierra LP the up to $800,000 annually in additional interest expense. This is a substantial amount of money that greatly offsets the possibility of the note coming due at an earlier time, resulting in it being a fair agreement.

Because the D.G.C.L. allows a protection against a breach of the duty of care under 141(e) and protections for fair transactions under 144(a)(3) and because Sierra Resources meets the requirements for these protections, there were no breaches of fiduciary duties to the appellees.

CONCLUSION

Because the appellants did not breach their fiduciary duties owed to the appellee, their actions are protected by the business judgment rule. Additionally, the appellants do not owe the appellee fiduciary duties, and even if they did, compliance with Sections 141(e) and 144(a) of the D.G.C.L. holds the appellants blameless for any alleged violation. For these reasons, the appellants respectfully request that this Court REVERSE the Court of Chancery’s grant of appellee’s motion

for summary judgment, REVERSE the denial of appellant’s motion for summary judgment, and GRANT summary judgment in favor of the appellants.

Respectfully submitted,
/s/Team I
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