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 (Jan 9, 2017)
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.	:	

APPELLEE'S REPLY BRIEF

Filed by Team N
Counsel for Plaintiff below-Appellee
Dated: February 3, 2017

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NATURE OF PROCEEDINGS

The Delaware Court of Chancery denied Sierra Resources Inc., its individual directors and the BNY Mellon Trust motion to dismiss and granted North Carolina Retirement Fund's cross-motion for summary judgement. Sierra Resources Inc., its individual directors and the BNY Mellon Trust appealed to the Supreme Court of the state of Delaware on November 23, 2016.

The first issue in this case was whether Sierra GP, the individual directors and BNY Mellon Trust had breached their fiduciary duties to North Carolina Retirement Fund by failing to inform North Carolina Retirement Fund of the proxy put and requiring an enhanced *Unocal* scrutiny standard. The Delaware Chancery Court disagreed with the defendants, finding that an outside counsel failure to inform North Carolina Retirement Fund would not disclaim the defendants of their own fiduciary duties to North Carolina Retirement Fund.

The second issue in this case was also initially raised in a pre-trial motion to deny North Carolina Retirement Fund had standing to sue the directors of Sierra GP Resources Inc. Following rendition of the opinion of the Delaware Chancery Court, the Defendants filed a motion of appeal urging error in the court's treatment of this issue.

SUMMARY OF ARGUMENT

Amylin makes clear that the inclusion of such proxy puts in Indentures is inherently suspect and should be reported to the Directors. Such provisions are inherently coercive and can result in breaches of fiduciary duties of loyalty and care. Under the circumstances presented here, there was a clear violation of both in approving the Indenture containing Section 11.01.

Pursuant to USACafes and its progeny, the Individual Defendants and Sierra Resources owe fiduciary duties to Sierra LP and Plaintiff.

STATEMENT OF FACTS

On October 13, 2008, during the financial crisis, Sierra Resources Inc. and North Carolina Retirement Fund entered into negotiations to form a joint venture aimed at taking advantage of the dismal real estate market by developing and investing in commercial buildings. R. at 4. The negotiations were successful and created Sierra LP which would serve as the investment vehicle for the two groups. R. at 4. North Carolina Retirement Fund is the sole limited partner is Sierra LP and contributed $80 million for the formation of the partnership, 80% of the partnership's capital. R. at 4. By contrast, Sierra Resources Inc., through its subsidiary Sierra GP, is the general partner and contributed $20 million. R. at 4. In Sierra LP's partnership agreement, it enumerated provisions which the eliminated fiduciary duties of the Sierra GP and its affiliates, though those provisions do not bar the relief sought in the instant case. R. at 5.

On August 15, 2013, Sierra LP completed a public offering worth $160 million in 2% 15-year Notes. R. at 5. The indenture in this public offering included Section 11.01, the provision at issue now, which provided a "dead hand proxy put provision" which, in summary, would cause the defunding of the partnership if Sierra GP or the board directors of Sierra Resources Inc. in event of an actual or even a merely perceived threat of their removal. R. at 2.

During the indenture negotiations, the primary underwriter, Morgan Stanley, did not reveal to the directors of Sierra Resources Inc. of Section 11.01. R. at 5. The directors of Sierra Resources Inc., relying solely on outside counsel and Morgan Stanley, did not make substantial

inquiry into the contents of the indenture - when one of the directors asked about any "novel" terms included in the indenture, outside counsel merely said no. R. at 6.

On October 12, 2015, the activist hedge fund High Street Partners LP had acquired a 6.3% share of Sierra Resources Inc.'s outstanding shares. R. at 6. High Street hinted that it would like Sierra Resources Inc. to apply a business strategy, and that failure to apply this strategy would result in High Street's attempt replace one or more of the directors. R. at 6-7. High Street's actions with regard to Sierra Resources Inc., though not directly connected to the running of Sierra LP, triggers Section 11.01. R. at 7. The financial effects of Section 11.01 would require Sierra LP to immediately pay the 2% Notes worth $160 million capital. R. at 7. To protect its investors, Sierra LP would require re-financing which would, by all outside estimates, be substantial and probably catastrophic for the investors. R. at 7.

ARGUMENT

I. THE DEAD HAND PROXY PUT PROVISION IS INVALID AND UNENFORCEABLE UNDER PREVAILING DELAWARE LAW

A. Question Presented

Whether the Court of Chancery erred in granting Plaintiff's cross-motion for summary judgment seeking a declaration that Section 11.01 of the Indenture Agreement is invalid and unenforceable because Defendants' approval of Section 11.01 was in violation of their fiduciary duties.

B. Scope of Review

The scope of review for an appeal from a decision granting summary judgment is de novo. Grabowski v. Mangler, 938 A.2d 637, 641 (Del. 2007); Williams v. Geier, 671 A.2d 1368, 1375 (Del. 1996) ("Our review of the trial court's determinations in this context is *de novo,* not deferential, both as to the facts and the law."). If the issues on appeal are specifically legal in nature, the lower court's rulings should be affirmed "unless they represent an err[or] in formulating or applying legal principles." Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1276 (Del. 1994) (internal quotations and citation omitted).

C. Merits of the Argument

A Delaware corporation's board of directors has the power to "conduct the corporation's business and affairs"[1], but in exercising such power, the directors "owe fiduciary duties of loyalty and care to the corporation and its shareholders." In re Ebix, Inc. Stockholder Litig., No. CV 8526-VCN, 2016 WL 208402, at *17 (Del. Ch. Jan. 15, 2016); Mills

[1] This power is granted by § 141, DCGL.

Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989).[2] Overall, [d]irectors have an affirmative duty to protect the financial interests of the stockholders and must proceed with a critical eye in acting on their behalf." Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 269 (Del. Ch. 1989) (internal quotations and citation omitted).

The business judgment rule, enhanced scrutiny[3], and entire fairness are the three standards of judicial review applied by Delaware courts when shareholders challenge the actions taken by directors. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1371 (Del. 1995).[4] This Court has previously noted that "identification of the correct analytical framework is essential to a proper judicial review of challenges to the decision-making process of a corporation's board of directors." E.g. MM Companies, Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003).

1. Amylin and its progeny make clear that proxy put provisions in debt instruments raise serious fiduciary duty concerns

In 2009, the Delaware judiciary encountered, for the first time, shareholder litigation challenging director approval of debt instruments[5] containing a proxy put provision. E.g. San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc., 983 A.2d 304, 318 (Del. Ch. 2009), aff'd, 981 A.2d 1173 (Del. 2009). In Amylin, the shareholders claimed that the

[2] See also Gantler v. Stephens, 965 A.2d 695, 709 (Del. 2009) (holding "that the fiduciary duties of officers are the same as those of directors.")
[3] Often referred to as the Unocal standard. E.g. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 28 (Del. Ch. 2010) (applying "the intermediate standard of enhanced scrutiny, typically referred to as the Unocal test").
[4] See also In re Ebix, Inc. Stockholder Litig., 2016 WL 208402, at *17 ("In assessing whether the directors' conduct amounts to a breach of their fiduciary duties in a given scenario, Delaware courts use three standards of review").
[5] Specifically, a credit agreement and an Indenture for notes issued.

directors'[6] approval was a breach of the duty of care because the directors were unaware of the proxy put provision when they approved the Indenture. See id. The court explained that the duty of care requires that in making business decisions, directors "consider all material information reasonably available, and that the directors' process is actionable only if grossly negligent". Id.

Thus, the precise issue for the Chancery Court was whether the directors were "grossly negligent in failing to learn of the existence of the [proxy put] provisions". Id. In determining that the directors' failure was not grossly negligent, the court noted that only after being informed by counsel that "there was not" anything "unusual or not customary", did the directors "approve the issuance of the Notes under the Indenture." Id.

Although no gross negligence was found at the time, the Amylin court made an important observation. Specifically, the court observed "[t]his case does highlight the troubling reality that corporations and their counsel routinely negotiate contract terms that may, in some circumstances, impinge on the free exercise of the stockholder franchise." Id. at 319. The court found two specific issues with debt instruments containing proxy put provisions: 1) "there are few events which have the potential to be more catastrophic for a corporation than the triggering of an event of default under one of its debt agreements" and 2) directors, "when negotiating with rights that belong first and

[6] The Amlyin Board of Directors appointed a Pricing Committee to act on the Board's behalf in approving the Indenture and thus, any action of the Pricing Committee was attributable to the Board of Directors. See Amlyin, 983 A.2d at 318.

foremost to the stockholders (i.e., the stockholder franchise), must be especially solicitous to its duties both to the corporation and to its stockholders." Id.

Regarding the second issue, the court found that it is especially problematic when "negotiating with debtholders, whose interests at times may be directly adverse to those of the stockholders." Id. Therefore, "[o]utside counsel advising a board in such circumstances should be especially mindful of the board's continuing duties to the stockholders to protect their interests." Id. Importantly, the court concluded that "terms which may affect the stockholders' range of discretion in exercising the franchise should, even if considered customary, be highlighted to the board [and] *[i]n this way, the board will be able to exercise its fully informed business judgment*." Id. (Emphasis added).

This Court affirmed the Chancery Court's decision in Amlyin finding that approval of the Indenture was not a breach of the duty of care. See San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc., 981 A.2d 1173 (Del. 2009). In affirming, this Court opined that the Chancery Court's decision was correct "not only for the reasons made explicit in the Court's opinion, but also for one that is implicit." Id. n.2. Specifically, "no showing was made that approving the 'proxy put' at that point in time would involve any reasonably foreseeable material risk to the corporation or its stockholders." Id. This Court determined that the "risk materialized only months later, and was aggravated by the unexpected, cataclysmic decline in the nation's financial system and capital markets". Id.

The Chancery Court later determined, in Amylin II, that counsel for the plaintiff-shareholders in Amylin were entitled to attorneys' fees because "significant and substantial benefits unquestionably accrued to Amylin's stockholders from this litigation." Amylin II, 2010 WL 4273171, at *7.[7] The finding of unquestionable benefits was based on "the fundamental importance to the shareholder franchise of having a choice of candidates for election to the board, significant and substantial benefits unquestionably accrued to Amylin's stockholders from this litigation." Id. Notably, the benefit was indirectly attained by litigation because of the waiver obtained by Amylin's board from the creditor regarding the proxy put provision, but ultimately, the method did not matter because the provision was "removed or, at least, limited." Id.

Moreover, the "Indenture no longer frustrate[d] the stockholders' ability to elect a new majority of directors to the Company's board-a fundamental stockholder right without which the legitimacy of board power comes into question." Id. at *13. The court opined that "[v]indication of the shareholder franchise is a major public policy objective; as a core value in corporate governance, steps undertaken to protect the stockholder franchise may be recognized as having a very real, even if unquantifiable, benefit." Id.

The Chancery Court has relied on Amylin in cases involving similar circumstances. E.g. Kallick v. Sandridge Energy, Inc., 68 A.3d 242 (Del. Ch. 2013); Pontiac General Employees Retirement System v. Ballantine,

[7] San Antonio Fire & Police Pension Fund v. Bradbury, No. CIV.A. 4446-VCN, 2010 WL 4273171, at *7 (Del. Ch. Oct. 28, 2010).

2014 WL 6388645 (Del. Ch. October 14, 2014)[8]. In Sandridge, the court found that a board's "little or no consideration to the adoption of the Proxy Put" entitled the plaintiff to a preliminary injunction because it appeared "the director [were] violating their fiduciary duty. Sandridge, 68 A.3d 242, 257, 263-64. This finding was based on the fact that "boards have a duty to their stockholders to pay very close attention to provisions that affect the stockholder franchise, such as Proxy Puts[,] [and] [t]his court made this duty explicit in Amylin.". Id. at 257.

In Pontiac General, the Chancery Court denied the defendants' motion to dismiss for lack of ripeness and opined the following:

> What I think is ripe now is a claim that, based on the facts of this case, the board of directors breached its duties in a factually-specific manner by adopting this ...dead hand proxy put arrangement.[9]

The facts "include[ed] the rise of stockholder opposition, the identified insurgency, the change from the historical practice in the company's debt instruments, the lack of any document produced to date suggesting informed consideration of this feature, the lack of any document produced to date suggesting negotiation with respect to this feature, etc." Id.

Notably, the court opined that the plaintiffs "are challenging *a proxy put with recognized entrenching effect [and] [t]here was ample precedent from this Court putting lenders on notice that these provisions were highly suspect and could potentially lead to a breach of duty on*

[8] (Trial Transcript) (Oral Argument on Defendants' Motions to Dismiss and Rulings of the Court).
[9] Pontiac General Employees Retirement System v. Ballantine, 2014 WL 6388645 (Del.Ch.) (October 14, 2014) (Trial Transcript).

the part of the fiduciaries who were the counter-parties to a negotiation over the credit agreement." (Emphasis added). Ultimately, the court found the facts alleged were sufficient to survive a motion to dismiss because, at least in part, the alleged conduct[10] "happened well *after* Sandridge *and* Amylin *let everyone know that these provisions were something you ought to really think twice about*". (Emphasis added).

2. Proxy put provisions are inherently coercive to the shareholder vote and therefore, directors approving instruments containing such provisions are required to provide a compelling justification for approval.

In both Sandridge and Pontiac General, the Chancery Court noted the disenfranchising or entrenching effect inherent in proxy provisions. See Sandridge, 68 A.3d at 258; Pontiac General, supra. In Sandridge, the court determined that enhanced scrutiny under "Unocal is the proper standard of review to examine a board's decision to agree to a contract with such provisions and to review a board's exercise of discretion as to the change of control provisions under such a contract." Id. at 259. The reason for enhanced scrutiny was that analysis under Unocal "address[s] situations where boards of directors make decisions that have clear implications for their continued control was explicitly designed to give this court the ability to use its equitable tools to protect stockholders against unreasonable director action that has a defensive or entrenching effect." Id. at 258.

[10] "Given the facts here, as alleged, including that there was a historic credit agreement that had a proxy put but not a dead hand proxy put, and then that under pressure from stockholders, including the threat of a potential proxy contest, the debt agreements were modified so that the change-in-control provision now included a dead hand proxy put". Id.

The proxy put provision had a defensive effect because "a contract that imposes a penalty on the corporation, and therefore on potential acquirers, or in this case, simply stockholders seeking to elect a new board, has clear defensive value." Id. at 259. The entrenching effect was recognized as clear due to the coercive impact of the proxy put on the shareholder vote; it deprived the shareholder's the ability to elect new directors. See id. at 258-59. The court noted that Unocal should be applied "with a special sensitivity towards the stockholder franchise." Id. at 259.

When Unocal is applied to defensive measures, the directors are required to show "reasonable grounds for believing that a danger to corporate policy and effectiveness existed and [that] the defensive measure chosen by the board [was] reasonable in relation to the threat posed." Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 269-70 (Del. Ch. 1989). (Internal quotations and citation omitted). If the directors' action affected the shareholder franchise, Unocal requires the directors to show "that their motivations were proper and not selfish, that they did not preclude stockholders from exercising their right to vote or coerce them into voting in a particular way, and that [their] actions were reasonably related to a legitimate objective." Johnston v. Pedersen, 28 A.3d 1079, 1090 (Del. Ch. 2011).[11] Overall, the directors need show their conduct was reasonable under the circumstances and was taken for a proper purpose. Sandridge, 68 A.3d at 259.

[11] ("When a board of directors takes action that affects the stockholder franchise, the board must justify its action under the enhanced scrutiny test.")

In the instant case, it is undisputed that the Individual Defendants were completely unaware of Section 11.01. (R. at 8). Thus, it is impossible for the Defendants to show a reasonable basis for approval of the Indenture. There is simply nothing that Defendants can show to indicate they acted reasonably under the circumstances; there was no consideration of Section 11.01. Although Defendants cannot show the action was reasonable under the circumstances, the Chancery Court has recognized that Section 11.01 can only be invalidated if it fails the entire fairness standard. See Shamrock Holdings, Inc., 559 A.2d at 271.[12]

There are two parts to the entire fairness standard: fair dealing and fair price. In re Trados Inc. S'holder Litig., 73 A.3d 17, 44 (Del. Ch. 2013); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989). However, "the test for fairness is not a bifurcated one [and therefore,] [a]ll aspects of the issue must be examined as a whole since the question is one of entire fairness." In re Trados Inc. S'holder Litig., 73 A.3d at 56 (quoting Weinberger, 457 A.2d at 709 n.7) (internal quotations omitted).

As an initial matter, the 2015 financial statements of the Defendants preclude any finding of fair price in relation to the inclusion of the proxy put provision. The potential trigger of the put negates any alleged notion of fairness revealed by affidavit from Morgan

[12] ("[N]either a board's failure to become adequately informed nor its failure to apply a *Unocal* analysis, where such an approach is required, will automatically invalidate the corporate transaction. Under either circumstance, the business judgment rule will not be applied and the transaction at issue will be scrutinized to determine whether it is entirely fair.").

Stanley. See generally Amylin, 983 A.2d at 319. Moreover, there can be no finding of fair dealing because the Individual Defendants were completely unaware of Section 11.01. The lack of information allowed a provision, which has a substantially defensive and disenfranchising purpose, to be approved. This approval operated against the duty of loyalty inherent in fair dealing. Overall, the Defendants cannot show that including Section 11.01 was entirely fair under the circumstances.

3. A failure to become informed of a proxy put provision doesn't remedy the coercive nature of the provision and as a matter of public policy, such provisions are unenforceable.

Due to the equitable nature of fiduciary duty claims, the Chancery Court has "broad remedial power [in] address[ing] breaches of the duty of loyalty." See In re Loral Space & Commc'ns Inc., 2008 WL 4293781, at *33 (Del. Ch. Sept. 19, 2008) (citing this Court's opinion in Int'l Telecharge, Inc. v. Bomarko, Inc., 766 A.2d 437, 439 (Del. 2000) ("we defer substantially to the discretion of the trial court in determining the proper remedy...to be awarded for a found violation of the duty of loyalty")). Similarly, this Court has previously recognized "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate". Weinberger v. UOP, Inc., 457 A.2d 701, 715 (Del. 1983).

The dead hand proxy put provision is an entrenchment provision and any contention that the Individual Directors were unaware of such provision is irrelevant. The entrenchment nature of the provision is not negated by lack of knowledge; the provision still works to coerce the shareholders' vote of a new slate of directors. Allowing such a provision, included within an Indenture, to have such an improper effect

on the shareholders' fundamental right to a free election would be in complete disregard of established precedent. Cf. Quickturn Design Systems, Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998) (invalidating a poison pill provision because it had the effect of requiring shareholders to vote for incumbent directors because new directors would not have the power to redeem the pill). Since the Section 11.01 of the instant case has the same entrenchment purpose as the poison pill redemption provision in Quickturn, this Court should invalidate Section 11.01 because it "violates fundamental Delaware law." Id. at 1290.

Moreover, Section 11.01 grants the Individual Defendants, who are members of a non-classified board, unique voting rights not available to other directors. Thus, Section 11.01 is invalid under Delaware law. Carmody v. Toll Brothers, Inc., 723 A.2d 1180, 1190 (Del. Ch. 1998) (holding "under § 141(d), the power to create voting power distinctions among directors exists only where there is a classified board, and where those voting power distinctions are expressed in the certificate of incorporation.").

Overall, the Chancery Court has the requisite discretion to remedy the breach of the duty of loyalty resulting from approval of Section 11.01. Moreover, prevailing law has found similar provisions unenforceable and therefore, invalid. Ultimately, approval of Section 11.01 cannot satisfy the entire fairness standard and the unenforceable nature of Section 11.01 renders it invalid.

II. PURSUANT TO USACAFES AND ITS PROGENY, THE INDIVIDUAL DEFENDANTS AND SIERRA RESOURCES OWE FIDUCIARY DUTIES TO SIERRA LP AND PLAINTIFF

A. Question Presented

Whether Sierra Resources Inc. and its directors owe fiduciary duties to Sierra LP and Plaintiff.

B. Scope of review

The scope of review for an appeal from a decision granting summary judgment is de novo. Grabowski v. Mangler, 938 A.2d 637, 641 (Del. 2007). Specifically, the de novo standard applies where the issue on appeal concerns whether a fiduciary duty was owed. See, e.g. In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 48 (Del. 2006) ("Whether the Chancellor correctly formulated the legal standard for determining if Ovitz owed a fiduciary duty...presents a question of law that this Court reviews *de novo*.")

C. Merits of the Argument

1. Sierra Resources and Individual Defendants owed a fiduciary duty to Sierra LP and Plaintiff

Sierra Resources and the Individual Defendants claim they owe no fiduciary duties to Sierra LP and Plaintiff because they are not the general partners of Sierra LP. See (R. at 11). However, this argument is meritless due to the principle established in USACafes and reiterated in its progeny. In USACafes, the Chancery Court determined, as a matter of first impression, that the directors of a corporate general partner owe fiduciary duties to the limited partnership and the limited partners. In re USACafes, L.P. Litig., 600 A.2d 43, 49 (Del. Ch. 1991). This

determination was based on "the theory underlying fiduciary duties"[13] and upon recognition that the duty "extends only to dealings with the partnership's property or affecting its business, but, so limited, its existence seems apparent in any number of circumstances." Id.

The claim for breach of fiduciary duty is an equitable one "and it is a maxim of equity that equity regards substance rather than form." Feeley v. NHAOCG, LLC, 62 A.3d 649, 668 (Del. Ch. 2012) (internal quotations and citation omitted). In Feeley, a member of an LLC ("Oculus") brought a claim for breach of fiduciary duties against the individual who served as the managing member of the LLC ("AK-Feel") that in turn, served as the managing member of Oculus. See id. at 653-55. In considering whether such a claim could withstand a motion to dismiss, the court noted that "Delaware corporate decisions consistently have looked to who wields control in substance and have imposed the risk of fiduciary liability on the actual controllers." Id. at 668.[14]

The Feeley court looked to USACafes as the controlling precedent for "what to do with the human controllers of an entity fiduciary" and noted that the principle of USACafes had been applied beyond the partnership context to cases involving LLCs and statutory trusts. See id. at 670-71.[15] Relying on USACafes, the court found that the individual

[13] Chancellor Allen explained "the principle of fiduciary duty, stated most generally, to be that one who controls 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." In re USACafes, L.P. Litig., 600 A.2d at 48.

[14] The court also referenced the Supreme Court's reasoning in S. Pac. Co. v. Bogert, 250 U.S. 483, 491-92 (1919) ("It is the fact of control of the common property held and exercised, not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation.").

[15] E.g. Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, 2009 WL 1124451, at *8-9 (Del. Ch. Apr. 20, 2009) (applying in LLC context); Paige Capital Mgmt.,

could be "held liable for breach of fiduciary duty in his capacity as the controller" of AK-Feel. Id. at 671. However, the court dismissed the claim because it only alleged gross negligence, or a breach of the duty of care, and "USACafes has not been extended beyond duty of loyalty claims." Id. at 671-72.[16]

In cases involving limited partnerships, "th[e] [Chancery] Court has followed USACafes consistently, holding that the individuals and entities who control the general partner owe to the limited partners at a minimum the duty of loyalty identified in USACafes." Lewis v. AimCo Properties, L.P., 2015 WL 557995, at *5 (Del. Ch. Feb. 10, 2015) (emphasis added); see Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood, 752 A.2d 1175, (Del. Ch. 1999).

In Wallace, one of the issues before the Chancery Court was whether "holders of units in a Limited Partnership state a cognizable claim for breach of fiduciary duties against parent corporations of the Limited Partnership's corporate general partner". Wallace, 752 A.2d at 1178. The Chancery Court held that "parents of a general partner, *may* owe fiduciary duties to limited partners if those entities control the partnership's property [and] [c]learly, those duties, when owed, may not be breached in a manner that harms the partnership.". Id.

LLC v. Lerner Master Fund, LLC, 2011 WL 3505355, at *1 (Del. Ch. Aug. 8, 2011) (same); Cargill, Inc. v. JWH Special Circumstance LLC, 959 A.2d 1096, 1111-12, 1119-21 (Del. Ch. 2008) (applying in statutory trust context). Feeley, 62 A.3d at 671, n.8-9.

[16] Citing Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, 2009 WL 1124451, at *10 (Del. Ch. Apr. 20, 2009) ("In practice, the cases applying *USACafes* have not ventured beyond the clear application stated in *USACafes:* the duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership." (internal quotation marks omitted)).

In Lewis, the plaintiffs were limited partners of four limited partnerships and each limited partnership had a corporate entity as its general partner. Id. at *1. The plaintiffs' complaint included an allegation of a breach of fiduciary duties by an officer of the publicly traded REIT[17] that indirectly owned each corporate general partner. Id. Ultimately, the court dismissed that allegation for failure to state a cause of action, but the dismissal was based on insufficient pleading, not because a cause of action could not exist. See id. at *8. The observations of the Lewis court are directly pertinent to the instant case.

The Lewis court observed, based on USACafes and Feeley, that a claim for breach of fiduciary duties could be asserted against the officers and directors of the corporate general partners. See id. at *7. Further, the court's analysis reveals that a claim for breach of fiduciary duties could be brought against the officer of the REIT that owned each corporate general partner. See id. at *8. Although the officer was a level higher up the business structure than the officers of the corporate general partners, this distinction was not determinative. See id. The claim was dismissed because the factual allegations of the complaint did not "support a reasonable inference that [the officer of the REIT] *exercised "control" over the [limited partnerships] or their respective [corporate general partners]*." Id. (emphasis added).

Overall, the Chancery Court has consistently opined that control of the limited partnership is the determining factor as to whether the

[17] Real Estate Investment Trust.

corporate parent of the entity serving as the general partner of the limited partnership owes fiduciary duties to the limited partnership and limited partners. See, e.g. Cargill, Inc. v. JWH Special Circumstance LLC, 959 A.2d 1096, 1110 (Del. Ch. 2008)[18]; Bigelow/Diversified Secondary P'ship Fund 1990 v. Damson/Birtcher Partners, 2001 WL 1641239, at *8 (Del. Ch. Dec. 4, 2001)[19]. The fiduciary duty owed in such a context is, at a minimum, the duty of loyalty. See Lewis, 2015 WL 557995, at *5; Lake Treasure Holdings, Ltd., 2014 WL 5192179, at *10[20]; Feeley, 62 A.3d at 671-72.

In the instant case, Sierra Resources[21], is the sole member and manager of Sierra GP, a Delaware LLC. (R. at 3). Sierra GP is the sole general partner of Sierra LP, a Delaware limited partnership. Id. Plaintiff owns 80% of the limited partnership interest in Sierra LP while Sierra GP owns the remaining 20%. Id. These ownership interests are based on the capital contributed by each respective party to Sierra LP: $80 million by Plaintiff and $20 million by Sierra GP. (R. at 4). The Individual Defendants have served as the Board of Directors for Sierra Resources at all relevant times to this case. (R. at 3). Through this

[18](explaining the partnership cases, relying on USACafes, stand for the proposition that "if a corporate parent of the fiduciary exercises dominion and control over the fiduciary in connection with a transaction that benefits the corporate parent at the expense of the underlying entity, the corporate parent may owe fiduciary duties directly to the underlying entity in connection with that transaction.")

[19](explaining that while mere ownership, directly or indirectly, is not determinative, the "affiliates of a general partner who exercise control over the partnership's property may find themselves owing fiduciary duties to both the partnership and its limited partners").

[20] ("The duty of loyalty obligated [the controlling member of the General Partner LLC) not to use [his] control over the [limited] partnership's property to advantage [himself of the General Partner LLC] at the expense of the [limited] partnership.") (citing Wallace, 752 A.2d at 1180) (internal quotations omitted).

[21] A publicly traded Delaware corporation. (R. at 3).

structure, Sierra Resources has exclusive, albeit indirect, control over Sierra LP. Id. Accordingly, the Individual Defendants, pursuant to their statutory authority as directors[22], have control over Sierra LP.

More specifically, Sierra Resources and the Individual Defendants had control over the capital contributed to Sierra LP, which includes the interest of Plaintiff. The fact that Sierra Resources and the Individual Defendants are not the general partners of Sierra LP is irrelevant to whether they owe Sierra LP and Plaintiff a fiduciary duty. The determinative factor is whether they had control over Sierra LP. See Lewis, 2015 WL 557995, at *5, *8-9; Feeley, 62 A.3d at 671; Wallace, 752 A.2d at 1178. It is undisputed that the Individual Defendants, on behalf of Sierra Resources, approved the Indenture containing Section 11.01. (R. at 5-6). Although Plaintiff agreed to a strategy seeking new debt financing, Plaintiff did not agree to having its investment subject to total loss based on the potential triggering of the dead hand proxy put provision.

Due to the Individual Defendants' exclusive control over Sierra LP, and their exclusive authority in approving the Indenture, which subjected Sierra LP to Section 11.01, there is no doubt that the Individual Defendants owed fiduciary duties to Sierra LP and Plaintiff. Further, Sierra Resources' role as corporate parent of the general partner of Sierra LP reveals Sierra Resources also owes a duty to Sierra LP and Plaintiff. As discussed in Part I, there was a clear violation of the duty of loyalty by approval of Section 11.01, which has an

[22] See § 141, DGCL.

entrenchment purpose and more importantly, the very likely potential to cause severe economic consequences to Sierra LP. Accordingly, Sierra Resources and the Individual Defendants owe Sierra LP and Plaintiff a duty of loyalty and that duty was violated upon approval of Section 11.01, which subjected Sierra LP to potentially drastic consequences that served no benefit to the transaction overall.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's order granting Plaintiff's motion for summary judgment on the claim that Section 11.01 is invalid and unenforceable under Delaware law.