

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE VAALCO ENERGY, INC.: Consolidated
STOCKHOLDER LITIGATION : Civil Action No. 11775-VCL

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Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, December 21, 2015
2 p.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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RULINGS OF THE COURT FROM ORAL ARGUMENT ON CROSS
MOTIONS FOR SUMMARY JUDGMENT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
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Wilmington, Delaware 19801
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Inc.

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1 then continues. So technically it's a comma and
2 identifies two exceptions: "except as follows:"
3 One exception is "... a corporation whose board is
4 classified as provided in subsection (d)"
5 Another exception is subsection 2, "In the case of a
6 board of directors having cumulative voting"

7 For better or for worse, those are the
8 two statutory exceptions. It is not the case that
9 there is some normative policy rationale, I think,
10 driving that. Could you have a combination of a
11 single-class or nonstaggered or straight board and
12 for-cause removal in theory? Yeah, I don't think it's
13 something that would be against human nature or a
14 crime against humanity or otherwise imponderable by
15 any means. But we have a legislative statement of
16 what Delaware law permits. And that's what I just
17 stated. That's historically how this statute has been
18 interpreted. It's how it was interpreted in the Rohe
19 versus Reliance Training case. It's how it was
20 interpreted in various treatises, et cetera.

21 By invalidating these provisions, I am
22 not engaging, nor is the plaintiff seeking,
23 reformation of the charter and bylaw. Reformation is
24 when you have a prior antecedent agreement that is not

1 accurately reflected in the written instrument. This
2 isn't that situation. This is a situation where there
3 is a provision that is contrary to law. Something
4 that is contrary to law is invalid, not because
5 somebody intended something else and didn't scriben it
6 accurately, but because you can't have a provision in
7 your charter that is contrary to law.

8 There has been arguments made about
9 whether this implicates the resistance to severability
10 that is expressed to C&J and Toys "R" Us. The general
11 default common law rule is that provisions of an
12 agreement, provisions in a charter and bylaws, even
13 provisions of a statute are severable. When people
14 agree to this in an agreement and include an
15 affirmative severability provision, it means that they
16 are emphasizing that. It's the same way that under
17 default common law you can get a decree of specific
18 performance, but if you then agree that somebody can
19 be granted specific performance, you're emphasizing
20 that. You're saying "In addition to all the default
21 doctrines, here you can get specific performance to
22 enforce this contract."

23 So when somebody puts in a
24 severability provision, that's what they're saying.

1 The absence of a severability provision, while it
2 might be a factor that one would consider, does not
3 preclude severability.

4 Now, I understand that C&J and Toys
5 "R" Us cut against that and discourage severability in
6 the deal when you're dealing with preclosing
7 injunctions. C&J is obviously a decision of the
8 Supreme Court, so I'm going to follow it. Even if
9 there's a severability clause, we're now not doing
10 that. We're doing the sort of all-or-nothing-type
11 enforcement contemplated by C&J. And, as I say,
12 obviously I'm going to go with that. But I don't
13 think that that speaks to severability in general or
14 invalidity in general or sort of making everything an
15 inevitable package deal in general. If I'm wrong
16 about that, I'm wrong about that; but I don't think,
17 at least based on the language of those cases, that
18 they cut more broadly than the deal context, the
19 negotiated acquisition context in which C&J and Toys
20 seem to have been decided. They certainly were
21 decided in that context, but on which they seem to
22 have been focused.

23 What I think is the defendants'
24 strongest argument against the plain language of

1 141(k) and this reading is the language in 141(d),
2 which, for better or for worse, says that "The
3 directors of any corporation organized under this
4 chapter may, by the certificate of incorporation or by
5 an initial bylaw, or by a bylaw adopted by a vote of
6 the stockholder, be divided into 1, 2 or 3 classes
7"

8 This creates, at least on its face,
9 the somewhat oxymoronic concept of a single-class
10 classified board. As the defendants see that, that
11 single-class board would be classified and, hence, the
12 directors only would be subject to removal for cause.

13 That, I think, is a pretty novel
14 reading of 141(d). I don't think anybody out there
15 has ever touted the idea of single-class classified
16 boards triggering removal for cause. Now, that
17 doesn't mean that the defendants haven't hit upon some
18 new discovery about company law. One of the things
19 that we discovered about company law in CML was that,
20 notwithstanding otherwise seemingly analogous
21 provisions to corporations, creditors can't sue
22 derivatively. And I played some role in discovering
23 that.

24 So are people discovering new things

1 about corporate law and company law? Sure, they are.
2 But you ought to have some really good reason for
3 suddenly discovering something new about a section
4 like 141, particularly when that interpretation of
5 141(d) would cut against what I think has been the
6 standard analysis of 141(k).

7 Actually, what I think that reference
8 is about -- and this is all part of plumbing the
9 depths of the legislative history of this -- but what
10 I thought was most telling on that was a document that
11 was provided to me for another purpose, and, namely,
12 that's "The 1974 Amendments To the Delaware
13 Corporation Law," the comment by Arsht and Black.

14 And one of the things that they talk
15 about in there about 141(d) is that part of the goal
16 of including this language "divided into 1, 2 or 3
17 classes" was to make clear in combination with the
18 language about "The certificate of incorporation may
19 confer upon holders of any class or series of stock
20 the right to elect 1 or more directors," et cetera,
21 that that second half of 141(d), those special
22 directors, special stock directors, were not an
23 additional class of directors. So there was
24 uncertainty about whether that would be an additional

1 class of directors, such that if you had a three-class
2 classified board plus special stock directors, do you
3 suddenly have four classes? And what Arsht and
4 Drexler explain is no, that's not the case. You then
5 still only have three classes.

6 I suspect that this 1, 2 or 3 classes
7 was getting at the idea that if you only have a
8 straight board, you only have one class of directors,
9 even if you have special stock directors. I don't
10 think that it's not designed to create the somewhat
11 oxymoronic idea of a one-class classified board.
12 It's, rather, saying that if you have special stock
13 directors, they're just part of the board along with
14 everybody else.

15 In saying that, I'm not going against
16 Insituform and what Chancellor Allen talked about
17 there about 141(k). What I'm talking about is the
18 reference to "1, 2 or 3" in 141(d).

19 So, as I say, I think that's the best
20 argument that the defendants have. It's not one that
21 I find persuasive. And it's also, I don't think, what
22 they did. I think it's one thing if you went out to
23 your stockholders and said "We are declassifying, and
24 we are declassifying from three classes into one

1 class, and our newly re-classified one-class board
2 will have all the attributes of a classified board
3 under Delaware law and, therefore, will not allow
4 removal except for cause." That at least would
5 squarely present the issue of what "1, 2 or 3 classes"
6 means under (d). Here, what we have is a declassified
7 straight board. We have a declassified straight board
8 that does not try to get into 141(k)(1) that way but,
9 rather, admits that it is a straight board and simply
10 looks to that 141(d) example by analogy as to say
11 "Hey, there's another way we could have done this. We
12 didn't do it, but you ought to let us do it, anyway."

13 Well, once framed that way, that
14 argument runs afoul of the venerable principle of
15 independent legal significance. And while in equity
16 we might look at the substance of things, in statutory
17 interpretation we value formality. And the fact that
18 you did not go one route means you did not go that
19 route. It means that for purposes of validity, for
20 invalidity, for what votes apply, et cetera. So the
21 fact that you might theoretically have gone some
22 heretofore unforeseen path towards a single-class
23 classified board for which directors would be
24 removable only for cause doesn't mean that because you

1 ended up with something that you'd like to say is the
2 functional equivalent of that you get the benefit.

3 So, as I say, A, I don't think the
4 argument works. I think that "1, 2 or 3 classes"
5 concept is geared to something else. B, I don't think
6 there's any way to believe that that's what people did
7 here in this case.

8 To the extent that this upsets
9 expectations at some give-or-take 175 public companies
10 that may have some strange combination of provisions
11 that attempts to achieve the same result, that is just
12 a consequence of people not reading the statute. And
13 I think defendants, quite appropriately, backed away
14 from this argument today. Just as "all the other kids
15 are doing it" wasn't a good argument for your mother,
16 and just as "all the other drivers are speeding" still
17 isn't a good argument for the highway patrolman, the
18 idea that 175 other companies might have wacky
19 provisions isn't a good argument for validating your
20 provision.

21 And I would note that there used to be
22 around 6,000 public companies out there. By
23 conservative measures, that number has dropped to
24 around 4,000. So what we're talking about is less

1 than 5 percent. Even giving the defendants the best
2 number, we're talking about, what, 3-ish, 4-ish
3 percent. There's 3-ish or 4-ish percent that will do
4 pretty much anything. I mean, we as a human species,
5 as we know now from the Internet, there is 3-ish,
6 4-ish percent that would dare to be different pretty
7 much no matter what. So I am not one who would be
8 swayed by those examples. And if people have to go
9 and fix things, so be it.

10 So I'm going to enter an order
11 granting a declaratory judgment as to the validity of
12 Article V, Section 3 of the charter and Article III,
13 Section 2 of the bylaws.

14 I'm not going to do anything more than
15 that. I think what people do next is up to the actual
16 actors involved. So, you know, one might think that
17 the board would potentially issue some new disclosures
18 and do whatever it thought it had to do as a matter of
19 Delaware disclosure law and the federal securities
20 laws. That's why the board has the excellent counsel
21 it has. And it will do whatever it feels that it
22 needs to do in that regard. And once we have seen
23 whatever it does, we'll deal with it. I'm not going
24 to sort of preemptively try to sketch out today what

1 happens in terms of revocations or validity of
2 consents or all that type of stuff. I'll deal with it
3 once we have a concrete situation on down the road.

4 That's really all I had for you-all.

5 Questions. Mr. -- oh, Mr. Bissell,
6 your hand shot up. You're eager. I was going to
7 start with Mr. Lebovitch because it was his
8 application.

9 MR. BISSELL: I think you should.

10 THE COURT: All right. Well,
11 Mr. Lebovitch I think is being gracious and yielding
12 to you.

13 MR. LEBOVITCH: (Indicating)

14 MR. BISSELL: Okay. Your Honor, thank
15 you for your ruling. It sounds like it is not a final
16 order --

17 THE COURT: Well --

18 MR. BISSELL: -- which -- and I only
19 ask that for -- to make sure we understand our appeal
20 paths, should we choose to go down that road.

21 THE COURT: So, look, I think that's
22 something we ought to talk about, because, you know,
23 Lord knows, I am not -- I don't mean -- I don't say
24 that to be discriminatory of anyone else's faith. I

1 am not the final word on these things. It would seem
2 to me, because I'm granting summary judgment, to be a
3 partial judgment. I can certify it as a 54(b) order.
4 I can -- I mean, maybe the parties would dismiss their
5 other claims and then it would be immediately
6 appealable. It's the type of thing that it would be
7 odd from my standpoint if I did anything to inhibit
8 your ability to seek an appeal. I think that would be
9 a misguided effort on my part.

10 So that would be my view of it. If
11 you guys want to talk in the first instance. But it
12 seems to me this is like a clean legal issue that
13 would seem to me to meet 54(b) requirements.

14 MR. BISSELL: Okay. Your Honor, we'll
15 confer with our clients and with our friends. And if
16 we need to talk to you about a certification, we'll
17 come back to you promptly.

18 THE COURT: Yeah. If you just want to
19 put in -- I mean, I'm happy to have you-all take the
20 first draft, Mr. Lebovitch. It can be a very tight
21 order, declaratory order. Mr. Lebovitch can take the
22 first crack at it and run it by you. If you just want
23 to put in there that this is a partial judgment as to
24 Count such and such and there's no just reason for

1 delay of an appeal and it's severable and distinct and
2 all that good stuff, I'm happy to enter that.

3 MR. BISSELL: Thank you, Your Honor.

4 THE COURT: Any other questions?

5 MR. BISSELL: No. Still a lot to
6 digest.

7 THE COURT: Okay. Mr. Lebovitch, how
8 about you?

9 MR. LEBOVITCH: Well, Mr. Bissell's
10 question raised a question for me. We will take a
11 crack at the order. Hopefully defendants will be able
12 to craft one amicably.

13 Maybe I'm not thinking through the
14 rules, but I just want to leave a placeholder. If
15 there's some agreement that this becomes a final
16 order, I just want to point out -- because I didn't
17 raise it in the argument, but it's in our briefs -- I
18 mean, right now there's a vote on January 5th. We
19 pointed out that the board had not made any
20 recommendation. We pointed out that that seems to
21 violate Section 242. We were, frankly, trying to keep
22 this focused and wait to present the clean issue to
23 the Court.

24 If by some chance, because Your Honor

1 is leaving it to the board to figure out their next
2 step, if they are going to go forward with some sort
3 of a vote on January 5 on, I don't really know what,
4 after this charter's been, I think, invalidated or the
5 provision has been invalidated, we have a placeholder.
6 We just want there to be a clear ability to come to
7 the Court quickly to enforce whatever rights
8 stockholders have under 242 to get a recommendation.
9 I don't know whether the order Your Honor contemplates
10 would somehow deprive the Court of jurisdiction, but I
11 want to have a very quick ability to come in and, you
12 know, stop that vote if they don't comply with the
13 statute.

14 THE COURT: The beauty of 54(b) is you
15 just go up on the thing that is the partial final
16 judgment as to that issue. So this court would still
17 have jurisdiction over the things that weren't severed
18 and sent up.

19 And, as I say, I don't want to do any
20 speculating today about what happens on January 5th
21 because, you know, you got smart people over there.
22 They're smart people with views about the world that
23 differ from yours, but at least in the first instance,
24 they should get the ability to figure out what to do.

1 MR. LEBOVITCH: Absolutely.

2 THE COURT: And you-all can figure out
3 what to do in response.

4 So here's what I will do, though. My
5 availability will get limited after the 26th. So
6 after the 26th, the time difference to reach me will
7 be about 12 hours. I'll be reachable. I'll be in a
8 fine city for most of that time. So I'm sure we can
9 figure out something. And, you know, it may be
10 something where you guys can just submit papers or
11 whatever, but it will become difficult to reach me
12 after the 26th.

13 So what I would propose is this: It
14 is right now 4 o'clock on the 21st. I think that
15 scrivening this order should be a pretty easy task.
16 Like, I'm envisioning essentially four numbered
17 paragraphs. Maybe one paragraph for Article V,
18 Section 3, one paragraph for Article III, Section 2;
19 and then if you want to throw in these paragraphs for
20 54(b) certification, that probably gets you up to four
21 or five paragraphs.

22 The legal talent that we have here
23 ought to be able to get me that by noon on Wednesday,
24 particularly if you get Ms. Azar and Mr. Foulds

1 involved for your side and if Mr. Bissell puts
2 Ms. McCormick on it.

3 So, I mean, if you and Mr. Bissell are
4 involved, then you guys will get arguing.

5 MR. LEBOVITCH: Go forever.

6 THE COURT: You'll want to revisit and
7 reprise portions of your argument.

8 MR. LEBOVITCH: Yes.

9 THE COURT: So that's why I'm
10 suggesting that that --

11 MR. LEBOVITCH: We'll delegate it,
12 Your Honor.

13 THE COURT: That way I can put this at
14 least in place. And if we need to talk on the
15 afternoon of Wednesday, we can do so. But as to this
16 issue, I can then leave you-all either in a position
17 where you've got what you need or you've got what you
18 need for going down and getting a final decision from
19 the people who matter. And then as to January, we'll
20 just have to see what happens.

21 MR. LEBOVITCH: Thank you, Your Honor.

22 THE COURT: All right. Anything else?

23 MR. LEBOVITCH: That's it.

24 THE COURT: Anything else from your

1 side, Mr. Bissell?

2 MR. BISSELL: No, Your Honor.

3 THE COURT: All right. Thank you,
4 everyone, for your time today. I appreciate it.

5 We stand in recess.

6 (Court adjourned at 3:50 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery for the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 19 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 22nd day of December 2015.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public