

1 subsequent decisions³ from courts sitting in Delaware.

2 The Court now concludes that its initial reading of *Anadarko* was overly broad,
3 and that Delaware law does impose fiduciary duties on the officers and directors of a wholly
4 owned subsidiary that run directly to the subsidiary itself, and not only to its sole shareholder.
5 This conclusion rest on three independent grounds.

6 First, it is beyond dispute that the *Anadarko* court’s statement is dictum as applied
7 in this context. The facts of *Anadarko* did not raise the issue of whether any fiduciary duty was
8 owed directly to the subsidiary. The only issue in *Anadarko* was whether fiduciary duties were
9 owed to prospective shareholders, either in addition to or in lieu of duties owed to the sole
10 shareholder, the parent. Consequently when that Court stated that “the directors of the
11 subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the
12 parent,” the significance of the key word “only” was to distinguish whether duties might also
13 have been due to the prospective shareholders, not to distinguish whether duties might also have
14 been owed to the subsidiary itself.

15 Moreover, the *Anadarko* opinion itself cautioned that it should be “confined to its
16 specific facts.”⁴

17 It would be a startling and dramatic departure from settled law to conclude that
18 officers and directors do not owe any fiduciary duty to the corporation they serve. It requires
19 more than dictum to convince this Court that Delaware has made such a dramatic change in
20 long-settled law.

21 Defendants do not cite any case decided since *Anadarko* in which a defalcating
22 director obtained dismissal of a suit brought by the corporation he served on the ground that the
23 corporation was a wholly owned subsidiary so no fiduciary duty was owed to it. Such a lack of
24 holdings would be surprising if *Anadarko* in fact established that rule of law. Instead, however,

25
26 ³ *Claybrook v. Morris (In re Scott Acquisition Corp.)*, 344 B.R. 283 (Bankr. D. Del. 2006);
27 *Production Resources Group LLC v. NCT Group, Inc.*, 863 A.2d 772, 791-92 (Del. Ch. 2004).

28 ⁴ 545 A.2d at 1177.

1 the quotations from *Anadarko* on which defendants rely have been cited only in dictum.

2 Moreover, even some of that dictum suggests that is not the rule of *Anadarko*.

3 Second, lower courts sitting in Delaware have not so read and applied *Anadarko*.
4 In *Scott Acquisition*, the Delaware bankruptcy court specifically rejected this Court's broad
5 reading of *Anadarko* in *Collins I*.⁵ While the interpretation of state law by a federal court sitting
6 in that state is not binding, it is certainly entitled to greater weight than this Court's conclusions.
7 Indeed, the Supreme Court has said that a federal court sitting in the state is in a better position
8 than is the Supreme Court itself to predict that state's law.⁶ This Court is certainly in no better
9 position than is the U. S. Supreme Court.

10 The Third Circuit has cited *Scott Acquisition* with approval.⁷ And the Third
11 Circuit's analysis of the potential conflict of interest between a director's duty owed to a wholly
12 owned subsidiary and to the parent/shareholder would not have been necessary if there simply
13 were no fiduciary duty owed to the wholly owned subsidiary.

14 Moreover, subsequent to *Anadarko* the Delaware Chancery Court held that
15 fiduciary duties do run directly to the subsidiary, rather than to the parent, even when the
16 subsidiary is wholly owned. In *Cochran v. Stifel*,⁸ a director sued the parent for indemnification
17 for attorneys fees incurred in litigating or arbitrating a claim that he had breached fiduciary
18 duties owed to the subsidiary of which he was a director. The issue was whether the

19
20 ⁵ 344 B.R. at 287 (“I do not believe that *Anadarko* advances this position [as concluded in
21 *Collins I*]. . . . *Anadarko* did not address the situation addressed here. Nor did *Anadarko* radically alter
22 a director's fiduciary obligations to the corporation as the defendants suggest [citation omitted]. In fact,
23 the majority of courts following *Anadarko* have explicitly rejected the defendants' interpretation as
24 ‘overly broad,’” citing *First Am. Corp. v. Sheikh Al-Nahyan*, 17 F. Supp. 10, 26 (D.D.C. 1998); *In re*
25 *Mirant Corp.*, 326 B.R. 646, 651 (Bankr. N.D. Tex. 2005)).

26 ⁶ *Butner v. U.S.*, 440 U.S. 48, 57 (1979) (“The federal judges who deal regularly with questions of
27 state law in their respective districts and circuits are in a better position than we to determine how local courts
28 would dispose of comparable issues.”).

⁷ *VFB LLC v. Campbell Soup Co*, 482 F.3d 624, 635-36 (3d Cir. 2007).

⁸ *Cochran v. Stifel Financial Corp.*, 2000 WL 286722 (Del. Ch. 2000)(unpublished), *aff'd in part and rev'd in part on other grounds*, 809 A.2d 555 (Del. 2002).

1 indemnification claim was governed by 8 Del. C. § 145(a), which applies to “third party actions,
2 not to actions brought by or in the right of the corporation, or by § 145(b), which applies to
3 actions brought “by or in the right of the corporation.” The parent argued that the breaches of
4 fiduciary duty was an action “by or in the right” of the parent.⁹ The Delaware Chancery court
5 rejected that argument, concluding instead that the subsidiary was asserting fiduciary duties
6 owed directly to itself, rather than directly to the parent. This conclusion could not have been
7 possible if *Anadarko* held what this Court concluded that it did in *Collins I*, because then there
8 would have been no fiduciary duties owed to the subsidiary, so the action must have been in the
9 right of or on behalf of the parent.

10 The Chancery Court’s opinion made clear that it was basing its holding on the
11 conclusion that Delaware law has not eliminated directors’ fiduciary duties owed to wholly
12 owned subsidiaries:

13 Nor am I inclined to read into § 145 an automatic conflation of a
14 parent corporation and its wholly-owned subsidiary. Our law has
15 traditionally respected the separate existences of a parent
16 corporation and its wholly-owned subsidiary, absent
17 circumstances justifying veil piercing or the conclusion that the
18 wholly-owned subsidiary was the parent’s agent.

19
20 In *Rales v. Blashand* . . . the Court implicitly recognized the
21 presumptive independence of the subsidiary board. . . . Put
22 simply, under *Rales*, a double derivative action is ultimately
23 brought in the right of the subsidiary, not the parent.

24
25 That is, I conclude that the General Assembly took a formalistic
26 approach to the relationship between a parent corporation and the
27 director of a subsidiary the parent elected, and did not assume that
28 corporate parents invariably direct and control the directors of
their subsidiaries. Rather, a showing that the director merely
‘served at the request of’ the parent is insufficient under § 145 to
prove ‘agency’ status; the director must go farther and demonstrate
that he was the parent’s agent under the traditional agency
definition.

29 Indeed, the facts of *Stifel* dramatically indicate the shocking results *Anadarko* would
30 yield if it were read overly broadly. It would mean that when a director self-deals at the expense

31 ⁹ *Id.* at (“[The parent] claims that any action brought by a wholly-owned subsidiary is, by
32 definition, brought ‘by or in the right’ of the subsidiary’s corporate parent.”).

1 of his corporation, as was alleged in *Stifel*, the corporation itself cannot sue for breach of
2 fiduciary duties if it happens to be wholly owned, though it would have such a cause of action if
3 just one share of its stock were owned by someone other than the parent.

4 Finally, even if *Anadarko* did divest wholly owned subsidiaries of fiduciary duties, such
5 a rule does not apply when there is more than one shareholder. Once the subsidiary becomes
6 insolvent, Delaware law recognizes that the fiduciary duties shift to the creditors.¹⁰ Once they
7 do, the effect is that there is more than one equitable beneficiary of those duties. Thus even
8 under a broad reading of *Anadarko*, it cannot apply in the insolvency context when multiple
9 creditors are the beneficiaries of the fiduciary duties.

10 For these reasons, those portions of this Court's previous opinion concluding that
11 Delaware law eliminates officers' and directors' fiduciary duties owed to a wholly owned
12 subsidiary¹¹ are vacated. Because the parties have settled this litigation, this opinion has no
13 effect except to correct an erroneous published analysis.

14 DATED AND SIGNED ABOVE

15 Copy of the foregoing mailed/e-mailed
16 this 25th day of September, 2007, to:

17 Curt W. Clausen, Esq.
18 Lucia Stark Williamson LLP
19 cwc@lswaz.com
20 Attorneys for Plaintiff

21 Daniel P. Collins, Esq.
22 Collins, May, Potenza, Baran & Gillespie, P.C.
23 dcollins@cmjbglaw.com
24 Chapter 11 Trustee

25 ¹⁰ *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 2007
26 WL 1453705, *7 (Del. Supr. May 18, 2007) ("When a corporation is *insolvent*, however, its creditors
27 take the place of the shareholders as the residual beneficiaries of any increase in value. Consequently,
28 the creditors of an *insolvent* corporation have standing to maintain derivative claims against directors on
behalf of the corporation for breaches of fiduciary duties." (emphasis in original)); *In re Ontos, Inc.*, 478
F.3d 427, 432 (1st Cir. 2007) ("Under Delaware law, creditors of an insolvent corporation are owed
fiduciary duties when the corporation is insolvent in fact," citing *Geyer v. Ingersoll Publ'ns Co.*, 621
A.2d 784, 787-88 (Del. Ch. 1992)).

¹¹ *Collins I*, 315 B.R. at 575-76.

1 Marty Harper, Esq.
2 Gary D. Ansel, Esq.
3 Andrew S. Jacob, Esq.
4 Kelly J. Flood, Esq.
5 Rebekah W. Francis, Esq.
6 Shughart Thomson & Kilroy
7 mharper@stklaw.com
8 gansel@stklaw.com
9 ajacob@stklaw.com
10 kflood@stklaw.com
11 rfrancis@stklaw.com
12 Attorneys for Plaintiff

13 Charles A. Blanchard, Esq.
14 Richard M. Lorenzen, Esq.
15 Perkins Coie Brown & Bain P.A.
16 cblanchard@perkinscoie.com
17 rlorenzen@perkinscoie.com
18 Attorneys for Kohlberg and Company, KSSI Management, Koco Investors I

19 Leslie G. Fagen, Esq.
20 Robert N. Kravitz, Esq.
21 Paul, Weiss, Rifkind, Wharton & Garrison LLP
22 1285 Avenue of the Americas
23 New York, NY 10019-6064
24 Attorneys for Kohlberg and Company

25 Richard A. Segal, Esq.
26 Sean P. O'Brien, Esq.
27 Gust Rosenfeld, PLC
28 rsegal@gustlaw.com
29 spobrien@gustlaw.com
30 Attorneys for Defendant Miller and Pack

31 William Novotny, Esq.
32 Robert A. Shull, Esq.
33 Mariscal, Weeks, McIntyre & Friedlander
34 william.novotny@mwmf.com
35 rob.shull@mwmf.com
36 Attorneys for Defendants Vigil, Beath, Sielaff, Gaubert, Williams,
37 Vannatta, Gentles and Gioia

38 James E. Cross, Esq.
39 Dawn L. Dauphine, Esq.
40 Osborn Maledon, P.A.
41 jcross@omlaw.com
42 ddauphine@omlaw.com
43 Attorneys for Defendants Peck, Paine, Lacovara, Jerome Kohlberg,
44 James Kohlberg, Gildehaus, Frieder, Farley, Dordelman, Capone, Bhonsle,
45 KSSI G.P. II, KSSI G.P. and Kohlberg and Company, L.P.

46 Doug Tobler, Esq.
47 Hammond & Tobler, P.C.
48 dtobler@hammondandtobler.com
49 Attorneys for Geele

1 Howard W. Meyer, Esq.
2 Law Offices of Howard W. Meyer
3 ronaldmeyerlaw@myexcel.com
4 Attorneys for Kromer

5 /s/ Pat Denk
6 Judicial Assistant

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A large, stylized watermark of the word "SIGNED" is oriented diagonally across the page, from the bottom-left towards the top-right. The letters are outlined in a double-line format.