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
Appellants,	:	
	:	On Appeal from the Court of Chancery of the State of Delaware
v.	:	
NORTH CAROLINA POLICE RETIREMENT FUND, individually and derivatively on behalf of SIERRA PROPERTIES LP,	:	C.A. No. 12871-CS
Appellee.	:	

Appellants' Opening Brief

Team M
Counsel for Appellants
February 3, 2017

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NATURE OF PROCEEDINGS

Appellees, Plaintiffs below, commenced a derivative lawsuit on January 20, 2016, in the right of Sierra LP. TO at 1[1]. Appellants, Defendants below, filed a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6) to dismiss the complaint. *Id*. Pursuant to Rule 12(b), the Court treated the defendants' motion to dismiss as a motion for summary judgment. *Id*. Appellees filed a cross motion for summary judgment. Chancellor Snyder granted summary judgment for Appellees on January 9, 2017. *Id*.

Appellants filed a Notice of Appeal with the Supreme Court of the State of Delaware on January 11, 2017. Appellants request this Court reverse the Chancery Court's order granting summary judgment for Appellees and grant the Appellants' motion for summary judgment because: (1) the Chancery Court erred in holding the limited partners owed fiduciary duties to each other; (2) the Chancery Court erred in holding the Appellants violated their fiduciary duties of care and loyalty; and (3) because the Chancery Court erred in holding the dead hand proxy put provision was per se illegal.

[1] Henceforth, TO represents the Chancery Court Trial Order.

SUMMARY OF THE ARGUMENT

This Court should overturn the Chancery Court's holding that the Indenture § 11.01 violates the Appellants' fiduciary duties to NCPRF as a limited partner and the partnership. Limited partners have the freedom to contract out of their fiduciary duties to one another. A general partner does owe fiduciary duties to the partnership, but cannot pierce the corporate shield to hold Sierra GP's board of directors liable.

This Court should overrule the Chancery Court's findings that the board of directors did not breach their fiduciary duty of care. Since § 11.01 was adopted when there was no threat of a hostile takeover, the duty of care is measured pursuant to the business judgment rule. This Court should hold that under this standard, the board of directors' legitimate business purpose for approving § 11.01 was to obtain notes from the bank at a significantly lower interest rate. The board of directors does not need to meet a best practices standard in making a business decision, but simply a reasonable person standard. This Court should also affirm the Chancery Court's findings that the board of directors did not breach their fiduciary duty of loyalty because the transaction was not self-interested and the board of directors acted in good faith.

This Court should also overturn the Chancery Court's findings that § 11.01's dead hand proxy put nature is not per se illegal. The specific facts of this case prove the provision was enacted on a clear day since it was not approved under threat of a hostile takeover. Likewise, the provision was approved in good faith because its sole

purpose was to elicit notes from the bank at an interest rate more favorable for the partnership.

STATEMENT OF FACTS

Sierra LP is composed of two limited partners; Sierra GP, the sole general partner, and the North Carolina Police Retirement Fund (NCPRF). TO at 3. Sierra GP is a 20% limited partner, while the NCPRF is an 80% limited partner. *Id*. Sierra GP is managed by Sierra Resources, which is a full-service real estate company. *Id* at 4. Sierra Resources has previously engaged in joint ventures through subsidiaries such as Sierra GP and Sierra LP. *Id*.

Sierra LP is the "investment vehicle" for a joint venture between NCPRF and Sierra GP to develop and invest in sustainable commercial buildings. *Id*. Their limited partnership agreement signed on October 13, 2008, specifically eliminated Sierra GP's fiduciary duties as a limited partner. *Id* at 4-5.

In early 2013, the Appellants realized that Sierra LP was underleveraged. *Id* at 5. To improve Sierra LP's profitability, Sierra GP sought out to secure approximately $150-$175 million in debt financing with Appellee's approval. *Id*. Sierra GP succeeded and on August 15, 2013, Sierra LP achieved a public offering of $160 million in two percent Notes. *Id*.

Along with this public offering, the parties also entered into the Indenture challenged in this proceeding. TO at 5. Counsel for Morgan Stanley originally drafted this Indenture and counsel for Sierra LP and Sierra Resources reviewed the draft and offered their own edits and suggestions. *Id*. § 11.01, the section at issue, remained

unchanged from Morgan Stanley's construction to the Indentures final acceptance and execution. TO at 5. Neither party sought to edit or exclude § 11.01 from the Indenture. *Id*. Likewise, neither party suggested to Morgan Stanley that § 11.01 should be included in the Indenture. *Id*. When Sierra Resources' board of directors approved the Indenture, one director asked outside counsel if any of the Indentures terms "required attention," to which outside counsel responded no. *Id* at 6. At this time, neither party knew of approaching any hostile takeover threat. *Id*.

On October 12, 2015, High Street Partners, LP (High Street) made a filing with the SEC stating that it acquired roughly 6.3% of Sierra Resources outstanding shares. *Id*. High Street stated in its Schedule 13D its intention to propose various new strategies to Sierra Resources. *Id*. High Street's proposal to Sierra Resources proposed a combination of "(i) accelerating distributions through dividends or stock repurchases or both, (ii) selling selected real estate assets, and (iii) exploring other strategic alternatives, including a possible sale of the company." *Id*. High Street also stated their intention to replace Sierra Resources' directors if they did not implement these changes. *Id*. at 6.

Following the filing of High Street's Schedule 13D, Sierra Resources stated in press releases and presentations that if High Street made significant changes to the board, the proxy put in the Indenture would be triggered. *Id* at 7. If this occurred, Sierra LP would be required to pay off the Notes requiring new financing to deal with a $2 to $3 million financial impact. *Id*. The parties agree that

triggering the proxy put would substantially or even catastrophically impact the partnership's equity holders. TO at 7.

ARGUMENT

I. § 11.01's INCLUSION IN THE INDENTURE DID NOT VIOLATE SIERRA GP'S FIDUCIARY DUTIES TO THE APPELLEES AS LIMITED PARTNERS.

A. QUESTION PRESENTED

Do limited partners owe the same fiduciary duties as general partners?

Can the Appellants pierce the general partnership's corporate shield to hold the board of directors liable?

B. SCOPE OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact, meaning the moving party is entitled to judgment as a matter of law. Ct. Ch. R. 56(c). The moving party has the burden to demonstrate there are no genuine issues of material fact. The court views these facts in the light most favorable to the nonmoving party, drawing its own conclusions to determine if there is an issue of fact that warrants a trial on its merits. *Bershad v. Curtiss- Wright Corp.*, 535 A.2d 840, 844 (Del. 1987). "Whether the Chancellor correctly formulated the legal standard" is a question of law that is reviewed de novo. *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 48 (Del. 2006). The trial court's factual findings regarding these fiduciary duties is afforded "substantial deference unless clearly erroneous or not the product of a logical and deductive reasoning process." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

C. MERITS OF THE ARGUMENT

i. This Court should grant summary judgment for the Appellants because the limited partners limited their liabilities in their Partnership Agreement.

Sierra GP, through the individually named board of directors, did not violate its fiduciary duties to the Appellees as limited partners because Sierra GP fairly negotiated the Indenture with the Appellees in good faith. When contracting to include a proxy put in a contract, a board's duty is to focus on the best interests of the stockholders. *Kallick v. SandRidge Energy, Inc.*, 68 A.3d 242, 249 (Del. Ch. 2013). Managers of LLCs do owe fiduciary duties unless they are eliminated, restricted, or displaced by explicit language in the operating agreement. *Feeley v. NHAOCG, LLC.*, 62 A.3d 649, 660 (Del. Ch. 2012). Similarly, the general partner in a limited partnership is also assumed to owe fiduciary duties unless they are eliminated or restricted by the partnership agreement. 6 Del. C. § 17-1101(d). Passive limited partners do not owe fiduciary duties to other passive limited partners unless they assume fiduciary duties by taking on an active role in management. *Feely*, 62 A.3d at 662. Likewise, a "person" might not owe fiduciary duties to the partnership unless they are an officer or agent of the partnership. *Id.*

Since the Appellees are a limited partner in the general partnership with Sierra GP, Sierra GP does not owe fiduciary duties to the Appellee. Even though Sierra GP is both the general partner and a 20% limited partner, fiduciary duties are not owed to the Appellees because the Limited Partnership Agreement contains provisions which either limit or eliminate Sierra GP's duty of care. TO at 4, 5. While

the parties agree that these provisions do not bar the relief sought, Sierra GP is still not liable for any breach of fiduciary duties because its role in the Indenture approval did not breach its default duty of care. TO at 4, 5.

ii. This Court should grant summary judgment for the Appellants because the Appellees have not plead sufficient facts to warrant piercing Sierra GP's corporate shield.

Sierra Resources' board is not liable in this case because the Appellees did not plead with enough certainty that the general partner is no longer significantly independent. If a limited partnership agreement either provides for or revises the fiduciary duties, a claim of a breached fiduciary duty must be analyzed according to the terms of the partnership agreement. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170, 171 (Del. 2002). The Court found in *Gotham Partners* that since the partnership agreement provided the fiduciary duties, then the partnership agreement also provided the standard for determining if the general partner breached its duties to the partnership. *Id.* at 171.

In order for a plaintiff to successfully pierce the corporate veil of a general partner, it must "allege facts that, if taken as true, demonstrate the Officers' and/or the Parents' complete domination and control of the [g]eneral [p]artner." *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1183-84 (Del. Ch. 1999). This degree of control must be so exclusive and so dominating that the general partner "no longer ha[s] legal or independent significance of [its] own." *Id.* at 1184. This standard also applies under the alter ego doctrine, which also "requires that

the corporate structure cause fraud or similar injustice." *Wood*, 752 A.2d at 1184.

The board of directors is not liable for any breach of fiduciary duties because Appellees did not sufficiently plead facts to prove Sierra GP is no longer independent. Likewise, the Appellees also did not sufficiently plead that Sierra GP is promoting any fraud or injustice. § 11.01's approval in the Indenture agreement was equally approved by both parties during its drafting stages. TO at 5. Neither party even edited or commented on its existence and a board member of Sierra Resources did ask its lawyers if any part of the Indenture had any unusual provisions. *Id.* at 5, 6. Moreover, neither Morgan Stanley nor Sierra GP or its board suggested including § 11.01 in the Indenture. *Id.* at 5. Its inclusion occurred as an industry standard only to earn notes with significantly lower interest rates from the bank. *Id.* at 9.

II. THIS COURT SHOULD HOLD THAT THE APPELLANTS DID NOT BREACH THEIR FIDUCIARY DUTY OF LOYALTY PURSUANT TO THE ENTIRE FAIRNESS STANDARD.

A. QUESTIONS PRESENTED

Did the directors satisfy the entire fairness test and their fiduciary duty of loyalty in approving Indenture § 11.01?

B. SCOPE OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact, meaning the moving party is entitled to judgment as a matter of law. Ct. Ch. R. 56(c). The moving party has the burden to demonstrate there are no genuine issues of material fact. The court views these facts in the light most favorable to the nonmoving party,

drawing its own conclusions to determine if there is an issue of fact that warrants a trial on its merits. *Bershad,* 535 A.2d at 844. The trial court's findings regarding duty of care and duty of loyalty involve questions of law which this Court reviews de novo. *Technicolor,* 634 A.2d at 360. "Whether the Chancellor correctly formulated the legal standard" is a question of law that is reviewed de novo. *Walt Disney Co.*, 906 A.2d at 48. The trial court's factual findings regarding these fiduciary duties is afforded "substantial deference unless clearly erroneous or not the product of a logical and deductive reasoning process." *Technicolor*, 634 A. 2d at 360.

C. MERITS OF ARGUMENT

i. This Court should hold the Appellants' decision to include § 11.01 in the Indenture was per se legal because it satisfied their fiduciary duty of loyalty and was not included in bad faith.

In order to prove that a breach of a fiduciary duty occurred, the Appellees must show: "(i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in the breach by the non-fiduciary defendants, and (iv) damages proximately caused by the breach." *In re Rural Metro Corp.*, 88 A.3d 54, 80 (Del. Ch. 2014) (citing *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001).

There are at least three recognized categories of fiduciary behavior that are considered "bad faith." *Walt Disney Co.*, 906 A.2d at 64. The first is subjective bad faith which is conduct motivated by an intent to do harm. *Id.* The second category is the opposite; it includes acts taken "by reason of gross negligence and without any

malevolent intent." *Walt Disney Co.*, 906 A.2d at 64. The third category falls between the two; dereliction of duty, or "a conscious disregard for one's responsibilities." *Id.* at 66. The legislature recognized the distinction between the fiduciary duty of care and the duty of good faith in their passages of DGCL 102(b)(7) (allowing one to disclaim the duty of care) and in § 145 of Delaware Chapter 8 (allowing indemnification for liability incurred for violating the duty of care but not the duty of good faith.) *Id.* at 65, 66.

The Chancery Court previously held that to find a failure to act in good faith, the fiduciary must intentionally act with a purpose other than that of advancing the corporation's best interests, intentionally act to violate the law, or fail to act in the face of a known duty to act. *Id.* at 67.

The Appellees cannot meet the second prong from *In re Rural Metro Corp.* because the Appellants did not breach any fiduciary duty. Sierra GP did not act in bad faith when its board approved the Indenture containing § 11.01 because it only intended to advance the corporation's best interests. In 2013, the partnership needed more capital to continue funding its projects. TO at 5. To secure this capital, the partners agreed to secure Notes. *Id.* Both parties read and edited the Indenture before its acceptance and neither party commented on § 11.01. *Id.* In the board meeting where Sierra GP approved the Indenture, one board member asked the attorneys if there were any unusual provisions in the Indenture, to which the attorneys answered there were none. *Id.* at 5, 6. Moreover, Morgan Stanley and the partnership used § 11.01 to bargain with the bank to obtain notes

with a significantly more favorable interest rate of 2%, which benefits the partnership by lessening their financial liabilities. TO at 9.

ii. This Court should hold that Appellants' decision to include § 11.01 in the Indenture was per se legal because it was not a self-interested transaction.

To avoid making a self-interested transaction, the fiduciary must act in the best interests of the shareholders and fully disclose both the facts of the conflict and the details of the transaction. 1-15 Del. Corp. L. and Prac. § 15.02, *The Fiduciary Obligation* LEXIS (updated as of 2016). A self-interested transaction occurs when the fiduciary creates and derives an "'improper personal benefit' from the transaction." *In re Dole Food Co.*, 2015 Del. Ch. LEXIS 223, at *128 (Aug. 27, 2015). A self-interested transaction is subject to the entire fairness standard under which the fiduciary must prove their transaction was the result of a fair process with fair terms. *In re Boston Celtics Ltd. Pshp. Shareholders Litig.*, 1999 Del. Ch. LEXIS 166, at *9 (Aug. 6, 1999).

When a breach of the fiduciary duty of loyalty or good faith is properly alleged, the appropriate standard to measure the fiduciary's behavior is the entire fairness test. To prove a deal fair as to process, the Court relies largely on available facts and analyzes "when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983.) Moreover, when analyzing a boilerplate provision, the provisions legitimacy does not always

depend upon the "particularized intentions of the parties" and is determined as a matter of law. *Sharon Steel Corp v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d. Cir. 1982).

Here, the Appellants fairly negotiated and accepted § 11.01 in the Indenture because its inclusion as a provision standard in the industry could have been edited or removed by either the Appellants or the Appellee. When Morgan Stanley attorneys drafted the Indenture, they included the boilerplate language of § 11.01 as they would in any other indenture agreement. TO at 5. Both parties submitted edits and revisions before the Indentures acceptance and neither party indicated any concern regarding § 11.01. *Id*. While the Appellees may argue Sierra GP's board would preserve their position as board members with the provision, the provision was not created by the Appellants but third party drafters. *Id*. Moreover, the provision was included by Morgan Stanley to elicit notes with a 2% interest rates instead of a more unfavorable rate fifty points higher. *Id*. Thus, the provision was not included to favor Sierra GP's board or to derive for them an "improper personal benefit" but to benefit the partnership by securing notes with a more favorable interest rate.

III. THIS COURT SHOULD HOLD THAT THE APPELLANTS DID NOT BREACH THEIR FIDUCIARY DUTY OF CARE PURSUANT TO THE BUSINESS JUDGMENT RULE.

A. Question Presented

Did the blind approval of § 11.01 violate the Appellants' fiduciary duty of care?

B. Standard of Review

Summary judgment is appropriate when there are no genuine issues of material fact, meaning the moving party is entitled to judgment as a matter of law. Ct. Ch. R. 56(c). The moving party has the burden to demonstrate there are no genuine issues of material fact. The court views these facts in the light most favorable to the nonmoving party, drawing its own conclusions to determine if there is an issue of fact that warrants a trial on its merits. *Bershad,* 535 A.2d at 844. "The Court of Chancery's legal conclusions are subject to de novo review by this Court." *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992). This Court will also defer to the Chancery Court's factual findings unless they are "clearly erroneous or not the product of a logical and deductive reasoning process." *Technicolor, Inc.*, 634 A.2d at 360.

It should be noted that the *Unocal* "enhanced scrutiny" standard of review is inapplicable. The "enhanced scrutiny" standard is applicable in cases of a "hostile takeover," which is not at issue here. *Unocal Corp. v. Mesa Petroleum Co.,* 493 A.2d 946, 952 (Del. 1985).

C. Merits of the Argument

i. This Court should hold Indenture § 11.01 did not violate the duty of care because the decision to adopt served a rational business purpose.

This Court should find that Indenture § 11.01 is per se legal and that the Appellants are entitled to summary judgment. Indenture § 11.01 is per se legal because it serves a legitimate business purpose. Directors' business "decisions will not be disturbed if they can be attributed to any rational business purpose." *Sinclair Oil Corp. v.*

Levien, 280 A.2d 717, 720 (Del. 1971). When Sierra LP completed a public offering of $160 million worth of 2% Notes, the purpose was one of financial benefit and thus, rational. This is evident by the affidavit by Morgan Stanley that established "if § 11.01 had not been included in the Indenture, the interest rate on the Notes would have had to have been 'up to 50 basis points' higher than 2% for the offering to have succeeded." TO at 9. Since the directors' action was rational, the Appellants should be entitled to the protections established in *Sinclair Oil Corp.*

ii. This Court should overrule the Chancery Court's holding that Sierra LP is liable as a limited partner because it disclaimed liability for the breach of the duty of care.

In order to prove that a breach of a fiduciary duty occurred, the Appellees must show: "(i) the existence of a fiduciary relationship" among three other prongs. *In re Rural Metro Corp.*, 88 A.3d at 80 (citing *Malpiede*, 780 A.2d at 1096. The three other prongs do not have to be discussed because there was no existence of a fiduciary relationship between the Appellees and Sierra LP.

A "[partner] or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement" so long as the implied covenant of good faith and fair dealing is not eliminated. 6 Del. C. § 17-1101(d). Further, "a partner or other person shall not be liable to a limited partnership or to another partner or to a another person that is a party to or is otherwise bound by a partnership agreement for breach of fiduciary duty for the partner's or other person's good faith reliance on the provisions of the partnership agreement." 6 Del. C. § 17-1101(e). In essence,

limited partners can waive "any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership." 6 Del. C. § 17-1101(f).

Sierra LP's limited partnership agreement "contains detailed provisions limiting or eliminating fiduciary duties of the general partner and its affiliates." TO at 4,5. Sierra LP is clearly an affiliate of Sierra GP. Under Title 6, § 17-1101 of Delaware Code, it was wholly appropriate for Sierra LP to waive "any and all liabilities," so long as the party still abides by the implied covenant of good faith and fair dealing. 6 Del. C. § 17-1101(f). Even so, "[w]hen an LP agreement eliminates fiduciary duties as part of a detailed contractual governance scheme, Delaware courts should be all the more hesitant to resort to the implied covenant [of good faith and fair dealing]." *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1018 (Del. Ch. 2010). Sierra LP clearly waived their fiduciary duties to the Appellees and therefore should not be a party to this lawsuit.

iii. In the alternative, if the Appellants do owe fiduciary duties to the Appellees, they did not breach their duty of care because § 11.01 served a legitimate business purpose.

Appellants' decision not to remove or edit § 11.01 should be measured according to the business judgment rule. The entire fairness standard applies only when a majority of the board is interested or lacks independence from the interested party. *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *Aronson v. Lewis*, 473 A. 2d 805, 815 (Del. 1984). "A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not

equally shared by the stockholders." *Aronson*, 473 A.2d at 812. A director can also be interested in the transaction if the decision will have a material impact on a director, preventing him or her from using his independent business judgment to make a decision. *Rales*, 634 A.2d at 936. A director is considered independent when his or her decision is based on "the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson*, 473 A.2d at 816.

Directors are required to make business decisions with the "care which ordinarily careful and prudent men would use in a similar circumstance." *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005). In *Aronson*, the Delaware Supreme Court interpreted this to mean "all material information reasonably available to [the directors]." *Aronson*, 473 A.2d at 812. "[U]nder the business judgment rule director liability is predicated upon concepts of gross negligence." *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) (citing *Aronson*, 473 A.2d at 812). Under this standard, in order for a director to be found in breach of the duty of care and not be protected under the business judgment rule, the directors must have acted with "gross negligence." *Van Gorkom*, 488 A.2d at 873.

The directors clearly did not act with gross negligence. The directors acted in an ordinary and careful manner by simply adopting a clause into the contract benefitted the business. At the time Morgan Stanley drafted the Indenture for Sierra LP and NCPRF, neither party knew of High Street's intention to replace one or more of Sierra LP's directors. TO at 6. SIerra LP's intention behind the Indenture was to

generate more financing for Sierra LP to continue fulfilling its purpose in the joint venture. TO at 5. It was not for two more years that High Street would threaten Sierra LP's board, well after the Indenture was agreed upon by both parties. *Id.* at 6.

Moreover, the Indenture itself would not only benefit the directors but the shareholders as well. With more capital, Sierra LP had more freedom to engage in business practices to generate a higher return for its investors. Simultaneously, this larger capital would also generate more debt liability for which Sierra GP as the general partner would be liable. A general partner with limited partners would not so easily take on an additional $160 million in debt liability unless it reasonably believed its joint venture would be profitable. Therefore, Sierra LP's board of directors made an independent business decision because they evaluated the merits of the Indenture in relation to how well they believed the company would perform, not on how § 11.01 could prevent shareholders from electing a new board. In fact, neither party even knew of § 11.01's existence and therefore could not know of its infringement on shareholder rights before both parties accepted the Indenture. TO at 6.

Thus, Sierra LP's board of directors was both disinterested and independent, meaning their business decision is afforded presumed protection under the business judgment rule.

IV. THIS COURT SHOULD HOLD THAT INDENTURE § 11.01 IS A LEGAL DEAD HAND PROXY PUT PROVISION BECAUSE IT WAS IMPLEMENTED ON A CLEAR DAY AND IN GOOD FAITH.

A. Question Presented

Are dead hand proxy puts per se legal?

B. Standard of Review

Summary judgment is appropriate when there are no genuine issues of material fact, meaning the moving party is entitled to judgment as a matter of law. Ct. Ch. R. 56(c). The moving party has the burden to demonstrate there are no genuine issues of material fact. The court views these facts in the light most favorable to the nonmoving party, drawing its own conclusions to determine if there is an issue of fact that warrants a trial on its merits. *Bershad,* 535 A.2d at 844. "The Court of Chancery's legal conclusions are subject to de novo review by this Court." *Merrill*, 606 A.2d at 99. This Court will also defer to the Chancery Court's factual findings unless they are "clearly erroneous or not the product of a logical and deductive reasoning process." *Technicolor*, 634 A.2d at 360.

C. Merits of the Argument

Contrary to the Appellee's argument and the *Healthways* decision, dead hand proxy puts are per se legal unless the narrow facts of the provision's construction suggest otherwise. For example, in *Healthways*, the Vice Chancellor clarified that ruling the dead hand proxy put illegal was based solely on the facts that the company faced a potential proxy contest and shareholder pressure. Transcript of Record, Pontiac Gen. Emples. Ret. Sys. v. Ballantine, 2015 Del. Ch. LEXIS 139 (Del. Ch. Apr. 8, 2015)(No. 9789-VCL). In this case however, when § 11.01 was approved by the board, there was no takeover threat and no shareholder pressure. It was merely a bargaining tool to gain more favorable interest rates on the partnership's notes. TO at 9.

In analyzing a company's decision to include a dead hand proxy put provision, this Court can weigh the facts against five factors: (1) if it is adopted on a "clear day" or a period when the company is not facing any actual proxy contests; (2) if the dead hand proxy put is part of the company's prior practice; (3) if there are other change of control provisions in the agreement; (4) if there is market expectation that the provision will be included; and (5) there is a legally proper purpose for the dead hand proxy put, meaning the provision was created and adopted in good faith. F. William Reindel, *"Dead Hand Proxy Puts" – What you Need to Know*, Harvard Law School Forum on Corporate Governance and Financial Regulation, Jun. 10, 2015.

With respect to the first element, this Indenture agreement occurred on a "clear day" because at the time of its approval, neither partner was threatened by a hostile takeover. TO at 5. The hostile takeover threat did not arrive until High Street's threat occurred in 2015, two years after the Indenture. *Id.* at 6. It is unclear from the current facts if other debt agreements signed by either Appellants or Appellees include dead hand proxy puts. However, since this provision is boilerplate language in Morgan Stanley's Indenture agreements, these agreements could be a regular part of a company who employs Morgan Stanley to draft indentures. *Id.* at 5. There is no other change of control provisions in this Indenture.

With respect to element four, there is a market expectation that this provision will be included because without it, the interest rates on the Notes would have been fifty points higher than the acquired two percent. *Id.* at 9. Likewise, these provisions have been and continue

to be standard in lending agreements specifically to prevent the lender from the ill effects of a company's hostile takeover. Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils of Shareholder Choice*, 152 U. Pa. L. Rev. 577, 619-620 (2003). It is also commonplace to find change of control provisions in joint venture agreements. *Id.* at 623. Specifically, they are used to cause a target or a party to lose substantial value in the joint venture if it forces a change of control. *Id.* at 621. Since this was an indenture drafted for limited partners in a joint venture, § 11.01 may have been included to protect the limited partners from each other in preventing a forced change of control. Regardless of the motivations for including it as boilerplate language, there is no evidence in the record that § 11.01 was included by Appellants to prevent the shareholders from exercising their rights to change the board of directors or to protect against a threatened buyout from High Street. Thus, this satisfies the fifth element requiring that the provision comply with the duty of good faith and fair dealing in its inclusion.

From a practical standpoint, dead hand proxy puts allow lenders to always know who is liable for their issued notes and confirms the lender's confidence in the borrower's business practices. F. William Reindel, *"Dead Hand Proxy Puts" – What you Need to Know*, Harvard Law School Forum on Corporate Governance and Financial Regulation, Jun. 10, 2015. Lenders also find confidence knowing they can retrieve their investment if boards participate in risky business strategies inconsistent with those discussed at the time of the loan because of a change of control. *Id.*

Despite its dead hand quality, change of control doctrines such as § 11.01 are expected by the debt market as a tool to entice lender investment. F. William Reindel, *"Dead Hand Proxy Puts" – What you Need to Know*, Harvard Law School Forum on Corporate Governance and Financial Regulation, Jun. 10, 2015. A dead hand proxy put does not differ from a change of control provision that automatically occurs upon a change of control within the board. *Id.* Here, the dead hand aspect is no more entrenching for the shareholders than an automatically occurring, non-controversial, change of control provision.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request this Honorable Court to reverse the Chancery Court's decision to grant the Appellees motion for summary judgment. Further, Appellants request this Honorable Court to grant the Appellants' motion for summary judgment.

The Appellants request a 30-minute oral argument.

Respectfully Submitted,

/s/ Team M
Team M, Counsel for
Defendants Below,
Appellants.

February 3, 2017