

MARK W. HANEY, ROBERT L. HANEY, JR., ELLIS P. CARTER, MARY CARTER STOKES, MARTIN C. CARTER, JR., DAVID A. CARTER, PAMELA CARTER CABIRO, MARCELLE CARTER LEBLANC, AND RONALD T. CARTER * * * * *

**NO. 2001-CA-0636
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA**

VERSUS

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DELTA PETROLEUM COMPANY, INC., DELTA ROCKY MOUNTAIN PETROLEUM, INC., PAUL B. MAXWELL, W. HAMPTON MAXWELL AND THOMAS A. MAXWELL

PLOTKIN, J. DISSENTING.

Appellant-plaintiffs, former shareholders of Delta Petroleum Co., Inc. (Delta), a closed corporation, appeal the granting of a partial summary judgment in favor of the appellee-defendants, Delta and two brothers/corporate directors John and Paul Maxwell. They allege that the defendants breached their fiduciary duty to the plaintiff shareholders and made fraudulent representations in the tender offer. As a result of those actions the plaintiff received offers to sell their stock substantially below

their true value. This Court's prior opinion in Haney v. Delta Petroleum Co., Inc., 99-0170, (La. App. 4 Cir. 10/6/99), 748 So.2d 36 does not preclude the issues herein. For reasons assigned, I would reverse the summary judgment and remand for a full trial.

The majority accepts the defendant's evidence on all issues to reach the merits in this case. The disputed evidence demonstrates that the stock buyers failed to disclose the critical fact that they had stock control of Delta Rocky Mountain Petroleum (DRMP) when they made their tender offer of \$1000 a share. Plaintiffs claim that they were informed in the tender offer that there was no market for the company's stock and that dividends would be decreased or eliminated. Thus, if true, the failure to disclose accurate financial information about Delta is one issue, but the alleged failure to disclose the majority ownership of the subsidiary entity DRMP, which is a fraudulent misrepresentation, is a separate, disputed issue.

Off balance sheet transactions, ownership, and values are material sources of information that should be disclosed in a clear and understandable manner in a stock tender offer. The tender of information concerning related party transactions requires fairness, respect for correct financial information, and full disclosure of material information in order for the parties to meet their fiduciary responsibilities.

As a result of the buyer's alleged breach of fiduciary duty and fraud, the sellers further claim that they not only did not know about DRMP but that they obviously did not recognize its present or potential value. On the other hand, the plaintiffs claim that the buyer knew the true value of the stock because of the manner in which the Whitney loan of \$4.5 million was structured for repayment. In support of this position, the plaintiffs presented the testimony of expert witness Albert Derbes and of a Whitney loan officer, Harry Stahel. Mr. Derbes opined that the Whitney loan for the tender offer buyout was based on the current value of Delta stock and the future value of DRMP. Although Delta representatives dispute this contention, only a trial on the merits can determine whether there was fraud as to the stock value, breach of a fiduciary duty, and/or intentional concealment of the true value of Delta stock.

Plaintiffs assert further that the defendant's claim of lack of knowledge and good faith as to the true value of Delta's stock is based on a subjective state of mind, which is insufficient to support a motion for a summary judgment. Particularly the plaintiffs argue that John and Paul Maxwell knew that the Delta stock was worth more than \$1000 per share, at least \$1347-\$1700 per share as of December 31, 1983. Finally, the plaintiffs claim that the defendants informed the plaintiffs of the lower number, told

the Whitney bank the higher amount, and falsified bank records provided to the plaintiffs.

Thus, there is a material dispute of fact in this record relating to the above issues. I would reverse the summary judgment and allow the case to proceed to trial.