Ryan v. Lyondell Chemical Co.
2008 WL 2923427
Court of Chancery of Delaware
July 29, 2008

Noble, Vice Chancellor.

I. Introduction

In this shareholder class action, Plaintiff Walter E. Ryan, Jr. ("Ryan") challenges the $13 billion cash for shares merger transaction (the "Merger") among Defendant Basell AF ("Basell"), its acquisition subsidiary, Defendant BIL Acquisition Holdings Limited, and Defendant Lyondell Chemical Company ("Lyondell" or the "Company"). Before the Court are Defendants' motions for summary judgment. On its face, the Merger offering the Lyondell stockholders $48 per share in cash, a substantial premium to market,[3] was very attractive; indeed, the Lyondell stockholders voted overwhelmingly in its favor, and the Merger was consummated on December 20, 2007.[4] Once one scratches the patina of this "blowout" market premium, however, a troubling board process emerges.

When this transaction materialized in the late spring and early summer of 2007, Lyondell was a financially strong and viable company. It was not in financial distress; it was not looking to raise capital; it was not looking to spin-off one of its divisions; and it was not otherwise "for sale" or "on the auction block." Lyondell's board of directors (the "Board") had neither sought the advice of investment bankers to value the Company, nor was it actively seeking strategic business partners.[5]

In response to Basell's unsolicited offer for the Company, the Board avoided an active role in negotiating the Merger, instead delegating much of that task to Lyondell's Chairman and Chief Executive Officer, Dan F. Smith ("Smith"). The Board never conducted a formal pre-signing market check to determine whether a better price could be obtained; in addition, it was not able to negotiate successfully for a post-signing go-shop period and, thus, did nothing post-signing to confirm that a better price could not have been obtained. The final merger agreement also employed several deal protection devices, including a no-shop provision, matching rights, and a $385 million break-up fee.[6] Moreover, the whole deal was considered, negotiated, and approved by the Board in less than seven days.

It is against that factual backdrop that Ryan brought this action and the Court considers the present motions. Notwithstanding the premium price and enthusiastic shareholder approval, Ryan alleges that the directors were looking out only for their own self-interest and that the process by which the Merger was approved and recommended to the Lyondell stockholders was fatally flawed for three reasons. First, the Board began and concluded its review of the transaction over the course of a mere seven day period. Given the frenetic pace at which this deal evolved, Ryan contends that the Board could not possibly have informed itself as to the value of the Company and the wisdom of this transaction for the Lyondell stockholders. Second, the Board never conducted a market check or otherwise "shopped" Basell's offer to determine if $48 per share was indeed the highest value

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[3] Characterized by the Defendants as a "blowout" price, $48 per share represents a 45% premium over the closing share price on May 10, 2007, the last trading day before the public became aware of Basell's interest in Lyondell, and a 20% premium over Lyondell's closing price on July 16, 2007, the day before the Merger was publicly announced.

[4] The Merger has occurred and the Court cannot undo it. Ryan did not seek any interim equitable relief.

[5] As will later be discussed, a Basell affiliate's acquisition of a right to purchase a block of Lyondell shares and its related Schedule 13D filing with the SEC in May 2007 effectively put the Company (and the market) on notice that some transaction might be in the offing. The Board did not respond to that development as if the Company were actively "in play"; instead, it opted for a more conservative "wait and see" approach because the Company "had not been put up for sale and [the Board] still had no intent of selling." Transmittal Affidavit of Scott M. Tucker Exhibit....

[6] Lyondell also had a shareholder rights plan (*i.e.,* a "poison pill"). The Board eventually pulled the pill with respect to Basell but, otherwise, the pill remained "active" against other unsolicited bids.

reasonably attainable by the Lyondell stockholders. Third, Ryan claims that the deal protection devices agreed to by the Board were unreasonable and essentially "locked up" this transaction for Basell by precluding other bidders from making an offer for the Company.

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The Board counters that it was adequately informed of the value of Lyondell both in the then-current mergers and acquisitions market and as a going concern. In its view, the financial projections and valuations prepared by Lyondell management were adequate to navigate the negotiation phase of the Merger, and it points out that, in any event, Basell's offer ultimately was blessed with a fairness opinion by Lyondell's independent investment banker, Deutsche Bank. The Lyondell Defendants also contend that it was well known to the markets that the Company was in play long before the Merger was announced and that not even a serious expression of interest, much less a competing bid, was forthcoming. In addition, from the time when the Merger was announced until it closed, no topping bid was received, which, they claim, is further proof that Basell had offered a superior premium for the Company. In short, the Board claims to have known the market in the summer of 2007 and the status of other potential acquirers, and it was reasonably confident, particularly given Basell's substantial initial offer, that another bid was unlikely.

As for Ryan's criticisms of the mechanics of the sale process, the Board maintains that it considered the possibility of conducting an auction, but the directors worried that a poorly received auction would have risked losing Basell's offer and depressed the value attainable by the shareholders. In addition, the directors contend that they pushed Basell as far as it would go on price, and they even sought other consideration, such as a go-shop and a significant reduction in the break-up fee-concessions Basell simply would not give. More importantly, however, in the view of the Board, all of this was adequately disclosed to the shareholders and they had a very simple choice to make: take Basell's enticing offer or reject it and wait for something better to come along (or just continue with Lyondell's successful operation). The Lyondell stockholders overwhelmingly chose to sell.

This case arises from the intersection of two fundamental tenets of Delaware corporate law. The first set of principles, known colloquially as "*Revlon* duties,"[8] requires a board, when it undertakes a sale of the company, to set its singular focus on seeking and attaining the highest value reasonably available to the stockholders. The Defendants extol the virtues of the "blowout" price paid by Basell. In this instance, however, the Board took no affirmative action to confirm that a better deal could not be obtained and, for summary judgment purposes, the record does not show that the Board was so knowledgeable about the value of the Company that no further effort was appropriate.

The second set of principles, generally addressed in *Unocal*[9] and *Omnicare,*[10] requires that deal protection measures must not be preclusive or coercive and, more importantly for present purposes, that such measures be reasonable in light of the circumstances. The Defendants support the deal protection measures by arguing that they were reasonable and necessary to secure Basell's offer for the Lyondell shareholders. They have not, however, been able to explain why deal protection measures of the scope adopted were appropriate under these circumstances. In short, the Board did nothing (or virtually nothing) to confirm the superiority of the price but, nonetheless, it provided Basell a full complement of deal protections. Maybe the price was the "blowout" the Defendants proclaim it to have been – it certainly was a "fair" price – and maybe the deal protection measures were reasonable and proportionate to the risks that the deal would not materialize otherwise, but those conclusions cannot be reached on the current record on summary judgment where the Court is precluded from choosing between plausible inferences. Accordingly, for the reasons that will be developed below, the Lyondell Defendants' motion for summary judgment with respect to Ryan's *Revlon* claims and his challenge to the deal protection measures will be denied.[11]

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[8] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173 (Del.1986).

[9] *Unocal Corp. v. Mesa Petroleum Co.,* 493 A.2d 946 (Del.1985).

[10] *Omnicare, Inc. v. NCS Healthcare, Inc.,* 818 A.2d 914 (Del.2003).

[11] The Lyondell Defendants invoke the exculpatory provision of the Company's charter authorized by 8 *Del. C.* § 102(b)(7). As explained more fully *infra* in Section III(B)(2)(d), that defense is not now available on summary judgment because the Board's apparent failure to make any effort to comply with the teachings of *Revlon*

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II. Factual Background

A. *The Parties*

Ryan was the owner of an unspecified number of shares of Lyondell common stock.

Lyondell is a Delaware corporation consisting primarily of two divisions-commodity chemicals and refining. It was the third-largest independent, publicly traded chemical company in North America, as well as a leading global manufacturer of chemicals and plastics, a refiner of heavy, high-sulfur crude oil, and a significant producer of fuel products.

Smith was Lyondell's Chairman and Chief Executive Officer. Defendants Carol A. Anderson, Susan K. Carter, Stephen I. Chazen, Travis Engen, Paul S. Halata, Danny W. Huff, David J. Lesar, David J.P. Meachin, Daniel J. Murphy, and William R. Spivey were well-credentialed, independent directors of Lyondell (collectively, the "Independent Directors").[13] The Independent Directors, together with Smith, constituted the entire eleven-member Board (sometimes, also, collectively, the "Individual Defendants" or the "Board").

Basell, a Luxembourg company with joint ventures and manufacturing operations in nineteen countries, is the global leader in polyolefin technology, production, and marketing. It is privately owned by Access Industries ("Access"), which is not a party to this lawsuit. BIL Acquisition Holdings Limited is a Delaware corporation formed by Basell for the purpose of effecting the Merger.

B. *Background of the Merger*

Access and Basell first expressed interest in Lyondell in April 2006 at an introductory meeting between Smith and Leonard Blavatnik ("Blavatnik"), the Chairman and President of Access. Smith informed Blavatnik that Lyondell was not for sale but that the Board was always willing to consider proposals to create value for its shareholders. That introductory meeting led to subsequent discussions, and Basell eventually sent a letter of interest to Lyondell offering to buy the Company within a range of $26.50 to $28.50 per share. The Board considered that offer, but determined that it was inadequate and not in the best interests of the Lyondell stockholders.

After Basell's solicitation in the late summer of 2006, Lyondell did not receive any other indications of interest, nor was it in a position that would have required the Board to raise capital or seek out a strategic partner. In fact, the Company was quite strong and financially viable – it had retired several billion dollars of debt under its long range strategic plan, and it planned to pay down an additional two billion dollars of debt by the end of 2008. In addition, Lyondell was active in the mergers and acquisitions market as a buyer, and it hoped its continued efforts to retire debt would improve its credit rating and, therefore, its access to the credit markets. The Company anticipated that these efforts would continue to translate into positive performance of its stock price over both the near and long term. Thus, Lyondell was not prepared (or looking) to sell itself in the spring of 2007 when Blavatnik (through an Access affiliated company) acquired a right to purchase all of the Lyondell shares owned by Occidental Petroleum Corporation ("Occidental"), Lyondell's second largest shareholder.[17]

The Occidental bloc was subject to a shareholders agreement, which contained, among other things, a standstill provision and limitations on the disposition of the Lyondell securities. At a board meeting on May 3, 2007, Stephen Chazen ("Chazen"), a director of Lyondell and Occidental's Chief Financial Officer, informed Smith and the Board of Occidental's intention to sell its stake in Lyondell, through a securities intermediary, in a manner legitimately designed to avoid and terminate the shareholders agreement. In addition, Chazen informed the Board of

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and its progeny implicates the directors' good faith and, thus, their duty of loyalty, thereby, at least for the moment, depriving them of the benefit of the exculpatory charter provision.

[13] Ryan does not allege, nor has he offered any evidence to suggest, that the Independent Directors were beholden to any of the proponents of this transaction.

[17] At the time, Occidental owned 20,990,070 shares, approximately 8.3% of the outstanding Lyondell stock (the "Occidental bloc"). The Occidental bloc was sold through a series of agreements and forward contracts. Blavatnik intended eventually to acquire the entire Occidental bloc.

his belief (though, he was not certain) that Blavatnik and Access would purchase the Occidental bloc. That development raised concerns, but the Board did not take any specific action in response.[19]

On May 11, 2007, an Access affiliate filed a Schedule 13D with the Securities and Exchange Commission ("SEC") disclosing its right to acquire the Occidental bloc through a series of forward contracts with Merrill Lynch, Pierce Fenner & Smith, Inc. The 13D further stated Blavatnik's intent possibly to engage Lyondell in discussions regarding various transactions between Lyondell and other Access affiliates. In response, the Board convened a special meeting that same day to discuss Blavatnik's move and his possible intentions with respect to the Company. The Board decided, however, that no immediate response was required and that it would await the reaction of the market and Lyondell's major shareholders to Blavatnik's move. It also decided to wait and see if any suitors would express an interest in the Company in light of the 13D's signal to the market that Lyondell was "in play."

That wait was not long. Three days later, on May 14, 2007, a representative of Apollo Management, L.P. ("Apollo"), a private equity group that was active in the commodity chemicals segment of the market, contacted Smith to see if Lyondell management would be interested in a management-led leveraged buyout transaction. Smith flatly rebuffed Apollo's solicitation, however, apparently because he and the other members of Lyondell management viewed such transactions as fraught with inherent conflicts of interest for both management and the Board. Aside from Apollo's passing overture on the heels of Blavatnik's 13D filing, Lyondell received no other expressions of interest. The market, as expected, reacted favorably to the 13D filing, with Lyondell's common stock trading up from a closing price of approximately $33 on May 10, 2007, to approximately $37 on May 11, 2007, the day the 13D filing was made public (a one-day gain of about 11%).Lyondell's stock price continued to oscillate around $37 over the ensuing weeks with the market atwitter in anticipation of a deal.

Despite the market's expectations, all remained quiet on the Access front. Smith and Blavatnik attempted to schedule a meeting, but their conflicting travel schedules prevented that from occurring sooner than July 9, 2007. In the meantime, Smith met with Basell's Chief Executive Officer, Volker Trautz ("Trautz"), in London in early June. Evidently, Smith was contemplating (or, at least, anticipating an offer for) a possible sale of the Company to Basell by that point and, according to an email sent from Trautz to Blavatnik, Smith had suggested to Trautz that a price of $48 per share for Lyondell would be "justified." The Board, however, was largely unaware of Smith's activities and contacts with Blavatnik and Trautz during this period. Moreover, despite the signals sent to the market by Blavatnik's 13D filing in May (and Smith's apparent anticipation of a transaction), the Board was indolent, making no effort to value the Company or to assess what options might be on the table *if* Basell (or another acquirer) made a move to acquire Lyondell.

On June 26, 2007, in a perhaps unexpected turn of events from Lyondell's perspective, Basell and Huntsman Corporation ("Huntsman"), another chemical manufacturer, announced a $9.6 billion transaction whereby Basell would acquire Huntsman for $25.25 per share in cash. For the moment, it appeared that Access had moved on and set its sights on another target. On July 4, 2007, however, Huntsman announced that it had received a competing proposal of $27.25 per share in cash from Hexion Specialty Chemicals, Inc. ("Hexion"), an Apollo affiliate, and was pursuing discussions on that proposal under the "fiduciary out" provision in its merger agreement with Basell. Blavatnik immediately contacted Smith to confirm their previously scheduled meeting on July 9. Smith did not inform the Board of this development.

At the meeting on July 9, 2007, Blavatnik expressed to Smith his interest in an all-cash acquisition of Lyondell. Blavatnik initially suggested that he could pay $40 per share for the Company. Smith informed Blavatnik that he would relay any serious offer to the Board but also that he viewed $40 per share as too low and believed the Board would agree. Over the course of the meeting, Blavatnik eventually increased his offer to a range between $44

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[19] In all likelihood, the Board probably realized that, even if it wanted to, it could not prevent Occidental from selling its shares to Blavatnik (or to anyone else for that matter); the record is clear that Occidental found a loophole in the shareholders agreement. Ryan has made much ado in his brief and at oral argument about the Board's failure to act in response to this development, but he has not articulated a persuasive argument for why it even matters in the grand scheme of this transaction. The Occidental bloc was not a control bloc and, in reality, gave Blavatnik only minimal, if any, leverage in his bid to acquire the Company. For better or for worse, the sale of the Occidental bloc was legitimately designed to avoid the operation of the shareholders agreement, and the fact of the matter is that it ultimately had little effect, if any, on the course of events leading to Basell's offer for Lyondell, except that it may have signaled to the market that Lyondell was "in play."

and $45 per share. Smith reiterated that he would relay any serious offers, but he again told Blavatnik that, in his opinion, it was doubtful that the Board would accept an offer in that range; Smith further advised that if Blavatnik was serious about acquiring Lyondell, he should make his "best" offer for the Company because it really was not on the market. Blavatnik told Smith he needed more time to consider his position and he requested Smith to call him from the airport later that day before Smith left for a previously scheduled Board meeting in Holland. As requested, Smith called Blavatnik shortly before his flight was scheduled to depart and Blavatnik made his "best" offer for the Company: $48 per share in cash if the Board would sign a merger agreement by July 16, 2007, and agree to a $400 million break-up fee (the "Basell Proposal"). Blavatnik further stated that the Basell Proposal would have committed financing, so there would be no financing contingency. Smith agreed to take the Basell Proposal to the Board.

C. *The Board's "Hasty" Consideration of the Basell Proposal*

Smith called a special meeting of the Board upon his arrival in Holland on July 10, 2007, to announce and discuss the Basell Proposal. During a fifty minute meeting, Smith presented Blavatnik's offer and the Board held preliminary discussions. The Board reviewed certain valuation materials regarding the Company which Lyondell management had prepared for the Board's regular meetings scheduled for July 11 and 12, 2007. The Board also discussed the status of Hexion's and Basell's offers for Huntsman, as well as the likelihood that another party might be interested in acquiring Lyondell. At the conclusion of the meeting, the Board directed Smith to seek a written offer from Basell, including detailed information about its financing. The Board then recessed its deliberations on the Basell Proposal until July 11. Smith, as directed by the Board, contacted Blavatnik who promised that the Board would receive a written proposal and details on his financing in due time. In the meantime, however, Blavatnik stated that he needed a firm indication of interest in the Basell Proposal from the Board by the end of the day on July 11, the deadline for Basell to propose a higher price for Huntsman, if it so desired.

The Board reconvened on July 11 to consider further the Basell Proposal and Blavatnik's request for a firm indication of interest. During a forty-five minute meeting, the Board claims to have thoroughly considered several aspects of the Basell Proposal, including: comparing the benefits to the Lyondell stockholders of the Basell transaction with those of remaining independent, the valuation of certain Lyondell assets, the process likely to be involved in a transaction with Basell, engaging the services of an investment bank to serve as a financial advisor for the Basell Proposal, and the impact of Basell's possible acquisition of Huntsman on its ability also to acquire Lyondell at some later date. Smith also advised the Board that there had been no specific discussions with Blavatnik about whether members of Lyondell management would be offered positions in the post-merger company. Thus, after "careful" consideration, the Board formally authorized Smith to negotiate with Blavatnik regarding the Basell Proposal. The Board also decided to reconvene to consider the matter further on July 16, the deadline to accept the Basell Proposal, but the directors agreed to be available in the meantime if needed by management.

Following the board meeting on July 11, work on the Basell Proposal moved forward quickly. Smith advised Blavatnik that the Board was favorably inclined to the transaction. Representatives of Basell and Lyondell discussed Basell's preliminary due diligence requests and the terms of a confidentiality agreement. Lyondell also retained the services of Deutsche Bank Securities, Inc. ("Deutsche Bank") to serve as its financial advisor for the Basell Proposal. In addition, Basell abandoned its pursuit of Huntsman and issued a press release stating that it would not increase its bid for that company.

On July 12, 2007, the Board met again for its previously scheduled regular meeting to discuss the routine business of Lyondell; it also held an executive session during that meeting to discuss the merits of the Basell Proposal without members of Lyondell management, other than Smith, present. Meanwhile, representatives of Lyondell and Basell were discussing the terms of Basell's financing, overseeing the due diligence process, and negotiating the terms of a definitive merger agreement. Deutsche Bank, for its part, was working feverishly to put together a fairness opinion for the Basell Proposal. That effort included compiling a list of potential strategic partners who might be interested in Lyondell, but, in accordance with Lyondell's instructions, Deutsche Bank did not attempt to solicit any competing offers for the Company.

Due diligence and negotiation of the terms of the merger agreement continued throughout July 13 and 14. On July 15, 2007, Smith contacted Blavatnik to discuss the status of the Basell Proposal and the proposed terms of the merger agreement. He stated that the Board was concerned that this transaction had moved quickly and that it wanted to be certain it had attained the best price for the Lyondell stockholders. Smith therefore requested four concessions from Blavatnik: (1) an increase in Basell's offer price; (2) a go-shop provision in the merger agreement to allow the Board to seek other potential buyers for a period of forty-five days following the execution of the merger agreement; (3) a break-up fee of 1% during the go-shop period; and (4) a reduction in the $400 million break-up fee after the go-shop period ended. Those requests, evidently, were not well received by an incredulous Blavatnik who stated unequivocally that he had offered his best price and a substantial premium for Lyondell and that it was essential to him that the transaction be agreed to and finalized quickly upon his terms. He nevertheless relented and agreed to reduce the break-up fee from $400 million to $385 million as a showing of good faith; otherwise, he flatly refused Smith's attempts to improve the terms of the deal.

The Board received the proposed merger agreement and related materials late in the day on July 15, 2007, and a letter detailing the fully committed financing for the Basell Proposal on July 16. The Board then convened its previously scheduled meeting to address the proposed merger between Basell and Lyondell. The Board initially discussed the general terms and conditions of the merger agreement, which included several deal protection devices: a $385 million termination fee,[35] a no-shop clause, and matching rights for Basell. In addition to the deal protection measures contained in the merger agreement, Lyondell had in place a previously adopted shareholder rights plan (*i.e.*, a "poison pill"), which it later pulled with respect to the Basell Proposal.[36] The Board also heard presentations from Lyondell management and from Lyondell's legal advisors concerning the structure of the transaction and its ability to consider superior proposals, should any emerge, under a typical "fiduciary out" provision in the merger agreement.

Lyondell's financial advisor, Deutsche Bank, then presented its financial analyses and conclusions regarding the financial fairness of the Basell Proposal, as well as its opinion as to the likelihood that Lyondell might receive a superior proposal. Deutsche Bank had performed several valuation exercises in an effort to assess the fairness of the Basell Proposal, using both more "bullish" financial projections based on Lyondell management's views (the "Management Case") and more "conservative" financial projections based on a consensus equity analyst view (the "Street Case"). Given the Management Case financial projections, the DCF and LBO analyses yielded a valuation range for Lyondell between $37 and $47 per share and $44.75 and $51.50 per share, respectively. Given the Street Case financial projections, the DCF and LBO analyses yielded a valuation range for Lyondell between $30 and $39 per share and $32.25 and $38.50 per share, respectively. The maximum projected value for Lyondell – $58.50 per share – was derived under a sum of the parts comparable company analysis, with certain *pro forma* adjustments. On the basis of its various analyses, Deutsche Bank concluded that $48 per share was indeed a fair price for the Lyondell stockholders. The investment bankers also identified for the Board twenty other companies that might have an interest in acquiring Lyondell, but they presented various reasons why they believed no other suitor had yet come forward with a bid and why, in their opinion, none would be likely to top Basell's offer of $48 per share.

After listening to the presentations of management and its legal and financial advisors and fully appreciating that Blavatnik was driving a very hard bargain vis-à-vis their fiduciary obligations in a sale scenario, the Board deliberated on the Merger. Thereafter, the Board voted unanimously to approve and recommend the Merger to the Lyondell stockholders. Basell's offer presented an opportunity for the stockholders to earn a substantial premium over the market price of Lyondell shares and, in the view of the Board, was simply too good not to pass along for their consideration.

The Merger was jointly announced by Lyondell and Basell before the opening of the markets on July 17, 2007. A preliminary proxy statement was filed with the SEC on August 14, 2007. The Proxy was filed on October 12, 2007. A special meeting of the Lyondell stockholders was held on November 20, 2007, to consider the proposed merger with Basell. The Merger garnered the near unanimous support of the Lyondell stockholders voting at the meeting, and the transaction closed on December 20, 2007.

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[35] The termination fee amounts to approximately 3% of the equity value of this transaction, or approximately 2% of Lyondell's enterprise value.

[36] Because the Board did not pull the pill altogether, the rights plan technically remained in effect against other potential bidders for Lyondell. Ryan asserts that the Board's failure to pull the pill served as yet another draconian deal protection for the Basell Proposal. Although the Board could not have employed the plan to thwart another bidder for Lyondell to Basell's benefit under Delaware law, see *infra* note 93, the existence of a poison pill was yet another hurdle (*i.e.*, transaction cost) a potential bidder would have to overcome to acquire Lyondell and, thus, may have deterred potential bidders to some limited extent.

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III. Analysis

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B. *The Merits ofDefendants' Motions for Summary Judgment*

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2. *Ryan's Revlon Claims*

This case presents a somewhat novel factual scenario for application of sale of control jurisprudence. Lyondell was neither in financial distress nor actively seeking a sale of assets, an investment of capital, strategic partnerships, or any other type of transaction before announcing the Merger. The Board, for all intents and purposes, did very little, if anything, to "seek" the best transaction available to the Lyondell stockholders. Essentially, the Board acted as a passive conduit to the stockholders for an unsolicited, attractive bid for the Company. Thus, the nub of Ryan's complaints in this case is whether the Board adequately fulfilled its fiduciary obligations under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* once it embarked down a relatively short path toward the sale of the Company.

In substance, Ryan complains about the process employed by the Board in agreeing to sell the Company to Basell. Those complaints relate primarily to the Board's fiduciary duty of care, and on summary judgment the Court cannot conclude that Ryan would be unable to prove a breach of that duty at trial. If he only succeeded in that endeavor, however, the Lyondell stockholders would not be entitled to money damages, the only remedy now otherwise available, because Lyondell had an exculpatory charter provision adopted in accordance with 8 *Del. C.* § 102(b)(7). Accordingly, Ryan can only prevail on his *Revlon* claims by overcoming the protection afforded to the Board by Lyondell's exculpatory charter provision; in other words, because the Board was independent and not impermissibly motivated by self-interest, Ryan must demonstrate that the Board either failed to act in good faith in approving the Merger or otherwise acted disloyally. As explained below, the Board's failure to engage in a more proactive sale process may constitute a breach of the good faith component of the duty of loyalty as taught in *Stone v. Ritter*.[64] For this reason, the Court must deny summary judgment on Ryan's *Revlon* claims.

(a) *The Board's Obligations in a Sale of Control*

The board of directors is tasked with managing the business and affairs of a Delaware corporation and, ordinarily, its decisions are shielded from intense *post hoc* judicial review by the business judgment rule. When a board of directors undertakes a sale of the company for cash, however, its actions are subject to enhanced judicial scrutiny. Thus, the ordinarily deferential "rational basis" review gives way to "an intensified form of review involv[ing] two 'key features': (a) a judicial determination regarding the adequacy of the decision-making process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the directors' actions in light of the circumstances then existing." Additionally, the burden is shifted to the directors to prove "that they were adequately informed and acted reasonably."

The directors' efforts are measured by the teachings of *Revlon* and its progeny which demand a singular focus on "the maximization of the company's value ... for the stockholders' benefit." The so-called "*Revlon* duties" are not unique fiduciary obligations, but they do guide a board in the discharge of its unyielding fiduciary duties of care and loyalty in the sale context. Concepts such as "maximization of value," "auctioning the company to the highest bidder," "seeking the best transaction," and "securing the best price," which predominate in *Revlon* jurisprudence, suggest that in most instances a board contemplating a sale of control is duty bound to engage actively in the sale process. Nevertheless, Delaware courts have not delineated the precise contours of a sale process because every transaction is different and every board confronts unique circumstances.

One limited exception to the active sale process generally contemplated by *Revlon* jurisprudence is

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[64] 911 A.2d 362 (Del.2006).

described in *Barkan v. Amsted Industries*.[73] There, the Delaware Supreme Court held that *Revlon* does not mandate that every change in control of a Delaware corporation be preceded by a "heated" bidding contest with multiple bidders; a sale to a single bidder without canvassing the market also is permissible where the board possesses "a body of reliable evidence with which to evaluate the fairness of the transaction." Thus, in the sale scenario, a sufficient body of reliable evidence demonstrating competent knowledge of the company's market may also be persuasive evidence of the directors' good faith discharge of their fiduciary duties and pursuit of the best transaction available to the stockholders. As with the particular mechanism of the sale process, however, Delaware courts are loathe to mandate the methods by which a board must acquire "reliable" market evidence. Similarly, there is no specific quantum of evidence that will be deemed "sufficient," and the Court must perform a fact-intensive, case-by-case assessment of the adequacy of a board's knowledge of the markets.

In short, *Revlon* does not demand a perfect process. The ultimate question is whether the process implemented by the board was a reasonable effort to advance the interests of the shareholders under the circumstances. A board of directors has considerable latitude in structuring the sale process, provided that it acts with demonstrable diligence in the pursuit of the best transaction reasonably available. With these principles in mind, the Court turns to an assessment of the Board's efforts in this case.

(b) *The Process Employed by the Board*

Although the Lyondell Defendants have not explicitly pursued a *Barkan* argument on summary judgment, there is some evidence in the record to suggest that the Board had a "sufficient" body of reliable evidence with which to judge the adequacy of the Basell Proposal.[78] First, the Board was active, sophisticated and generally aware of the value of the Company and the conditions of the markets in which the Company operated. The depositions of Smith and Engen capably demonstrate this. The Board was routinely advised of the financial outlook for the Company. Lyondell's long range plan was updated and presented to the Board at least annually. In addition, Lyondell was involved in negotiations for the purchase of its refining joint venture with CITGO in mid-2006. Certainly, a great deal can change in market conditions in one year's time, but, nevertheless, the process involved in the acquisition of the balance of the refining joint venture is at least some evidence of a relatively recent opportunity for the Board to investigate thoroughly the market value of a substantial segment of the Company and to consider its longer term prospects for the stockholders.

The Board also was aware of Apollo's (the only other company to express even a passing interest in Lyondell) negotiations with Huntsman and the general status of other players in the chemical mergers and acquisitions market. At the time, Apollo was proposing a nearly $11 billion deal with Huntsman. The notion that Apollo (or Access, for that matter) could promptly have acquired and integrated Lyondell on the heels of Huntsman is unduly optimistic. In addition, the Board had other reasons to suspect that another bidder might not emerge. In particular, Smith noted Lyondell's unique amalgamation of "castoffs of other companies." Indeed, according to Smith, many of Lyondell's competitors (and potential acquirers) were exiting Lyondell's "specialty businesses" segment of the market, which had contributed to Lyondell's success in acquiring other companies over the years. Thus, in his opinion, the universe of potential buyers who would be looking for assets like those of Lyondell was small.

The Board also was presented with detailed financial analyses of the Company and the Basell Proposal from both management and Deutsche Bank. All of those analyses appear to have indicated that Basell's offer for Lyondell was fair and that the probability of a topping bid was slight, if not non-existent. Moreover, the Company had, at least to some extent, been on the market since May 13, 2007, two months before the Board's receipt of the Basell Proposal, when Blavatnik filed his 13D with the SEC. Other than the casual inquiry from Apollo, no one had expressed an interest in Lyondell despite seemingly widespread knowledge that it was "in play."

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[73] 567 A.2d 1279 (Del. 1989). The parties have not argued the *Barkan* line of cases in their summary judgment papers. Where, as here, a board of directors elects a passive sale process, *Barkan* is a critical subset of the Court's *Revlon* analysis.

[78] There is no evidence of a proactive sales process (*e.g.*, a market check or an auction). The main thrust of the Lyondell Defendants' arguments on summary judgment is that the Basell Proposal was self-evidently the best deal available to the Lyondell stockholders, thereby satisfying the Board's *Revlon* objective. Implicit in that argument, then, is reliance on a basis of market knowledge from which to draw that conclusion.

In addition, Smith, who arguably had the greatest knowledge of the Company and its markets, reported to the Board that he had negotiated a material increase in Basell's offer through his discussion with Blavatnik and had concluded that $48 per share was the best price then available. In the Board's view, based on the evidence of Smith's efforts, the premium represented by the Basell Proposal was likely to preclude all but the most aggressive bidders from engaging in a competitive sale process. Finally, in addition to relying on the market evidence available to it in July 2007, the Board argues that after the deal was announced, no indications of interest or topping bids were received during the four intervening months between the announcement and the shareholder vote on the Merger, and, thus, it relies upon an implicit post-signing market check to validate that it had in fact received top dollar for the Company.

On the other hand, one can also reasonably question the adequacy of the Board's knowledge and efforts on numerous fronts. First, this agreement materialized very quickly. The entire deal was negotiated, considered, and agreed to in less than seven days. That is not an impossible feat to pull off, but it does give pause as to how hard the Board really thought about this transaction and how carefully it sifted through the available market evidence. According to minutes of its meetings that week, the Board formally met to discuss the Basell Proposal for a total of no more than six or seven hours, with half, if not more, of that time accruing the day it reviewed the final terms of the merger agreement and voted to approve the deal. Those statistics do not inspire confidence that the Board carefully considered all of the alternatives available to Lyondell.

The Defendants also argue stridently that Blavatnik's 13D filing effectively put a "For Sale" sign on the Company and that no bidders were forthcoming. That may be true, but one may wonder if that same fact should have prompted the Board to take some action *in anticipation* of a possible proposal from Basell or another suitor, even if it had no specific intention of selling at the time. The Board did not retain an investment banker or even ask management to prepare projections and valuations of the Company before the Basell Proposal was delivered by Smith. The Board also never made an effort to conduct a formal market check of any kind; instead, it languidly awaited overtures from potential suitors reacting to Blavatnik's 13D filing. The Defendants argue that the writing regarding the fate of Lyondell clearly was on the wall for all in the market to see, but the Board either failed to read it or simply chose to ignore it as evidenced by the extent of its efforts in the two months preceding the Basell Proposal.

The Court also notes that there is very little evidence that the Board actually negotiated on the Basell Proposal or actively participated in the sale process. Other than a brief discussion of Blavatnik's possible intentions following the 13D filing in May, the Board did not undertake a serious effort to prepare for a possible sale of the Company. Smith, however, appears to have engaged in substantial preparations for a possible offer from Blavatnik and Access. For example, he met with Trautz in early June and (perhaps) suggested a price of $48 per share for the Company. Smith also scheduled a meeting with Blavatnik to discuss the 13D filing and a possible transaction. The Board, meanwhile, appears to have been unaware of these events until July 10 when Smith announced the Basell Proposal. Although "casual" discussions about possible deals and joint ventures were a regular occurrence in Lyondell's industry, and although it was within Smith's authority to engage in such discussions without express Board approval, one might reasonably argue under these circumstances that Smith's conversations with Trautz and Blavatnik were different and that the Board should have been consulted sooner and given an opportunity to shape the negotiating strategy before a firm (and possibly final) offer was on the table.

Finally, the Board's reliance on an implicit post-signing market check in this case cannot be sustained on summary judgment based on the current record. Unlike the facts of *In re Pennaco Energy, Inc.*, for example, the Board has not satisfactorily demonstrated an assiduous balancing of its "single bidder strategy" with an effective and relatively unencumbered post-signing market check. First, the Pennaco board demonstrated satisfactory knowledge of the market to justify its pursuit of a single-bidder strategy. For example, in response to growing market interest in an acquisition of the company, the Pennaco board developed a pitch book, which included the financial data it shared with the investment community, to provide to any potential buyer who expressed an interest in acquiring the company. In the months preceding the merger, several companies expressed an interest and received the pitch book. When the eventual acquirer, Marathon Oil, finally sought additional due diligence pursuant to a confidentiality agreement, the Pennaco board actively engaged itself in the oversight of that process and the subsequent negotiations.

Second, the Pennaco board pushed back against Marathon with respect to the merger price, and it was able to negotiate a substantial reduction in the breakup fee demanded by Marathon. The board also retained a fiduciary out that would permit it to speak with other potential acquirers under certain conditions. Moreover, in addition to the board's efforts to retain its agility to respond to a superior bid, it appeared that Pennaco's financial advisor actually contacted certain strategic buyers in violation of the no-shop clause in the Marathon merger agreement. Thus, under those circumstances, the Court was satisfied that the board had adequately balanced its single bidder sale strategy with a sufficient post-signing market check, and, therefore, it concluded that the shareholder plaintiffs were not likely to succeed on their *Revlon* claims.

In this case, by contrast, the Board made little comparable effort prior to receiving the Basell Proposal. For example, in response to speculation in the market resulting from Blavatnik's 13D filing and the early indication of interest from Apollo, the Board did nothing to evaluate the Company for a possible sale or to begin exploring a strategy for maximizing value for the shareholders. In addition, in the months preceding the Basell Proposal, Smith appears to have engaged in substantive discussions regarding a possible transaction with Trautz, and eventually Blavatnik, all unbeknownst to the Board. Thus, unlike the Pennaco board that at least arguably had an opportunity to participate in shaping and directing the negotiating strategy with Marathon, the Lyondell Board was largely out of the loop until the very end of the process when it, more or less, ceremonially approved the deal Smith had negotiated.

Moreover, once it was included in the sale process, there is no significant evidence that the Board negotiated the Basell Proposal or seriously pushed back against Blavatnik and Basell with respect to the offer price or the deal protections. Although the deal protections agreed to in this case may have been similar to those agreed to in *Pennaco* or may seem "typical" in deals of this nature, as explained more fully below, the Court is not satisfied, on this summary judgment record, at least, that they were the result of a reasonable exercise of the Board's business judgment and did not amount to a "formidable barrier" to the emergence of a superior bid. Finally, the Board's decision to disregard the possibility of conducting even a discrete and targeted market check to pitch a sale of the entire Company or the possibility of breaking it up into more valuable parts, particularly given Lyondell's unique market niche and Smith's assessment that few companies would be interested in acquiring Lyondell*in toto*, cannot be justified on the limited record presently before the Court.

In sum, the process chosen by the Board is troubling under *Revlon.*It is difficult for the Court to conclude on this record, after giving Ryan the benefit of all reasonable inferences, that the process employed by the Board was a "reasonable" effort to create value for the Lyondell shareholders under these circumstances.[92] For that reason, summary judgment on Ryan's *Revlon* claims is denied.

(c) *The Deal Protection Measures*

Ryan also challenges the reasonableness of the Board's decision to grant Basell considerable deal protections for the Merger-namely, a $385 million termination fee, matching rights, a no-shop provision, and the residuum of the poison pill. In his view, the deal protection measures, although perhaps not objectionable when standing alone, in the aggregate precluded other bids for the Company and left the Lyondell shareholders with no choice but to accept Basell's offer. In short, he argues that the Board's decision to grant such strong deal protections effectively rendered the Merger a *fait accompli* and was unreasonable under the circumstances facing the Board in July 2007.

Deal protection measures, of course, are not necessarily impermissible. Reasonable deal protections can serve numerous important purposes, including the fostering of deal certainty for both the target and the acquirer. Furthermore, deal protections can provide a rational economic incentive for a bidder to offer "top dollar" for a target company – a benefit that is consistent with the target board's *Revlon* objective – because it can be reasonably confident that its efforts will not be thwarted by a marginally more attractive jumping bid. Despite those laudable benefits, however, Delaware law does not bestow upon a board of directors "unbridled discretion" to consent to deal protection measures in derogation of their unyielding fiduciary duties toward the shareholders. Thus, the Board's decision to accede to Blavatnik and Basell's demands for deal protections must withstand enhanced judicial

[92] As the Court considers the record, the better inference, especially considering the potential consequences from losing the Basell Proposal, likely favors the Lyondell Defendants. The Court, however, cannot take the better inference on summary judgment to the exclusion of a less compelling, but still reasonable, inference.

scrutiny.[96]

Ryan concedes that none of the deal protection measures agreed to by the Board is preclusive or coercive when standing alone. He focuses instead on the cumulative effects of the deal protections acting in concert to argue that they precluded other bids for the Company which, in turn, coerced the Lyondell shareholders to accept the Basell Proposal for want of a meaningful choice. The latter argument concerning the coerciveness of the deal protections in this case may be dispensed with quickly; the former, however, requires more thorough consideration.

Deal protections and other provisions in a merger agreement are said to be coercive when they have the effect of causing a shareholder to vote in favor of a transaction for reasons other than its merits. There is nothing structurally coercive about the Basell Proposal, however. In fact, contrary to Ryan's conclusory assertions, the Lyondell shareholders had a legitimate choice when considering the Basell Proposal-they could have rejected it and let Lyondell continue with its successful operation. There were no voting agreements by controlling shareholders that preordained approval of the Merger before the shareholders voted, nor were there any threats from Lyondell management or the Board that the shareholders would suffer adverse consequences by voting against the deal. In addition, there was no provision in the merger agreement whereby Basell would be paid a termination fee upon a simple "no" vote by the shareholders. Thus, there is no reason why the Lyondell shareholders could not vote the Merger up or down on its merits, and, therefore, the structure of the deal was not coercive.

Ryan's arguments concerning the aggregate preclusive effect of the deal protections are more compelling, but they beg the broader, and more problematic, question of the reasonableness of the Board's decision to grant considerable protection to a deal that may not have been adequately vetted under *Revlon.* In particular, the problem lies primarily in the Board's decision to tie its hands with a no-shop, even with the requisite fiduciary out, under the circumstances of this case. In other words, where there is lingering doubt as to the Board's efforts to ensure that it had secured the "best" transaction available to the Lyondell shareholders before it endorsed the transaction, the Court also should be skeptical of the wisdom of the Board's decision to grant considerable deal protections, simply as a matter of course, that limited its ability to discharge proactively its fiduciary obligations after the fact. On summary judgment, without undisputed and sufficient evidence of either a proactive market check or that the Board, in fact, "*knew*" that it had secured the best deal reasonably available to the stockholders, one cannot exclude the inference that the deal protections agreed to by the Board served no purpose other than to squelch even the remotest possibility of a competing bid that might have increased the price for the stockholders.[103]

The Board argues that Basell demanded the deal protections as a condition of making the offer, but that argument is unpersuasive. First, there is no evidence that the Board put up much resistance to avoid conceding on all the protections Basell sought. Second, there is no persuasive evidence in the present record that Basell was going to walk away from the deal if it did not receive all the protections it demanded. The Court, thus, is not persuaded that a difficult and demanding buyer justifies a board's acquiescing in merger provisions that may undermine (to some extent) the interests of the stockholders under the circumstances-at least, not without adequate evidence that the board really had no choice but to accept the conditions or lose the offer.

Alternatively, the Board contends that the sheer magnitude of the transaction premium warranted, or at least

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[96] One might read *Omnicare* to suggest that deal protection measures must withstand the enhanced judicial scrutiny test prescribed by *Unocal.* The better reading of *Omnicare*, however, is that the Delaware Supreme Court reconfirmed that enhanced judicial scrutiny, regardless of the particular analytical framework, is the appropriate test for this Court to apply when reviewing a board's decision to grant deal protections. *Unocal* is but one formulation of enhanced scrutiny that might be applied; it is not, however, the only test, nor is it necessarily appropriate in all circumstances. Thus, *Omnicare* did not mark an analytical sea change; instead, it is consistent with numerous cases in which this Court has carefully scrutinized a board's decision to grant deal protections before according it the deference normally given to directors' business decisions.

[103] There is something of an unavoidable tension between the rationale supposedly supporting deal protection measures in a competitive market and the Defendants' argument here. They have contended that the Basell proposal constituted a "blowout" price, one that simply by its magnitude meant that there would be no one else willing to enter into any competition to acquire Lyondell. If so, what purpose did the deal protections serve? Maybe it is simply a matter of "belts and suspenders." On the other hand, maybe someone – a knowledgeable someone – had material doubts about whether the price itself would scare off any potential poacher.

justified, its decision to grant considerable deal protections to secure the Basell Proposal for the shareholders. That may be so, but a premium to market alone does not satisfy *Revlon* – or necessarily warrant concession to any form of deal protection the buyer demands. The Board had *some* evidence (to be sure) that the Basell Proposal was a "good" deal for the shareholders – for example, no serious suitors had emerged after Access' 13D filing in May 2007, the Basell Proposal offered a healthy premium to Lyondell's clear day trading price, and Deutsche Bank anointed the deal with a fairness opinion. On the other hand, however, the fairness opinion does nothing more than show that Basell was offering a "fair" price for Lyondell because it fell more or less in the middle of the various valuation ranges calculated by Deutsche Bank. Moreover, the Board did *nothing* (or virtually nothing, at least on this record) to study the market carefully or to prepare itself in anticipation of an offer for the Company. Essentially, the Board argues that it just *knew* when the Basell Proposal landed in its lap that it was a great deal and a "blowout" price for the shareholders and that no other bidder could (or would) top it. For the reasons discussed above, however, it has not satisfactorily demonstrated that knowledge for summary judgment purposes.

In sum, although deal protections are part of the mergers and acquisitions landscape and can serve numerous important purposes for both the target and the acquirer, the reasonableness of the Board's decision to grant this particular mix of deal protections under the circumstances presented is a question of fact that cannot be resolved on summary judgment. After trial, or perhaps on a more complete summary judgment record, the Court may be satisfied that the Board in fact secured the "best" deal available to the shareholders, or, at the very least, that it undertook to discharge its *Revlon* duties in good faith under the circumstances. If that is so, then perhaps its decision to accede to this particular mix of deal protections also will be deemed reasonable. On summary judgment, however, where the Court cannot weigh the evidence presented and is required to draw any reasonable inference in favor of Ryan, the non-moving party, and where there is considerable doubt as to the adequacy of the Board's efforts under *Revlon,* the Court cannot conclude that the Board's decision to agree to this particular mix of deal protections was reasonable. Accordingly, summary judgment is denied.

(d) *The Board's Shortcomings under* Revlon *May Implicate the Duty of Loyalty which Precludes a Section 102(b)(7) Defense on Summary Judgment*

The Lyondell Defendants argue that even if the Court concludes, as it has, that for summary judgment purposes the Board's efforts under *Revlon* were insufficient, they nevertheless are entitled to summary judgment because those perceived shortcomings amounted to nothing more than a breach of the duty of care and Lyondell has adopted an exculpatory charter provision in accordance with 8 *Del. C.* § 102(b)(7) to preclude an award of damages for such a breach of duty. This may not be a case, however, where a board of directors simply botched the sale process in some careless or even grossly negligent manner; instead, this is a board of directors that appears never to have engaged fully in the process to begin with, despite *Revlon's* mandate. Thus, the good faith aspect of the duty of loyalty may be implicated, which precludes a Section 102(b)(7) defense to Ryan's *Revlon* and deal protection claims.[105]

Although the so-called *Revlon* duties are not unique fiduciary obligations, they act as a source of certain guidelines for the discharge of a director's fiduciary duties of care and loyalty in a sale scenario. As discussed in the preceding sections, the adequacy of the Board's sale efforts under the *Revlon* line of cases has been called into doubt. The record does not demonstrate that the Board engaged in an active sale process; in fact, to the contrary, it made no discernible effort at salesmanship either before or after the Merger was announced. Furthermore, although the Board perhaps had adequate information about the market to satisfy the narrow *Barkan* exception to a more robust sale process, on summary judgment it has not carried that burden. In short, the Board has not satisfactorily demonstrated an undertaking of the careful process envisioned by cases such as *Revlon, Barkan,* and *QVC* for discharging the directors' unremitting duty of care in a sale of control.

In *Stone v. Ritter*, the Delaware Supreme Court held that "the fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. It also encompasses cases where the fiduciary fails to act in good faith."[109] The Court went on to state, "Where directors fail to act in the face of a known

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[105] Because the Board's decision to grant Basell considerable deal protections is inextricably related to the discharge of its *Revlon* duties under these circumstances, the Court concludes that a Section 102(b)(7) defense does not absolve the directors of liability on the deal protection claims either, at least at this stage of the proceedings.

[109] 911 A.2d at 370.

duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith." One consequence if directors act disloyally or not in good faith is that the protections of an exculpatory charter provision do not attach.

The record, as it presently stands, does not, as a matter of undisputed material fact, demonstrate the Lyondell directors' good faith discharge of their *Revlon* duties-a known set of "duties" requiring certain conduct or impeccable knowledge of the market in the face of Basell's offer to acquire the Company. Perhaps with a more fully developed record or after trial, the Court will be satisfied that the Board's efforts were done with sufficient good faith to absolve the directors of liability for money damages for any potential procedural shortcomings. With a record that does not clearly show the Board's good faith discharge of its *Revlon* duties, however, whether the members of the Board are entitled to seek shelter under the Company's exculpatory charter provision for procedural shortcomings amounting to a violation of their known fiduciary obligations in a sale scenario presents a question of fact that cannot now be resolved on summary judgment.

...

IV. Conclusion

The denial in part of the Lyondell Defendants' motion is driven more by the constraints of a summary judgment process than it is by our corporate law. The price-$48 per share-was undeniably a fair one and may well have been the best that could reasonably have been obtained in that market or any market since then. When control of the corporation is at stake, however, directors of a Delaware corporation are expected to take context-appropriate steps to assure themselves and, thus, their shareholders that the price to be paid is the "best price reasonably available." The Court cannot conclude on the limited record before it that, as a matter of undisputed material fact, the directors acted appropriately under the circumstances of this case. Whether that can be demonstrated for summary judgment purposes on a more complete record or at trial, of course, remains to be seen.

***24** For the foregoing reasons, the Court grants summary judgment on all claims in favor of the Basell Defendants and against Ryan. The Court also grants summary judgment in favor of the Lyondell Defendants and against Ryan on the structural loyalty claims and all disclosure claims. Otherwise, the Lyondell Defendants' motion for summary judgment is denied. To the extent that it is not moot, the Court also denies Ryan's application for additional discovery pursuant to Court of Chancery Rule 56(f).