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

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APPEARANCES:

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THE COURT: All right. Thank you, everyone. Welcome back.

This is one of those occasions where you-all did an excellent job on the briefs, and that allowed me to formulate my thoughts coming in. Sometimes the oral argument, indeed, is a swing. Today it wasn't. That's not because you didn't do a very fine job. It's just because I felt like people did an excellent job in the briefing, and so I understood where both sides were.

I am granting the plaintiffs' motion for summary judgment. I do believe that Article V, Section 3 of the charter and Article III, Section 2 of the bylaws, which provide for only for-cause removal in the context of a nonclassified board, conflict with Section 141(k) of the Delaware General Corporation Law and are, therefore, invalid.

This analysis is driven by the plain language of 141(k). 141(k) states affirmatively "Any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors ...." That is the rule. It

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

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

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

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

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

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

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

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

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

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

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

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

So are people discovering new things

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BISSELL: I think you should.

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

MR. LEBOVITCH: (Indicating)

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

THE COURT: Well --

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

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

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

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

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

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

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

MR. BISSELL: Thank you, Your Honor.

THE COURT: Any other questions?

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

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

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

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

If by some chance, because Your Honor

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

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

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

MR. LEBOVITCH: Absolutely.

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

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

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

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

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

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

MR. LEBOVITCH: Go forever.

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

MR. LEBOVITCH: Yes.

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

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

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

MR. LEBOVITCH: Thank you, Your Honor.

THE COURT: All right. Anything else?

MR. LEBOVITCH: That's it.

THE COURT: Anything else from your

side, Mr. Bissell?

MR. BISSELL: No, Your Honor.

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

We stand in recess.

(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