

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BASF CORPORATION,)
)
 Plaintiff,)
)
 v.) C.A. No. 3608-VCS
)
 POSM II PROPERTIES PARTNERSHIP,)
 L.P., and POSM II LIMITED)
 PARTNERSHIP, L.P.,)
)
 Defendants.)

MEMORANDUM OPINION

Date Submitted: December 9, 2008

Date Decided: March 3, 2009

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STRINE, Vice Chancellor.

I. Introduction

The plaintiff, BASF Corporation, a Delaware corporation, seeks to withdraw from defendant POSM II Limited Partnership, L.P. (the “Partnership”), a Delaware limited partnership, and have its interest in the Partnership bought out. BASF has a contractual right to withdraw if Lyondell Chemical Company or one of Lyondell’s affiliates no longer operates the Partnership’s petrochemical facility in Channelview, Texas (the “Plant”). Historically, Lyondell both leased the Plant from the Partnership and served as the general partner of defendant POSM II Properties Partnership, L.P. (“POSM II Properties”) which is, in turn, the general partner of the partnership. BASF argues that the December 2007 purchase of Lyondell, which was then a public company, by Basell AF S.C.A. changed this situation and triggered BASF’s contractual right to have its interest in the Partnership bought out by the general partner, POSM II Properties.

In its First Amended and Supplemental Verified Complaint (the “Amended Complaint”), BASF argues that its right to be bought out was triggered either because: (1) the fact that Lyondell has experienced a change in control means that Lyondell is no longer operating the Plant; or (2) as a factual matter, LyondellBasell Industries AF S.C.A., Lyondell’s new parent company, is operating the Plant rather than Lyondell. POSM II Properties and the Partnership have moved to dismiss this action, arguing that BASF has no rights upon a change in control of Lyondell and that BASF has not adequately pled that Lyondell no longer operates the Plant.

In this opinion, I grant the defendants’ motion to dismiss. First, I address BASF’s contention that because Lyondell went from a publicly traded company to a wholly

owned subsidiary of another company, Lyondell ceased to operate the Plant. I conclude that the plain language of the withdrawal provision does not entitle BASF to have its interest bought out simply because Lyondell has experienced a change of control. Rather, BASF only has the right to withdraw if Lyondell or one of its affiliates is no longer operating the Plant. Although Lyondell may now have a single owner of its shares, rather than a large group of public stockholders, as long as Lyondell continues to operate the Plant, POSM II Properties is not obligated to purchase BASF's interest in the Partnership.

Next, I turn to BASF's conclusory allegation that LyondellBasell — Lyondell's parent company — now operates the Plant, rather than Lyondell itself. This is a conclusory allegation because it is not supported by any pled facts. BASF does not plead that the Plant is no longer managed and operated by managers and employees of Lyondell. Rather, BASF distorts a management report and a set of financial statements of Lyondell's parent corporation that plainly are designed to portray the overall financial and operational situation of LyondellBasell, and excerpts quotes that supposedly suggest that LyondellBasell is directly operating the plant. But, the very documents BASF cites make clear that LyondellBasell is a holding vehicle with no employees or operations of its own. Instead, LyondellBasell's subsidiaries, of which Lyondell is one, conduct LyondellBasell's operations. Of equal importance is the fact that BASF pleads no facts suggesting that Lyondell's separate corporate form should be disregarded. That is, BASF pleads no facts suggesting that Lyondell is not continuing to operate the plant, much less that its parent corporation has so disrespected Lyondell's separate existence that

Lyondell's veil should be pierced. All that BASF has pled is that Lyondell now has a single owner of its equity rather than many, and that this single owner is in a position to influence Lyondell. Every solvent corporation is subject to influence by its stockholders, when those stockholders use the correct means. The fact that Lyondell now has a single stockholder does not rationally support an inference that Lyondell does not operate anything itself, including the Plant. Accordingly, I grant the defendants' motion to dismiss.

II. Factual Background¹

At the center of this litigation is the Partnership, which was formed on July 27, 1990 by the Agreement of Limited Partnership between POSM II Properties, Alberta Gas Chemicals, Inc., and Mobil Chemical Company. The Partnership was created for the sole purpose of "own[ing] a propylene oxide/styrene monomer coproduction plant . . . at a site in Channelview, Texas" and leasing that Plant and the land it was built on to ARCO Chemical Company.²

¹ All facts are drawn from the First Amended and Supplemental Verified Complaint ("Am. Compl."), the exhibits thereto, or BASF's Verified Complaint. *See* Ct. Ch. R. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *AT&T Corp. v. Lillis*, 953 A.2d 241, 257 (Del. 2008) ("Under some circumstances, a party may offer earlier versions of its opponent's pleadings as evidence of the facts therein." (quoting *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 736 (7th Cir. 2002))); *Ishimaru v. Fung*, 2005 WL 2899680, at ** 9-10 (Del. Ch. Oct. 26, 2005) (considering amendments to a complaint on a motion to dismiss). All reasonable inferences have been drawn in BASF's favor. Conclusory allegations not supported by pled facts, however, have not been accepted as true.

² Am. Compl. Ex. 1 (Agreement of Limited Partnership (July 27, 1990)) ("Partnership Agreement") § 2.2.

When the Partnership was formed, Alberta and Mobil were limited partners and POSM II Properties was the general partner.³ Aside from being the intended tenant of the Plant, ARCO was also POSM II Properties' initial general partner.⁴ Thus, from its inception, the Partnership was indirectly controlled by the operator of the Plant.

The Partnership Agreement did not set out what the limited partners would contribute to the Plant's construction. Instead, POSM II Properties entered into separate agreements with each of the limited partners of the Partnership addressing that subject.⁵ In June 1991, POSM II Properties entered into a Supplementary Agreement with Mobil. In that Agreement, Mobil promised to contribute an initial \$5 million as well as up to an additional \$85 million. The Supplementary Agreement also granted Mobil certain rights. Most importantly for this action, § 14(b) provides that:

If [POSM II Properties] becomes aware that the Plant no longer is to be operated by [ARCO] or its Affiliates (as defined in the Partnership Agreement) it shall so notify [Mobil], such notification to be given at any time up to thirty days after the date of such change in operation. Upon receipt of such notice, [Mobil] shall have ninety days to notify [POSM II Properties] that it wishes to withdraw from the partnership.⁶

Section 14(c) then provides a mechanism by which Mobil's interest would be bought out if § 14(b) is triggered. By stark contrast, the Supplementary Agreement does not contain a change of control provision expressly obligating POSM II Properties to purchase

³ Partnership Agreement at 70, 71.

⁴ Partnership Agreement at 70.

⁵ Partnership Agreement § 7.1(a).

⁶ Am. Compl. Ex. 2 (POSM II Supplementary Agreement (June 10, 1991)) ("Supplementary Agreement") § 14(b).

Mobil's stake if ARCO is purchased by another company, has its board or management changed as the result of a proxy contest, or has a change in its capital structure.

And, Mobil was not just a passive investor in the Plant; it also intended to be a major consumer of the Plant's output. On the same day Mobil signed the Supplementary Agreement, Mobil signed a separate processing contract to have ARCO produce styrene monomer for Mobil's use.⁷ According to BASF, the processing agreement required ARCO to produce styrene monomer for Mobil at cost.⁸

Although the Partnership still exists, the parties in interest have changed. In July 1992, only a little over a year after the Supplementary Agreement was signed, BASF took over Mobil's stake in the Partnership.⁹ In the process, BASF was assigned Mobil's rights under both the Partnership Agreement and the Supplementary Agreement.¹⁰ BASF also obtained Mobil's rights under the styrene monomer processing contract.¹¹

In 1998, Lyondell acquired ARCO and, according to BASF, succeeded to ARCO's interest.¹² Lyondell also took over the lease for the Plant that ARCO had entered into with the Partnership. Thus, by mid-2007, Lyondell was both operating the Plant and controlling the Partnership through POSM II Properties, and BASF was a limited partner who also had the right to buy styrene monomer from Lyondell at cost.

⁷ Am. Compl. Ex. 4 (Styrene Monomer Processing Contract (June 10, 1991)).

⁸ Am. Compl. ¶ 16.

⁹ Am. Compl. Ex. 1 (Agreement Assigning of Mobil's Interest in the Partnership (July 1, 1992)) at 2.

¹⁰ *Id.*

¹¹ Am. Compl. Ex. 4 (Agreement Assigning Mobil's Interest under the Styrene Monomer Processing Contract (July 1, 1992)) at 1.

¹² Am. Compl. ¶¶ 8, 15.

According to BASF, this state of affairs was interrupted in late December 2007 when Basell, a privately held Dutch chemical group, acquired Lyondell by purchasing all of Lyondell's stock for cash.¹³ In the process, Lyondell transformed from a publicly held company with a diverse stockholder base into the wholly owned subsidiary of a privately held company. As part of the acquisition, Basell also changed its capital structure. A new, privately held Dutch company, LyondellBasell Industries AF S.C.A., is now the parent of both Basell and Lyondell, which remain separate subsidiaries.¹⁴

The day Basell's acquisition of Lyondell was completed, BASF wrote to POSM II Properties asserting that POSM II Properties had to give BASF the option of having its interest in the Partnership bought out.¹⁵ In ensuing correspondence, BASF argued that because LyondellBasell now owns Lyondell, LyondellBasell "exercises complete operational control of the Plant," and, as a result, § 14(b) of the Supplementary Agreement was triggered.¹⁶ POSM II Properties, however, responded that Lyondell remains the operator of the Plant and that there was no change in operation within the meaning of § 14(b).¹⁷

¹³ Am. Compl. ¶ 18.

¹⁴ Am. Compl. Ex. 6. It is not entirely clear from the Amended Complaint whether LyondellBasell is a new company or simply a renamed version of Basell. For purposes of this motion, I have assumed that it is a new company as that is how the Complaint describes it, but whether that is the case is immaterial. *See* Am. Compl. ¶ 19.

¹⁵ Am. Compl. Ex. 10 (letter from Thomas A. Clare, Kirkland & Ellis LLP to George T. Shipley, Shipley Snell Montgomery LLP (Dec. 20, 2007)).

¹⁶ Am. Compl. Ex. 11 (letter from Thomas A. Clare, Kirkland & Ellis LLP to George T. Shipley, Shipley Snell Montgomery LLP (Jan. 21, 2007)).

¹⁷ Am. Compl. Ex. 14 (letter from George T. Shipley, Shipley Snell Montgomery LLP to Thomas Clare, Kirkland & Ellis LLP (Feb. 15, 2008)).

BASF then brought this action against the Partnership and POSM II Properties seeking a declaration that there has been a change in operation within the meaning of § 14(b). Despite the fact that § 14(b) is concerned with the operations of the Plant, BASF has not pled a single fact about those operations. BASF does not allege that the Plant is being run differently than it was before Basell acquired Lyondell. Nor does it allege that Lyondell employees and officers are not directly managing, overseeing, and operating the Plant. In short, the allegations in the Amended Complaint are totally bereft of any fact indicating that operations at the Plant were affected at all by the fact that Lyondell's equity is now owned by a single owner. Because BASF has pled no facts suggesting how the change in Lyondell's equity ownership has affected the Plant in any way at all, much less an adverse way, it appears that BASF has independent business reasons of its own for seeking to withdraw, reasons that are not substantively related to the change in Lyondell's equity ownership. Rather, that change is simply the hook on which to hang a claim that BASF's § 14(b) right to withdraw has been triggered.¹⁸

Interestingly, in its Verified Complaint (the "Original Complaint"), BASF asserted that it had the right to withdraw solely on the basis that if LyondellBasell was the controlling stockholder of Lyondell, LyondellBasell was also controlling the Plant, a situation that supposedly triggered § 14(b).¹⁹ In making its original argument, BASF

¹⁸ Tr. at 29. Since oral argument on this motion, LyondellBasell has announced that it is suffering from serious financial problems. See Chemical Unit Files For Bankruptcy, N.Y. Times, Jan. 7, 2009, at B4 ("The United States operations of LyondellBasell, a petrochemical company, filed for bankruptcy protection in New York on Tuesday, facing a huge debt load and slumping demand for its products."). BASF has not moved to amend based on this event.

¹⁹ See Verified Complaint ¶ 28.

conceded that Lyondell was still in fact operating the Plant. Rather, BASF argued that § 14(b) was triggered because LyondellBasell, as the owner of Lyondell, can now direct Lyondell's operation of the Plant.

But, in its Amended Complaint, BASF pivoted away from its statement that Lyondell operates the Plant. After its 180 degree spin, BASF now asserts that LyondellBasell, rather than Lyondell, is operating the Plant.²⁰ BASF says that because Lyondell is no longer operating the Plant, § 14(b)'s plain language gives BASF a right to withdraw.

After having changed its tack, BASF therefore settled for asserting two theories for relief: (1) that a change in control of the operator of the Plant means that there was a change in operator for purposes of § 14(b); and (2) that LyondellBasell now operates the Plant, rather than Lyondell.

The defendants have moved to dismiss the Amended Complaint. They argue that the Supplementary Agreement gives BASF no rights upon a change in control of Lyondell and that BASF has not alleged actual facts that support BASF's conclusory allegation that Lyondell no longer operates the Plant.

III. Legal Analysis

Because this is a motion to dismiss, I must evaluate BASF's claim under the familiar Rule 12(b)(6) standard. This means that I must accept the well-pled allegations in the Amended Complaint as true and give BASF the benefit of all reasonable inferences

²⁰ In line with the plaintiff-friendly Rule 12(b)(6) standard, I have not given any weight to the allegation in the Original Complaint that Lyondell operates the Plant. I merely present the fact that BASF changed its theory for completeness.

that flow from the face of the Amended Complaint.²¹ But, even at this stage of the litigation, “neither inferences nor conclusions of fact unsupported by allegations of specific facts upon which the inferences or conclusions rest are accepted as true.”²² As a result, I only accept conclusory statements as true where they are supported by pled facts.²³ Finally, in conducting this inquiry I am allowed to consider the documents that BASF has attached to its Amended Complaint.²⁴

A. A Change In Operation Is Not Triggered By A Change In Control Of Lyondell

BASF’s first argument is that the withdrawal right provided in §14(b) is triggered by a purchase of Lyondell. This argument presents a straightforward question of contract interpretation. “Under Delaware law, the proper interpretation of language in a contract is a question of law.”²⁵ Accordingly, the meaning of a contract is properly determined on a motion to dismiss.²⁶ This is done by effectuating, “to the extent possible, the reasonable shared expectations of the parties at the time they contracted.”²⁷ In

²¹ *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (holding that on a motion to dismiss under Rule 12(b)(6), “the plaintiff is entitled to all reasonable inferences that logically flow from the face of the complaint”).

²² *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988); *see also In re General Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (holding that in deciding a motion to dismiss, “a trial court is required to accept only those ‘reasonable inferences that logically flow from the face of the complaint’ and ‘is not required to accept every strained interpretation of the allegations proposed by the plaintiff’” (quoting *Malpiede*, 780 A.2d at 1083)); *In re Lukens Inc. S’holder Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) (holding that on a motion to dismiss, a court need only accept allegations supported by pled facts).

²³ *See Grobow*, 539 A.2d at 187 n.6.

²⁴ *See* Ct. Ch. R. 10(c).

²⁵ *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

²⁶ *Id.*

²⁷ *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. Sept. 4, 2003) (quoting *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *9 (Del. Ch. June 6, 1996)).

determining this intent, I am limited to considering the words of the contract unless their meaning is ambiguous.²⁸

Here, the provision at issue is a relatively simple one. Section 14(b) is only triggered if POSM II Properties “becomes aware that the Plant no longer is to be operated by [Lyondell] or its Affiliates.”²⁹ On its face, this asks a simple question: is Lyondell or one of its affiliates operating the Plant?³⁰

Notwithstanding this obvious interpretation, BASF advances a strained reading of § 14(b) to argue that a change in control of the operator of the Plant means that there was a change in the operator itself. The first step in its approach is to simplify and distort § 14(b)’s focus on whether or not Lyondell is still operating the plant by referring to this question as whether there has been a “change in operation.”³¹ BASF then notes that

²⁸ See *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (“If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.”).

²⁹ Supplementary Agreement § 14(b). Because the Supplementary Agreement was between ARCO and Mobil, § 14(b) actually discusses whether ARCO is no longer operating the Plant. But, in their briefing both parties have assumed that this language applies to Lyondell in the same manner it applied to ARCO. See Op. Br. at 7; Ans. Br. at 8. Thus, I have assumed for purposes of this opinion that the language applies if neither Lyondell nor one of its affiliates is operating the Plant.

³⁰ As the defendants have pointed out, there remains a question as to whether LyondellBasell is an affiliate within the meaning of § 14(b). Neither side, however, spent a great deal of time briefing this issue, and, in any event, it is not necessary to reach this question as I find that even if LyondellBasell is not an affiliate within the meaning of § 14(b), BASF’s Complaint still does not state a claim.

³¹ See, e.g., Ans. Br. at 8. As noted later, the phrase “change in operation” is used in § 14(b), but only as a short hand for the specific commitment Mobil received which turned on whether “the Plant no longer is to be operated by [ARCO] or its Affiliates.” Supplementary Agreement § 14(b).

“operate” has been defined to mean “to control [or direct] the functioning of.”³² BASF argues that because LyondellBasell is now the sole stockholder in Lyondell, it controls Lyondell. And, because LyondellBasell now controls Lyondell, BASF argues that LyondellBasell is now indirectly operating the Plant through Lyondell.

Boiled down to its essence, BASF is asserting that if any party besides Lyondell is capable of exerting influence on Lyondell, and therefore influencing Lyondell’s operation of the Plant, then in some sense that third-party is the actual party operating the Plant. This is an extraordinary argument that reads § 14(b) very loosely, so loosely that its text has almost no relevance to the meaning advanced. As BASF admitted at oral argument, this broad construction of § 14(b) would give it a withdrawal right in a myriad of situations, including ones that could have occurred if Lyondell remained a public company without a single controlling stockholder. Thus, as BASF confessed, BASF interprets § 14(b) as providing it with a withdrawal right if: (1) a successful proxy contest was conducted at Lyondell that resulted in a change of the Lyondell board and a decision to replace Lyondell’s CEO, and the new CEO changes operations at the Plant;³³ or (2) stockholders successfully exerted pressure on Lyondell management to change its approach to operating the Plant.³⁴

Admittedly, these sorts of events do not occur every year. But, given the ever-increasing level of stockholder activism over recent decades, these events are far from

³² Ans. Br. at 12 (citing *The American Heritage Dictionary of the English Language*, available at <http://dictionary.reference.com/browse/operate> (last visted Oct. 8, 2008); *Webster’s II New College Dictionary* (3d ed. 2005)).

³³ Tr. at 37-38.

³⁴ Tr. at 55-56.

uncommon. Over the life of the Partnership, one would expect a public company with a diverse stockholder base, as Lyondell was before it was acquired by Basell, to be subjected to a variety of cross-cutting pressures that might change how it would approach its operations, including those at the Plant. According to BASF, § 14(b) gave BASF a withdrawal right whenever Lyondell's stockholder base changed in some important way (would it be enough if someone bought a controlling stake but did not take the company private?) or where Lyondell's stockholders somehow influenced (or simply had the capability of influencing?) the corporation in its operation of the Plant.

Burdening stockholders' ability to alienate or vote their shares with a financial penalty at the corporate level, such as a requirement for the corporation to pay off a contractual partner like BASF, is not a small thing. But, it commonly happens. The method by which it is done, however, involves something far more straightforward than § 14(b); it involves the use of a change of control provision that vests certain rights in one contractual party if the other experiences a change of control as defined in the contract. Such provisions are used in many contexts, including in the joint venture context analogous to the limited partnership here.³⁵ Given the important rights of Lyondell

³⁵ See, e.g., MODEL JOINT VENTURE AGREEMENT WITH COMMENTARY § 8.2(g) (2006) (defining "a Change in Control of the Member or Person directly or indirectly controlling the Member" as a Default Event and specifically defining what constitutes a "Change in Control"). Change of control provisions have also become a common fixture in a variety of corporate contracts. See Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils of Stockholder Choice*, 152 U. PA. L. REV. 577, 614 (2003) ("Change of control provisions can be — and currently are — incorporated into a variety of contracts, including intellectual property licenses, leases, joint ventures, debt and equity financing, union contracts, and employee stock option plans."); see also *In re Loral Space and Commc'ns Corp. Inc.*, 2008 WL 4293781, at **12-13 (Del. Ch. Sept. 19, 2008) (describing a change in control provision in a securities purchase agreement); *Sutton Holding Corp. v. DeSoto, Inc.*, 1991 WL 80223 (Del. Ch. May 14, 1991) (addressing whether

stockholders that would be burdened by BASF's reading of § 14(b) and the prevalence of common contractual models that directly state what BASF claims is implied by § 14(b), a court should be chary about reading a provision like § 14(b) that, on its face, has nothing to do with a change of corporate control as one that embodies hidden meanings burdening stockholders. If the parties to the Supplementary Agreement had reached a bargain to give Mobil a right to walk away and be bought out upon a change of control of ARCO, one would have expected them to use the common technique and do that explicitly. In this regard, it is notable that change of control provisions often detail the precise scenarios that qualify,³⁶ whereas, under BASF's approach, the parties would either have to reach an after-the-fact accord on what corporate events qualified as an implied change in the operator or have a court do so.

Delaware law does not invest judicial officers with the power to creatively rewrite unambiguous contracts in this manner. By its plain terms, § 14(b) is not a change of control provision. Although § 14(b) contains the phrase "change in operation," § 14(b) is not concerned with any and all changes in operation, but only a specific, albeit important, change. Section 14(b) is only triggered in the event that "the Plant no longer is to be operated by [Lyondell] or its Affiliates."³⁷ Putting to the side the question of whether

there was a change in control under a pension plan); Kenneth C. Johnson, *Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review*, 94 YALE L. J. 909 (1985) (addressing concerns about change of control provisions in employment contracts).

³⁶ See MODEL JOINT VENTURE AGREEMENT WITH COMMENTARY § 8.2(g) (specifying in detail the situations that would constitute a change in control).

³⁷ Supplementary Agreement § 14(b).

LyondellBasell is an affiliate of Lyondell,³⁸ the mere fact that Lyondell now has a single stockholder — LyondellBasell — rather than a disaggregated group of public stockholders, does not mean that Lyondell has stopped operating the Plant within the meaning of § 14(b).

As will be discussed in more detail in addressing BASF's other argument, BASF does not allege that Lyondell has not continued its existence as a separate corporation, does not have assets, does not have large number of managers and employees, and is not using its assets, managers, and employees to operate the Plant. For purposes of § 14(b), the mere fact that Lyondell is now controlled by a private company does not make it, as BASF argues, a different company than the one referred to in the Supplementary Agreement.³⁹ The fact that Lyondell's equity is owned by LyondellBasell does not change the fact that Lyondell Chemical Company still exists and operates the Plant.⁴⁰ BASF has not pointed to any language in the Supplementary Agreement or any other agreement that makes promises about how Lyondell would be capitalized or on whose behalf the Plant would be operating.

³⁸ Without answering the question, it seems plausible that LyondellBasell is an affiliate of Lyondell under the Partnership Agreement's definition of the term, which defines two companies as affiliates when one is wholly owned by the other. *See* Partnership Agreement at 5. Indeed, one could imagine rational parties not caring whether the affiliate was a parent or a subsidiary of Lyondell so long as it shared a commonality of interest with Lyondell in the success of the Plant.

³⁹ *See* Op. Br. at 15-16 (“[E]ven if ‘Lyondell Chemical Company’ continues to exist on paper . . . it is not the same ‘Lyondell Chemical Company’ that actually existed in reality and actually operated the Plant.”).

⁴⁰ The fact that § 14(b) is only directed at the operator as a legal entity is also reflected in the Supplementary Agreement's use of the term “ACC” to refer to ARCO. The definition of ACC in the Partnership Agreement is simple, ACC means ARCO Chemical Company. Partnership Agreement at 5. This captures ARCO as a legal entity, not as a transient collection of owners and business policies.

The original parties to the Supplementary Agreement could, of course, have negotiated specific promises from POSM II Properties about the capital structure of the operator of the Plant or about the other common occurrences that, under BASF's interpretation, would mean that the contractually defined operator was no longer operating the Plant, such as the replacement of the operator's management or the purchase of a certain percentage of stock by a single investor or a group of affiliated investors. And, BASF could have negotiated to add such promises after it acquired Mobil's interest. But, the arrangement between BASF and POSM II Properties, as the deal now stands, does not contain promises about Lyondell's capital structure. And, having failed to secure those promises through negotiations, BASF is not well placed to argue that this court should create those terms because they might serve BASF's business interests.⁴¹

Section 14(b) is only triggered if Lyondell no longer operates the Plant, which Lyondell may continue to do even if it experiences a change in control of its equity.

B. BASF Has Not Adequately Pled that LyondellBasell Operates The Plant

Having determined that § 14(b) is only triggered if Lyondell no longer operates the Plant, I now turn to whether BASF adequately pleads its alternative theory that LyondellBasell is now operating the Plant in Lyondell's stead. As explained above, even at this stage of the proceedings, I need "not concede pleaded conclusions of law or fact

⁴¹ See *Delucca v. KKAT Mgmt.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006) ("[I]t is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not. Rather, it is the court's job to enforce the clear terms of contracts.").

where there are no allegations of specific facts which would support such conclusions.”⁴²

Thus, in order to state a claim, BASF must plead facts that rationally support the inference that LyondellBasell, rather than Lyondell, now operates the Plant.⁴³

But, as we have seen, aside from the conclusory allegation that, following Basell’s purchase of Lyondell, “LyondellBasell Industries became the operator of the Plant,”⁴⁴ the Amended Complaint does not plead any facts about the Plant’s operations. The Amended Complaint also does not allege that the Lyondell managers and employees who were operating the Plant have been replaced by managers and employees working directly for LyondellBasell. In fact, the Amended Complaint does not allege any change in the operational direction of the Plant.

⁴² *Shintom Co., Ltd. v. Audiovox Corp.*, 2005 WL 1138740, at *2 (Del. Ch. May 4, 2005) (quoting *Weinberger v. UOP, Inc.*, 409 A.2d 1262, 1264 (Del. Ch. 1979)), *aff’d*, 888 A.2d 225 (Del. 2005); *see also Grobow*, 539 A.2d at 187 n.6 (“Even under the less stringent standard of a Chancery Court Rule 12(b)(6) motion to dismiss, all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true, but neither inferences nor conclusions of fact unsupported by allegations of specific facts upon which the inferences or conclusions rest are accepted as true.”).

⁴³ *See Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007) (requiring that a complaint “plead facts supporting an inference of breach, not simply a conclusion to that effect” to survive a motion to dismiss); *Feldman v. Cutaia*, 956 A.2d 644, 653-54 (Del. Ch. 2007) (“While specific allegations of fact, along with reasonable conclusions buttressed by specific allegations of fact, will sustain a complaint, mere conclusions of law or fact are insufficient under this standard of review.” (citations omitted)), *aff’d*, 951 A.2d 727 (Del. 2008). Recognizing the costs of modern litigation, the U.S. Supreme Court has adopted a similar standard. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1959 (2007) (holding that a claim for relief “requires more than labels and conclusions” and that a complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true”).

⁴⁴ Am. Compl. ¶ 25.

Instead, in flipping from its original statement that Lyondell operates that Plant to its current allegation that LyondellBasell operates the Plant, BASF has relied entirely on two quotes from LyondellBasell's public disclosures.

Specifically, BASF quotes LyondellBasell's Management Report for the Year Ended December 31, 2007 (the "Management Report") as stating that "LyondellBasell Industries' PO/SM II plant at the Channelview, Texas complex was created through a joint venture among Lyondell and unrelated equity investors. LyondellBasell Industries retains a majority interest in [the Plant] and is the operator of the [Plant]."⁴⁵ Similarly, BASF's Amended Complaint excerpts the statement "LyondellBasell Industries operates the U.S. PO Joint Venture's . . . plants" from LyondellBasell's Consolidated Financial Statements Years ended December 31, 2007 and 2006 (the "Financial Statements").⁴⁶

But, although these documents provide good quotes for BASF, they do not substitute for fact pleading that rationally supports the inference that Lyondell no longer operates the Plant. Indeed, when read completely and in context, these documents refute rather than support the inference that BASF seeks the court to draw.⁴⁷ As so read, both

⁴⁵ Am. Compl. ¶ 25 (quoting Am. Compl. Ex.8 (Lyondell Basell AF S.C.A Management Report for the Year Ended December 31, 2007) ("Management Report") at 16.

⁴⁶ Am. Compl. ¶ 2 (quoting Am. Compl. Ex. 9 (LyondellBasell Industries AF S.C.A. Consolidated Financial Statements Years ended December 31, 2007 and 2006 With Independent Auditors' Report) ("Financial Statements") at 19).

⁴⁷ See *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59 (Del. 1995) (noting that even in cases where the relevant document is not part of the complaint, it is important that a court be able to consider the whole document because "[w]ithout the ability to consider the document at issue, 'complaints that quoted only selected and misleading portions of such documents could not be dismissed under Rule 12(b)(6) even though they would be doomed to failure.'" (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991))).

documents are clearly meant to provide a picture of LyondellBasell as a corporate holding company, and thus they refer to LyondellBasell and its various subsidiaries as a single entity instead of as a collection of subsidiaries and affiliated companies. The documents cannot sensibly be read to suggest that LyondellBasell as a holding corporation operates the Plant, instead of Lyondell, the operating subsidiary that presumably continues to hold all the assets it possessed before the change in its equity owner.

The first document, the Management Report, makes its scope explicit and defines “LyondellBasell Industries” as LyondellBasell and its consolidated subsidiaries.⁴⁸ Thus, when it says that LyondellBasell Industries operates the Plant, the Management Report is simply offering the unremarkable proposition that LyondellBasell or one of its subsidiaries operates the Plant. That is, the entire basis for BASF’s claim is that because Basell bought Lyondell, Lyondell is now a subsidiary of LyondellBasell, and — voilà — Lyondell is now included and subsumed in the Management Report’s term “LyondellBasell Industries.” Rather than having to do something it apparently cannot (such as pleading that Lyondell’s corporate veil should be pierced because it in fact has no separate dignity from its parent), BASF has, by the magic of simplifying definitions in documents describing the consolidated operations of holding corporations, won its case. Because Lyondell’s parent produces documents that include its subsidiaries within the scope of the term LyondellBasell Industries, the subsidiary Lyondell must not be

⁴⁸ Management Report at 8 (“‘LyondellBasell Industries’ or the ‘Company’ refers to LyondellBasell Industries AF S.C.A and its consolidated subsidiaries.”).

operating the Plant. Rather, all operations must now be occurring at the mother ship, regardless of the continued existence of the various subsidiaries.

This line of reasoning is not, well, really reasoning. A holding corporation like LyondellBasell must present reports of their affairs on a consolidated basis.⁴⁹ The fact that holdings corporations do so does not render all their subsidiaries inutile, deprived of all their separate legal dignity. If that were the case, one wonders why large public holding corporations would continue their common practice of running business lines and holding assets through multiple subsidiaries.⁵⁰ After all, simply by making SEC filings, the holding corporation would eliminate its subsidiaries' separate legal existences!

There is nothing in the Management Report that supports a rational inference that LyondellBasell is actually operating the Plant in place of its operating subsidiary, Lyondell. In fact, the Report directly contradicts BASF's conclusory assertion that

⁴⁹ *E.g.*, *Consolidated Financial Statements*, ACCOUNTING REVIEW BULLETIN NO. 51, ¶ 3 (1959) (“All majority-owned subsidiaries . . . shall be consolidated except [for subsidiaries that the majority-owner does not control].”).

⁵⁰ Delaware public policy does not lightly disregard the separate legal existence of corporations. *Gasden v. Home Pres. Co., Inc.*, 2004 WL 485468, at *4 (Del. Ch. Feb. 20, 2008) (“A Delaware court will not lightly disregard a corporation’s jural identity.”). The reason for that is that the use of corporations is seen as wealth-creating for society as it allows investors to cabin their risk and therefore encourages the investment of capital in new enterprises. *See, e.g., Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *8 (Del. Ch. Mar. 4, 2004) (holding that a parent company was not liable for its subsidiary’s breach of contract where there was no basis for piercing the corporate veil); *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at **8-9 (holding that a parent company cannot be liable for its subsidiaries actions absent veil piercing or agency liability). To pierce a corporate veil, a plaintiff must show that the interests of justice require it because matters like fraud, public wrong, or contravention of law are involved. *Pauley Petroleum Inc. v. Cont’l Oil Co.*, 239 A.2d 629, 633 (Del. 1968) (holding that veil-piercing “may be done only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved”). BASF has not even tried to meet that standard. Moreover, it is precisely because sophisticated parties like BASF understand that changes in control can affect the behavior of a corporate contractual partner that they bargain expressly for change of control provisions.

LyondellBasell operates the Plant. *The Report unambiguously states that LyondellBasell by itself “does not manufacture any products, does not have any employees or business operations, operates exclusively through its subsidiary companies, and has no source of operating income or assets of its own other than its interests in its subsidiary companies.”*⁵¹ That description is impossible to reconcile with BASF’s allegation that LyondellBasell actually operates a large petrochemical plant.⁵²

This leaves the Financial Statements to bear the full weight of BASF’s assertion. Unlike the Management Report, the Financial Statements do not contain a single definition of LyondellBasell Industries that shows that the Statements are explicitly referring to LyondellBasell and its consolidated subsidiaries as operating the Plant. On their face, the Consolidated Financials therefore read literally as stating that LyondellBasell operates the Plant.

But, the purpose that Lyondell offers the Financial Statements for — to show that LyondellBasell operates the Plant in place of LyondellBasell’s wholly owned subsidiary Lyondell — distorts the nature of consolidated financial statements. Under Generally Accepted Accounting Principles, “[t]he purpose of consolidated statements is to present,

⁵¹ Management Report at 8 (emphasis added).

⁵² BASF points out that the Management Report defines Lyondell separately from LyondellBasell, and that when the Management Report refers to LyondellBasell operating the Plant, the authors had the choice of using the precise, defined term for Lyondell, but did not do so. When read as a whole and in concert, the Management Report does not support a rational inference that LyondellBasell itself, rather than Lyondell, is operating the Plant. In complex documents, inconsistencies arise. That is why it is important to read them as a whole and contextually. Indeed, the only fair inference is that LyondellBasell does not directly operate anything because, among other things, it has no employees or business operations of its own. Management Report at 8. Rather, operations are done at the subsidiary level by companies like Lyondell. *Id.*

primarily for the benefit of the stockholders and creditors of the parent company, the results of operations and financial position of a parent company and its subsidiaries essentially as if the group were a single company with one or more branches or divisions.”⁵³ Thus, although the Financial Statements may not be felicitously drafted, there is no rational basis for believing that when LyondellBasell’s accountants drafted the Financial Statements they were addressing the legal question of who operates each LyondellBasell facility around the world instead of following accounting rules and crafting a picture of the total health of LyondellBasell and its various holdings, which include Lyondell.⁵⁴ In this context, a single statement about LyondellBasell operating the Plant does not create a rational inference that the parent holding company, LyondellBasell, is actually operating the Plant. Instead, although the sentence that refers to the Plant might have been more carefully worded, its plain meaning in line with the rest of the Financial Statements is that the Plant is operated, as are all of LyondellBasell’s operations, through one of its subsidiaries. The short hand of the Financial Statements is to describe LyondellBasell as being accountable for all of the operations and results of its wholly-owned subsidiaries, so that the Financial Statements can provide a complete picture of the health of LyondellBasell as a holding company that possesses subsidiaries with diverse operations and substantial assets.

⁵³ *Consolidated Financial Statements*, ACCOUNTING REVIEW BULLETIN No. 51, ¶ 1 (1959).

⁵⁴ *E.g.*, CONSOLIDATED FINANCIAL STATEMENTS, Accounting Review Bulletin No. 51, ¶ 3 (1959) (“All majority-owned subsidiaries . . . shall be consolidated except [for subsidiaries that the majority-owner does not control.]”); Financial Statements at 9 (“The consolidated financial statements, prepared under accounting principles generally accepted in the United States, include the accounts of LyondellBasell Industries and its consolidated subsidiaries.”); 17 C.F.R. § 210.3-01(a) (2009) (requiring consolidated balance sheets by SEC registrants); 17 C.F.R. § 210.3-02(a) (2009) (requiring consolidated statements of cash flow and income by SEC registrants).

In sum, BASF has certain rights in the event that Lyondell no longer operates the Plant. To try to invoke those rights, BASF changed its description of the relationship between LyondellBasell and the Plant in its Amended Complaint, switching from alleging that Lyondell operates the Plant to alleging that LyondellBasell operates the Plant. But, BASF has not pled any facts about conditions on the Plant floor at all. NONE. Instead it makes a conclusory allegation that is only supported by “gotcha” quotes from LyondellBasell filings. When actually examined, the only reasonable inference that flows from the documents is that Lyondell continues to operate the Plant. As long as Lyondell is still operating the Plant, § 14(b) of the Supplementary Agreement is not triggered.

IV. Conclusion

For the foregoing reasons, BASF’s First Amended and Supplemental Verified Complaint is dismissed. **IT IS SO ORDERED.**