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The Airgas Decision: Directors Can Still Just Say No

A debate has raged about the proper limits of a poison pill as a defense to a non-coercive, all-cash offer when a corporate board has determined the offer price to be inadequate. Shareholder rights advocates have argued that in such circumstances, if all relevant information is disclosed, shareholders should be allowed to accept or reject the offer. The Delaware Chancery Court in *Air Prod. & Chem., Inc. v. Airgas, Inc., et al*, decided this debate in favor of Airgas' Board based on the facts of the case. In a sprawling opinion, Vice Chancellor Chandler determined that a board of directors that has acted in good faith and has a reasonable factual basis for believing a non-coercive, all cash tender offer is inadequately priced may maintain a poison pill as a valid defense against the offer. The Court emphasized that its ruling did not validate the use of a poison pill as a "just say never" defense in all circumstances, while recognizing that it did "bring us one step closer to that result." Vice Chancellor Chandler signaled his personal discomfort with the discretion granted corporate boards to resist non-coercive tender offers under existing Delaware judicial precedent, but felt constrained by that precedent to issue his decision in favor of Airgas' Board, effectively ending the Air Products takeover effort.

Background

After several unsuccessful attempts to engage Airgas in a negotiated transaction, on February 11, 2010, Air Products made a formal all-cash tender offer for a majority of Airgas' shares at \$60 per share. At the time of the initial offer, Airgas' stock price did not yet reflect the sustained operational improvements that would be realized over the coming months. Airgas rejected this offer. In March of 2010, Air Products nominated a slate of three independent directors for election to Airgas' classified board of directors at Airgas' 2010 annual meeting. Air Products also proposed bylaw amendments that would accelerate the 2011 annual meeting, thereby advancing the timetable on which it could obtain control of Airgas' board. The takeover battle continued throughout 2010 with Air Products offering progressively higher prices and with Airgas providing its shareholders copious information about the long-term prospects of Airgas and the inadequacy of Air Products' offers. Airgas' Board was supported by inadequacy opinions from two respected financial advisory firms. At the 2010 annual meeting, Airgas stockholders elected Air Products' nominees and adopted the proposed bylaw amendments. Airgas sued to invalidate the bylaw amendments and the Delaware Supreme Court ultimately ruled in favor of Airgas, delaying Air Products' ability to gain control of Airgas' Board until about August 2011. During the end stages of the



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litigation, Air Products made its “best and final” offer of \$70 cash per share, which Airgas continued to reject. Additionally, Air Products made it clear that it would not pursue a second proxy contest either to elect additional directors at the next annual meeting or to remove the entire Airgas Board.

After their election to the Airgas Board, the three Air Products nominees obtained their own counsel and hired a third independent financial advisor to assess Air Products’ offer. After taking a hard look at the Air Products offer and Airgas’ long-term prospects, Air Products’ own nominees became convinced that Air Products’ offer price was inadequate and that Airgas was worth at least \$78 per share.

The Court’s Ruling

The Court applied the enhanced scrutiny mandated by the *Unocal* decision to its examination of Airgas’ maintenance of its poison pill. Under the *Unocal* framework, to justify defensive measures, such as a poison pill, a corporate board must have reasonable grounds for believing a danger to corporate policy and effectiveness exists and the response to that threat must be reasonable in relation to the threat posed.

The Court easily concluded that the Airgas board acted in good faith and conducted a reasonable investigation, emphasizing that Airgas’ Board was clearly independent and relied on three independent financial advisors. The Court found that the only “threat” considered by the Airgas board was the inadequate price of the offer, in conjunction with the fact that a majority of the Airgas stock was held by risk arbitrageurs who would be expected to tender into the inadequate offer in pursuit of short-term gains. Although the Court expressed doubt that such a threat was significant, it recognized that Delaware Supreme Court precedent has held that price inadequacy is a legally recognized threat in Delaware.

The Court further found that the combination of Airgas’ poison pill and staggered board did not preclude Air Products from pursuing control of Airgas by means of a proxy contest. The Court concluded that Airgas’ defensive measures were a proportionate response because the board was not “cramming down” an alternative transaction, was continuing to run the company for the long-term, and had not taken any actions that would forever preclude Air Products (or another bidder) from defeating Airgas’ defensive measures if the price is right. This course of action has been clearly authorized under Delaware law.

In summary, Vice Chancellor Chandler recognized that a corporate board cannot be forced into Revlon mode (i.e., maximizing current stockholder value) any time a tender offer is made at a premium to market. However, he emphasized that his decision does not endorse a board’s right to “just say never.” “What it does endorse is Delaware’s long-understood respect for reasonably exercised managerial discretion, so long as boards are found to be acting in good faith and in accordance with their fiduciary duties (after rigorous judicial fact-finding and enhanced scrutiny of their defensive actions).”

Although this is clearly an important reaffirmation of a board’s ability to maintain a poison pill as a valid defense against a non-coercive, inadequate takeover bid, the decision is dependent on its particular facts, including:

- All but one of the Airgas directors were independent.
- The Airgas board clearly demonstrated their good faith and thorough investigation and analysis of Air Products’ offer.
- The Air Products nominees “changed teams” and agreed with the incumbent directors that the offer price was inadequate.

The role of the Air Products nominees was heavily emphasized by the Court in its opinion. The Court highlighted that Air Products nominated directors who were committed to taking a fresh look at the offer rather than directors committed to shareholder choice and redemption of the poison pill. It is easy to conclude that if some of these facts were different, Vice Chancellor Chandler, or another Court, might have decided this case differently.

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