DRASTIC TIMES CALL FOR DRASTIC MEASURES: A FAIRFAX COUNTY JUDGE ORDERS JUDICIAL DISSOLUTION IN THE FACE OF MINORITY SHAREHOLDER OPPRESSION

Virginia corporate law, in application as in reputation, is not particularly protective of minority shareholders. The Virginia Stock Corporation Act (the "Act") allows for frequent deference to the business judgment rule, and such deference has regularly been applied by Virginia courts interpreting the Act. A recent decision by a Fairfax County judge, however, indicates that Virginia courts might be willing to disallow business judgment protection and, at least in cases of extreme minority shareholder oppression, offer a correspondingly extreme remedy: judicial dissolution.

In *Colgate, et al. v. The Disthene Group, Inc.*[1], Circuit Judge Jane Roush held for plaintiff minority shareholders and ordered the dissolution of defendant The Disthene Group, Inc. ("Disthene"), a closely-held Virginia corporation that operates as a holding company with three subsidiaries. Chief among these subsidiaries is Kyanite Mining Corporation ("Kyanite"), one of Virginia's oldest mining companies. In ordering the judicial dissolution of Disthene under § 13.1-747 of the Code of Virginia (the "Code") because of the misapplication and waste of corporate assets and the enduring oppression of minority shareholders, Roush declined to protect Disthene's directors and their decisions through application of the business judgment rule (which protects directors from individual liability for corporate decisions) or the business judgment doctrine (which protects the decisions themselves).[2]

The story leading up to the Kyanite trial spans decades and involves longstanding family disputes, stock manipulation and repeated attempts to squeeze out minority shareholders. Roush found that those in charge at Disthene, Gene B. Dixon Jr. ("Gene") and his son Guy Dixon ("Guy"), engaged in dividend suppression and unfair share redemptions while paying themselves excessive compensation, favoring the interests of their immediate family members and misusing corporate funds for non-business purposes.[3] Disthene's argument that these actions should enjoy business judgment protection was rejected by the court, which found that the board of directors of Disthene was rarely involved in decision making and that, when it was involved, its decisions were not properly informed. Instead, the board of directors "merely bent to Gene's ironhanded will and rubberstamped his decisions. Gene and Guy did not exercise their good faith business judgments in their dealings with the Plaintiffs and other minority shareholders. They were motivated not by the best interests of the corporation, but by their personal best interests."[4]

Roush emphasized that Code § 13.1-690, Virginia's statutory business judgment rule, does not protect a director who, instead of exercising his business judgment on the corporation's behalf, acts out of his own best interest and contrary to that of the corporation.[5] Indeed, Roush pointed out, "the business judgment rule and the business judgment doctrine apply only when the

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[1] No. CL-11-117 (Aug. 30, 2012).
[2] *Id.* at 10-12.
[3] *Id.* at 12-35.
[4] *Id.* at 12.
[5] *Id.* at 11.

directors actually exercise their *good faith* business judgment."[6] Ultimately, the court concluded that there was "no reason to believe that the management of Disthene will ever treat the Plaintiffs fairly" and that dissolution was the appropriate – albeit "drastic" – remedy.[7]

One week after the August 30 ruling, Roush ordered Disthene into receivership and ordered liquidation of the holding company's assets. Attorneys for Disthene have stated that they will appeal the ruling; if the appeal is granted, liquidation proceedings will likely be put on hold.[8]

Professor Lyman Johnson of William & Mary Law School, who served for the plaintiffs as an expert witness, predicted in a post-ruling interview with the *Richmond Times-Dispatch* that this holding "will help bolster minority shareholder investment in Virginia companies because of the protections the decision carries for minority shareholders."[9] Indeed, pending the outcome of Disthene's intended appeal, this ruling could mark a turning point in Virginia's judicial approach to the rights and protections of minority shareholders. Stay tuned.

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[6] *Id.* (emphasis added).
[7] *Id.* at 40.
[8] Bill McKelway, *Judge orders Buckingham mining firm into receivership*, RICH. TIMES-DISPATCH, Sept. 7, 2012, *available at* http://www2.timesdispatch.com/news/2012/sep/07/tdmet01-judge-orders-buckingham-mining-firm-into-r-ar-2184983/.
[9] Posting of Jeff Hanna to Washington & Lee University News Blog, http://news.blogs.wlu.edu/2012/09/05/wl-law-profs-involved-in-landmark-mine-company-dissolution-case-2/ (Sept. 5, 2012).