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Transaction ID 20842373
Case No. 3176-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WALTER E. RYAN, JR., individually and on behalf of all others similarly situated,	:	
Plaintiff,	:	
v.	:	**C.A. No. 3176-VCN**
LYONDELL CHEMICAL COMPANY, DAN F. SMITH, 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, WILLIAM R. SPIVEY, BASELL AF, and BIL ACQUISITION HOLDINGS LIMITED,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: December 5, 2007
Date Decided: July 29, 2008

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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,[1] and Defendant Lyondell Chemical Company ("Lyondell" or the "Company"). Before the Court are Defendants' motions for summary judgment.[2] 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

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[1] References to Basell may also include BIL Acquisition Holdings Limited, as appropriate.

[2] Lyondell and the individual defendants (sometimes, collectively, the "Lyondell Defendants") have moved separately for summary judgment and have joined in Basell's brief in support of its motion for summary judgment. Throughout this memorandum opinion, "Defendants" refers collectively to all of the defendants.

Ryan has filed a brief in opposition to Defendants' motions; however, he seeks additional discovery pursuant to Court of Chancery Rule 56(f) and, therefore, asserts that resolution of the motions at this point is premature.

[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.

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.

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[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 ("Tucker Ex. ___") 1 (Deposition of Dan F. Smith at 35).

[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.

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 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.

Ryan also alleges that the Lyondell Defendants breached their disclosure duties in connection with the proxy materials soliciting stockholder approval of the Merger. Consequently, the Lyondell stockholders, in Ryan's view, were uninformed in their decision to approve the Merger at $48 per share. Finally, in addition to the preceding claims against the Lyondell Defendants, Ryan asserts aiding and abetting claims against the Basell Defendants.

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,[7] 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

[7] Indeed, management's projections were more bullish than the investment banker's projections of Lyondell's future performance.

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.

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

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

[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).

respect to Ryan's *Revlon* claims and his challenge to the deal protection measures will be denied.[11]

With respect to Ryan's other claims against the Lyondell Defendants—his structural loyalty and disclosure claims—the Court grants the Lyondell Defendants' motion. The undisputed evidence shows that the members of the Board were not motivated by self-interest to approve the Merger. Moreover, Ryan has not challenged the independence of the ten non-management directors from the proponents of this transaction. As for the disclosure claims, the proxy materials sent to the Lyondell stockholders disclosed, in a full and accurate manner, most of the material information to which the stockholders were entitled. One minor, although perhaps material, defect exists in the disclosures concerning Deutsche Bank's financial analyses.[12] Nevertheless, the Court concludes that, at worst, the failure to disclose amounted only to a breach of the Board's duty of care. Accordingly, Lyondell's exculpatory charter provision adopted in accordance with

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[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* 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.

The Lyondell Defendants also point to the overwhelming support of their shareholders for the transaction as a basis for claiming shareholder ratification. Ratification, at this point, does not meet the objectives of the Lyondell Defendants for the reasons discussed *infra* in note 129.

[12] Ryan made no effort to seek interim injunctive relief—even though he had ample time—that easily could have resulted in the cure of any minor defect that may have existed in the proxy disclosures.

8 *Del. C.* § 102(b)(7) precludes an award of money damages resulting from this breach of the Board's fiduciary duties, and, thus, the Lyondell Defendants are entitled to summary judgment on these claims.

Finally, Ryan seeks to impose liability on the Basell Defendants as aiders and abetters of the Lyondell Defendants' fiduciary breaches. Basell, however, as demonstrated by the undisputed material facts of record, negotiated at arm's-length with an independent Board. Accordingly, the Basell Defendants are entitled to summary judgment on Ryan's aiding and abetting claims.

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.[14]

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,[15] 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

[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.
[14] As noted, "Basell" may refer collectively to Basell AF and BIL Acquisition Holdings Limited.
[15] A potential purchase price range of $24 to $27 per share had been suggested in the early discussions.

considered that offer, but determined that it was inadequate and not in the best interests of the Lyondell stockholders.[16]

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]

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[16] Transmittal Affidavit of Jenness E. Parker Exhibit ("Parker Ex. ___") 11 (letter from Lyondell to Blavatnik and Access rejecting offer). At the time, Lyondell had just acquired CITGO Petroleum Corporation's interest in a refining joint venture between the two companies; thus, the Board believed that better value would be achieved for the stockholders by following Lyondell's strategic plan. Tucker Ex. 1 (Smith Dep. at 17; 23-28).

[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

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 his belief (though, he was not certain) that Blavatnik and Access would purchase the Occidental bloc.[18] That development raised concerns, but the Board did not take any specific action in response.[19]

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agreements and forward contracts. Blavatnik intended eventually to acquire the entire Occidental bloc. Tucker Ex. 4 (Schedule 13D).

[18] Tucker Ex. 3 (Definitive Proxy Statement (the "Proxy") at 19). Ryan disputes the Proxy's representation that Chazen identified Blavatnik and Access as the potential purchaser of the Occidental bloc during the May 3, 2007, Board meeting because, according to the minutes of that meeting, Chazen stated that "he is not aware for certainty [sic] of the identity of the ultimate buyer." Tucker Ex. 5. The minutes, however, do not necessarily contradict the Proxy. Tucker Ex. 3 (Proxy at 19). Smith's deposition confirms the Proxy's representation that Occidental had informed Lyondell that Blavatnik might be the acquirer of its shares:

> Q. Did you have any inkling, prior to May 11th, that Mr. Blavatnik was in the process of trying to acquire Lyondell shares?
>
> A. Yes. Third party, if you will. Again, through the disclosures in here, you see that Occidental had told us of their intent to exit their position. And in the process of doing that, shared with us that they thought through this complicated sequence of events, that it was likely that Mr. Blavatnik was recipient, on the other end, ultimately of these shares.

Tucker Ex. 1 (Smith Dep. at 33).

[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

On May 11, 2007, an Access affiliate[20] 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."

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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."

[20] AI Chemical Investments, LLC, a Delaware limited liability company, was formed for the purpose of acquiring the Occidental bloc. Blavatnik is the sole member of that company. For purposes of this memorandum opinion, the Court may refer to the acquisition entity that filed the 13D as either "Access" or "Blavatnik."

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.[21] 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[22] with the market atwitter in anticipation of a deal.[23]

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

[21] Tucker Ex. 1 (Smith Dep. at 40-42).
[22] Parker Ex. 5 (Stock Price Data).
[23] *See, e.g.*, Parker Ex. 10 (Joseph Chang, *Blavatnik puts Lyondell in Play*, ICIS CHEMICAL BUSINESS, May 21, 2007)

("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."[24] 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

[24] Tucker Ex. 13 (Email from Trautz to Blavatnik).

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 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[25] if the Board would sign a

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[25] Blavatnik's offer of $48 per share for Lyondell caused great consternation for the Basell and Access executives involved in this transaction, or so the Defendants want the Court to believe. *See, e.g.*, Parker Ex. 7 (Email from Alan Bigman to Blavatnik ("I am uncomfortable with the

merger agreement by July 16, 2007, and agree to a $400 million break-up fee[26] (the "Basell Proposal"[27]). Blavatnik further stated that the Basell Proposal would have committed financing, so there would be no financing contingency.[28] 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.[29] During a fifty minute meeting, Smith presented Blavatnik's offer and the Board held preliminary discussions. The Board reviewed certain valuation materials regarding the

[Lyondell] valuation—it is almost $5 billion more than we were offering a year ago and over $2 billion more than we were discussing just a few weeks ago. The issue with [Merrill Lynch] . . . is another indication that we're on the edge here.")); Parker Ex. 7 (Email from Philip Kassin to Lincoln Benet ("I hate the deal at $48. . . .")); Tucker Ex. 9 (Kassin Dep. at 36 (noting that $48 was, in his view, a "ludicrous" price for Lyondell); *id.* at 95 ("MR. STERLING: [W]hy did you vote against the deal in your capacity as a [Basell] board member? MR. KASSIN: I felt that 48 was too full a price based on both intrinsic valuation as well as market valuation of Lyondell. MR. STERLING: And I believe you said . . . Mr. Volker Trautz voted the same way you did? MR. KASSIN: I do not know on the Basell record whether he voted against it. I do know as some of the exhibits that have been shown, that Mr. Trautz was not in agreement with the 48."); *id.* at 103 ("MR. KASSIN: [T]he line was in the sand that Mr. Blavatnik drew that we were going to do this at 48. My job was to get out and get financing of this at 48. I felt the 48 was a ridiculous price and we should have bought Huntsman instead. And I was very concerned about getting my financing.")).

[26] Other deal protection measures (a no-shop provision and matching rights) were included in the merger agreement as the result of later negotiations.

[27] Basell was the Access subsidiary (and operating entity) designated to acquire Lyondell.

[28] Indeed, the Lyondell transaction came on the cusp of the credit crunch that slowed large-scale merger activity in the latter part of 2007 and thereafter, and the Basell executives were worried that they might not get adequate financing. *See generally* Tucker Ex. 9 (Kassin Dep. at 103-05).

[29] The Board was overseas at the time for a previously scheduled board meeting and several days of activities related to Lyondell's operations abroad.

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.[30] 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.[31] 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.

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[30] Tucker Ex. 3 (Proxy at 22). Specifically, the meeting minutes describe the Board's discussion as follows:

> The Board discussed that only the Board has final approval authority to recommend a merger or cash offer to the shareholders . . . . Discussions ensued regarding the potential path forward to maximize shareholder value, whether to remain a stand-alone entity and pursue the current Long Range Plan or to proceed with a potential transaction . . . . The Board then discussed the potential terms of the transaction, including the cash offer and the fact that the Board would insist upon no financing or other contingencies (except regulatory or shareholder approvals). The Board compared this potential transaction to Mr. Blavatnik's current proposed transaction with Huntsman Chemicals. The Board discussed the impact on the Company's stock price and other negative factors if this transaction were to be announced but not successfully completed. There was an extensive discussion of strategic paths for the Company as compared to this potential transaction, including the potential value of the refinery, the China joint venture and other developments in the Company's Long Range Plan . . . . A discussion followed regarding disclosure obligations, potential timing of discussions and timing for a special meeting of the Board to consider the proposed transaction. The Board then discussed the status of the proposed Basell transaction with Huntsman and the impact on this potential transaction between Lyondell and Basell . . . . The Board then discussed Mr. Blavatnik's background and history and their fiduciary duties as discussions progress."

Parker Ex. 3 (Minutes of July 11, 2007 board meeting).

[31] Tucker Ex. 3 (Proxy at 22); Parker Ex. 3 (Minutes of July 11, 2007 board meeting).

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.[32] In addition, Basell abandoned its pursuit of Huntsman and issued a press release stating that it would not increase its bid for that company.[33]

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,

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[32] The written engagement letter was signed on July 14, 2007. Parker Ex. 13.

[33] Hexion and Huntsman announced a definitive merger agreement valued at approximately $10.6 billion (including assumption of certain debt) on July 12, 2007, and paid Basell a $200 million break-up fee under the Basell-Huntsman merger agreement.

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.[34] 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.[37]

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[34] Tucker Ex. 17.

[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.

[37] Tucker Ex. 14 (Merger Agreement § 4.2).

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,[38] 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.[39] 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.[40] 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.[41] On the basis of its various analyses, Deutsche Bank concluded that $48 per share was indeed a fair price for the Lyondell stockholders.

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[38] The valuation exercises included: an historical stock price performance analysis; an analysis of selected publicly traded "competitor" companies; an analysis of selected precedent transactions; a discounted cash flow analysis ("DCF"); and a leveraged buyout analysis ("LBO").
[39] Tucker Ex. 25 (Fairness Presentation at 17, 25, 27).
[40] *Id.* (Fairness Presentation at 17, 26, 28).
[41] *Id.* (Fairness Presentation at 17, 21).

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.[42]

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.[43] A

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[42] Indeed, the Board recognized the risk that *failing* to pass along such a premium offer likely would have subjected them to a host of lawsuits from disgruntled shareholders. *See, e.g.*, Tucker 1 (Smith Dep. at 55-56 ("MR. ODDO: What were your thoughts about the 48-dollar proposal? MR. SMITH: Golly gee, that's a lot of money. If that's not a take-out, I've never seen a take-out price. If you look at the prospects, if you look [at] the way the market valued us . . . we got the value up into the low 30s . . . [Lyondell was] pretty well valued in the market at that level. This was 50 percent greater than that value. When I looked at our prospects, if we did everything right and had all the breaks over the next five years, frankly, I couldn't see that we could get to a market price of 48. That was one where the shareholders would fire us if we didn't take it.")).
[43] Tucker Ex. 3.

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,[44] and the transaction closed on December 20, 2007.

D. *The Litigation in Texas and Delaware*

The first shareholder class action lawsuit challenging the Merger, and raising claims similar to those asserted by Ryan in this action, was filed in Texas on July 23, 2007.[45] Ryan, although not a party to that suit, actively participated in the Texas litigation, specifically in order to prepare for a preliminary injunction hearing, which was held there on November 9, 2007.[46] In connection with that effort, Ryan received nearly 200,000 pages of documents and has had an opportunity to depose several witnesses concerning the Merger.

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[44] 168,008,513 shares out of 253,625,523 outstanding Lyondell shares (approx. 66.23%) were voted at the meeting. The results of the vote on the Merger were as follows:

	FOR	**AGAINST**	**ABSTAIN**
BENEFICIAL COMMON	166,033,511	715,935	358,891
REGISTERED COMMON	861,770	31,992	6,414
TOTAL SHARES VOTED	166,895,281	747,927	365,305
% OF VOTED	99.33%	0.44%	0.21%
% OF OUTSTANDING	65.80%	0.29%	0.14%

Chart adapted from Parker Ex. 15.

[45] *Plumbers and Pipefitters Local 51 Pension Fund v. Lyondell Chemical Co.*, Cause No. 2007-43958 (80th Jud. Cir. Harris Cty., TX). Ryan filed this action on August 20, 2007.

[46] The Texas court denied the preliminary injunction by an order dated November 13, 2007. Ryan did not seek a preliminary injunction (or any other expedited action) in this proceeding.

E. *The Additional Discovery Sought by Ryan in his Rule 56(f) Application*

Ryan claims that resolution of the Defendants' motions for summary judgment would be premature and prejudicial because he still needs a wide-ranging assortment of discovery in order to respond adequately to the motions. In particular, Ryan seeks the depositions of *all* the Individual Defendants (except Smith and Travis Engen ("Engen"), Lyondell's "lead" independent director, who were deposed in the Texas litigation) to illuminate his fiduciary duty claims. He also seeks to depose other employees of Lyondell and Deutsche Bank regarding his allegations of deficiencies in Deutsche Bank's fairness opinion and the Proxy. In addition, he also seeks to depose Blavatnik and various other representatives and employees of Basell in connection with his aiding and abetting claims. Finally, he claims that, if nothing else, he has not had an adequate opportunity to review the 200,000 pages of documents produced by the Defendants.

III. ANALYSIS

A. *Standards Governing Defendants' Motions for Summary Judgment*

The summary judgment standard is well-known. In order to prevail, the moving party must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.[47] Where the moving party supports its motion by affidavit and sufficient evidence to warrant summary

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[47] Ct. Ch. R. 56(c); *see, e.g.*, *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007); *In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904, 926 (Del. Ch. 2004).

judgment, the burden shifts to the non-moving party to rebut the evidence presented by setting forth specific facts showing a genuine issue for trial; the non-moving party may not rest upon mere allegations and general denials.[48] In considering the summary judgment record, however, the Court is not permitted to weigh the evidence, and all reasonable inferences from the record presented must be drawn in favor of the non-moving party to determine the existence *vel non* of disputed material facts.[49] "[I]f from the evidence produced there is a reasonable indication that a material fact is in dispute or if it appears desirable to inquire more thoroughly into the facts in order to clarify application of the law, summary judgment is not appropriate."[50] With those principles in mind, the Court moves to the merits of Defendants' motions.

B. *The Merits of Defendants' Motions for Summary Judgment*

1. The General Duty of Loyalty Claims[51]

Ryan advances three arguments in support of his claim that the Individual Defendants breached their duty of loyalty to the Lyondell stockholders. First, he

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[48] Ct. Ch. R. 56(e); *see, e.g.*, *HIFN, Inc.*, 2007 WL 1309376, at *9; *In re Oracle Corp. Deriv. Litig.*, 867 A.2d at 926.

[49] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005); *see also Izquierdo v. Sills*, 2004 WL 2290811, at *2 (Del. Ch. June 29, 2004) ("On a motion for summary judgment, judges may only determine whether or not there is a genuine issue as to a material fact; they may not try that issue.").

[50] *AeroGlobal*, 871 A.2d at 444.

[51] All of Ryan's loyalty claims, except those related to his *Revlon* claims, his deal protection claims, and his disclosure claims, are lumped together in this section for convenience.

claims that the Independent Directors were improperly motivated to approve the Basell Proposal because they stood to reap a financial "windfall" through the early vesting of stock options in connection with the Merger. Second, he claims that Smith was improperly motivated and biased in his negotiation and consideration of the Basell Proposal by his right to receive certain change-in-control payments (in addition to the early vesting of his stock options), as well as by his desire to negotiate continued employment with the post-merger company. Finally, Ryan alleges that Chazen acted disloyally by allowing Occidental to structure the sale of the Occidental bloc in such a way as to avoid the restrictions (or spirit) of the shareholders agreement. That action and the Board's failure to respond, in Ryan's view, set in motion the chain of events leading to an inevitable sale of the Company to Basell.

(a) *The Independent Directors neither had an Impermissible Financial Interest in the Basell Proposal nor were Beholden to any Proponent of this Transaction*

Ryan has not produced any facts to suggest that the Independent Directors were improperly interested in the Basell Proposal or otherwise personally conflicted as a result of the cash payments they would receive for their Lyondell stock and options. In his Complaint, Ryan produced a chart showing that, as a result of the Merger, the Independent Directors stood to gain anywhere between $233,000 and $3.75 million, depending upon the number of shares and options they owned.[52] In his brief opposing summary judgment, Ryan further asserted that the financial benefits accruing to the Lyondell directors were "much more beneficial than what the average shareholder [would] receive." This contention apparently flows from the fact that the Independent Directors were entitled to have their stock options vested and cashed out in connection with the Merger as opposed to waiting for those benefits to accrue over a longer term if Lyondell remained independent.

Ryan's bald allegations and the paucity of facts he marshals to support this contention do not make for a case of improper interest and disloyalty on the part of the Independent Directors. The vesting of stock options in connection with a merger does not create a *per se* impermissible interest in the transaction.[53] If it could, then directors would be faced with a proverbial Catch-22 requiring them either to forego the options (a rightfully earned component of their compensation) or to accept their rightfully earned compensation and risk a breach of their duty of loyalty. Such an irrational system would deprive the board of a strong incentive to maximize value.[54]

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[52] Compl. ¶ 93.

[53] *See, e.g.*, *Krim v. ProNet, Inc.*, 744 A.2d 523, 528 (Del. Ch. 1999). The general rule is not ironclad, however, because, for example, one could imagine a scenario where a board surreptitiously grants itself valuable stock options on the eve of a merger that might then constitute a disabling self-interest.

[54] *Cf. Orman v. Cullman*, 794 A.2d 5, 27 n.56 (Del. Ch. 2002) ("A director who is also a shareholder of his corporation is more likely to have interests that are aligned with other

Furthermore, it is well-settled that "[a] director is considered interested when he will receive a personal financial benefit from a transaction that is not equally shared by the stockholders."[55] No such benefits exist for the Lyondell directors. Where, as here, the options vesting in connection with a merger were awarded as part of an established compensation plan, the accelerated vesting does not confer a special benefit upon the directors. The options, instead, are a legitimately earned benefit and, in fact, provide the directors with a powerful incentive to seek a transaction offering the highest value per share; thus, the vesting of the directors' options advanced the desired result of aligning the Board's interests with those of the Lyondell stockholders.[56] Ryan's hyperbole aside, the directors' options were paid at $48 per share (less the strike price)—the exact same benefit conferred upon *all* Lyondell stockholders.[57] Thus, Ryan cannot demonstrate that the Independent Directors received a benefit not shared equally by the Lyondell stockholders, and

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shareholders . . . as it is in his best interest, as a shareholder, to negotiate a transaction that will result in the largest return for all shareholders.").

[55] *In re Western Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *11 (Del. Ch. May 22, 2000) (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

[56] *See, e.g.*, *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1006 (Del. Ch. 2005) (noting that stock and options provide "a rational incentive" for directors to pursue more lucrative offers); *In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 709 (Del. Ch. 2001) ("[T]he board's grant of options to itself . . . was consistent with a policy of aligning the board's interests with those of the stockholders. This is a permissible purpose.").

[57] *Cf. Gilbert v. El Paso Co.*, 575 A.2d 1131, 1146 (Del. 1990) (where board members did not stand on both sides of transaction, right to tender their own shares did not confer a special benefit not also extended to all shareholders).

so he fails to establish a breach of the Independent Directors' duty of loyalty.[58] The Defendants, therefore, are entitled to summary judgment on these claims.[59]

(b) *Ryan's Complaints about Chazen and the Sale of the Occidental Bloc are Much Ado about Nothing*

In his brief, and particularly at oral argument, Ryan belabored his point that the sale of the Occidental bloc contravened the spirit of the shareholders agreement governing those shares. He argues this event transpired as a result of grievous acts of disloyalty by Chazen and the Board and rendered Basell's acquisition of Lyondell inevitable. Ryan's vociferous protestations notwithstanding, however, the sale of the Occidental bloc does not support any meritorious loyalty claim.

At best, Ryan raises an argument that the Board acted disloyally by standing idly by and allowing Lyondell's second-largest shareholder to divest its holdings through a loophole in the shareholders agreement. As a practical matter, however, there was nothing the Board could have done to prevent that from occurring. The

[58] The Court also notes in passing that Ryan does not argue that the Independent Directors are not, in fact, independent. Indeed, there are no facts to suggest that the Independent Directors are beholden to any proponent of this transaction. As such, Ryan cannot prevail on his duty of loyalty claims on a theory that the Independent Directors lacked independence to consider impartially the Basell Proposal.

[59] Because Ryan has not challenged the Independent Directors' independence from Smith, it is not necessary to consider in any detail whether Smith's personal financial interest (payment of his Lyondell stock and options, plus certain other change-in-control payments) or his alleged interest in employment with the post-merger company amounted to a breach of his duty of loyalty. Even if it is assumed that those interests did amount to material self-dealing, the Merger nevertheless was considered and approved by ten other directors whose independence from Smith is unchallenged. Accordingly, the Court grants summary judgment dismissing Ryan's general loyalty claims based upon the alleged benefits flowing to Smith by way of the Merger.

shareholders agreement permitted a sale of the entire Occidental bloc through certain machinations, and Occidental exploited the opportunity. That, it seems, amounts to nothing more than an astute reading of the shareholders agreement. The Board's decision not to respond under those circumstances was not an unreasonable exercise of its business judgment and, thus, not the act of corporate treachery Ryan alleges.[60]

In short, the Court does not need to conjure the spirit of the shareholders agreement to determine that Ryan has not raised even the specter of a legitimate loyalty claim regarding this aspect of his case. The Defendants, therefore, are entitled to summary judgment.

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

[60] Even if the Court were to assume that there was some action the Board could have taken in response to the sale of the Occidental bloc, Ryan has not set forth any cogent reasons for why this transaction matters in the broader context of the Merger. Through its acquisition of the Occidental bloc, Access secured only an 8% interest in Lyondell. That was obviously a toehold position, but it was not a control position and it afforded Access no opportunity to control the action of the Board.

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.*[61] 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).[62] Accordingly, Ryan can only prevail on his *Revlon* claims by overcoming the protection afforded to the Board by Lyondell's exculpatory charter provision;[63] in other words, because the Board was independent and not

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[61] 506 A.2d at 173.
[62] 8 *Del. C.* § 102(b)(7) provides, in pertinent part, that a Delaware corporation may adopt in its charter "[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for money damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law . . . ."
[63] *See, e.g.*, *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *6 (Del. Ch. Jan. 25, 1999).

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[65] and, ordinarily, its decisions are shielded from intense *post hoc* judicial review by the business judgment rule.[66] 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

[64] 911 A.2d 362 (Del. 2006).
[65] 8 *Del. C.* § 141(a).
[66] The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Ordinarily, the burden rests on the plaintiff to rebut the presumption by proving either (1) that the directors were interested or lacked independence to assess the merits of the transaction; or (2) that the challenged transaction otherwise was not the product of a valid exercise of business judgment. *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *4 (Del. Ch. Nov. 30, 2007).

their decision; and (b) a judicial examination of the directors' actions in light of the circumstances then existing."[67] Additionally, the burden is shifted to the directors to prove "that they were adequately informed and acted reasonably."[68]

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."[69] 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.[70] 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

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[67] *In re Toys "R" Us, Inc.*, 877 A.2d at 1000 (citing *Paramount Commc'ns, Inc. v. QVC Networks, Inc.*, 637 A.2d 34, 45 (Del. 1994)).

[68] *Id.*

[69] *Revlon*, 506 A.2d at 182. Of course, maximizing value does not necessarily mean securing the offer with the highest dollar value.

[70] "'*Revlon* duties' refer only to a director's performance of his or her duties of care . . . and loyalty in the unique factual circumstance of a sale of control over the corporate enterprise." *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 731 (Del. Ch. 1999). The Court's ordinary measuring sticks for violations of the duty of care (*i.e.*, gross negligence) and the duty of loyalty (*e.g.*, impermissible interest, lack of independence, or "bad faith") still apply. With respect to the duty of care, the board of directors has the burden of establishing that it undertook reasonable efforts to secure the *material* facts necessary to assess competently the adequacy and desirability of a particular transaction as contrasted with some alternative. The Court, of course, is mindful that reasonableness, not flawlessness, is the ultimate test. *In re Pennaco Energy, Inc.*, 787 A.2d at 705. With respect to the duty of loyalty, the Court must be satisfied that the directors were not motivated by any self-interest that is antithetical to the interests of the stockholders and that the process employed by the board demonstrates a reasonable, good faith effort to discharge its fiduciary obligations in the sale of control context. *See Stone*, 911 A.2d at 370.

of control is duty bound to engage actively in the sale process.[71] Nevertheless, Delaware courts have not delineated the precise contours of a sale process because every transaction is different and every board confronts unique circumstances.[72]

One limited exception to the active sale process generally contemplated by *Revlon* jurisprudence is 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."[74] Thus, in the sale scenario, a sufficient

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[71] Indeed, in the wake of *Revlon*, many cases suggested that when a board of directors undertakes a sale of the company, it can satisfy its "*Revlon* duties" by engaging in a proactive sale process designed to secure the best transaction available to the shareholders. Thus, in broad brush, one could reasonably discern from *Revlon* jurisprudence that, in most instances, a board of directors would be well-advised to do *something* to test the adequacy of an offer or to demonstrate otherwise that a proposed deal maximizes stockholder value. *See, e.g.*, *McMullin v. Beran*, 765 A.2d 910, 918 (Del. 2000) (in pursuing the best value reasonably available for all stockholders, "the directors must be especially diligent. . . ."); *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989) (discussing "a board's active and direct role in the sale process."). As this Court more recently noted, the hallmark of a "paradigmatic" *Revlon* claim is a supine board. *In re Toys "R" Us, Inc.*, 877 A.2d at 1002.

[72] *See, e.g.*, *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989) ("[T]here is no single blueprint a board must follow to fulfill its duties.").

[73] 567 A.2d at 1279. 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.

[74] *Id.* at 1287. "The corollary to this is clear: when [a board does] not possess reliable evidence of the market value of the *entity* as a whole, the lack of an active sales effort is strongly suggestive of a *Revlon* breach." *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 195 n.76 (Del. Ch. 2007).

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.[75] Similarly, there is no specific quantum of evidence

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[75] *Barkan*, 567 A.2d at 1287. In *Barkan*, for example, the Delaware Supreme Court was satisfied that the Amsted Industries board had amassed a sufficient body of evidence against which to judge the adequacy and fairness of the favored leveraged buyout transaction in a single-bidder sale scenario. First, the Amsted Industries board took a proactive role in collecting relevant market information. For example, in response to the acquisition of a sizeable number of shares by a sophisticated investor, the Amsted Industries board retained an investment banker to provide advice on possible responses to that acquisition and the possibilities it presented. The board also formed a special committee of disinterested directors to consider any change in control transactions that might develop. Additionally, over a period of ten months, while it sensed that a transaction was in the offing, the Amsted Industries board considered numerous valuations of the company, both optimistic and pessimistic, in order to determine the propriety of a management-led leveraged buyout transaction and, as a consequence, to orient itself as to the value of the company in the market. Second, the Amsted Industries board was confronted by declining economic performance, which tended to support an inference that the management buyout transaction offered the best value attainable by the shareholders; in addition, the management-sponsored buyout proposal benefited from unique tax advantages, which, in turn, also supported an inference that no other bidder would be likely to top management's offer. Finally, the Delaware Supreme Court was satisfied that the implicit market check that had occurred during the ten months preceding the management proposal, and the lack of other bids during that time period, was "supportive of the board's decision to proceed." Thus, all of that information coupled with the independent advice the special committee and the full board received in connection with the proposed transaction throughout the process constituted a sufficient body of evidence against which the board was able to judge the fairness of the proposed management buyout transaction to the shareholders.

On the other hand, for example, in *In re Netsmart Technologies, Inc.*, 924 A.2d at 195-99, this Court was critical of the Netsmart board's decision not to solicit interest from a targeted group of strategic buyers based upon its limited knowledge, from previous experiences, that no strategic buyer would be interested in acquiring Netsmart. The Court observed that Netsmart's prior attempts to solicit interest in a sale of the company did not reflect more recent changes in the company's assets and marketability and, in any event, failed to account for any changes that might have occurred on the targeted buyers' side in the interim between earlier solicitations and 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.[76]

In short, *Revlon* does not demand a perfect process.[77] 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

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the proposed sale. The Court also noted that in the "niche," micro-cap market in which Netsmart operated, and particularly for the reasons identified by the Netsmart board as making it difficult to attract market attention, the board could not rely upon the implicit post-signing market check technique employed (and tacitly approved of) in other, large-cap sale cases. The Court stated, "In the case of a niche company like Netsmart, the potential utility of a sophisticated and targeted sales effort seems especially high." *Id.* at 197. In short, the Netsmart board failed to demonstrate a sufficient body of market knowledge to justify its decision to abstain from soliciting bids from a targeted group of strategic buyers, and instead to focus only on a limited auction among selected financial buyers.

[76] *Barkan*, 567 A.2d at 1288 ("The evidence that will support a finding of good faith in the absence of some sort of market test is by nature circumstantial; therefore, its evaluation by a court must be open-textured. However, the crucial element supporting a finding of good faith is knowledge. It must be clear that the board had sufficient knowledge of relevant markets to form the basis for its belief that it acted in the best interests of the shareholders.").

[77] *See, e.g.*, *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 118 (Del. Ch. 2007) ("Reasonableness, not perfection, measured in business terms relevant to value creation, rather than by what creates the most sterile smell, is the metric.").

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.[79] 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

[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.

[79] *Cf. In re Pennaco Energy, Inc.*, 787 A.2d at 706 (Where a board's knowledge of the company has not been seriously challenged, "[t]here is no basis to believe that the board itself did not have a sound basis to evaluate the price at which a sale of the company would be advantageous.").

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."[80] 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.[81]

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.[82]

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[80] Tucker Ex. 1 (Smith Dep. at 18-19).
[81] *Id.*
[82] A fairness opinion coupled with idle speculation as to why no other company would submit a competing bid for Lyondell, particularly given Lyondell's instruction to Deutsche Bank not to solicit competing bids, does not demonstrate a satisfactory discharge of the directors' *Revlon* duties on summary judgment. At most, Deutsche Bank's fairness opinion indicates that Basell's offer was "financially fair" to the Lyondell stockholders, but that is far from saying it was the "best" deal reasonably available. This is not to say, however, that a fairness opinion might not buttress other efforts of a board to meet the expectations of *Revlon*.

It also bears noting, that a simple question lurks beyond these summary judgment motions: even if Ryan ultimately succeeds in establishing a compensable *Revlon* claim, how will damages be proven in this case, given that Basell's offer was a "fair" price?

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."

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.[83]

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[83] *Compare In re Pennaco Energy, Inc.*, 787 A.2d at 707 (Where the board "carefully balanced" single-bidder strategy with allowance for an effective post-signing market check, the fact that no higher bid came forth after the deal was announced was "'evidence that the directors, in fact, obtained the highest and best transaction reasonably available.'" (citation omitted)).

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,[84] 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.[85] 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,[86] even if it had no specific intention of selling at the time. The Board did

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[84] *See, e.g.*, *In re Lear Corp.*, 926 A.2d at 118 (noting that, in the deal context, a week is not an impossibly short period of time for a board to consult with advisors, strategize on price and deal term objectives, and negotiate a deal).

[85] See generally *supra* note 30 and accompanying text.

[86] *See, e.g.*, *Barkan*, 567 A.2d at 1282 (board retains investment banker to counsel it regarding possible responses to a widely recognized, sophisticated investor's acquisition of a significant number of the company's shares); *In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *1 (Del. Ch. Nov. 1, 2007) (company anticipates being acquired and retains investment banker);

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.[87]

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.

In re Toys "R" Us, Inc., 877 A.2d at 982-83 (board hires investment bankers to develop options when sensing that financial pressures may necessitate a sale of corporate assets).

[87] Of course, when the news of Basell's bid for Huntsman broke in late June, one could infer that the Board (understandably) would not have expected a proposal for Lyondell just a few weeks later.

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,[88] 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.*,[89] 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.[90] 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

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[88] Tucker Ex. 6 (Engen Dep. at 39).
[89] 787 A.2d at 691.
[90] One should also keep in mind, however, the procedural posture of *Pennaco*: a motion for preliminary injunction.

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 break-up 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.[91]

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.[93] In his view, the deal protection measures, although perhaps not

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[91] *Compare In re Netsmart Techs., Inc.*, 924 A.2d at 195-99.

[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.

[93] Whether the existence of the poison pill had any meaningful effect on potential acquirers is debatable, but unlikely, even though it might have added minimally to the overall transaction cost. A poison pill "does not deter rival bidders from expressing their interest in acquiring a corporation." *Barkan*, 567 A.2d at 1287. As the Delaware Supreme Court explained in *Barkan*: "Because potential bidders know that a pill may not be used to entrench management or to unfairly favor one bidder over another, they have no reason to refrain from bidding if they believed they can make a profitable offer for control of the company." *Id.* Thus, although one might agree with Ryan that the better course of action would have been for the Board to have pulled the pill altogether to avoid this *post hoc* inquiry, the mere presence of the pill likely did not have a substantial deterrent effect on other potential bidders for Lyondell.

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.[94] Despite those laudable benefits, however, Delaware law does not bestow upon a board of directors

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[94] By discouraging other bidders to an extent, reasonable deal protections can encourage first-acquirers to offer top dollar for a company at the outset. *See, e.g.*, Shawn J. Griffith, *The Costs and Benefits of Precommitment: An Appraisal of* Omnicare v. NCS Healthcare, Inc., 29 J. CORP. LAW 569 (2004). Without some form of protection, however, a first-acquirer might reasonably fear that its offer will simply be used as a stalking horse for a better offer and that it might eventually lose the deal. *Cf. Omnicare*, 818 A.2d at 932 ("Defensive devices taken to protect a merger agreement executed by a board of directors are intended to give that agreement an advantage over any subsequent transactions that materialize before the merger is approved by the stockholders and consummated. This is analogous to the favored treatment that a board of directors may properly give to encourage an initial bidder when it discharges its fiduciary duties under *Revlon*."). The latter scenario might disadvantage shareholders by encouraging a lower opening bid by the first-acquirer, if it anticipates a bidding war for the company. If no other bidders emerge to compete with the lower opening bid, stockholders wind up losing out on value and the first-acquirer ends up with the company for less than it was otherwise willing to spend (assuming the shareholders did not simply walk away from the deal). Thus, perceived deal protections may serve an important function in maximizing shareholder value.

"unbridled discretion" to consent to deal protection measures in derogation of their unyielding fiduciary duties toward the shareholders.[95] Thus, the Board's decision to accede to Blavatnik and Basell's demands for deal protections must withstand enhanced judicial scrutiny.[96]

Ryan concedes that none of the deal protection measures agreed to by the Board is preclusive or coercive when standing alone.[97] 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.

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[95] *Id.*

[96] *E.g.*, *In re Toys "R" Us, Inc.*, 877 A.2d at 1016; *In re Lear Corp.*, 926 A.2d at 119-20; *Orman v. Cullman*, 2004 WL 2348395, at *6-8 (Del. Ch. Oct. 20, 2004); *see also Omnicare*, 818 A.2d at 930-33; *Unocal*, 493 A.2d at 953-55. 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. *See In re Toys "R" Us, Inc.*, 877 A.2d at 1016 (citations omitted).

[97] *See* Tr., Oral Argument, Nov. 27, 2007, at 73, 76.

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.[98] 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.[99] 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

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[98] *Orman*, 2004 WL 2348395, at *7 (citing *Williams v. Geier*, 671 A.2d 1368, 1382-83 (Del. 1996)).

[99] In this context, where Lyondell was a very viable entity, it is difficult to imagine how the combination of these deal protection measures could be said to "coerce" the shareholders into voting for the Basell Proposal. Ryan's view is that by deterring other bids for the Company, the Lyondell shareholders were left with Basell as their only option (*i.e.*, they were coerced into voting for this deal because it was the only one ever presented); on the contrary, however, a reasonable alternative to the Basell Proposal under these circumstances would have been to reject that offer and allow Lyondell to continue under its seemingly successful long range plan. In other words, the Lyondell shareholders were not confronted with a Hobson's choice of taking Basell's offer because it was the only offer on the table or watching their investment suffer serious harm. A different perspective, of course, might emerge if, for example, the target company is approaching insolvency.

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,[100] 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,[101] 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

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[100] The deal protections agreed to in this case are not novel and, perhaps, could even be said to appear regularly, in one form or another, in deals of this magnitude. One thus can surmise that an aggressive suitor probably would not have been deterred. That argument is unavailing in the first instance on summary judgment because the Court cannot weigh the evidence to draw definitively that conclusion. But, in any event, enhanced judicial scrutiny of the Board's decision to accede to such provisions in the merger agreement does not contemplate reflexive approval of a "typical" mix of deal protections. Ultimately, the reasonableness of a particular mix of deal protections is context specific and does not lend itself to an algebraic formulation such that "x" amount of market check, knowledge, or raw premium to market entitles the board to agree to "y" level of deal protections as a matter of course. *Louisiana Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007).

[101] *E.g.*, the lack of a proactive pre-signing market check or sufficient evidence of market knowledge justifying a single-bidder strategy under *Barkan*.

proactively its fiduciary obligations after the fact.[102] 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

[102] *Paramount Commc'ns, Inc. v. QVC Networks, Inc.*, 637 A.2d 34, 48 (Del. 1994) ("[Contractual provisions such as a no-shop], whether or not they are presumptively valid in the abstract, may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the [directors from carrying out their fiduciary duties under Delaware law."]

[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.

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.[104]

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

[104] *See, e.g.*, *Orman*, 2004 WL 2348395, at *8.

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

[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.

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*,[106] *Barkan*,[107] and *QVC*[108] 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 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."[110] One consequence if directors act disloyally

[106] 506 A.2d at 173.
[107] 567 A.2d at 1279.
[108] 637 A.2d at 34.
[109] 911 A.2d at 370.
[110] *Id.*

or not in good faith is that the protections of an exculpatory charter provision do not attach.[111]

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.

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[111] *See* 8 *Del. C.* § 102(b)(7) which provides, in pertinent part, that Delaware corporations may adopt in their charter "[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for money damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law . . . ."

3. Disclosure Claims

The Court turns now to Ryan's disclosure claims.[112] Under Delaware law, when a board of directors seeks stockholder approval of a proposed corporate transaction, it must disclose fully and fairly all *material* facts and information within its control.[113] An omitted fact will be deemed material if there is "'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"[114] "The burden of *demonstrating a disclosure*

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[112] Compl. ¶¶ 80-89; *see also* Pl.'s Opp'n to Basell's Mot. for Summ. J. at 20-22, 35-44. In his Complaint, Ryan asserts ten disclosure claims. In his brief in opposition to the pending motions for summary judgment, he asserts nineteen or twenty-one (depending on which section of his brief one reads) bullet-pointed disclosure violations; most of those are supported only by cursory argument.

The Court also notes that Ryan's Complaint, which was filed before the issuance of the Proxy, alleges disclosure claims based upon the preliminary proxy statement. In his brief, however, he focuses on disclosure issues allegedly plaguing the Proxy. As a technical matter, the Court could consider those claims, raised for the first time in opposition to Defendants' motions for summary judgment, to be outside the scope of this action. *See, e.g.*, *Rosser v. New Valley Corp.*, 2005 WL 1364624, at *8 (Del. Ch. May 27, 2005). The parties nevertheless have joined debate over the merits of Ryan's disclosure claims. Furthermore, in fairness to Ryan, one could argue that at least some of the disclosure claims articulated in his brief grow out of or relate to the disclosure claims alleged in his Complaint; moreover, to the limited extent his disclosure claims have any merit, it does not appear that the preliminary proxy differs materially from the definitive proxy or that the alleged material deficiencies of the former document were cured in the latter.

[113] *Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992). The so-called duty of disclosure, of course, is not an independent fiduciary duty standing on the same footing as the fiduciary duties of care and loyalty. *In re CheckFree Corp.*, 2007 WL 3262188, at *2.

[114] *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (adopting materiality standard articulated by the United States Supreme Court in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

violation and of establishing the materiality of requested information lies with the plaintiff."[115]

Ryan's veritable cornucopia of unsupported complaints and allegations regarding the perceived inadequacies of the disclosures in the Proxy ranges from dissatisfaction with the process surrounding Deutsche Bank's engagement,[116] to quibbles with the substance of Deutsche Bank's valuation work,[117] and to consternation over the Board's failure to self-flagellate with respect to its efforts in considering the merits of the Basell Proposal.[118] By and large, however, the disclosure violations alleged in Ryan's brief, most, evidently, warranting nothing

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[115] *In re CheckFree Corp.*, 2007 WL 3262188, at *2 (emphasis added) (citation omitted). Whenever a board of directors communicates with stockholders about a proposed corporate transaction, there likely will always be some additional detail that one could argue ought to have been disclosed in the proxy materials. But a duty to disclose is not a mandate for prolixity. Indeed, on numerous occasions, this Court has observed that "[b]alanced against the requirement of complete disclosure is the pragmatic consideration that creating a lenient standard for materiality poses the risk that the corporation will 'bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decisionmaking.'" *Skeen v. Jo-Ann Stores, Inc.*, 1999 WL 803974, at *4 (Del. Ch. Sept. 27, 1999) (quoting *TSC Indus.*, 426 U.S. at 448), *aff'd*, 750 A.2d 1170 (Del. 2000). Thus, if a stockholder is to advance successfully a disclosure claim, it is critical that he pinpoint the precise information that he believes should have been disclosed and proffer a reason why that information would have been material.

[116] *E.g.*, Pl.'s Opp'n to Basell's Mot. for Summ. J. at 42-43. None of these claims is alleged in the Complaint.

[117] *E.g.*, Compl. ¶¶ 86, 89; Pl.'s Opp'n to Basell's Mot. for Summ. J. at 39-42. Mere quibbles with the substance of an investment banker's work (*e.g.*, mere disagreement with the banker's subjective judgments regarding proper earnings multiples) does not suffice to state a disclosure claim. *See, e.g.*, *In re JCC Holding Co., Inc. S'holders Litig.*, 843 A.2d 713, 721 (Del. Ch. 2003).

[118] *E.g.*, Compl. ¶¶ 81, 87; Pl.'s Opp'n to Basell's Mot. for Summ. J. at 43-44. "The directors' duty of disclosure does not oblige them to characterize their conduct in such a way as to admit wrongdoing." *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997).

more than passing mention in bullet points, fall woefully short of the mark.[119] Even under the charitable standards of summary judgment, his allegations largely fail to identify any information that would have altered the "total mix" of information available to the Lyondell stockholders in considering how to vote on the Merger. From the thicket, however, emerges one minor, although perhaps material, problem.

The Proxy devotes nearly seven pages to a generally fair and adequate description of the valuation work performed by Deutsche Bank. The problem lies in the disclosures concerning the discounted cash flow analyses. In performing the DCF, Deutsche Bank expressly relied upon two sets of financial projections—a more bullish set, provided by Lyondell management (the "Management Case"), and a more conservative set, obtained from the Institutional Brokers' Estimate System (I/B/E/S) (the "Street Case").[120] Deutsche Bank highlighted the differences

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[119] Merely rifling through the proxy statement and nitpicking undisclosed, marginally important details, as Ryan has done here (*i.e.*, bullet point argument), without sponsoring specific reasons to support the materiality of the undisclosed information will not suffice to state a cognizable disclosure claim.

[120] Only a summary of the Management Case financial projections was reported in the Proxy. Ryan complains that this partial disclosure of the financial projections relied upon by Deutsche Bank is inaccurate and misleading. The Court disagrees. There is no requirement that the Board disclose the investment banker's fairness presentation in its entirety. *See In re CheckFree Corp.*, 2007 WL 3262188, at *2; *see also In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *16 (Del. Ch. May 4, 2005) ("'[A] disclosure that does not include all financial data needed to make an independent determination of fair value is not . . . *per* se misleading or omitting a material fact. The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis.'"), *aff'd*, 897 A.2d 162 (Del. 2006). Instead, stockholders are entitled to "a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendation of their board as to how to vote on a merger or

between the two sets of financial projections in its presentation to the Board, and it expressed its opinion that a DCF analysis using both financial cases was appropriate to achieve a fuller understanding of the adequacy of the Basell Proposal.

Deutsche Bank performed its DCF for both the Management Case and the Street Case by applying a range of discount rates from 9.5% to 11.5%. Deutsche Bank apparently selected that range based upon "its judgment of the estimated weighted average cost of capital of [selected comparable companies]."[121] As a result, the DCF analyses yielded valuation ranges between $37 and $47 per share under the Management Case and between $30 and $39 per share under the Street Case. Ryan points out, however, that Lyondell management had supplied Deutsche Bank with an internal WACC estimate of 8.25%.[122] For reasons that are not explained in the Proxy, Deutsche Bank did not perform its DCF analysis, even under the Management Case scenario, using management's estimate of the

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tender rely." *In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002). Such a summary must at least include a description of the valuation exercises underlying the fairness opinion, the "key assumptions" used in performing those exercises, and the range of values thereby generated. *Id.* In this case, the *Pure Resources* standard is satisfied by the Proxy's summary of the Management Case financial projections, which explicitly sets forth Lyondell's EBITDA estimates through 2011, and the other disclosures concerning the key assumptions underlying the various valuation exercises performed by Deutsche Bank (except as otherwise discussed herein), the descriptions of those valuation exercises, and the ranges of values thereby generated.

[121] Tucker Ex. 3 (Proxy at 33).

[122] Tucker Ex. 22.

discount rate. "As anyone who performs valuations knows, raising discount rates and lowering terminal multiples drives down the resulting value ranges."[123] Thus, in Ryan's view, the reported DCF valuations were misleadingly skewed downward by Deutsche Bank's inflated discount rate assumptions, and, consequently, the Basell Proposal appeared more attractive than it really was.

Although there may be a rational and acceptable reason for Deutsche Bank's decision to ignore the discount rate suggested by Lyondell management,[124] there is no indication in the Proxy that management even had suggested a discount rate (let alone one that was materially lower than the range of discount rates applied by Deutsche Bank), nor is there a satisfactory explanation for why Deutsche Bank did not use management's estimate of Lyondell's WACC to determine the appropriate range of discount rates to apply, even though Deutsche Bank otherwise purported to rely on management projections for its Management Case DCF. This information, although concededly a relatively minor detail, may have been material

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[123] *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 76 (Del. Ch. 2007).

[124] Indeed, it would appear from the deposition of Kevin McQuilkin, the Deutsche Bank managing director who oversaw the preparation of the fairness opinion, that management's estimate of the weighted average cost of capital was deemed unreliable. Tucker Ex. 15 (McQuilkin Dep. at 39-44); *see also* Tucker Ex. 1 (Smith Dep. at 116-117 (explaining that management WACC was used only for internal benefits calculations)); Tucker Ex. 19 (Dep. of T. Kevin DeNicola at 66-67 ("I think the purpose of the engagement of Deutsche Bank was to provide an independent analysis for purposes of providing us financial guidance. So I wanted them to decide what they wanted to do as far as their methodologies, what assumptions they made. I didn't want to be involved in the discussion of how they came up with [things such as discount rates] necessarily. They were paid to be independent.")). If that is so, Ryan would be challenged to establish the materiality of the undisclosed management WACC estimate at trial.

to the Lyondell stockholders. At the very least, given Deutsche Bank's reliance on other management projections, one could argue that the Proxy should have included an explanation for Deutsche Bank's rejection of management's WACC assumption in selecting the discount rates for its DCF analyses.[125] On summary judgment, the Court must draw the inference in Ryan's favor, and, consequently, it cannot foreclose the possibility of finding a disclosure violation on that ground.

Notwithstanding the foregoing conclusion that the Board may have violated its disclosure duty, the Court also concludes that such a failure to disclose management's estimate of the DCF discount rate under these circumstances was, at worst, an oversight on the part of the Board, and, therefore, amounted to nothing more than a breach of the duty of care.[126] Ryan has not brought forth any evidence to suggest that the Board intentionally misled the shareholders by withholding additional disclosures concerning Deutsche Bank's selection of a discount rate for its various DCF analyses. Indeed, from the deposition of Kevin McQuilkin,[127] it may very well have been that the management estimate of the discount rate simply

[125] *In re Topps Co.*, 926 A.2d at 76 ("Subjective judgments like [discount rates] are, of course, not scientific, but highly-paid valuation advisors should be able to rationally explain them.").

[126] The failure to disclose materials facts can implicate both the duty of care and the duty of loyalty. In some instances, it may implicate both fundamental fiduciary obligations; in others, however, only one of the duties may be implicated. The sorting out of the particular fiduciary duty failing with respect to a particular disclosure violation requires a fact-intensive analysis. When there is no evidence of disloyalty or bad faith in connection with the failure to disclose, however, a Section 102(b)(7) provision will absolve the directors of monetary liability for their failure because only their duty of care is at issue. *In re Transkaryotic Therapies, Inc.*, --- A.2d ----, 2008 WL 2699442, at *8-11 (Del. Ch. June 19, 2008).

[127] Tucker Ex. 15.

was deemed unreliable and was, therefore, overlooked in the process of preparing the Proxy. In any event, absent any evidence suggesting something more nefarious than a mere oversight, the Court concludes that Lyondell's exculpatory charter provision absolves the Board of liability for money damages resulting from the alleged disclosure violation.[128] Accordingly, the Lyondell Defendants are entitled to summary judgment on all of Ryan's disclosure claims.[129]

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[128] Although the Board is absolved of liability for money damages resulting from the potential disclosure violation under Lyondell's exculpatory charter provision, one also could make a compelling argument that all of Ryan's disclosure claims ought to be barred by the doctrine of laches. Delaware corporate law insists upon an informed stockholder franchise. *See, e.g.*, *In re Lear Corp.*, 926 A.2d at 114-15 ("Delaware corporation law gives great weight to informed decisions made by an uncoerced electorate. When disinterested stockholders make a mature decision about their economic self-interest, judicial second-guessing is almost completely circumscribed by the doctrine of ratification."). The necessary predicate to implementing that policy, however, is adequate disclosure in the proxy solicitation materials *before* the shareholder vote. Thus, this Court has stated a clear preference for remedying disclosure problems through interim equitable relief whenever possible. *See, e.g.*, *In re Transkaryotic Therapies, Inc.*, --- A.2d ----, 2008 WL 2699442, at *8-10 (discussing the history of Delaware's treatment of disclosure problems and explaining the basis for this Court's preference for an injunctive remedy). In addition to the pertinent public policy considerations, the Court explained the pragmatic considerations discouraging *ex post* litigation of disclosure claims in *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 960 (Del. Ch. 2001):

> Delaware case law recognizes that an after-the-fact damages case is not a precise or efficient method by which to remedy disclosure deficiencies. A post-hoc evaluation will necessarily require the court to speculate about the effect that certain deficiencies may have had on a stockholder vote and to award some less-than-scientifically quantified amount of money damages to rectify the perceived harm.
>
> Therefore, our cases recognize that it is appropriate for the court to address material disclosure problems through the issuance of a preliminary injunction that persists until the problems are corrected. An injunctive remedy of that nature specifically vindicates the stockholder right at issue—the right to receive fair disclosure of the material facts necessary to cast a fully informed vote—in a manner that later monetary damages cannot and is therefore the preferred remedy, where practicable.

See also Gantler v. Stephens, 2008 WL 401124 at *19 n.136 (Del. Ch. Feb. 14, 2008) ("Courts have more flexibility in fashioning appropriate relief in response to this type of proxy-related disclosure claim when it is pressed as one for a preliminary injunction before the shareholder vote."); *In re Lear Corp.*, 926 A.2d at 115.

There may, of course, be situations where, for some reason, an injunctive remedy is not feasible. That would not have been the case here, however. Ryan filed this lawsuit just over a month after the Merger was announced, and a full three months before the stockholder vote. For whatever reason, he did not seek injunctive relief in this action. (Perhaps he believed that the parallel Texas litigation seeking such a remedy would suffice.) Had Ryan pursued such a course of action, the Court would have been in a position to fashion an effective remedy to correct the minor oversight with respect to a disclosure concerning management's estimate of the DCF discount rate. Ryan, however, sat on his rights.

The Defendants have not raised a laches defense to Ryan's disclosure claims, and, in any event, they are absolved of liability for the minor disclosure violation by virtue of Lyondell's Section 102(b)(7) provision. The Court pursues this aside, however, because, assuming money damages were available in this case, particularly nominal damages, they would have been an unsatisfactory salve for a disclosure violation that very easily could have been remedied if Ryan had acted more diligently. Prompt action by Ryan would have promoted Delaware's preference for an informed shareholder vote on the Merger, but his dilatory efforts, instead, thwarted achieving that goal. Thus, where, as here, a shareholder had ample opportunity to seek an injunctive remedy for a perceived disclosure violation, and where there is no evidence of a breach of the directors' duty of loyalty or good faith in connection with the disclosure, it may be appropriate to invoke the doctrine of laches to bar him from pursuing a claim for money damages.

[129] A brief digression on the Lyondell Defendants' belated shareholder ratification defense is warranted. The shareholders voted to approve the Merger on November 20, 2007, after Ryan had filed his answering brief in opposition to the Defendants' motions for summary judgment. The Defendants raised the ratification defense in their reply brief, and, consequently, Ryan has not had a fair opportunity to respond. Nevertheless, the Court will discuss some general observations with respect to the application of such a defense in this context.

But for a relatively minor disclosure violation, which the Court concludes resulted only from a breach of the Board's duty of care and, therefore, is immune from money damages under Lyondell's Section 102(b)(7) provision, the Lyondell Defendants would have an argument that the otherwise informed, disinterested, and uncoerced shareholder vote on the Merger ratified the transaction and any breaches of the Board's fiduciary duties that may have occurred in connection with the Merger. The Court declines to countenance that defense, at least at this stage of the proceedings, for two reasons. First, and more obvious, the mere fact that the Board is absolved of liability for money damages resulting from the potential disclosure violation does not erase the harmful effects it may have had on the shareholder vote on the Merger; thus, it cannot be said that the shareholder vote was "fully informed" for ratification purposes. Second, as elaborated below, the breach of the duty of loyalty in this case is predicated upon the directors' failure to discharge their *Revlon* duties in good faith; consequently, it would be inequitable to allow a shareholder vote on the Merger to remove from further judicial review a potential fundamental failure on the part of the Board to act in the best interests of the shareholders.

The "textured" law in Delaware regarding the effects of shareholder ratification, particularly with respect to duty of loyalty claims, was carefully examined and explained in *Solomon v. Armstrong*, 747 A.2d 1098, 1113-17 (Del. Ch. 1999). The Court began by observing, "A different rule exists for every permutation of facts that fall under the broad umbrella of 'duty of loyalty' claims." *Id.* at 1114-15. The Court went on, however, to discuss the effect of shareholder ratification in three typical fact patterns in which duty of loyalty claims arise. The first fact pattern is where directors engage in self-dealing transactions. Ratification in those instances is governed by statute, 8 *Del. C.* § 144, and the effect of a fully-informed vote of the shareholders is to sustain the protections of the business judgment rule. *Id.* at 1115-16. The second fact pattern is where a corporation engages in a transaction with its controlling stockholder (*e.g.*, a parent-subsidiary merger). In those instances, an informed ratification by the majority of the minority shifts the burden of proof on the issue of entire fairness from the controlling shareholder to the challenging shareholder. *Id.* at 1116-17. The third fact pattern is "where shareholder approval is sought (*e.g.*, approval of a merger) and where there is *no* controlling shareholder, control group, or dominating force." *Id.* at 1117 (emphasis in original). In those instances, the Court stated that the effects of shareholder ratification are "penetrating" and that absent doubts as the board's disinterest in the transaction at issue, "an informed and uncoerced shareholder vote on the matter provides an independent reason to maintain business judgment protection for the board's acts." *Id.*

This case, at first blush, arguably fits within the third category of loyalty cases described in *Solomon*. There is no controlling shareholder, control group, or dominating force which compromised the shareholders' ability to vote independently on the Basell Proposal. In addition, the shareholders had a considerable, even if imperfect, amount of information against which to judge for themselves the fairness and adequacy of the Basell Proposal. Thus, one could argue that the shareholder vote presents a compelling basis for sustaining the Board's efforts under the business judgment rule. On the other hand, however, the precise loyalty issue being challenged in this case—the Board's good faith discharge of its *Revlon* duties—arguably was not before the shareholders in voting on the Merger.

In *In re Santa Fe Pacific Corp.*, 669 A.2d 59, 67-68 (Del. 1995), for example, the target board of directors had adopted several defensive measures to thwart the proponent of a disfavored tender offer. When the merger transaction favored by the board was later approved by the shareholders, the directors argued ratification to foreclose the objecting shareholders' arguments that the directors had breached their fiduciary duties by erecting defensive measures against the competing tender offer. The Delaware Supreme Court concluded that shareholder ratification could not reach the board's unilateral decision to adopt the defensive measures prior to the vote on the merger because the teachings of *Unocal* and *Revlon*, in essence, rest upon "'the overriding importance of voting rights[]'" in connection with a change in corporate control. *Id.* at 67 (quoting *Paramount Commc'ns, Inc. v. QVC Networks, Inc.*, 637 A.2d 34, 42 (Del. 1994)). By the time the Santa Fe Pacific shareholders were asked to vote on the merger, the board's unilateral defensive actions against the disfavored tender offer had already worked their pernicious effects (*i.e.*, they foreclosed a "no" vote on the favored merger, which, in turn, would have enabled the shareholders to tender into the competing offer) and so the shareholders could not have approved the board's unilateral decision to erect defensive barriers against the competing offer. *Id.* at 68.

4. Ryan's Aiding and Abetting Claims Against Basell Also Fail

Finally, the Court turns to Ryan's aiding and abetting claims alleged against the Basell Defendants. A claim of aiding and abetting in a breach of fiduciary duty requires the plaintiff to establish: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and non-fiduciary."[130] However, "[t]his Court has consistently held that 'evidence of arm's-length negotiation with fiduciaries negated a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries.'"[131]

Although in most instances the board's efforts in connection with securing the particular transaction to be voted upon by the stockholders will be subject to ratification by the fully informed, uncoerced shareholder vote, in this instance, the Court is persuaded that the rationale of *Santa Fe Pacific* ought to apply, at least for summary judgment purposes, to preclude a ratification defense from removing the Board's actions from further judicial review. As a threshold matter, untangling the care and loyalty issues in the *Revlon* and deal protection claims in this case is not an easy task. *See, e.g.*, *id.* at 67 ("*Revlon* and *Unocal* and the duties of a board when faced with a contest for corporate control do not admit of easy categorization as duties of care or loyalty." (citation omitted)). More importantly, however, the Board's potential failure to discharge its fundamental *Revlon* duties in good faith prior to recommending and submitting the Merger to the shareholders may have undermined the voting process by depriving the shareholders of the assurance that the Board had diligently pursued the best transaction reasonably available to them. *Cf. QVC Networks, Inc. v Paramount Commc'ns, Inc.*, 635 A.2d 1245, 1266 (Del. Ch. 1993) ("What is at risk [in a change in corporate control] is the adequacy of the protection of the property interest of the shareholders who are involuntarily being made dependent on the directors to protect that interest.") The Lyondell shareholders were entitled to rely upon the Board to discharge its fiduciary obligations in good faith prior to recommending a particular change in control transaction, and, thus, they could not have been asked to ratify the Board's alleged unilateral decision to abdicate its fundamental fiduciary obligations in that regard simply by voting in favor of the Merger.

[130] *Globis Partners, L.P.*, 2007 WL 4292024, at *15.

[131] *In re Gen. Motors (Hughes)*, 2005 WL 1089021, at *26.

There is no evidence in the record to support an inference that the parties to this transaction did not deal with each other at arm's-length. Ryan points to the compressed timeline for this deal as evidence to suggest that Blavatnik "bullied" management and the Board into accepting the Basell Proposal in violation of their fiduciary duties, but that argument falls short. Basell certainly drove a hard bargain with the timeline it imposed on the Basell Proposal. A hard bargain, however, cannot suffice to establish an aiding and abetting claim where the parties negotiated at arm's-length.

The record is, instead, replete with evidence of arm's-length dealings between Basell and Lyondell. For example, Smith negotiated over Basell's offer price during the course of the July 9, 2007, meeting where he and Blavatnik discussed a possible transaction between Basell and Lyondell. In addition, the Board instructed Smith to seek additional concessions on the Basell Proposal, which he did. Blavatnik refused those requests, but, nevertheless, such evidence is strongly suggestive of an arm's-length and adversarial process. There also is no evidence to suggest that Basell representatives participated in Lyondell board meetings or that Basell otherwise injected itself into the Board's process of approving the Basell Proposal. Moreover, the Board consisted almost entirely of disinterested and independent directors and there is nothing in the record to suggest that Basell exercised dominion over the Board.

In sum, there is no support in the record for Ryan's claim that Basell aided and abetted a breach of the Board's fiduciary duties. On the contrary, the record—as a matter of undisputed fact—clearly demonstrates that the parties to this transaction dealt with each other at arm's-length. The Board was disinterested and independent of Basell, and the latter was unable to exercise control over the former. As such, Ryan cannot demonstrate that Basell knowingly participated in a breach of the Board's fiduciary duties, and the Basell Defendants, therefore, are entitled to summary judgment.

C. *Ryan's Application for Additional Discovery under Rule 56(f)*

In addition to filing a substantive response to the Defendants' motions, Ryan has also filed an affidavit under Court of Chancery Rule 56(f) contending that he requires additional discovery to properly oppose the motions for summary judgment.[132] Rule 56(f) affords the Court broad discretion to allow a party opposing summary judgment to take additional discovery, upon timely application, provided that (1) the party opposing summary judgment has identified, with some degree of specificity, the additional facts sought by the requested discovery;[133] and (2) the facts sought, if they exist, are known only by the party moving for summary

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[132] Ct. Ch. R. 56(f) provides: *When affidavits are unavailable*. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[133] *See, e.g.*, *von Oppel v. Youbet.com, Inc.*, 2000 WL 130625, at *1 (Del. Ch. Jan. 26, 2000) (citation omitted).

judgment.[134] The Court's denial of several aspects of the pending summary judgment motions has mooted much of Ryan's application. The Court, nevertheless, must address his Rule 56(f) affidavit in the context of the claims which have been dismissed: the structural loyalty claims, the disclosure claims, and the aiding and abetting claims against the Basell Defendants.

Ryan's application fails in the first instance because it is untimely. Basell filed its motion for summary judgment on September 27, 2007, and its opening brief in support of its motion on October 12, 2007. Ryan sought no discovery in this action[135] from that time until he filed his Rule 56(f) application in conjunction with filing his answering brief, which, incidentally, occurred only after he obtained an extension of its due date.[136] Moreover, the parties and witnesses Ryan seeks to depose have been well-known to him at least since he filed this action, and he was free to notice their depositions at any time. Ryan attributes his failure to focus his attention on this action to his participation in the Texas action. That was his choice, and, absent a stay authorized by this Court, he had an obligation to diligently prosecute this action as well.

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[134] *See, e.g.*, *Scharf v. Edgcomb Corp.*, 2000 WL 1234650, at *2 (Del. Ch. Aug. 21, 2000) (citation omitted).

[135] Ryan did, however, participate in the discovery process in the Texas litigation.

[136] On November 8, 2007, Ryan moved for an extension of time to file his Answering Brief, which was then due on November 9, 2007. LEXIS Trans. I.D. No. 16986950 (Motion, Nov. 8, 2007). The Court convened for a teleconference on November 9, 2007 to discuss Ryan's request, and the Court granted an extension to November 14, 2007 for Ryan to file his Answering Brief. LEXIS Trans. I.D. No. 17047806 (Transcript, Nov. 9, 2007).

More importantly, however, Ryan has not identified with any degree of precision the facts he intends to elicit to contest the Defendants' motions for summary judgment. Instead, he alleges, in conclusory fashion, that he needs the depositions of no less than fifteen additional witnesses and additional time to review the nearly 200,000 pages of documents already produced by the Defendants, apparently because the documents are not in an easily searchable format.[137] In short, Ryan's application is not a carefully developed plan to discover relevant facts, but instead appears to be a haphazard effort evincing little more than a bare attempt to engage in a fishing expedition in search of a viable cause of action. That is not a proper use of Rule 56(f). Ryan's application for additional discovery, accordingly, will be denied for the following reasons in particular.[138]

1. Deposition of, and Documents from, Blavatnik and Other Basell Representatives

Ryan asserts that depositions of Blavatnik and other Basell representatives, such as Basell CEO Trautz, are necessary to prove his aiding and abetting claims. As the Court determined *supra* in Section III(B)(4), however, the aiding and abetting claims against the Basell Defendants fail for reasons that these depositions and document productions would not change. Accordingly, the Court concludes

[137] The Defendants maintain that the documents are searchable and that they have offered to show Ryan how to search the documents.
[138] The Court does not address the additional discovery sought under Rule 56(f) for claims that have survived summary judgment.

that they would not lead to the discovery of additional relevant information, and this request is denied.

2. Depositions of Deutsche Bank Representatives

The Court addresses this category as it might apply to Ryan's disclosure claims. Ryan seeks to depose several Deutsche Bank representatives, including Chris Towery and John Anos. Ryan makes no effort to identify who Messrs. Towery and Anos are or what their involvement was with the Basell Proposal and Lyondell.[139] In any event, Ryan has already had an opportunity to depose Kevin McQuilkin, the Deutsche Bank managing director who directly oversaw the preparation of the fairness opinion concerning the Basell Proposal,[140] and he has not pointed to any specific deficiencies in McQuilkin's knowledge regarding Deutsche Bank's preparation of its fairness opinion. As such, the Court concludes that McQuilkin provided adequate detail about Deutsche Bank's fairness opinion and that additional discovery from Deutsche Bank witnesses would not reveal any new or useful information. Accordingly, Ryan's request for additional discovery from Deutsche Bank is denied.

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[139] Apparently, Anos and Towery participated on the Deutsche Bank team that prepared the fairness opinion. Tucker Ex. 15 (McQuilkin Dep. at 12-15).
[140] *Id.* (McQuilkin Dep. at 12-13).

3. <u>200,000 Pages of Documents</u>

Ryan asserts that 200,000 pages of documents, in a non-searchable format, were "just recently" received prior to filing his brief and Rule 56(f) affidavit. Ryan further contends that it will be necessary to review all of the documents by hand in order for his counsel to begin taking depositions—a process, which according to Ryan, "may take months" since the documents are not searchable. The Court acknowledges the inherent difficulty in reviewing 200,000 pages of documents, but Ryan has not set forth a sufficient reason for the Court to determine that, with an appropriate level of effort to review the documents, he could not have gotten the job done in time to take additional discovery, if necessary, and to adequately respond to the Defendants' motions. Accordingly, his request for additional time to review documents is denied.

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.

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).

An implementing order will be filed.