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

APPELLEE'S REPLY BRIEF

Filed by Team P
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Appellee
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NATURE OF PROCEEDINGS

North Carolina Police Retirement Fund ("NCPRF") filed a complaint with the Delaware Court of Chancery on January 20, 2016 maintaining that the "dead hand" proxy put provision in Section 11.01 of the trust indenture (the "Indenture") between Sierra LP and BNY Mellon, *per se*, violates Delaware law by depriving Sierra Resources' incumbent board of directors (the "Board") of any ability to avoid a "Change of Control." Op. 20. Sierra GP, LLC ("Sierra GP"), Sierra Resources, Inc. ("Sierra Resources"), and The Bank of New York Mellon Trust Company, N.A. ("BNY Mellon") filed a motion to dismiss under Court of Chancery Rule 12(b)(6). Op. 1. Since Appellants presented matters in their 12(b)(6) motion that were not included in the complaint, the Court decided to treat the motion to dismiss as a motion for summary judgment pursuant to Court of Chancery Rule 12(b). Op. 1. As required by Court of Chancery Rule 12(b), NCPRF was offered an opportunity for limited discovery, and both parties agreed that there were no genuine issues of material fact. Op. 1. Therefore, NCPRF presented a cross-motion for summary judgment. Op. 1. The Court of Chancery of the State of Delaware denied Appellant's summary judgment motion and granted Appellee's cross-motion. Op. 12. On January 11, 2017, Appellants filed a Notice of Appeal with the Supreme Court of the State of Delaware. Notice of Appeal at 1.

SUMMARY OF ARGUMENT

I. The Court of Chancery was correct in determining that Section 11.01 of the Indenture, per se, violated Delaware law. The Board at Sierra Resources should not have accepted the "dead hand" proxy put within Section 11.01 because the Board was not aware of a substantial threat or a fiduciary risk to the corporation and did not conduct a reasonable investigation concerning potential threats. Additionally, Sierra Resources adopted an unreasonable measure by permitting the "dead hand" proxy put to remain in Section 11.01. Alternatively, Sierra Resources did not negotiate in good faith on behalf of its limited partner to excise the unreasonable terms in the Indenture.

II. The Court of Chancery was correct in determining that Sierra Resources owes fiduciary duties to NCPRF. Delaware law states general partners of a limited partnership owe direct fiduciary duties to the partnership and its limited partners. Sierra Resources owes fiduciary duties to Sierra LP and NCPRF because Sierra Resources maintains full control over Sierra GP. The directors of Sierra Resources can be held personally liable to Sierra LP and NCPRF because they engaged in an unfair, self-dealing transaction, which benefitted the directors at the expense of the limited partnership.

STATEMENT OF FACTS

In 2008, NCPRF, a pension fund, entered joint venture negotiations with Sierra Resources, a full-service real estate company and Delaware

corporation. Op. 4. The parties sought to take advantage of the deflated real estate market by investing in sustainable and high profit commercial real estate. Op. 4. On October 13, 2008, the parties formed Sierra LP through a limited partnership agreement titled "LP Agreement." Op. 4. NCPRF contributed $80 million in capital to fund Sierra LP, and Sierra Resources contributed $20 million. Op. 4. Thus, NCPRF owns 80% of the limited partnership interest in Sierra LP, and the remaining 20% is owned by Sierra GP, whose sole member and manager is Sierra Resources. Op. 3.

On August 16, 2013, Sierra LP issued 2% notes (the "Notes") in a public offering for $160 million due in 2028. Op. 2. To complete the offering, Sierra Resources entered a trust indenture with BNY Mellon, which contained a provision known as the "dead hand" proxy put. Op. 2. The provision triggers afford the holders of the Notes (the "Noteholders") an automatic put option when there is a "Change of Control." Op. 2. "Change of Control" occurs when a majority of directors do not remain on the board for a consecutive twelve-month period. Op. 2. "Change of Control" can also occur when "an actual or threatened solicitation of proxies or consents for election" for a position in a governing body by any person other than the incumbent board of directors. Op. 2.

The first draft of the Indenture was prepared by counsel for Morgan Stanley, the underwriter of the offering. Op. 5. During negotiations of the content of the Indenture, representatives of Sierra LP and Sierra Resources testified they never communicated with anyone

at Morgan Stanley concerning the provisions in Section 11.01. Op. 5. When counsel for Sierra LP and Sierra Resources reviewed the draft, they provided several comments and suggested edits, but left Section 11.01 unchanged. Op. 5. Further, the company's counsel responded that there were no novel terms that required attention from the finance committee or the board of directors when counsel was requested by one of the directors on the finance committee that approved the Indenture. Op. 5-6. Shareholder activism was a well-known occurrence in the real estate industry that had been widely reported. Op. 6. At the time of the Indenture negotiations, Sierra Resources was not aware of any arrangements of election contests to replace any of its directors, or "activist" shareholders interested in acquiring a significant equity position in Sierra Resources. *Id.*

On October 12, 2015, High Street Partners, LP "High Street", an activist hedge fund, filed a Schedule 13D with the SEC indicating it had acquired 6.3% of outstanding shares of Sierra Resources. *Id.* The 13D further stated an intention to propose certain strategic alternatives, and an interest in undertaking to replace one or more of the directors of Sierra Resources through a contested solicitation of proxies if Sierra Resources declined to implement High Street's proposal or similar strategies. *Id.* Sierra Resources has publically stated that if High Street nominees constituting a majority of the board were elected, the proxy put would be triggered, mandating Sierra Resources to pay off the Notes. Op. 7.

ARGUMENT

The Board was deprived of the ability to avoid a "Change of Control" because the Noteholders of Sierra LP's Notes could trigger the proxy put by approving the election of persons nominated in connection with an election contest. Thus, NCPRF argues that Section 11.01 should be declared invalid and unenforceable.

I. The Court of Chancery was Correct in Determining that Section 11.01 of the Indenture, per se, violates Delaware law.

A. Question Presented

Whether Section 11.01 of the Indenture deprived Sierra Resources' incumbent board of directors of any ability to protect the corporation from an activist shareholder because the "dead hand" proxy put mechanism entrenched the current board of directors and prevented the actual or threatened proxy solicitation of new board members, who are not nominated by the current board.

B. Scope of Review

When on appeal from a Court of Chancery decision granting summary judgment, the Court must decide issues of both law and fact. Levitt v. Bouvier, 287 A.2d 671, 672 (Del. 1972). Legal conclusions are reviewed *de novo*. Merrill v. Crothall-American, Inc., 606 A.2d 96, 99 (Del. 1992). The Court must also determine whether factual findings are clearly supported by the entire record and whether the conclusions

drawn from those findings are the product of an "orderly and logical" reasoning process. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 35 (Del. 2006). The Court does not draw its own conclusions with respect to the facts of the record unless the record shows that "the trial court's findings are clearly wrong and justice so requires." *Id.*

C. Merits of Argument

The Court should affirm the Court of Chancery's decision granting summary judgment. The "dead hand" proxy put is unreasonable under the *Unocal* heightened standard of review because Sierra Resources were not aware of a perceived threat and the "dead hand" proxy put is an unreasonable defensive measure. Also, Sierra Resources did not act in good faith and fair dealing when it entered into the transaction with BNY Mellon because Sierra Resources was unable to show a significant economic benefit for including Section 11.01 in the Indenture.

1. The "dead hand" proxy put is unreasonable under *Unocal* enhanced review analysis.

The Delaware Supreme Court held that the *Unocal* heightened standard of the business judgment rule applies in the context of takeovers. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. 1985). The heightened *Unocal* standard is a two-part test: 1) the Board must show that it had reasonable grounds for believing that a threat to the corporation existed and, 2) the Board must show that it adopted a reasonable defensive measure in retaliation to the posed

threat. *Id.* at 955. In the context of a takeover, this Court held that in "situations where [the] board of directors makes decisions that have clear implications for their continued control," the heightened standard of *Unocal* is an "equitable tool to protect stockholders against unreasonable director action that has a defensive or entrenching effect." *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 258 (Del. Ch. 2013) (citing *Unocal Corp.*, 493 A.2d at 954-55).

Sierra Resources allegedly accepted the "dead hand" proxy put in Section 11.01 of the Indenture to lower the interest rate on the Notes. Op. 9. The result of triggering the Noteholder's put rights under the "dead hand" proxy put of Section 11.01 is a "Change of Control." Op. at 2. Once a "Change of Control" occurs, the Noteholders have the right to demand payment of the Note's principal and accrued interest from Sierra LP. *Id.* The shareholders were hindered from nominating a new slate of directors to replace the incumbent board through a proxy contest. *Id.* The "dead hand" proxy put prevented the incumbent board from stopping the "Change of Control" even if they approved the dissident board that was not originally solicited through a proxy by the incumbent board of directors. *Id.*

In *Amylin*, the court determined that a "dead hand" proxy put clause "with such an eviscerating effect on the stockholder franchise would raise grave concerns." *San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc.*, 983 A.2d 304, 315 (Del. Ch. 2009). Based on the Court of Chancery decision, Section 11.01 of the Indenture fits the definition of a takeover and should be analyzed under the *Unocal*

standard because it has "clear implications for [the Board's] continued control" and entrenches the Board. *Kallick*, 68 A.3d at 258.

i. The Board of Sierra Resources did not satisfy Prong 1 of the Unocal analysis.

The first prong of the *Unocal* standard requires the Board have a reasonable belief that a threat to the corporation exists. Unocal, 493 A.2d at 954-55. In *Kallick*, the entrenched board of directors were aware of the potential proxy contest to nominate dissident members to the board of directors. 68 A.3d at 244. The court held that the incumbent board of directors could not identify a substantial risk nor a breach of fiduciary duty regarding the approval of the nominated slate. *Id.* at 246. The court did identify a substantial risk or a breach of fiduciary duty if the proposed new board contained "persons of suspect integrity." *Id.* Thus, the burden shifts to the Board to prove that it had a reasonable belief of substantial risk to the corporation. Cheff v. Mathes, 199 A.2d 548, 555 (Del. 1964). A board may meet its burden by showing good faith and reasonable investigation of the "dead hand" proxy put. *Id.* Here, Appellant stated that the board was not aware of anyone planning to participate in an election contest when Sierra LP entered the Indenture. Op. 6. While "the phenomenon of shareholder activism was well known in the real estate industry," the board of directors did not conduct a reasonable investigation before entering the Indenture. *Id.* Therefore, Sierra Resources cannot claim that it had established reasonable belief that a threat to the incumbent board existed because the board of directors

were not aware of a possible threat at the time of the negotiation of the Indenture agreement. *Id.* The "dead hand" proxy put is a, per se, violation of Delaware law because the incumbent board of directors were not aware of any actual threat to Sierra Resources and did not have reasonable grounds to believe that a threat existed. Op. 6. Sierra Resources should not have placed defensive measures in the Indenture without a reasonable belief that an "activist" threat to the board existed.

ii. The Board of Sierra Resources did not satisfy Prong 2 of the Unocal analysis.

Assuming that the Board could have reasonably believed that a threat to the incumbent board of directors existed, the board of directors adopted an unreasonable defensive measure against the potential threat. *Unocal Corp.*, 493 A.2d at 955. In the second prong of the *Unocal* standard, the board of directors must show that the defensive action taken by the board was reasonable in retaliation to a perceived threat. *Id.* In *Kallick*, the court stated that a board of directors would be acting in "absence of good faith and reasonableness" to maintain power to approve a dissident slate but refuse to exercise that power to protect the incumbent board. *Kallick*, 68 A.3d at 261. At the time that Sierra LP approved the Indenture, a substantial risk to the company or its creditors did not exist. Op. 6. In fact, if there was a substantial risk to Sierra Resources or its creditors, the "dead hand" proxy put in Section 11.01 is more disadvantageous to persons not on the incumbent board than the defensive measures taken by

the board of directors in *Kallick*. 68 A.3d at 250-51. In *Kallick*, the court described the incumbent board's advantage of approving a dissident slate of directors as an "immediate, irreparable harm." *Id.* at 264. The dissident board could be nominated, but the proxy put would be triggered as soon as the majority of directors on the board were no longer the same directors as the incumbent board. *Id.* at 244. The Section 11.01 "dead hand" proxy put doesn't even allow for the nomination of a dissident slate or an "an actual or threatened solicitation of proxies or consents for election." Op. 2.

Sierra Resources identified that Section 11.01 could be an issue for the corporation when one of the directors of the finance committee asked outside counsel to determine whether Section 11.01 contained any novel terms that required the attention of the board. Op. 5-6. Therefore, the Board had a duty to reasonably investigate the "dead-hand" proxy put provision without knowing of any apparent substantial risk to the company or its creditors. Op. 6. As the court below stated, Defendants cannot place blame solely with outside counsel because the "dead hand" proxy put, "even if considered customary" should be brought to the Board's attention. *Amylin Pharm.*, 983 A.2d at 319. The "dead hand" proxy put affected the ability of stockholders to make changes to the board and was unreasonable because the Board did not reasonably investigate the "dead hand" proxy put once the finance committee became aware of the provision. Op. 5-6.

The Court should hold that the "dead-hand" proxy put provision is a, per se, violation of Delaware law because the board of directors did

not use a reasonable defensive measure against a perceived threat to the incumbent board.

2. The "dead hand" proxy put violated the good faith and fair dealing standard inherent in business transactions.

The board of directors has a duty to act with implied good faith and fair dealing. *Amylin Pharm.*, 983 A.2d at 307. In *Amylin*, the Indenture "would prohibit any change in the majority of the board as a result of any number of contested elections, for the entire life of the notes." *Id.* at 315. The Court of Chancery then stated that "an indenture with such an eviscerating effect on the stockholder franchise would raise grave concerns." *Id.* Finally, the court "want[s], at a minimum, to see evidence that the board believed in good faith that, in accepting such a provision, it was obtaining in return extraordinarily valuable economic benefits for the corporation that would not otherwise be available to it." *Id.* Therefore, the court should weigh the economic benefit of a transaction against the restrictive provision in the Indenture.

In *Amylin*, the Court of Chancery held that the bank simply pursued an opportunity to collect a fifty-point base fee for a triggering of the "Change of Control" and a twenty-five point base fee for attempting to solicit consent for a dissident board. *Id.* at 312. According to the court, the board of directors did not sufficiently negotiate the terms of the Indenture and had a responsibility to negotiate on behalf of the shareholders instead of creditors, "whose interests at times may be directly adverse to those of the stockholders." *Id.* at 319.

Here, the board of directors claim that not accepting Section 11.01 of the Indenture would have increased interest rates "up to 50 basis points higher." Op. 9. The alleged advantage of accepting the "dead hand" proxy put is at odds with the risk of transactional costs of refinancing, which could cost Sierra Resources "$2 to $3 million." Op. 7. These transaction costs would additionally cost Sierra Resources its $20 million investment to pay out the proxy put and NCPRF its $80 million investment. The ability for the bank to demand these fees without Section 11.01 are not an "extraordinarily valuable economic benefit[]." *Amylin Pharm.*, 983 A.2d at 315. Similar to Amylin Pharmaceuticals, Sierra Resources did not receive an "extraordinarily valuable economic benefit[]" for the restrictive "dead hand" proxy put, because the 50 basis points were an insufficient benefit. Op. 9; *Id.* Therefore, the board of directors were not negotiating in good faith and fair dealing when they entered the transaction with BNY Mellon.

II. The Court of Chancery was Correct in Determining that Sierra Resources owes a fiduciary duty to the North Carolina Police Retirement Fund.

A. Question Presented

Whether the individual directors of Sierra Resources owe a fiduciary duty to NCPRF, the limited partner of Sierra LP, when Sierra Resources is the sole manager and sole member of Sierra GP, LLC, the sole general partner of Sierra LP.

B. Scope of Review

When on appeal from a Court of Chancery decision granting summary judgment, the Court must decide issues of both law and fact. Levitt, 287 A.2d at 672. Legal conclusions are reviewed *de novo*. Merrill, 606 A.2d at 99. The Court must also determine whether factual findings are clearly supported by the entire record and whether the conclusions drawn from those findings are the product of an "orderly and logical" reasoning process. *In re* Walt Disney Co., 906 A.2d at 35. The Court does not draw its own conclusions with respect to the facts of the record unless the record shows that "the trial court's findings are clearly wrong and justice so requires." *Id.*

C. Merits of Argument

This Court has always upheld that a general partner of a limited partnership owes direct fiduciary duties to the partnership and to its limited partners. *See* Boxer v. Husky Oil Co., 429 A.2d 995, 997 (Del. Ch. 1981); Meinard v. Salmon, 483 A.2d 633 (Del. 1984). Sierra Resources argues that liability can only be asserted against Sierra GP, Sierra LP's sole general partner, and that Sierra Resources and its directors do not owe any fiduciary duties to NCPRF. Op. 11. However, because Sierra Resources had full control of the limited partnership and engaged in a self-interested transaction, both the corporation and its directors can be held liable for the loss to Sierra LP. Op. 2-6.

1. Sierra Resources owes a fiduciary duty of loyalty to Sierra LP because Sierra Resources maintains total control of the general partner of Sierra LP.

Sierra Resources owes a fiduciary duty of loyalty to Sierra LP because it manages and controls Sierra LP. Op. 3-4. Corporate general partners owe a fiduciary duty of loyalty to the Partnership and any other partner because they control the general partner through the votes of its directors. Wallace v. Wood, 752 A.2d 1175, 1182 (Del. Ch. 1999). In *Wood*, the corporate general partner and the limited partner formed a limited partnership to acquire, own, and operate cable television systems. 752 A.2d at 1178. The corporate general partner then circumvented a provision in the contract prohibiting indebtedness to acquire leverage to make acquisitions, causing the limited partner to bring suit. *Id.* at 1179. The Court of Chancery found that "unless restricted by the limited partnership agreement, the general partner of a Delaware limited partnership and the directors of a corporate General Partner who control the partnership, like directors of a Delaware corporation, have the fiduciary duty to manage the partnership in the partnership's interests and the interests of the limited partners." *Id.* at 1182. While the "LP Agreement" signed by NCPRF and Sierra Resources contains detailed provisions limiting or eliminating fiduciary duties of the general partner in regards to competition with the limited partner and monetary liability for breach of duty of care, the parties agree that neither of those provisions bars the relief sought in this case. Op. 4-5.

i. The LLC and LP legal entities created by Sierra Resources for the purpose of engaging in transactions and limiting liability do not limit its fiduciary duties to the limited partnership and to its limited partner, because it retains control over the limited partnership.

The legal entities created by Sierra Resources for the purpose of engaging in transactions do not limit its fiduciary duties. *Wood*, 752 A.2d at 1182. The Court of Chancery stated that "fiduciary duties may be imputed to a separate entity formed and controlled by the fiduciaries for the purpose of engaging in a transaction with an entity to whom those duties are owed." Barbieri v. Swing-N-Slide Corp., No. 14239, 1997 Del. Ch. LEXIS 9 (Del. Ch. Jan. 29, 1997). According to the Court of Chancery, Sierra Resources would not be able to escape fiduciary duty had it formed an agreement directly with the limited partner. Thus, the creation of the LP and the LLC for the purpose of the transaction does not absolve Sierra Resources of its fiduciary duties to Sierra LP. Op. 3.

ii. Sierra Resources owes fiduciary duties to NCPRF because Sierra Resources performed all of the management functions and the carried out all of the activities of Sierra LP.

Sierra Resources owes fiduciary duties to NCPRF because Sierra Resources performed all the management functions and carried out all the activities of Sierra LP as its general partner. Op. 4-6. The Delaware Court of Chancery stated in Boston Celtics, "when the directors of a general partner perform all of the management functions and carry out the activities of the company, they owe the limited partner fiduciary duties." *In re* Boston Celtics Ltd. Pshp.

Shareholders Litig., No. 16511, 1999 Del. Ch. LEXIS 166 at *14 (Del. Ch. Aug. 6, 1999). The Boston Celtics LP was a Delaware limited partnership managed by Celtics, Inc., a corporate general partner. 1999 Del. Ch. LEXIS 166 at *1. The corporate general partner set up a reorganization of the company for the purposes of tax restructuring, without the consent of the limited partner, leaving the limited partner with diluted equity interests. *Id.* at *10. The court iterated that, "the fiduciary duty of fair dealing by a general partner to a limited partner is no less than that owed by a director to a shareholder. The form of the enterprise does not diminish the duty of fair dealing by those in control of the investments." *Id.* Therefore, Sierra Resources owes fiduciary duties to Sierra LP regardless of the legal entities Sierra Resources utilized for the control and management of Sierra LP.

2. The individual directors of Sierra Resources engaged in an unfair, self-dealing transaction for which courts traditionally hold individual corporate general partners liable.

The individual directors of Sierra Resources engaged in an unfair, self-dealing transaction that entrenched the current board. Op. 2. Traditionally, directors of corporate general partners of limited partnerships were elevated to fiduciaries of limited partners and subjected to liability for implementing unfair, self-dealing transactions. *Wood*, 752 A.2d at 1182. A "self-dealing" transaction is defined as a personal benefit derived from a transaction with or involving the entity to which one owes a fiduciary duty. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). In this instance, Sierra Resources allowed the "dead hand" proxy put provision for its personal

benefit of entrenching the current board of directors and preventing the actual or threatened proxy solicitation of new board members, who were not nominated by the current board. Op. 2.

i. The directors of Sierra Resources engaged in a self-dealing transaction because they used control over Sierra LP's property to their personal advantage, at the expense of the limited partner.

The directors of Sierra Resources owe fiduciary duties to NCPRF, the limited partner, because they used control over Sierra LP's property to the advantage of the directors and at the expense of the partnership. *In re* USA Cafes, L.P. Litig., 600 A.2d 43 (Del. Ch. 1991). In *USA Cafes*, the corporate general partner of a limited partnership sold substantially all the partnership's assets to a successor corporation in exchange for monetary benefits. 600 A.2d at 43. The Court of Chancery found that "that one who controls the property of another may not, without implied or express agreement, intentionally use that property in a way that benefits the holder of control to the detriment of the property or its beneficial owner." *Id.* at 48. Whereas in *USA Cafes* limited partners were receiving a grossly inadequate price, NCPRF could lose an $80 million investment or the opportunity to refinance. Op. 4, 7. Further, were the "dead hand" provision be triggered, the outcome of having to pay the put provision would not be material to Sierra Resources, but the impact on NCPRF would be four times greater. Op. 7.

The directors of Sierra Resources engaged in self-interested transactions that were averse to the interests of NCPRF, causing them

to be liable as fiduciaries to Sierra LP. *Wood*, 752 A.2d at 1181. In *Wood*, limited partners were promised a relatively stable investment. *Id.* However, without the knowledge or consent of the limited partners, corporate general partners engaged in wrongful, self-interested acts which converted the limited partnership into a highly speculative, highly leveraged investment. *Id.* Similarly, Sierra Resources only obtained "general endorsement" from NCPRF for obtaining debt financing. Op. 5. Sierra Resources did not ask for specific consent to include the "dead hand" proxy put and the directors of Sierra Resources failed to adequately solicit other provisions than the "dead hand" proxy put. Op. 5-6. The directors of Sierra Resources negated to bring up any novel terms that required attention from the finance committee or the board, even after they reviewed the draft and approved the terms for offering the Notes. Op. 4-5.

ii. Many courts have held directors of corporate general partners personally liable for breach of fiduciary duty by the general partner or the corporation.

Finally, many courts have held directors of corporate general partners personally liable for breach of fiduciary duty by the general partner or the corporation. Two courts have held a sole shareholder of a corporate general partner personally liable for a breach of fiduciary duty to limited partners. Tobias v. First City National Bank and Trust Co., 709 F. Supp. 1266, 1277-78 (S.D.N.Y. 1989); Remenchik v. Whittington, 757 S.W.2d 836 (Tex. Ct. App. 1988); *see also In re* Integrated Resources Inc., Case No. 90-B-10411 (CB) (Bankr. S.D.N.Y.

Oct. 22, 1990) (holding controlling shareholder is held liable). The Court of Chancery in *USA Cafes* stated that, "while these authorities extend the fiduciary duty of the general partner to a controlling shareholder, they support as well, the recognition of such duty in directors of the general partner, who, more directly than a controlling shareholder, is in control of a partnership's property." 600 A.2d at 49.

Further, in an oral ruling denying a motion to dismiss in *Healthways*, the most recent "dead hand" proxy put case, Vice Chancellor Laster stated that a borrower's directors could face personal liability for a breach of the duty of loyalty. Pontiac Gen. Emples. Ret. Sys. v. Ballantine, No. 9789, 2015 Del. Ch. LEXIS 139 (Del. Ch. May 8, 2015) (transcript, Oct. 14, 2014, settled out of court). The directors of Sierra Resources directly participated in the breach of the general partner by failing to adequately review the self-serving Indenture provision and allowing it to be instated without scrutiny by the board or consent from the limited partners. Op. 4.

CONCLUSION

For the aforementioned reasons, the court should uphold the decision of the court below, and grant summary judgment for the Appellees.