

## Revlon and Unocal Enhanced Scrutiny Rejected for Dissolution Plan

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In *Huff Energy Fund v. Gershen*, C.A. No. 11116-VCS, the Delaware Court of Chancery dismissed a stockholder's challenge to the board of director's decision to dissolve the company following an asset sale. The Court ruled that the enhanced scrutiny standards of *Revlon* and *Unocal* do not supplant the business judgment rule in the context of a company's decision to dissolve.

In 2006, plaintiff The Huff Energy Fund, L.P. ("Huff") started buying stock in defendant Longview Energy Company ("Longview"), ultimately resulting in a 40% stake. In 2008, Longview started pursuing a liquidity event. According to Huff, this liquidation strategy was driven by one director's displeasure with Huff's increasing ownership in Longview and two directors' desire to trigger large severance payments owed under employment agreements upon a change in control.

Longview negotiated a proposed \$43 million sale of oil and gas assets; however, oil prices collapsed and the bidder withdrew. Thereafter, Longview found a new buyer for the same assets at a significantly reduced price of \$28 million. Longview's board of directors (the "Board") and shareholders approved the sale and adopted a plan to dissolve Longview following the sale. However, due to Longview's potential indemnification obligations in a separate lawsuit between Longview and affiliates of Huff, the Board concluded it could not make an immediate distribution of sale proceeds to stockholders.

Huff sued Longview and six directors (all of the eight directors, other than the two directors designated by Huff). Huff alleged 1) the plan of dissolution violated Huff's rights under a shareholders agreement and 2) the Board breached its fiduciary duties in approving the dissolution plan. The defendants moved to dismiss the complaint and the Court granted the motion.

As to the contract claims against the directors, the Court reaffirmed Delaware precedent holding that a director cannot be liable for breach of contract, provided the director did not purport to be individually bound. While several directors signed the shareholders agreement, they did so only in their representative capacities on behalf of entities as opposed to in their individual capacities. The Court also denied the breach of contract claims against all defendants based on various grounds of contractual interpretation.

Next, the Court addressed the fiduciary duty claims. Rejecting these claims, the Court cited the

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following grounds: 1) the directors were disinterested and independent; 2) *Revlon* does not apply; 3) *Unocal* is inapplicable; and 4) the stockholder vote cleanses the transaction.

The Court determined that the allegations of directors' financial interest and disloyalty fell short of the standard required to strip the directors of the protections afforded by the business judgment rule. Although two Longview directors were to receive large severance payments, Delaware precedent holds that the mere possibility of receiving change-in-control benefits pursuant to preexisting employment agreements, without more, does not disqualify directors as a matter of law. Moreover, the Longview severance payments were triggered by the unchallenged sale of assets, not the Board's adoption of the dissolution plan, which formed the gravamen of the complaint. And, in any event, Huff made no breach of loyalty allegations against the other directors, meaning that a majority of independent and disinterested directors properly approved the dissolution plan.

Having failed to rebut the business judgment rule's presumption of loyalty and care, Huff unsuccessfully attempted to persuade the Court that the Board's adoption of the dissolution plan triggered enhanced scrutiny under either *Revlon* or *Unocal*.

As background, the Court explained that *Revlon* enhanced scrutiny applies to "final stage" transactions, such as a cash sale, a break-up, or a transaction that fundamentally alters ownership rights. Inherent in these transaction processes are "subtle structural and situational conflicts" that do not permit the degree of judicial deference associated with business judgment rule.

In *Huff*, the Court rejected the plaintiff's argument that the Board's adoption of the dissolution plan was a final stage transaction under *Revlon*. Though the Board's adoption of the dissolution plan prompted the winding-up process, the dissolution plan did not disturb the Board's authority to control the means of dissolution and Longview's remaining assets, nor did it free the directors from their duty to act in the best interests of Longview's stockholders. Therefore, the adoption of the dissolution plan did not implicate the same policy concerns as a *Revlon* final stage transaction.

The Court similarly declined to hold that the Board's dissolution plan was an "unreasonable poison pill" so as to invoke *Unocal* heightened scrutiny. In the context of evaluating defensive measures in a hostile takeover, the *Unocal* decision focused on the concern with board entrenchment and noted the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." In *Huff*, however, the plaintiff cited no case suggesting that the Board's mere adoption of a plan of dissolution was a defensive measure in the *Unocal* sense. Furthermore, the Court determined that one director's perception that Huff's stake in Longview posed a threat to that director's corporate power was not the type of "omnipresent specter" of board entrenchment traditionally invoking *Unocal* scrutiny.

Citing other precedent, the Court in *Huff* held that the stockholder approval of the dissolution plan cleansed the transaction, resulting in the irrebuttable application of the business judgment rule.

[Huff Energy Fund v. Gershen, C.A. No. 11116-VCS.pdf](#)

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