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Re: Ryan v. Lyondell Chemical Company, et al.
C.A. No. 3176-VCN
Date Submitted: August 20, 2008

Dear Counsel:

The individual defendant members of the board of directors of Defendant Lyondell Chemical Company ("Lyondell" or the "Company") seek certification of an interlocutory appeal of a portion of the Court's July 29, 2008, Memorandum

Opinion[1] and Order (the "Opinion") denying them, at least for the moment, on the basis of a limited summary judgment record,[2] the protection of Lyondell's exculpatory charter provision for potential breaches of their fiduciary duty of care in connection with the sale of the Company to Basell AF for $13 billion in July 2007.[3] The Court determined that the record did not clearly demonstrate the absence of issues of material fact with respect to the Board's good faith discharge of its known fiduciary duties in connection with the sale,[4] and, therefore, the Court could not yet

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[1] *Ryan v. Lyondell Chem. Co.*, 2008 WL 2923427 (Del. Ch. July 29, 2008). References to the Opinion here are to its slip form. The factual background of this case is set forth at length in the Opinion. Pertinent facts are repeated here as appropriate.

[2] Defendants made a tactical choice to seek summary judgment very early in this case, and, consequently, they relied upon a record developed in connection with related preliminary injunction litigation in Texas. Here, Ryan filed his Complaint on August 20, 2007; Defendants moved to dismiss and to stay discovery on September 12, 2007; the Basell defendants then moved for summary judgment on September 27, 2007. The Defendants joined in Basell's motion for summary judgment on November 21, 2007, but they did not separately brief their arguments in defense of Ryan's allegations against them; instead, they relied upon the Basell defendants' briefs, which focused primarily (at least in their opening brief) on addressing Ryan's aiding and abetting claims. The Court heard oral argument on the motions for summary judgment less than a week later.

[3] Defendants point out that Lyondell, the nominal defendant, did not owe fiduciary duties to the Lyondell stockholders and, accordingly, should have been dismissed. *See, e.g.*, *In re Wheelabrator Techs., Inc. S'holders Litig.*, 1992 WL 212595, at *9 (Del. Ch. Sept. 1, 1992). Ryan has not disputed this contention. The Defendants are correct, and the Court's failure to dismiss Lyondell from this action was an inadvertent oversight. In accordance with Court of Chancery Rule 60(a), an order will be entered granting judgment in favor of Lyondell and dismissing it from this action. For purposes of this letter opinion, the term "Defendants" refers only to the individual defendants, the members of Lyondell's board.

[4] *See* Opinion at 5, 6, 7 n.11, 37-46, 51, 53, 56, 64 n.129, and 72-73. *But see id.* at 46 n.92 ("As the Court considers the record, the better inference, especially considering the potential

determine the legal effect of Lyondell's exculpatory charter provision.[5] In particular, on the summary judgment record before the Court, it appeared that: (1) the directors *knew*, based on the filing of a Schedule 13D with the Securities and Exchange Commission in May 2007, that the Company was "in play;"[6] (2) despite having that knowledge, the directors did *nothing* (or virtually nothing) to prepare or to develop a strategy—consistent with the principles of *Revlon*[7] and its progeny—for maximizing shareholder value in connection with a possible sale of the Company;[8] (3) the directors did nothing (or virtually nothing) pre-signing to confirm

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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.").

[5] The Basell defendants mentioned Lyondell's exculpatory charter provision in support of their motion for summary judgment on Ryan's aiding and abetting claims in a footnote in their opening brief, in which, as noted, the Defendants joined. The Basell defendants also asserted the Section 102(b)(7) argument in their reply brief (in which the Defendants again joined) but their argument hinged on their hardly surprising view that, at best, Ryan's *Revlon* claims amount only to violations of the Defendants' duty of care. On the current record, however, the Court cannot adopt Defendants' "strictly duty of care" gloss on the facts.

[6] Not only did the directors *know* that the Company was "in play" following the 13D filing, they cloaked themselves in the fact that it effectively put a "For Sale" sign on the Company and no bids were forthcoming. *See, e.g.*, Reply Br. in Supp. of Basell's Mot. for Summ. J. at 11; Tr. of Oral Arg. Nov. 27, 2007 at 31 ("[COUNSEL FOR LYONDELL DEFENDANTS]: The only relevance of the 13D . . . is that it put the company in play as the market reflected and as also this Court has noted in several cases."); *see also id.* at 31, 87.

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

[8] This is not to say that the filing of a 13D automatically triggers "*Revlon* duties." The Defendants concede and, in fact, argue vigorously that the 13D filing in May 2007 effectively put the Company "in play." See *supra* note 6. Thus, it is in that context that the Court makes its comments about the significance of the 13D in this instance.

that a better deal could not be obtained;[9] (4) the directors did nothing (or virtually nothing) to negotiate on Basell's offer;[10] and (5) the directors did nothing (or virtually nothing) post-signing to verify that a better deal could not have been obtained.[11] From those simple and as yet unexplained facts, it is possible to draw the reasonable inference, at least for purposes of denying summary judgment on the current record, that the directors *may have* consciously disregarded their known fiduciary obligations in a sale scenario.[12] Thus, in the Opinion, the Court questioned

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[9] As the Court noted in the Opinion, idle speculation by the investment bankers that it was unlikely another bidder would top Basell's offer, without more, does not suffice to warrant summary judgment on this record. Opinion at 39 n.82.

[10] The directors essentially took the price offered by Basell and promptly conceded on the deal protections. Maybe the price was a "take-out" bid, but, on this record, when one looks to the two months of inactivity and the perfunctory fairness opinion, that fact alone does not justify the grant of summary judgment.

[11] Where a company sits on the market for a period of time after a deal is announced without the emergence of a competing bid, that fact can be evidence that the directors obtained the highest value attainable for the company. *E.g.*, *In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 707 (Del. Ch. 2001). On summary judgment, however, given other facts in the record, that is not sufficient to warrant summary judgment.

[12] The directors have not suggested that they did not understand that the well-settled value maximization principles of *Revlon* and its progeny would govern the discharge of their fiduciary obligations in this context. Implicit in their flogging of the premium price that happened to land in their laps in July 2007, however, is the directors' apparent belief that they should be relieved of those obligations based upon their disinterest, a premium price, a fairness opinion, and the mere passage of time after the deal is announced. In the case of a board, such as this, that has no "traditional" loyalty conflicts (e.g., improper motive or impermissible pecuniary interest) that argument may have considerable appeal, but that is not the present state of our law. As the Court reads our *Revlon* jurisprudence and understands the principles of a fiduciary relationship, the directors' obligations in connection with a sale of the corporate enterprise do not ebb and flow on

whether, on a more fully developed record, that failure to act might rise to the level of "something more" than a mere violation of the board's fiduciary duty of care,[13] and, accordingly, it denied summary judgment in order to clarify and develop the record further in that regard.[14] Nonetheless, Defendants contend that the Court committed reversible error by denying them the protection of Lyondell's exculpatory charter provision because, in their view, the Court improperly conflated possible violations only of the Board's duty of care (i.e., gross negligence) with a violation of the good faith component of the duty of loyalty as defined in *Stone v.*

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the fortuities of an offered deal premium and the ability to secure an expensive fairness opinion that (Quelle surprise!) concludes that the offer is "fair" to the shareholders.

[13] Opinion at 54 ("This may not be a case, however, where a board of directors simply botched the 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."). Alternatively, when the record is properly developed, the Court may well conclude that the Defendants made a good faith effort to comply with their *Revlon* duties under the circumstances and that any procedural shortcomings amount only to a violation of the directors' fiduciary duty of care, thus, entitling them to the protection of Lyondell's exculpatory charter provision. Moreover, a third alternative still exists—the Court might conclude that the process implemented by the directors under all the circumstances was reasonable under *Revlon* and its progeny and, thus, find that no breach of fiduciary duty occurred at all. The record, at this preliminary stage, simply is not sufficiently developed to rule out all material fact issues, and the Court may not weigh the evidence to reach those conclusions.

[14] Indeed, a trial court should deny summary judgment where it appears necessary or desirable to amplify the record in order to clarify the application of the law to the facts. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

Ritter[15] and *In re Walt Disney Company Derivative Litigation*[16] (i.e., intentional dereliction or conscious disregard of fiduciary duties).

In the Opinion, the Court perhaps did not expound in sufficient detail upon its reasons for denying the directors the protection of Lyondell's exculpatory charter provision. A fair reading of the Opinion, however, plainly reveals that the Court's concern about the application of a Section 102(b)(7) defense on this rudimentary summary judgment record is whether by taking no discernible action to prepare for a possible sale of the Company in light of the 13D filing, and then, later, by doing nothing (or virtually nothing) actively to confirm that Basell's offer really was the "best" deal reasonably available, the Defendants may have exhibited a "conscious disregard" for their known fiduciary obligations in a sale scenario. Thus, the Court did not apply an inappropriate concept or definition of "bad faith" in this context under the controlling Delaware Supreme Court precedents, and it did not "resolve" a substantial issue or "determine" a legal right. It simply denied a motion for summary judgment on a sparse preliminary injunction record where the facts, unfortunately, suggest an inference of conscious board inaction in the face of a

[15] 911 A.2d 362 (Del. 2006).
[16] 906 A.2d 27 (Del. 2006) [hereinafter *Disney*].

known duty to act.[17] Accordingly, because the criteria of Delaware Supreme Court Rule 42(b) governing certification of an interlocutory appeal have not been met, the Defendants' motion must be denied.[18]

A. *The Directors' Good Faith and Section 102(b)(7) Under These Circumstances*

Before proceeding with an analysis of Defendants' motion for certification of an interlocutory appeal, the Court digresses briefly to expand its analysis of the Section 102(b)(7) issue.

Defendants latch on to a single line in the Court's seventy-three page Opinion—"*the board's failure to engage in a more proactive sale process may*

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[17] Contrary to the Defendants' assertions that the Opinion threatens to unleash a liability crisis similar to that experienced in the wake of *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), the Court's decision, as Ryan correctly points out in his brief opposing certification of an interlocutory appeal, will in no way impede a properly motivated and unconflicted corporate director who attempts to discharge his fiduciary obligations in good faith from successfully asserting a Section 102(b)(7) defense on a fully developed summary judgment record (or at any other proper procedural stage, for that matter). Moreover, unlike the situation presented in *Van Gorkom* where the directors found themselves between that proverbial rock and a hard place through no fault of their own and attempted, in good faith, to discharge their fiduciary duties under the circumstances—the motivating purpose behind the adoption of Section 102(b)(7)—the directors in this instance walked into a potential liability trap with their eyes wide open: they *knew* the Company was "in play," they *knew* what the proper discharge of their fiduciary obligations in connection with a sale of control demanded, and yet they appear, on the limited record before the Court, to have done *nothing* to prepare for a possible sale.

[18] The question of whether "*Revlon* duties," as that concept has evolved in Delaware law, should apply with full force in the context of a disinterested and independent board is not an issue presently framed in this litigation.

constitute a breach of the good faith component of the duty of loyalty as taught in Stone v. Ritter"[19]— in order to support their argument that the Court has "conflated" a mere breach of the duty of care (i.e., gross negligence) with a finding that the Directors acted in "bad faith." The purportedly offending line, however, does not even appear in the section of the Opinion addressing Defendants' Section 102(b)(7) argument.[20] In fact, nowhere in Defendants' motion for certification of an interlocutory appeal, where they repeatedly disparage the Opinion for applying an "incorrect" formulation of the definition of "bad faith," do they even cite to the Court's actual analysis of the Section 102(b)(7) issue where it explicitly quoted the Delaware Supreme Court's formulation of "bad faith" from *Stone v. Ritter*.[21]

Furthermore, semantics and the Court's decision not to incant *Disney*'s iteration of a definition of "bad faith" conduct aside, the Opinion clearly questions whether the Defendants "engaged"[22] in the sale process—i.e., diligently and

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[19] Defs.' Mem. of Law in Supp. of their Application for Certification of Interlocutory Appeal ("Defs.' Mem.") at 7 (emphasis in original) (quoting Opinion at 32-33).

[20] Opinion at 54-56.

[21] *Id.* at 55 (quoting *Stone*, 911 A.2d at 370). The definition of "bad faith" articulated in *Stone* tracks precisely the same definition of "bad faith" articulated in *Disney*, 906 A.2d at 67.

[22] "Engage, vb. To employ or involve oneself; to take part in; to embark on." BLACK'S LAW DICTIONARY 570 (8th ed. 2004) (footnote not in original text); "Engage, vb, vi, 2b: to employ or involve oneself; c: to take part : PARTICIPATE." WEBSTER'S THIRD NEW INT'L DICTIONARY (UNABRIDGED) 751 (1993) (emphasis in original).

faithfully undertook to discharge their known fiduciary obligations—in a manner consistent with the Delaware Supreme Court's teachings in *Revlon* and its progeny.[23] This is where the 13D filing in May 2007 and the subsequent two months of (apparent) Board inactivity become critical. Although the Court acknowledges that the testimony in the record suggests that the Board was *generally knowledgeable* about the value of the Company (e.g., they appear to have been updated at least on an annual basis), the Directors made *no apparent effort* to arm themselves with *specific knowledge* about the present value of the Company in the May through July 2007 time period, despite *admittedly knowing* that the 13D filing in May 2007 effectively put the Company "in play," and, therefore, presumably, also knowing that an offer for the sale of the Company could occur at any time.[24] It is these facts that raise the specter of "bad faith" in the present summary judgment

[23] Opinion at 54, 56.

[24] One could argue (as Defendants seem to) that the fairness opinion and other professional advice after-the-fact were enough to satisfy the single-bidder exception to a more robust sale process recognized in *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279 (Del. 1989). Perhaps that view will carry the day when the Court is in a position to weigh the evidence and find the facts. On summary judgment, however, regardless of how attractive that inference may be, it does not exclude the other possible inference that had the Board been sufficiently attentive to discharging its known fiduciary obligations and done something more beforehand to study the market and the interest of other buyers perhaps the outcome would have been different (i.e., the shareholders could possibly have received more value for their shares).

record, which, in turn, colors the Court's view, at least for the moment, of the directors' later "negotiations"[25] with Basell and their inability to attempt to discharge their known fiduciary obligations after the fact due to the deal protections to which they had agreed. Perhaps in the Opinion, however, the Court was not as clear as it might have been in this regard.

In *Disney*, the Delaware Supreme Court approved of the Chancellor's formulation of one possible definition of director misconduct amounting to bad faith—"intentional dereliction of duty, a conscious disregard for one's responsibilities."[26] The Supreme Court was clear, however, that liability in those

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[25] The Court uses this term loosely to describe the directors' actions in considering Basell's offer.

[26] 906 A.2d at 64, 67. The Court in *Stone* also adhered to the *Disney* definition of "bad faith." 911 A.2d at 370 ("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." (citing *id.*)). In the Opinion, this Court followed precisely the definition of "bad faith," and the consequent basis for potential liability, articulated by the Delaware Supreme Court in *Disney* and *Stone*, *see* Opinion at 65 ("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." (quoting *Stone*, 911 A.2d at 370)), and held that, at least for the time being, the directors were not entitled to the protection of Lyondell's exculpatory charter provision because it was not clear from the record that the conduct at issue here amounts only to a violation of the directors' duty of care. Moreover, consistent with *Disney*, the Court noted that conduct that is not in good faith or that amounts to a violation of the duty of loyalty is not exculpable under the plain language of Section 102(b)(7). *Id.* at 54-55, 56 n.11. Defendants may disagree with the Court's interpretation of the facts in the limited summary judgment record, but the Court did not affirmatively misstate the current law, and it certainly did not create new law equating a pure violation of the duty of care with a failure to act in good faith. *See id.* at 32-33 ("If [Ryan] only succeeded in [proving a breach of the directors' duty of care at trial], however, the Lyondell

instances is *not* predicated upon the breach of the fiduciary duty of care; rather, liability results from the breach of the separate and distinct duty of good faith.[27] The

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stockholders would not be entitled to money damages, the only remedy now otherwise available, because Lyondell had an exculpatory charter provision adopted in accordance with 8 *Del. C.* § 102(b)(7). Accordingly, Ryan can only prevail on his *Revlon* claims by overcoming the protection afforded to the Board by Lyondell's exculpatory charter provision; in other words, because the Board was independent and not impermissibly motivated by self-interest, Ryan must demonstrate that the Board either failed to act in good faith in approving the merger or otherwise acted disloyally."); *id.* at 54 ("This may not be a case, however, where a board of directors simply botched the 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. . . . 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.") (internal citations omitted)).

[27] Now, in light of *Stone*, it is the duty of loyalty that serves as the legal framework for liability for a failure to act in good faith. But simply because the basis for legal liability is academically distinguishable does not mean that conduct possibly amounting only to a breach of the duty of care will necessarily be factually distinguishable from conduct resulting also in a breach of the good faith component of the duty of loyalty. *See Disney*, 906 A.2d at 65 ("[I]n the pragmatic, conduct-regulating legal realm which calls for more precise conceptual line drawing, the answer is that grossly negligent conduct, without more, does not and cannot constitute a breach of the fiduciary duty to act in good faith. The conduct that is the subject of due care may overlap with the conduct that comes within the rubric of good faith in a psychological sense, but from a legal standpoint those duties are and must remain quite distinct."); *see also id.* at n.104 ("An example of such overlap might be the hypothetical case where a director, because of subjective hostility to the corporation on whose board he serves, fails to inform himself of, or to devote sufficient attention to, the matters on which he is making decisions as a fiduciary. In such a case, two states of mind coexist in the same person: subjective bad intent (which would lead to a finding of bad faith) and gross negligence (which would lead to a finding of a breach of the duty of care). Although the coexistence of both states of mind may make them indistinguishable from a psychological standpoint, the fiduciary duties that they cause the director to violate—care and good faith—are legally separate and distinct."). In the Opinion, the Court decided that there were material fact questions that raised an issue of whether the directors' failure to act in the face of a known duty to

Supreme Court further explained that although it could demarcate three points in the spectrum of fiduciary conduct deserving of a "'bad faith' pejorative label," the historical and statutory distinction between a violation of the duty of care and a violation of the duty to act in good faith (even though both can be said to fall within the realm of "bad faith") was important because of the potential consequences flowing from that distinction.

At one end of the spectrum, the Supreme Court identified a category of acts involving non-exculpable, "so-called 'subjective bad faith,' that is, fiduciary conduct motivated by an actual intent to do harm."[28] The Court further described those acts as involving conduct constituting "classic, quintessential" bad faith. In

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act amounted to something more than a simple violation of the duty of care (i.e., gross negligence). In other words, this is an instance where issues of care and loyalty (good faith, in this context) bleed together under the facts presented in the summary judgment record, and, therefore, the Court was unable to ascertain, at least at this point, the ultimate effect of Lyondell's exculpatory charter provision in this context. The Court was careful to explain, however that, ultimately, a determination that the directors' failed to act in "good faith" could result in liability only because in that instance the directors will have violated their duty of loyalty. Opinion at 54-56. Thus, the Court did not conflate good faith into a theory that would result in legal liability for a breach of only the directors' duty of care, notwithstanding a Section 102(b)(7) charter provision. Unfortunately, at this preliminary stage of this case, it is difficult to frame the issue in a manner that does not, to some extent, track closely with those facts suggesting only an apparent failure to act with appropriate care; it remains to be seen whether the directors' acts (or failure to act) reach into the realm of non-exculpable bad faith. *See, e.g.*, *Desimone v. Barrows*, 924 A.2d 908, 935 (Del. Ch. 2007).

[28] *Disney*, 906 A.2d at 64.

this case, no such acts are alleged. Nor could the facts adduced in the record support any finding of an actual intent to do harm to the corporation and the shareholders.

At the opposite end of the "bad faith" spectrum, the Supreme Court identified acts exhibiting only a lack of due care—"that is, fiduciary action taken solely by reason of gross negligence and without any malevolent intent."[29] In that regard, the Court observed that "grossly negligent conduct, without more, does not and cannot constitute a breach of the fiduciary duty to act in good faith."[30] The Supreme Court explained that the distinction between gross negligence and non-exculpable "bad faith" (i.e., that elusive something "more") has important consequences in Delaware's jurisprudence and corporate statutory scheme because, for example, director conduct amounting *only* to a violation of the duty of care, but otherwise taken in good faith, is exculpable under 8 *Del. C.* § 102(b)(7) or indemnifiable under 8 *Del. C.* § 145.

In between the aforementioned points along the "bad faith" conduct spectrum, however, the Delaware Supreme Court identified a third category of acts—intentional dereliction of duty or a conscious disregard of one's responsibilities.

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[29] *Id.*
[30] *Id.* at 65.

Such misconduct, according to the Court, is "properly treated as a non-exculpable, non-indemnifiable violation of the fiduciary duty to act in good faith."[31] The Supreme Court explained:

> [T]he "universe of fiduciary misconduct is not limited to either disloyalty in the classic sense (i.e., preferring the adverse self-interest of the fiduciary or of a related person to the interest of the corporation) or gross negligence. Cases have arisen where corporate directors have no conflicting self-interest in a decision, yet engage in misconduct that is more culpable than simple inattention or failure to be informed of all facts material to the decision. To protect the interests of the corporation and its shareholders, fiduciary conduct of this kind, which does not involve disloyalty (as traditionally defined) but is qualitatively more culpable than gross negligence should be proscribed. A vehicle is needed to address such violations doctrinally, and that doctrinal vehicle is the duty to act in good faith.[32]

The Court further elaborated that because "Section 102(b)(7)(ii) expressly denies money damage exculpation for 'acts or omissions not in good faith . . . the statutory denial of exculpation for [such acts] must encompass the intermediate category of misconduct . . . ."[33] Thus, one possible (but not the only) formulation of the definition of misconduct falling within this intermediate category is "where the

[31] *Id.* at 66.
[32] *Id.*
[33] *Id.* at 67.

fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[34]

In the context of a motion for summary judgment, it is not necessary (or prudent) for the Court to determine precisely where, on these facts, the line falls between exculpable, "bad faith" conduct (i.e., gross negligence amounting only to a violation of the duty of care) and a non-exculpable, knowing disregard of the directors' known fiduciary obligations in a sale scenario.[35] It suffices that, on this limited record, there exists apparent and unexplained director inaction despite their knowing that the Company was "in play" and their knowing that *Revlon* and its progeny mandated certain conduct or impeccable knowledge of the market in pursuit of the best transaction reasonably available to the stockholders in a sale scenario.[36] As a result of that apparent and unexplained inaction in the face of a

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[34] *Id.* at 67 (quoting *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005)); *see also Stone*, 911 A.2d at 370 ("Where directors fail to act in the face of a known duty of 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."); Opinion at 55 (quoting *Stone*).

[35] To the extent the Opinion did not include this exhaustive analysis of the provenance of the concept of "bad faith" the Court was applying in denying summary judgment on a very limited record, it is now clarified in that regard.

[36] There is no single "blueprint" the directors must follow, and the possible methods by which they might have conducted a "reasonable" sale process under *Revlon* and its progeny are multitudinous. *Barkan*, 567 A.2d at 1286. As the Court noted in the Opinion, perhaps the process chosen by the Board in this instance ultimately will be deemed "reasonable" under all the circumstances when

well-settled and well-known duty to act, the Court finds itself somewhere in the intermediate grey area of conduct identified by the Delaware Supreme Court as deserving of the "bad faith pejorative label." Whether the directors have crossed the line into a cognizable violation of the good faith component of the duty of loyalty is not clear, but, in any event, the possibility of "bad faith" *on this record* raises questions of material fact regarding the directors' entitlement to exculpation, and the record must be amplified to determine the proper application of Lyondell's exculpatory charter provision under these circumstances.

Under the Defendants' self-serving view of the record, where one simply ignores (1) the fact of the 13D filing in May 2007, (2) the fact the directors acknowledge that the 13D put the Company in play, and (3) the (apparent) fact of the directors' subsequent two months of slothful indifference despite *knowing* that the Company was in play, the Court probably would have to agree that "on [that] record there is simply no issue whatsoever of material fact about intentional or

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the record is more fully developed. Thus, the Court is not suggesting that the directors conduct in this case *is* necessarily an example of bad faith, non-exculpable conduct, thus, exposing them to personal liability. Instead, the Court is saying that it *may be* such conduct, but that it is necessary to develop the record more fully in order to make that determination. As the Court stated in the Opinion, whether that requires only a more fully-developed presentation on summary judgment or a trial remains to be seen.

conscious wrongdoing by the Lyondell board."[37] Unfortunately, and notwithstanding Defendants' wishes to the contrary and their trumpeting of the "blowout" premium in an effort to distract from those important facts, that is *not* the record that presently exists. In the sale of control context, no case under Delaware law has yet recognized the Lyondell directors' (apparent) "do nothing, hope for an impressive-enough premium, and buy a fairness opinion" approach to discharging a director's fiduciary obligations when selling the corporate enterprise; perhaps, under the circumstances, that process, eventually, will be deemed "reasonable" on a more complete record, but there is nothing in Delaware's corporate law that renders the process so self-evidently reasonable that the directors are per force deemed to have acted in good faith and entitled to summary judgment on what amounts to nothing more than a barebones preliminary injunction record.[38]

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[37] Defs.' Mem. at 13.

[38] Once again, the Court emphasizes that this is summary judgment and the record, as it presently stands, is nothing more than the record prepared for the preliminary injunction hearing in Texas. Based upon the apparent and, thus far, unexplained inaction of the directors in the two months preceding Basell's offer despite knowing that the Company was "in play," Ryan is entitled to probe into the directors' motives and actions to determine whether they undertook to discharge their known fiduciary obligations in a sale scenario in good faith under the circumstances.

In short, the predicament in which the directors presently find themselves is entirely of their own making and the result of their impatience with the litigation process. That is perhaps understandable, but in these unusual circumstances where the directors were not in fact engaged in any type of sale process before deciding on short notice to sell the Company, Ryan is entitled to look into their actions to satisfy himself and the Court that the directors were sufficiently attentive

The directors, in essence, seek to rely exclusively on the fortuity of an offered deal premium and an after-the-fact fairness opinion to sustain their conduct under the circumstances or, at the very least, their entitlement to exculpation for money damages.[39] They argue that, under the deadline imposed by Basell, they made a reasonable effort to inform themselves about the offer and that, even if they lacked complete knowledge to properly judge the adequacy of the offer, they violated only their duty of care. In the seven days during which the board considered Basell's offer, the Defendants' argument may be correct that only their duty of care is implicated. The problem, however, is that there was a two month window in which the directors knew (or should have known) that the Company was on the market and that they might receive an offer at any time. It is during those two months where they apparently chose not to take any specific action to prepare for a possible offer and sale.

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to their fiduciary duties. Yes, undeniably, the directors, in this instance, managed to achieve a good result, but a fiduciary's discharge of his duties and obligations are not judged merely by the result he achieves.

[39] The directors may well have had sufficient knowledge of Lyondell's market in the summer of 2007 to satisfy *Barkan*'s single-bidder sale strategy. If that is so, the record simply is underdeveloped in that regard, and, thus, the directors are left with only a premium offer and a fairness opinion to support their argument that they acted properly under the circumstances.

Moreover, after remaining passive for two months while knowing that the Company was "in play," when Basell finally delivered its offer, the directors did nothing (or virtually nothing) to verify the superiority of Basell's offer (aside from recognizing an obvious premium and obtaining a fairness opinion). Thus, when one views the totality of the directors' conduct on this record, that leads the Court to question whether they may have disregarded a known duty to act and may not have faithfully engaged themselves in the sale process in a manner consistent with the teachings of *Revlon* and its progeny. Whether that apparent failure to act ultimately rises to the level of something "more" that constitutes "bad faith" sufficient to deprive the directors' of the protection of Lyondell's exculpatory charter provision remains to be seen.[40] On summary judgment, however, it suffices that Ryan has established an issue of material fact with respect to the directors' diligent and faithful discharge of their known "*Revlon* duties," and for that reason the directors'

[40] *See* Opinion at 46 n.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.").

motion for summary judgment was properly denied to allow the parties to develop a better record of the directors' efforts in connection with the sale to Basell.[41]

B. *The Interlocutory Appeal*

Defendants' motion for certification of an interlocutory appeal is governed by Supreme Court Rule 42(b). In order to certify an appeal for interlocutory review under that rule, the Court's order must: (1) determine a substantial issue, (2) establish a legal right, and (3) comply with one of the additional five criteria listed in Rule 42(b)(i)-(v).[42] The Supreme Court typically accepts interlocutory appeals only where the circumstances are "extraordinary" or "exceptional."[43] In this

[41] Defendants posit that it "simply cannot be" that corporate directors acted in "bad faith" where they were properly motivated and incentivized to maximize shareholder value, generally aware of the value of the company, and able to secure and recommend a premium offer to the shareholders. Maybe so. The record as it presently stands, however, contains unexplained director inaction despite the Defendants' admittedly knowing that the Company was "in play" and also their presumably knowing the requirements of *Revlon* and its progeny for discharging their fiduciary duties in a sale scenario. Maybe the Defendants were motivated by a "good faith" belief that the Company was not in imminent danger of being sold; maybe they had a "good faith" belief that they knew what the Company was worth and were capable of evaluating any offers and negotiating with potential acquirers; or maybe, although it may be unlikely, they were not being attentive to their fiduciary obligations. Summary judgment is inappropriate where such questions exist in the record.

[42] DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 14.04, at 14-6 (2008).

[43] *Ryan v. Gifford*, 2008 WL 43699, at *4 (Del. Ch. Jan. 2, 2008).

instance, Defendants essentially seek leave to appeal the Court's denial of summary judgment where the Court determined that it would be necessary and desirable to clarify the factual record in certain respects in order to determine the legal effect of Lyondell's exculpatory charter provision under these circumstances. Because the Court's Opinion does not satisfy the criteria of Supreme Court Rule 42, the Court must deny certification of Defendants' interlocutory appeal.

First, the Court's Opinion does not determine and resolve a substantial issue. In denying the Defendants, *for the time being*, the protection of Lyondell's exculpatory charter provision pending further development of the record with regard to the directors' good faith efforts to discharge their known fiduciary duties in connection with the sale of the Company to Basell, the Court, according to the Defendants, applied an incorrect concept of "bad faith." They advance this argument despite the Court's *quoting directly* the Delaware Supreme Court's definition of "bad faith" from *Stone v. Ritter*.[44] Defendants' argument is nothing more than an attempt to manufacture a legal issue to compensate for their failure to develop a sufficient factual record to enable the Court to conclude on summary

[44] Opinion at 55.

judgment that the directors' perceived procedural shortcomings in connection with the sale of the Company to Basell amounted only to a breach of the directors' fiduciary duty of care. Thus, notwithstanding Defendants' consternation over the outcome on their summary judgment motion, the reports of the death of Section 102(b)(7) (and the consequent possibility for the "resuscitation" of a *Van Gorkom*-esque liability crisis) in Delaware law are greatly exaggerated both with regard to the application of Lyondell's exculpatory charter provision in this case, and certainly with regard to the application of a Section 102(b)(7) provision defense in any other case.

In considering the Defendants' Section 102(b)(7) defense on the limited summary judgment record, the Court simply looked to controlling Supreme Court precedents defining "bad faith" misconduct, and determined that issues of material fact existed regarding the directors' entitlement to the shield of Lyondell's exculpatory charter provision in light of an apparent failure to act despite the directors' knowledge that the Company was in play as of May 2007 and their knowledge that *Revlon* and its progeny require a board to make a diligent and good faith effort to attempt to secure the best transaction reasonably available to the stockholders.[45] To the extent the Opinion did not expound in sufficient detail regarding the Court's basis for determining that issues of material fact exist in the record, which preclude an application of the law regarding the directors' entitlement to exculpation to the facts at this time, the Opinion has been clarified in accordance with the Court's analysis above. Accordingly, for the reasons discussed herein, the Court's Opinion did nothing more than to assess the application (or potential application) of well-settled law under the peculiar and underdeveloped facts of this case, and, consequently, it did not determine a substantial issue material to the parties' dispute.

Second, the Opinion did not establish a legal right. Defendants assert in their brief in support of their motion for certification of an interlocutory appeal that

[45] *See, e.g.*, *Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1054 (Del. Ch. 1997) (Under *Revlon*, "the board's duty of loyalty requires it to try in good faith to get the best price reasonably available. . . ."). Unlike a *Caremark* scenario in which director bad faith misconduct can be exhibited by a sustained and systematic failure of oversight, in the sale context, it seems that the directors (more than likely) have only one shot. They either choose to engage diligently and faithfully in the sale process to discharge their fiduciary obligations toward the corporation and the shareholders, or they do not. Here, unfortunately, there is unexplained inaction despite the directors' knowing that the Company was in play. Whether that inaction ultimately is fatal to the Defendants' entitlement to exculpation for any breaches of their duty of care is an open question of fact, but, in light of that inaction, the Court cannot conclude that there is no possible issue of "bad faith" in this record.

"[h]ere the Court's decision to deny Defendants' motion for summary judgment under the erroneous legal definition of 'bad faith' – thereby depriving them of the protections of the Company's Section 102(b)(7) exculpatory charter provision and subjecting them to potential personal liability – clearly diminished Defendants' legal rights."[46] The Defendants' interpretation of the Opinion—that they have been "deprived" of the protection of the Company's exculpatory charter provision—is not only inaccurate, but, in fact, the Court stated repeatedly throughout the Opinion that on a more developed factual record the directors may very well either prevail on the merits of Ryan's *Revlon* claims or, alternatively, on their Section 102(b)(7) defense.

Moreover, under Supreme Court Rule 42, "a legal right is established where the court determines an issue essential to the position of the parties regarding the merits of the case, and a legal right generally is not established where either party may yet prevail at trial."[47] The Opinion clearly does not preclude the Defendants from prevailing on their Section 102(b)(7) defense at trial, or even on further motion practice after the factual record is better developed; the Court simply denied the defendants' motion for summary judgment *on the current record* in light of the open

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[46] Defs.' Mem. at 18.
[47] WOLFE & PITTENGER, *supra* note 42, § 14.04[b], at 14-8 to -9.

issues of material fact. Defendants can still prevail on their Section 102(b)(7) exculpatory charter provision defense once they establish (assuming they are able to do so) that the potential procedural shortcomings under *Revlon* and its progeny in fact amount to nothing more than a breach of their fiduciary duty of care. Accordingly, the Opinion did not establish a legal right.

Lastly, Defendants argue that interlocutory review of the Court's conclusion with respect to their Section 102(b)(7) defense might terminate the litigation or otherwise serve the interests of justice. Indeed, an early application of Lyondell's exculpatory charter provision to the facts of this case could be dispositive of Ryan's claims and could save the directors the time and expense of continuing to defend this litigation. Thus, an interlocutory appeal could terminate the litigation, which satisfies Supreme Court Rule 42(b)(v).[48]

[48] With that conclusion and in light of the discussion above, it is not necessary to consider the Defendants' argument that the Opinion "conflicts" with other Court of Chancery decisions, Defs.' Mem. at 21 n.12, or their conclusory argument that the "issue relates to the application of an important Delaware statute that should be settled by the Delaware Supreme Court." This is not an issue of first impression with regard to the application or interpretation of Section 102(b)(7)—it is merely an issue of applying well-settled law and legal principles to the unique, and not fully developed, facts of this case. The Court's decision to deny summary judgment to amplify the record for that purpose is hardly exceptional.

Accordingly, because the Opinion did not determine a substantial issue or establish a legal right, the Defendants have failed to satisfy the standards of Supreme Court Rule 42.

C. *Conclusion*

For the foregoing reasons, the Defendants' motion for certification of an interlocutory appeal must be denied.[49]

An appropriate order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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[49] The Defendants have argued that this action should be stayed pending appeal. The Court will stay this action pending the Delaware Supreme Court's resolution.