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Delaware Court of Chancery Declines to Order Redemption of Airgas Poison Pill

In one of the most anticipated opinions from the Court of Chancery in many years, Chancellor Chandler declined to order the board of directors of Airgas, Inc. to redeem its stockholder rights plan. A forced redemption would have opened the path for Airgas stockholders to tender into an offer by Air Products that the Airgas board believes to be inadequate, but that is known to be supported by a large percentage of those stockholders. The dispute involved a fundamental question of corporate governance: may a board of directors acting in good faith "just say no" to a tender offer found by them to be inadequate by refusing to redeem a shareholder rights plan? The Chancellor found, with some reluctance, that the answer under Delaware law as it currently stands is that a board has the power, and indeed, the fiduciary duty, to manage a corporation (including the selection of a time frame for achievement of corporate goals), which duty "may not be delegated to the stockholders".

In answering this question, the Court first held that the *Unocal* standard alone would apply, and not a *Revlon* review. The former standard applies in the context of board action taken in the face of a takeover bid, while the latter applies when a company is in "play". Application of the so-called *Revlon* duties would have narrowed the board's mandate to "getting the best price reasonably available for stockholders in the sale of the company," instead of the broader mandate of managing the business and affairs of the corporation. Thus, so long as the board has not put the company up for sale, the only standard that applied to the Airgas board's action is *Unocal* review.

The longstanding *Unocal* standard is made up of two prongs. Under the first prong, a court examines whether a board of directors reasonably identified a specific threat to the corporation that warranted a defensive response. In *Airgas*, the threat the board identified was that the price offered by Air Products was inadequate, but attractive enough to short-term stockholders (such as arbitrageurs or event-driven investors) for them to accept the offer and forego the potential higher value of continuing to own the company under present management's plan. The Court of Chancery found that, after exhaustive investigation and on the advice of three separate financial advisors and its own management, the overwhelmingly independent Airgas board (including three Air Products-nominated directors following their election to the board) in good faith reasonably believed that the price Air Products offered was materially inadequate. This inadequacy paired with the board's view that stockholders were myopic in their attraction to the inadequate price constituted a reasonable threat (referred to as "substantive coercion" by the Delaware courts).

The second prong of the *Unocal* standard involves a substantive review by the court as to whether the board responded to the identified threat in an appropriately measured way. Under this prong, the Court found that the Airgas board had responded proportionately because its actions, including the company's package of defensive protections of the poison

pill and the staggered board, did not preclude the stockholders from eventually being allowed to consider the Air Products bid. Although the avenue to this result would require replacing sufficient directors of the classified Airgas board after another eight month wait, it was "realistically attainable" and thus the Court was "constrained to conclude that Airgas's defensive measures are not preclusive." Further supporting the requisite reasonableness of the board's response was the fact that the three directors that Air Products nominated to the Airgas board had, since joining the Airgas board, come to the view that the Air Products bid was inadequate and that it was critical that the board "protect the pill."

While Chancellor Chandler emphasized that this decision does not endorse a board's ability to "just say never", it does affirm Delaware's previously articulated view of the board's ability to "just say no" when acting in good faith and reasonably exercising their managerial discretion. The decision stands for the idea that a board cannot be forced into *Revlon*-mode, a stance where the directors are only permitted to focus on the immediate realization of maximum stockholder value. Instead, if well-informed directors choose to keep a corporation independent, their decisions in ensuring independence will be judged by the *Unocal* standard alone. Thus, boards have extraordinary freedom to eschew short-term value in favor of a plan to realize long-term value, so long as they act in good faith and in accordance with their fiduciary duties. We note as an epilogue, that this decision likely will not be appealed to the Delaware Supreme Court, as Air Products has announced its intention to withdraw its offer.

For a copy of the opinion, see: http://www.paulweiss.com/files/upload/AirProducts-v-Airgas.pdf.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Jay Cohen	212-373-3163	Ariel J. Deckelbaum	212-373-3546
Stephen P. Lamb	302-655-4411	Jeffrey D. Marell	212-373-3105
Richard A. Rosen	212-373-3305	Robert B. Schumer	212-373-3097
Frances F. Mi	212-373-3185		

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1-212-373-3000

BEIJING
Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86-10-5828-6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852-2846-0300

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44-20-7367-1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81-3-3597-8101

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1-202-223-7300

WILMINGTON
500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
+1-302-655-4410