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,	:	Court Below: 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 O
Counsel for Appellants
February 3, 2017

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Nature of Proceedings

Appellee, North Carolina Police Retirement Fund, Plaintiff below, sued in the Court of Chancery claiming that the Appellants' approval of an indenture agreement (the "Indenture") between Sierra Energy Partners LP ("Sierra LP") and the Bank of New York Mellon Trust Company, N.A. ("BNY Mellon") containing Section 11.01 violated Appellants' fiduciary duties to Appellee and Sierra LP. Op. 8. Section 11.01 contains a change in control provision, a dead hand proxy put. Op. 2. Appellee sought a determination that Section 11.01 of the Indenture is invalid and unenforceable. Op. 8. Appellee filed this action on January 20, 2016. Op. 8.

Appellants filed motions to dismiss, and Appellee replied with a cross motion for summary judgement. Op. 8. The Court of Chancery determined to treat Appellants' motions to dismiss as motions for summary judgment. Op. 8. Chancellor Synder granted summary judgment for Appellee on January 9, 2017 ruling that Section 11.01 was invalid. Op. 12. The Court of Chancery also held that the Appellants breached their fiduciary duties. Op. 11.

Appellants request that this Court reverse and vacate the Court of Chancery's grant of summary judgment for Appellee.

Summary of Argument

1. This court should reverse and vacate the Court of Chancery's opinion granting summary judgement because the Appellants did not owe fiduciary duties to Appellee. Appellee is a stockholder in a subsidiary of the parent company where Appellants serve as members of the board of directors. Also a signed agreement was signed stating that Appellants

had limited fiduciary duties to Appellee. Therefore, Appellants do not owe fiduciary duties to Appellee. Alternatively, if Appellants owe fiduciary duties to Appellee, Appellants did not breach those fiduciary duties.

2. This court should also reverse and vacate the Court of Chancery's opinion granting summary judgement for Appellee because the dead hand proxy put provision in question is valid and enforceable. A proxy put provision does not *per se* violate Delaware Law. Appellants' decision to enter into the Indenture containing Section 11.01 is valid and enforceable under the business judgement rule and *Unocal*. The proxy put provision also passes the proxy put legitimacy test set forth by the *Amylin* court. Alternatively, if the Court finds that entire fairness rule applies Appellants' decision is valid and enforceable.

Statement of Facts

Sierra Resources, Inc. ("Sierra Resources") is the manager and sole member of Sierra GP, LLC ("Sierra GP"). Op. 3. Sierra GP is the sole general partner and twenty-percent limited partner in Sierra LP. Op. 3. Appellee owns an eighty-percent limited partnership interest in Sierra LP. Op 3. On October 13, 2008, Appellee signed a limited partnership agreement with Sierra Resources to create Sierra LP. Op. 4. The agreement included provisions limiting or eliminating fiduciary duties of the general partner (Sierra GP) and its affiliates. Op. 4. In early 2013, Appellants believed Sierra LP was underleveraged. Op. 5. After consulting with the Appellee, and receiving their general endorsement, Appellants, on behalf of Sierra LP, began an effort to line-up credit. Op. 5.

In the Indenture dated August 16, 2013, Sierra LP and BNY Mellon signed 2% notes (the "Notes") due in 2028. Op. 2. The Indenture included Section 11.01, a proxy put provision, which occurred when there was a "Change of Control." Op. 2. The initial Indenture was prepared by counsel for Morgan Stanley, who was the lead underwriter. Op. 5. Outside counsel for Appellants reviewed the draft from Morgan Stanley and made revisions. Op. 5. None of the Appellants suggested or encouraged the inclusion of Section 11.01. Op. 5. One of the directors of Sierra Resources inquired into the terms of the Notes and the outside counsel told the board the provisions within the Notes were routine. Op. 5–6. When Sierra LP entered into the Indenture, there had been no indication that any person or entity was planning a proxy contest to replace one or more of the directors. Op. 6. While there is a phenomenon of shareholder activism, none of Sierra LP's investors were considered activists or had recently acquired significant portions of the company. Op. 6.

Two years after the Indenture, on October 12, 2015, High Street Partners, LP ("High Street") filed a Schedule 13D indicating to the SEC that it had "acquired approximately 6.3% of the outstanding shares of Sierra Resources." Op. 6. High Street intended to propose a strategy that would involve the acceleration of distributions through dividends or stock repurchase, the selling of assets, and/or selling the company altogether. Op. 6. The High Street 13D also stated that if the board did not take their suggestions, High Street would take action by replacing one or more of the directors. Op. 6. There is no proxy contest against the board. Op. 7.

Argument

I. THIS COURT SHOULD OVERRULE THE LOWER COURT'S DECISION BECAUSE THE APPELLEES WERE NOT OWED ANY FIDUCIARY DUTIES, AND IF APPELLEES WERE OWED FIDUCIARY DUTIES, THE APPELLANTS DID NOT VIOLATE THEM IN THE PASSAGE OF THE PROXY PUT.

A. Questions Presented

Under prior case law, does a board of directors owe fiduciary duties to a subsidiary company who contracted out of them?

Alternatively, under prior case law, does a board of directors approving of a proxy put provision, on a clear day, violate a subsidiary company's fiduciary duty?

B. Scope of Review

The Court of Chancery's decision granting summary judgment is subject to de novo review. *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994). This Court may draw its own factual conclusions "if the trial court's rulings are clearly wrong," and "examine all legal issues to determine whether the trial court 'erred'" in applying the law. *Id.*

C. Merits of the Argument

1. Appellants Do Not Owe Any Fiduciary Duties to Appellee.

While the parties do not dispute the facts, the lower court incorrectly applied the law. Directors owe fiduciary duties to their shareholders, meaning Appellants owe fiduciary duties to the shareholders of Sierra Resources. Appellants do not owe fiduciary duties to the shareholders of Sierra LP, which includes Appellee.

The lower court purports to follow precedent set by *In re USA Cafes, L.P. Litigation*, 600 A.2d 43, 48–49 (Del. Ch. 1991), even though *USA Cafes* is significantly different than the current case. Op. 11. In *USA Cafes*, the plaintiffs brought four theories of liability. *USA Cafes*, 600 A.2d at 46. The central theory included the board's breach of the duty of loyalty. *Id.* The board of directors claimed that no fiduciary duties were owed to the limited partnership. *Id.* at 48. The court stated at the center of fiduciary duties is the concept that one who controls the property of another may not "use that property in a way that benefits the holder of the control to the detriment of the property or its beneficial owner." *Id.* However, the Court also states that the main requirement in this relationship is "fidelity in the control of property for the benefit of another." *Id.*

The board of directors in *USA Cafes* allegedly benefited by receiving cash payments and other substantial personal benefits at the detriment of the property. *Id.* at 46. This was a direct and intentional attempt to control the property of their subsidiary in a way that benefited the individual members of the board while damaging the subsidiary. The directors in *USA Cafes* had clear intent and consciously decided to make the sale for a low stock price for their subsidiary. In *USA Cafes* the defendants moved to dismiss the breach of fiduciary duty claims, asserting that the general partner owed fiduciary duties to the limited partners. *Id.* at 47. Yet as directors of the General Partner the defendants did not owe fiduciary duties to the limited partners. *Id*. *USA Cafes* is significantly different from the current case, since Appellants were not even aware Section 11.01 existed.

The *USA Cafes* Court would not consider the board inadequately informed if the board reviewed most of the provisions of the Indenture. While *USA Cafes* points out one claim of liability is based upon the directors not being "sufficiently informed" to make a valid business judgement on a sale. Appellants consulted outside counsel, and even specifically asked their attorney whether or not any information was novel and required board attention within the Indenture. Op. 10. The Chancery Court's ruling that Appellants' reliance on outside counsel was not enough to qualify them as "sufficiently informed" would set a precedent that board members could no longer rely on the opinions of outside counsel.

A ruling against Appellants would require the Court to go against precedent set by *USA Cafes* since the two cases are not comparable. Here, Appellants had control over the property of Sierra LP. Appellants were not aware of Section 11.01 within the Indenture. Since they did not *intentionally* use the property of Sierra LP regarding Section 11.01, Appellants pass the *USA Cafes* requirements. Therefore, the Appellants never intentionally used the property of Sierra LP in regards to Section 11.01.

By consulting with outside counsel, Appellants did everything required of them under Delaware Law in regards to the proxy put provision. When outside counsel stated there was nothing "novel" within the proxy put, Appellants followed their advice. Op. 6. A sustainably burdening option would be to require Appellants to read and analyze for themselves every single provision within an agreement that a subsidiary company might enter into. This approach would be unfeasible. If board

members read every single word, of every single contract, they still may not understand all of the provisions. Board members are unaware of what is routine and what is novel within legal documents. Outside counsel is best situated to read and advise the board since they routinely read and analyze these documents. In this specific instance the board members were advised by outside counsel that there were no "novel" provisions. Op. 6.

Directors owe fiduciary duties to their shareholders, meaning that Appellants owe fiduciary duties to the shareholders of Sierra Resources, which does not include Appellee. Sierra LP's limited partnership agreement contains explicit provisions which limit or eliminate the fiduciary duties of the general partner (Sierra GP) and its affiliates. Op. at 4. While the parties have agreed that does not bar relief sought in the case the existence of these provisions is noteworthy since it points to the intent of the parties to limit the fiduciary duties owed between the different entities. Op. 3.

The lower court also incorrectly follows the precedent in *San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc.*, 983 A.2d 304, 307 (Del. Ch. 2009)("*Amylin I*"). The Court of Chancery below referenced *Amylin I* which stated the fiduciary duties of the board of directors with "terms which may affect the stockholders' range of discretion in exercising the franchise should, *even if considered customary*, be highlighted to the board." *See Id.* at 319. Op. 10. The question becomes – who should be responsible for highlighting those terms to the board. The lower court's decision seems to require that the board should be responsible for highlighting terms to *themselves*. Op. 10.

Appellants agree the board does have the responsibility to inquire about terms which affect the stockholder franchise and that blame for the failure to become aware of such terms does not "lay solely at the doorstep of outside counsel". Op. 10. Section 11.01 is the provision which affects the stockholders' discretion in exercising the franchise. Appellants took it upon themselves to specifically ask outside counsel whether any novel terms, which required board attention, were within the Indenture. Op. 10. Appellants did not leave it solely to outside counsel to discover novel terms within the agreement. Appellants specifically asked outside counsel to search for novel terms to fully understand the Indenture and make an informed decision whether to approve the Indenture.

2. If This Court Concludes That Appellants Owe Fiduciary Duties to Appellee, Appellants Did Not Violate Those Fiduciary Duties.

Fiduciary duties require a board to act with care and to make decisions that positively affect their shareholders. The board must be knowledgeable and perform due diligence when deciding on behalf of the company. *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 745 (Del. Ch. 2005). Once the board has performed their due diligence, the board has acted within their fiduciary duties. *Id.*

Appellants performed due diligence and used the industry norm of seeking expertise from outside counsel regarding the Indenture. Finding a breach of fiduciary duties would lead to directors no longer relying on the opinions or statements of outside counsel. Appellants contacted experts to review the Indenture agreement, and Appellants reasonably relied upon the legal advice they were given. After speaking with outside counsel, Appellants had no reason to further investigate the matter, and

at no point did they intentionally advocate for Section 11.01 to be placed into the Indenture. Op. 5.

In *Amylin I*, the court rejected the idea that the Amylin board had breached its duty of care in entering into an indenture that contained a continuing director provision, similar to the Indenture in this current case. *Amylin I,* 983 A.2d at 318-19. The court also stated in *Amylin I* that the board was receiving advice from "highly-qualified counsel" and that type of guidance is "not the sort of conduct generally imagined when considering the concept of gross negligence". *Id*. This Court affirmed the lower court's decision that the directors within *Amylin I* did not breach their duty of care. *San Antonio Fire & Police Pension Fund v. Amylin Pharms. Inc.* 981 A.2d 1173 (Del. 2009) ("*Amylin II*"). *Amylin II* stated that the Plaintiffs did not show that the dead hand proxy put would "involve any reasonably foreseeable material risk to the corporation or its stockholders." *Id.* at 1173 n.2. In this case, when the Indenture was signed in 2013 Appellants were not aware of any reasonably foreseeable material risk to the corporation or its stockholders. Op. 6. The potential risk did not emerge until over two years later in October of 2015 when High Street filed a Schedule 13D. Op. 6. Therefore, Appellee cannot show that Section 11.01 would "involve any reasonably foreseeable material risk to the corporation or its stockholders". *Id.*

a. Appellants Did Not Breach Their Duty of Loyalty.

The duty of loyalty requires directors to make all decisions without personal economic conflict. *Cede & Co. v. Technicolor*, 634 A.2d 345, 361 (Del. 1993). This Court has defined the duty of loyalty as follows:

"Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Id.* The presence of Section 11.01 within the Indenture does not amount to personal economic conflict of Appellants.

Traditional examples of self-interest by a director would include a director receiving a personal benefit from the transaction, that other shareholders did not receive, or a director connected to the parties on both sides of the transaction. *Id*. at 362. The behavior of the directors in this case does not amount to a breach of their duty of loyalty. The directors, individually, gained nothing by entering into the Indenture. This Court must rule that a board of directors who were unaware of a provision, and did not gain anything individually from the provision, cannot breach their duty of loyalty.

Technicolor cited *Aronson* which stated that in establishing a breach of duty of loyalty, a plaintiff "must present evidence that the director either was on both sides of the transaction or 'derived any personal benefit from it in the sense of self-dealing.'" *Id*. at 363. Applying the *Aronson* test, the directors in this case were not present on both sides of the transaction, and they have received no personal benefits from including Section 11.01 in the Indenture.

Additionally, a director breaches their duty of loyalty if they act in bad faith. *In Re Chelsea Therapeutics Int'l Ltd. Stockholders Litig.*, Consol. C.A. No. 9640-VCG, slip op. at 1 (Del. Ch. May 20, 2016) quoting *In re The Walt Disney*, 907 A.2d at 754-55. *In Re Chelsea* defined

"bad faith" as actions by directors that "can in no way be understood as in the corporate interest. . . ." *In re Chelsea*, No. 9640-VCG at 1-2. The directors in this case did not act in bad faith. The actions of the Sierra Resources directors regarding the Indenture can be understood as in the best interest of the corporation.

b. Appellants Did Not Breach Their Duty of Care.

The duty of care requires that those challenging a business decision must show that the directors failed to act in good faith, in the honest belief that the action taken was in the best interest of the company, or on an informed basis. *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). The good faith standard requires directors to be honest, not to have any conflicts of interest, and not approve wrongful or illegal activity. *In re Walt Disney Derivative Litig.,* 825 A.2d 275 (Del. Ch. 2003). In this case, the directors honestly believed that the Indenture contained no novel provisions. This honest belief was based upon the inquiry directed towards outside counsel about novel provisions within the Indenture. Op. 10.

The directors have no conflicts of interest regarding the Indenture. The directors gain no personal benefits from the Indenture or Section 11.01. Appellee will argue that Section 11.01 could be viewed as a benefit for the directors since it becomes somewhat more difficult to lose their positions. However, since the directors did not have knowledge of this "benefit" at the time of their approval of the Indenture, the directors could not have considered the benefit to themselves. The directors have approved no wrongful or illegal activity. Dead hand proxy puts are not *per se* illegal or wrongful. Provisions similar to Section

11.01 are now routine in indenture agreements, by approving Section 11.01 directors did not violate the law.

The "best interests of the company" standard looks to the substance behind the directors' decision making. *Aronson*, 473 A.2d at 812. The standard requires directors to have a "reasonable belief" that the decisions are in the company's best interest, this belief is both subjective and objective. *Id.* Appellants were not aware of the specific language of Section 11.01. The directors can still meet the reasonable belief standard. Appellants had a reasonable belief that the Indenture as a whole was in the best interest of the company. The directors first sought general approval from the Appellee. Then, the directors sought the advice of outside counsel regarding any novel provisions which would require additional board review. These steps show that the directors had a reasonable belief that the Indenture was as a whole in the best interest of the company.

Therefore, this Court should reverse and vacate the lower court's opinion that the Appellants had fiduciary duties and, alternatively, if Appellants did have fiduciary duties, that those fiduciary duties were not violated.

II. THIS COURT SHOULD REVERSE THE LOWER COURT'S DECISION BECAUSE THE LOWER COURT FAILED TO APPLY THE UNOCAL STANDARD TO THE APPELLANT'S DECISION TO APPROVE OF SECTION 11.01.

A. Question Presented.

Under prior case law, does the legality of a proxy put provision, a legitimate business purpose to include that provision, and the inevitability of including that provision allow the court to use the *Unocal* standard.

B. Scope of Review

As noted supra, the Court of Chancery's decision granting summary judgment is subject to de novo review. *Arnold*, 650 A.2d at 1276. This Court and may draw its own factual conclusions "if the trial court's rulings are clearly wrong," and "examine all legal issues to determine whether the trial court 'erred'" in applying the law. *Id.*

C. Merits of the Argument

1. Section 11.01 Does Not *Per Se* Violate Delaware Law.

Appellee incorrectly claims Section 11.01, violates Delaware General Corporation Law (DGCL) §141(k). There is no infraction because Section 11.01 is common practice and case law upholds similar provisions. DGCL §141(k)'s primary purpose is to allow "any director or the entire board of directors" to be voted out of their positions for any cause. Del. Code Ann. tit. 8 §141(k)(2017). A *per se* violation needs no further evaluation other than the text of the provision and the statute. *Per se*, BLACK'S LAW DICTIONARY (Deluxe 10th ed. 2014). Due to the recent case law from this Court and the lower courts, a purely textual reading cannot be the only necessary analysis.

In *Amylin II*, 981 A.2d at 1173, this Court affirmed the Chancery Court's decision because of both the reasons explicit in the Chancery opinion, but also for the implicit reason. This Court stated the implicit reason for allowing the proxy put in the indenture was that at the time of the "proxy put" there was no "reasonably foreseeable material risk" to both the corporation and/or its shareholders. *Id.* n.2. Amylin's board voted to authorize members of the senior management to negotiate terms of particular notes. *Amylin I*, 983 A.2d at 307. The lawsuit arose from

an indenture within those negotiated notes. *Id.* at 307–08. Amylin's outside counsel circulated a draft of the indenture and the Pricing Committee discussed certain terms with outside counsel. *Id.* at 308–09. During the meeting, the proxy put provision was not brought up or discussed with the Amylin board of directors. *Id.* at 309.

The Court of Chancery in *Amylin* did not outlaw proxy puts or continuing director provisions. *Id.* The court even recognized that since the board in *Amylin* was unaware of any potential proxy contests during the approval of the proxy put, there was no reason to believe that the board was trying to restrict stockholder speech. *Id.* If a potential change of control provision is involved, *Unocal* will govern the board's decision making process. Arthur Fleischer et al, *§3.02 EVOLUTION OF UNOCAL PRINCIPLES FOR TAKEOVER DEFENSE* ch. 3 (Aspen Publishers ed. 2016).

The situation in *Amylin* is similar to the case at hand, both in *Amylin* and in this case the board received advice of "highly qualified counsel." *Amylin I*, 983 A.2d at 309. Appellants outside counsel reviewed the proxy put provision within the Indenture and decided not to change anything within Section 11.01 finding the section routine. Op. 5. The board of directors wanted to make sure they knew of all the unique provisions within the debt agreement. When one of directors asked outside counsel if there were any terms that the board should know about, counsel told the board "no". Op. 5. Since Section 11.01 was routine enough for outside counsel to leave the section out of discussions with the board, the inclusion of Section 11.01 cannot be a *per se* violation of Delaware Law.

Appellee even gave Sierra GP a general endorsement for the strategy of raising new debt capital to improve profitability. Op. 5. If Appellee truly had a problem with a routine provision, they should have included their objection in their general endorsement of Sierra GP's plan. Without this routine provision, there is evidence that the rate of 2% would have been unobtainable for Sierra LP. Op. 5. If Sierra LP did not accept Section 11.01 from BNY Mellon, they would have to go to another bank that would require Sierra LP to have the same proxy put provision.

In all proxy put cases, whether the Chancery Court or this Court upheld the sections or declined to uphold them, the Courts have never ruled proxy put provisions *per se* violate Delaware Law. This Court in *Amylin II* accepted the proxy put and this Court should continue to follow that precedent. Vice Chancellor Lamb in *Amylin I* ruled that there was no violation of fiduciary duties even though the board failed to inform themselves of the indenture's continuing director provision because the provision was customary. *Amylin I,* 983 A.2d at 307. A customary provision in debt agreements cannot be seen as a *per se* violation of the Delaware Law.

The continuing directors provision within the Indenture agreement is enforceable under Delaware Law. Since the provision requires no director vote following its initial approval and the provision does not deny a new board member, anyone not a "continuing director", the right to vote in any instance, the provision is enforceable. *Cal. Pub. Emples.' Ret. Sys. v. Coulter,* 2005 Del. Ch. LEXIS 54 at *13 (Apr. 21,2005). Since both the proxy put provision and the continuing director provision are not *per se* violations of the DGCL, they do not violate Delaware law.

Therefore, the Court should apply the *Unocal* standard in determining liability against the board and reverse and vacate the lower court's decision.

2.Since Section 11.01 Does Not *Per Se* Violate the Delaware General Corporation Law, the *Unocal* Standard Applies.

The *Unocal* test begins with "the premise that the transaction at issue was defensive." *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257 (Del. Ch. 1989). Whether the board failed to become informed or failed to apply the *Unocal* analysis will not automatically invalidate the transaction. *Id.* at 271. When a board of directors is largely composed of disinterested directors, these directors should be deemed to act from the same motives as the members of management who proposed the transaction. *Id.* Appellants are similar to disinterested board members because they were unaware of the existence of Section 11.01. If the decision is deemed defensive, this Court may undertake the *Unocal* analysis for the board where the directors failed to do so. *Id.* When this Court reviews a corporation's board decisions, the Court looks to *any rational business purpose* for the board's decision. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (emphasis added).

In *Kallick v. Sandridge Energy Inc.*, 68 A.3d 242 (Del. Ch. 2013), the court applied the *Unocal* standard to determine a reasonable justification for the board's refusal to approve the dissident slate. However, the court did not use *Unocal* to determine the legitimacy of the proxy put section. *Id.* In *Sandridge*, TPG-Axon ("TPG"), a 7% stockholder of Sandridge, launched a consent solicitation to change the staggered board, remove all the directors, and install its own slate. *Id.* Sandridge contended that the election of the TPG nominees would constitute a

"change in the board" and would trigger the proxy put. *Id.* The court referenced *Amylin I* when analyzing the fiduciary duties of the board and ruled that the board cannot disapprove a slate of directors for purposes of the proxy put. *Id.* at 246. When disapproving a slate of directors the board must maintain its primary duty and may refuse to grant approval "only if [the board of directors] determines that the director candidates running against them posed such a material threat of harm to the corporation. . . ." *Id.* The court did not discuss the legitimacy of the proxy put section, but rather the fiduciary duties associated with how to enforce the proxy put. *Id.* The *Sandridge* court focused on the action of the board of directors when the proxy put has been triggered and not on their decision to approve the provision. *Id.*

The Court in *Sandridge* also cited *Schnell v. Chris-Craft Industry, Inc.*, 285 A.2d 437, 439 (Del. 1971), in which this Court ruled that inequitable action does not become permissible simply because it is legally possible. While the proxy put is legally permissible, the actions of the board to refuse to let the dissident board attempt to take over were not. Therefore, the approval of a proxy put provision will be reviewed under *Unocal* by this Court, but a refusal to approve a dissident board that would trigger the proxy put would not be reviewed under the *Unocal* standard.

The present case is significantly different from *Sandridge*; the key difference is the lack of a proxy contest in this case. Also unlike *Sandridge*, Appellee has sued claiming that Section 11.01 of the Indenture violated the board's fiduciary duties in its approval. Whereas *Sandridge*, was about a board decision regarding an active proxy contest. Since

Appellee's claim is related to the routine proxy put provision, this Court should apply the *Unocal* standard.

This Court should not automatically assume that a dead hand proxy put section means a board of directors is entrenching themselves. Rather, the provision itself requires shareholders to make sure they understand the long-term ramifications of their decision to hold a proxy contest. A dead hand proxy put signed on a "clear day" cannot be seen as entrenchment because Appellants were not responding to a contest on that day or reasonably threatened within the near future.

The case before this Court does not resemble the situation in *Pontiac General Employees Retirement System v. Ballantine*, 2014 WL 6388645 (Del. Ch. Oct. 14, 2014) (TRANSCRIPT)("*Healthways*"). In *Healthways,* the board of directors agreed to a proxy put provision in 2010. *Id.* In May 2012, Healthways became subject of a potential proxy contest. *Id.* Soon after the notice of the potential proxy contest, the board of directors restated the credit agreement containing the dead hand proxy put. *Id.* The shareholders sued and Healthways moved to dismiss. *Id.* Vice Chancellor Laster rejected the motion to dismiss emphasizing that the decision was factually specific. *Id.* The Vice Chancellor highlighted that the board's action against the backdrop of a pending proxy threat was the main issue in the case, and not the approval of the dead hand proxy put. *Id.* The Vice Chancellor also highlighted that the decision was extremely fact specific and that each case must be reviewed in-depth. *Id.*

a. When This Court Determines the Legitimacy of a Proxy Put Provision, This Court Must Review the *Amylin Test*.

When this Court examines the proxy put provision, multiple factors must be considered when determining it legitimacy. The first factor is whether including the provision was initiated by the underwriters, lenders, or other counterparties to address legitimate concerns by the company. *Amylin I*, 983 A.2d 304, 315. Under the first factor of the proxy put legitimacy test, Appellants succeed. Including the provision was initiated by the underwriters of the 2% Notes to address legitimate concerns of BNY Mellon. Lenders like to know their borrowers and want reassurance that the direction of the company is headed toward prosperity for both the creditor and the business.

The second factor is whether the company negotiated the provision in good faith, so as to reduce its impact, and what alternatives were available. *Id.* Under the second factor of the proxy put legitimacy test, Appellants also prevail. The board of directors followed the advice of outside counsel, who informed the board that all the provisions within the Indenture were routine. As far as the board was concerned, they were negotiating in good faith with the advice of their outside counsel. Even if the board knew about the provision, they would have accepted the provisions because it lowered the percentage by "50 basis points." Op. at 9.

The third factor is whether the board was motivated by entrenchment or to facilitate a financing or other arrangement whose terms, as a whole, are beneficial to the company. *Amylin I*, 983 A.2d 304, 315. Under the third factor of the proxy put legitimacy test, Appellants succeed. The board could not have been motivated by entrenchment because Section

11.01 was unknown to the board of directors. This Court should not have entrenchment concerns because the board did not advocate or initiate for Section 11.01 to be added.

The fourth factor is the likelihood that the provision could be triggered and, if triggered, the impact on the shareholder franchise. *Id.* Then in connection to the triggering, the need for an "approved" out as in *Amylin* and the increased flexibility to directors. *Id.* Appellants also prevail on the fourth factor of the proxy put legitimacy test. At the time the provision was put into place there was a low likelihood that the provision would be triggered, the directors had no knowledge of any proxy contests. However, similar to *Healthways* there may be potential in the future to renegotiate the specific provision with BNY Mellon. *See Healthways*, 2014 WL at *1.

The fifth and final factor is whether the board believed in good faith that by agreeing to a proxy put, it was obtaining in return "extraordinarily valuable" economic benefits for the corporation that otherwise would not be available. *Amylin I*, 983 A.2d 304, 315. Appellants succeed on this factor as well. The board received significant economic benefits in the form of percentage points on the debt from BNY Mellon. Op. 9. If the board tried to go forward without the proxy put provision, BNY Mellon, or any other bank, would have provided a deal with higher percentage points. Therefore, without the proxy put provision, the Indenture would have not have been lucrative for the company.

Even if the board of directors knew about the proxy put provision, the board had legitimate business reasons to allow a creditor to have a proxy put. One valid business reason is that some slates of dissident

board members have agendas for short-term shareholder value maximization that could contravene the core corporation strategy and long-term shareholder value. *See* F. William Reindel, Fried, Frank, Harris, Shriver & Jacobson LLP, https://corpgov.law.harvard.edu/2015/06/10/dead-hand-proxy-puts-what-you-need-to-know/ (last visited Jan. 20, 2017). A creditor who cannot trust that there will be stability on a board of directors will not lend money to that company. Creditors prefer to know their borrowers and since they are lending their money, the creditors want to feel comfortable with the direction of the company. The proxy put gives the creditor stability in their money by allowing the creditor to accelerate the repayment of the debt to protect their interests.

The board of directors also accepted the proxy put on a "clear day." There was no actual or realistically potential proxy contest during the time of negotiations of the Indenture. Op. 6. The proxy put was a part of protecting the bank's legitimate interests rather than an entrenchment effect for the company's directors and that process supported the conclusion. Therefore, since the board made a rational business decision for including the proxy put, whether the board knew about the provision or not, the board passes the business judgment rule and the *Unocal* test.

b. If This Court Concludes That Entire Fairness Applies, Rather Than *Unocal* and the Business Judgment Rule, Appellants Still Prevail.

The Entire Fairness doctrine can only be applied when the "presumption of the business judgment rule is defeated." *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361 (Del. 1995). When this Court reviews the entire fairness of a board decision, this Court considers

two factors. The first factor reviews whether the deal was fair itself. *Cinerama, Inc. v. Technicolor*, 663 A.2d 1156, 1162-63 (Del. 1995). The second factor this Court reviews is whether the deal was at a fair price. *Id.*

The deal between Sierra LP and BNY Mellon for 2% Notes was an entirely fair transaction. First, no representative from any of the Appellants knew or even suggested the addition of Section 11.01. Op. 5. There was no discussion of the section begin added and when a board member asked outside counsel whether there was anything "out of the ordinary" in the agreement, outside counsel told the board member that the agreement did not contain any novel provisions Op. 6.

An affidavit provided from Morgan Staley stated that without the proxy put, the interest rate on the Notes would have been 'up to 50 basis points' higher than 2% for the offering to have succeeded. Op. 9. Without the dead hand proxy put provision Sierra LP would not have received the capital it needed, let alone obtain the credit at a reasonable and fair price. Thus, since Appellants accepted an entirely fair deal, this Court should find in favor of the Appellants and reverse and vacate the lower court decision.

Conclusion

For the foregoing reasons, this Court should reverse the Court of Chancery's opinion, vacate the Chancery opinion, and grant summary judgment in favor of the Appellants.

Respectfully submitted,

/s/ Team O

February 3, 2017 Team O, Counsel for Appellants