IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WALTER E. RYAN, JR., Individually and on behalf of all others similarly situated,	:	
Plaintiff,	:	
v.	:	C.A. No. 3176-VCN
LYONDELL CHEMICAL COMPANY, DAN F. SMITH, CAROL A. ANDERSON, SUSAN K. CARTER, STEPHEN I. CHAZEN, TRAVIS ENGEN, PAUL S. HALATA, DANNY W. HUFF, DAVID J. LESAR, DAVID J.P. MEACHIN, DANIEL J. MURPHY, WILLIAM R. SPIVEY, BASELL AF, and BIL ACQUISITION HOLDINGS LIMITED,	:	
Defendants.	:	

OPENING BRIEF IN SUPPORT OF BASELL'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

On July 17, 2007, after arm's-length negotiations, Basell AF, the global leader in polyolefins, and Lyondell Chemical Company ("Lyondell"), one of the world's largest chemical companies, entered into a Merger Agreement, pursuant to which Basell AF and its acquisition subsidiary, BIL Acquisition Holdings Limited (collectively, "Basell" or "Defendants") will acquire Lyondell for approximately $13 billion, or $48 per share in cash (the "Proposed Transaction"). This represents a 45% premium over the closing share price on May 10, 2007, the last trading day before the public became aware that Basell was interested in a deal with Lyondell. The Proposed Transaction also represents a 20% premium over Lyondell's closing share price on the day before the merger was publicly announced. Since the Proposed Transaction was announced on July 17, 2007, no other bidder has emerged.

Nevertheless, on August 20, 2007, Plaintiff brought this action – *over a month* after the Proposed Transaction was announced – alleging, in wholly conclusory terms, that the members of the Lyondell board of directors breached their fiduciary duties by conducting an inadequate sale process and approving an unfair price. In addition, while the Complaint does not assert any direct claims against Basell, it alleges that Basell aided and abetted the alleged breaches of fiduciary duties. Plaintiff's claims lack substance and should be dismissed as a matter of law. The undisputed facts demonstrate that it cannot reasonably be found that the members of the Lyondell board of directors: (i) engaged in self-dealing or are otherwise interested in the Proposed Transaction; (ii) lack independence; (iii) were improperly motivated to intentionally or in bad faith

conduct a less than professional search for the best value for Lyondell's shareholders; (iv) approved the Proposed Transaction in response to any perceived imminent threat to Lyondell; (v) rebuffed any potential offers from third parties; or (vi) "locked-up" the Proposed Transaction without bargaining for a fiduciary-out provision. Further, Plaintiff has not alleged any material facts or produced any evidence to support an aiding and abetting claim against Basell. In fact, Plaintiff has not presented a single piece of evidence demonstrating that Basell "knowingly participated" in a fiduciary breach. Indeed, Plaintiff's own Complaint makes clear that Basell was engaged in arm's-length negotiations with Lyondell. (Compl. ¶¶ 58-78).

In short, Plaintiff has not adequately alleged, nor produced any record evidence from which the Court could reasonably infer that Defendants have committed, or aided and abetted in the commission of, a breach of fiduciary duty under Delaware law. Where, as here, arm's-length negotiations between independent and disinterested boards have resulted in a Proposed Transaction that offers significant value for Lyondell's shareholders, Plaintiff's baseless claims must be dismissed as a matter of law. For these reasons, and others discussed below, Basell's motion for summary judgment should be granted, and judgment should be entered in favor of Defendants.

STATEMENT OF FACTS

A. The Parties.

Plaintiff Walter E. Ryan, Jr. is a purported shareholder of Lyondell who claims to have held Lyondell shares during the relevant time period. (Compl. ¶ 16). Defendant Lyondell Chemical Company, a Delaware corporation with its principal place of business in Houston, Texas, is one of the world's largest chemical companies. (Compl. ¶ 17). Defendant Basell AF is a global leader in polyolefin technology and is privately owned by Access Industries ("Access"). Defendant BIL Acquisition Holdings Limited is a Delaware corporation formed on July 13, 2007, for the purpose of affecting the Proposed Transaction. (Compl. ¶¶ 29-30). The other named defendants in this action are the directors of Lyondell (the "Individual Defendants").

B. Basell Negotiates At Arm's-Length With Lyondell.

Because Plaintiff's Complaint largely relies on the preliminary proxy statement ("Proxy"), the facts are mostly undisputed.[1] (Larkin Aff. Ex. 1). At various times over the past year, Basell and Lyondell have explored a possible business combination between the two companies. (Compl. ¶¶ 58-59; Larkin Aff. Ex. 1 at 16-20). Beginning in April 2006, Lyondell's Chief Executive Officer, Dan Smith ("Smith"), met with Leonard Blavatnik ("Blavatnik"), chairman of Access (Basell's parent corporation), and Philip Kassin, senior vice president and head of M&A and financing of Access, for an introductory meeting requested by Blavatnik. (Compl. ¶ 58; Larkin Aff. Ex. 1 at 16).

[1] The statement of facts concentrates on issues related to the claim that Basell aided and abetted the Lyondell Defendants' alleged breach of fiduciary duty.

Following this meeting, Access contacted Lyondell to discuss its interest in exploring a potential acquisition of Lyondell by Basell. (Compl. ¶ 59; Larkin Aff. Ex. 1 at 16). Smith indicated that Lyondell was not for sale, but that Lyondell would always be interested in creating value for its shareholders. (*Id.*). In July, Access contacted Lyondell to let it know that Access remained interested in pursuing a transaction, potentially involving a purchase of all of Lyondell's outstanding shares. (Compl. ¶ 61; Larkin Aff. Ex. 1 at 17). Thereafter, on August 10, 2006, Access and Basell sent a written indication of interest in acquiring Lyondell. (Compl. ¶ 63; Larkin Aff. Ex. 1 at 17). However, the Lyondell board determined that the proposed offer was not in the best interest of Lyondell's shareholders, and that it did not wish to further explore the proposal. (Compl. ¶ 64; Larkin Aff. Ex. 1 at 17). At that time, Lyondell had just acquired CITGO Petroleum Corporation's interest in a refining joint venture. (Compl. ¶ 65; Larkin Aff. Ex. 1 at 18).

Thereafter, in July 2007, the parties reconnected and engaged in arm's-length negotiations over the Proposed Transaction. (Compl. ¶ 70; Larkin Aff. Ex. 1 at 20; Kassin Aff. at 2). Specifically, on July 9, 2007, Blavatnik proposed to Smith that Basell would acquire Lyondell for a significantly higher price of $44 to $45 per share—nearly double its previous offers. (*Id.*). However, Smith responded that he did not think that such a price would be sufficient and suggested that Blavatnik make his best offer. Compl. ¶ 71; Larkin Aff. Ex. 1 at 20) Later that day, Blavatnik increased the offer to $48 per share. (Compl. ¶ 71; Larkin Aff. Ex. 1 at 20; Kassin Aff. at 2). After Lyondell retained a financial advisor, Deutsche Bank, to explore possible strategic alternatives, and

the Lyondell board compared the benefits to the Lyondell shareholders of such a transaction with those of remaining an independent entity and discussed the valuation of Lyondell, all of the directors present voted unanimously to approve the merger with Basell. (Compl. ¶¶ 73, 77; Larkin Aff. Ex. 1 at 21-22). Lyondell and Basell issued a joint press release on July 17, 2007, announcing the merger. (Compl. ¶ 78; Larkin Aff. Ex. 2). On August 14, 2007, the Proxy was filed with the SEC in connection with the Proposed Transaction. (Compl. ¶ 79).

C. Plaintiff's Deficient Complaint.

On August 20, 2007, Plaintiff brought this action seeking to enjoin the merger between Lyondell and Basell because, for the most part, he believes the merger price is unfair.[2] (Compl. ¶¶ 4, 5, 8, 9, 12, 41, 46, 52, 55). However, in challenging the Proposed Transaction, Plaintiff does not allege waste, the existence of a higher, better offer, or that the Lyondell board members were interested, engaged in self-dealing, or lacked independence. Moreover, Plaintiff has not alleged any facts suggesting that the Lyondell shareholders cannot decide for themselves whether to approve the Proposed Transaction or seek appraisal. Instead, Plaintiff offers only speculative allegations that, among other things, the 3% termination fee impeded the Lyondell directors from

[2] Similar litigation in connection with the Proposed Transaction is also ongoing in the District Court of Texas in an action captioned *Plumbers & Pipefitters Local 51 Pension Fund v. Lyondell Chemical Co.*, C.A. No. 2007-43958. This Texas action was filed on July 17, 2007. Basell was not named as a defendant in the Texas action; only after Plaintiff filed this Complaint naming Basell as a defendant did the Texas plaintiff join Basell as a defendant in that action. Therefore, the Delaware action was the first-filed action to name all of the relevant parties to the Proposed Transaction as defendants. Moreover, Basell AF, a foreign corporation, has not yet been properly served in the Texas action, and intends to pursue all applicable defenses.

obtaining a more beneficial offer (Compl. ¶ 13) and that "certain members of management *may be* offered the opportunity to participate as equity investors in the deal." (Compl. ¶ 92) (emphasis added). These conclusory allegations do not state a claim under Delaware law. In addition, Plaintiff raises a host of disclosure claims, all of which have no merit. (Compl. ¶¶ 79-89).

The only claim against Basell in the Complaint is for allegedly aiding and abetting the Lyondell Defendants' purported breach of fiduciary duty in connection with the Proposed Transaction. (Compl. ¶ 33). However, the Complaint is noticeably devoid of any specific facts suggesting that Basell (1) knowingly participated in any breach of fiduciary duty, or (2) participated in something other than arm's-length negotiations with Lyondell.

On September 12, 2007, Basell filed a motion to dismiss this action on the grounds that Plaintiff failed to state a claim for relief. The Lyondell Defendants also filed a motion to dismiss on the same grounds. Thereafter, on September 27, 2007, Basell filed a motion for summary judgment pursuant to Court of Chancery Rule 56. Both potentially dispositive motions are currently pending before the Court. On October 8, 2007, Basell moved to certify this action as a Class Action pursuant to Court of Chancery Rules 23(a) and 23(b)(1)-(2), and filed a brief in support of that motion.

ARGUMENT

I. LEGAL STANDARD.

"A court will grant a motion for summary judgment if the evidence of record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Krahmer v. Christie's, Inc.*, 911 A.2d 399, 404 (Del. Ch. 2006), *aff'd mem.*, No. 594, 2006, 2007 Del. LEXIS 177 (Del. Apr. 25, 2007); Court of Chancery Rule 56(c). If the moving party supports its motion with record evidence, "the nonmoving party must set forth specific facts showing that there is a genuine issue for trial." *Goodwin v. Live Entm't, Inc.*, C.A. No. 15765, 1999 Del. Ch. LEXIS 5, at *14 (Del. Ch. Jan. 22, 1999), *aff'd mem.*, No. 72, 1999, 1999 Del. LEXIS 238 (Del. July 23, 1999); Ch. Ct. R 56(e). "Summary judgment will be denied only if 'there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or inferences to be drawn therefrom.'" *See AGR Halifax Fund, Inc. v. Fiscina,* 743 A.2d 1188, 1192 (Del. Ch. 1999) (citation omitted). As discussed below, there are no material facts in dispute, and the issue of whether Basell aided and abetted the Individual Defendants' alleged breaches of fiduciary duty can be (and should be) resolved on summary judgment as a matter of law.

II. PLAINTIFF'S AIDING AND ABETTING CLAIM AGAINST BASELL DOES NOT RAISE DISPUTED MATERIAL ISSUES OF FACT, AND IS ENTIRELY WITHOUT MERIT.

It is well-settled under Delaware law that to state a claim for aiding and abetting a breach of fiduciary duty, a party seeking relief must prove the following elements: (1) the existence of a fiduciary relationship; (2) a breach of the fiduciary's

duty; (3) "knowing participation" in the breach by a defendant who is not a fiduciary; and (4) damages. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995); *see also In re General Motors (Hughes) S'holder Litig.*, C.A. No. 20269, 2005 Del. Ch. LEXIS 65, at *93 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006). The Court has found that the second and third prongs are the most relevant. *See General Motors*, 2005 Del. Ch. LEXIS 65, at *93. "Knowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach." *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001). A plaintiff must plead factual allegations from which knowing participation can be reasonably inferred. *See General Motors*, 2005 Del. Ch. LEXIS 65, at *94. If a plaintiff fails to plead such facts, then a plaintiff must have alleged that the fiduciary breached its duty in an "'inherently wrongful manner,'" or that the act taken by the fiduciary was *per se* illegal. *Id*. at *95.

Here, Plaintiff failed to allege *any* facts that suggest Basell knowingly participated in a fiduciary breach. There cannot reasonably be a genuine dispute as to material facts over this claim, and it must be dismissed as a matter of law. Moreover, Plaintiff has not alleged (and cannot reasonably claim) that any of the provisions in the Merger Agreement, such as the 3% termination fee, are "inherently wrongful" or "*per se* illegal." *See In re Telecomms., Inc. S'holders Litig.*, C.A. No. 16470, 2003 Del. Ch. LEXIS 78, at *14 (Del. Ch. July 7, 2003) (dismissing aiding and abetting claim and holding that acquiror's agreement to terms of a merger is insufficient alone to meet burden to plead knowing participation). Instead, Plaintiff only makes conclusory and

speculative statements in his complaint that "Basell is aware that the Individual Defendants are fiduciaries and have *apparently* actively and knowingly participated in the Buyout in order to obtain the substantial financial benefits at the expense of the stockholders." (Compl. ¶ 33) (emphasis added). Such statements are not sufficient to sustain an aiding and abetting claim. *See General Motors,* 2005 Del. Ch. LEXIS 65, at *95 ("Conclusory statements of knowing participation will not suffice"); *see also, e.g., In re Santa Fe Pac. Corp.*, 669 A.2d at 72 (holding that the conclusory statement that the alleged aider and abettor "had knowledge of" the director defendants' fiduciary duties and "knowingly and substantially participated and assisted" in the alleged breaches did not state a claim); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 735 (Del. Ch. 1999) (holding that the complaint's conclusory allegation that the alleged aider and abettor '"approved and urged"' the director defendants to enter into the merger agreement did not state a claim). In any event, for the reasons stated below, Plaintiff has failed to satisfy the second and third elements of an aiding and abetting claim.

A. Plaintiff Does Not State A Claim For Breach Of Fiduciary Duty Against The Individual Defendants.

Plaintiff has failed to state a claim for breach of fiduciary duty. As a result, Plaintiff's aiding and abetting claim must also fail as a matter of law. *See, e.g., Manzo v. Rite Aid Corp.*, C.A. No. 18451-NC, 2002 WL 31926606, at *6 (Del. Ch. Dec. 19, 2002) (dismissing claim of aiding and abetting because underlying breach of fiduciary duty claims was dismissed with prejudice), *aff'd mem.*, 825 A.2d 239 (Del. 2003); *Goodwi*n, 1999 Del. Ch. LEXIS 5, at *89 (granting summary judgment on aiding and abetting claims after finding no breach of underlying fiduciary duty); *see also*

McGowan v. Ferro, 859 A.2d 1012, 1041 (Del. Ch. 2004) (accord), *aff'd mem.*, 873 A.2d 1099 (Del. 2005).

First, Plaintiff cannot reasonably claim that the Individual Defendants or their advisors were interested, materially conflicted, or lacked independence. Second, Plaintiff has not stated a *Revlon* claim. Third, to the extent Plaintiff is claiming that the merger price was unfair, such a bare allegation does not state a claim under Delaware law. *See Porter v. Texas Commerce Bancshares, Inc*., C.A. No. 9114, 1989 WL 120358, at *4-5 (Del. Ch. Oct. 12, 1989) (holding that "repeated allegations of the inadequacy of the merger price do not themselves create a claim" and "may be disposed of summarily"). Finally, Plaintiff's disclosure claims are equally without merit. Therefore, Plaintiff has not demonstrated that the Lyondell directors breached their fiduciary duties of good faith or loyalty. [3]

1. Plaintiff has not demonstrated a conflict of interest.

It is well-settled that conclusory allegations of breach of fiduciary duty will not suffice to state a claim. *See McMillan v. Intercargo Corp*., 768 A.2d 492, 503 (Del. Ch. 2000). Plaintiff makes two flimsy allegations in an attempt to show that the Lyondell board is conflicted.

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[3] To the extent Plaintiff is seeking monetary damages against the Individual Defendants for breaches of their fiduciary duty of care, such claim is barred under the exculpatory provision in Article VII of Lyondell's Certificate of Incorporation. (Larkin Aff. Ex. 3). As a result, summary judgment must be granted to the Individual Defendants as to the duty of care claims. *Goodwin*, 1999 Del. Ch. LEXIS 5, at *15. Accordingly, Plaintiff "may survive summary judgment only by pointing to record evidence creating a genuine factual dispute whether the defendant directors breached their fiduciary duties of good faith or loyalty." *Id.* at *16. Plaintiff has not done so here.

First, Plaintiff claims that the Individual Defendants "will reap a significant windfall by the immediate vesting of their options and restricted stock." (Compl. ¶ 90). However, these payments are not unique to the Individual Defendants; ***all*** option holders are entitled to receive the same cash payments for their options upon the closing of the merger.[4] Moreover, the fact that the holders of outstanding stock options are entitled to receive consideration in respect of such stock options upon consummation of a merger does not create a conflict between the interests of the directors and the interests of stockholders. *See Krim v. ProNet, Inc.*, 744 A.2d 523, 525 (Del. Ch. 1999). The Individual Defendants have a powerful incentive to obtain as much as possible for their stock options. The value of those options are tied to price of the merger; the higher the merger price, the more the options are worth at closing. Thus, the director's interests are aligned with the interests of all Lyondell stockholders. *See, e.g., In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1004 (Del. Ch. 2005) (CEO's "compensation from the merger results from the stock and options he holds – he therefore had more incentive than almost anyone to make sure that the board did the best risk-adjusted job it could of getting the best price"). In any event, Plaintiff has not alleged that these payments are material to the directors. *See, e.g., In re CompuCom Sys., Inc. Stockholders Litig.*, C.A. No. 499-N, 2005 WL 2481325, at *8 (Del. Ch. Sept. 29, 2005) (dismissing action, holding that "complaint simply does not allege that these . . . benefits were ***material*** to the directors") (emphasis added).

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[4] In addition, option holders would likely be entitled to receive these payments in other similar transactions. (Larkin Aff. Ex. 1 at 35-36).

Second, Plaintiff – without alleging any supporting facts or presenting any evidence – claims that "[i]n addition to maintaining their management positions with the Company, although no agreements have been disclosed, certain members of management ***may be*** offered the opportunity to participate as equity investors in the deal." (Compl. ¶ 92) (emphasis added). Such rote speculation does not state a colorable claim. *See In re General Motors (Hughes) S'holders Litig.*, 897 A.2d 162, 168 (Del. 2006) (holding that a court is not required to accept as true conclusory allegations without specific supporting factual allegations). As described in the Proxy, "there had been no discussions with Mr. Blavatnik regarding whether there would be continuing roles for members of Lyondell management following any such transaction." (Larkin Aff. Ex. 1 at 21). Furthermore, as of the date of the Proxy, "neither [Lyondell], Basell nor any affiliate thereof has entered into any employment agreements with our management in connection with the merger, nor amended or modified any agreements or plans." (Larkin Aff. Ex. 1 at 40; Kassin Aff. at 2). Plaintiff has not presented any record evidence to the contrary.

Accordingly, because the undisputed facts demonstrate that the Lyondell board members and their advisors were disinterested in the Proposed Transaction, any duty of loyalty claim against the Individual Defendants fails to state a claim. *See, e.g., In re Lukens Inc. S'holders Litig.*, 757 A.2d at 728-29.

2. Plaintiff's Revlon claim must fail.

To the extent this transaction even implicates the heightened scrutiny of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), Plaintiff has not produced any evidence creating a genuine issue of material fact as to whether the

Individual Defendants breached their *Revlon* obligations. This Court has not hesitated to dismiss *Revlon* claims as a matter of law when a plaintiff fails to produce record evidence suggesting that the directors acted outside the range of reasonableness. *See, e.g.*, *Goodwi*n, 1999 Del. Ch. LEXIS 5, at *74. The Delaware Supreme Court has held that there is "no single blueprint" under Delaware law that a board must follow in the context of a sale of a company in order to fulfill its fiduciary duties. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). For example, in *In re Wheelabrator Techs. Inc. S'holders Litig.*, this Court dismissed *Revlon* claims, holding that, "even assuming . . . that *Revlon* duties were triggered . . . no facts are alleged that support a cognizable claim that those duties were breached here." C.A. No. 11495, 1992 WL 212595, at *8 (Del. Ch. Sept. 1, 1992). The Court explained:

> [E]ven if there occurred a "fundamental change of corporate control" that triggered *Revlon* duties under *Barkan*, the plaintiffs have not alleged that WTI's directors were so uninformed about WTI's value that they violated their *Revlon* duties by not conducting an active survey of the market, or "market check."
>
> What the plaintiffs do allege is that WTI's directors failed to conduct a market check to assure themselves that there were no superior alternative transactions. That, without more, is insufficient. Under *Barkan* the plaintiffs must allege that WTI's directors did not have adequate information about the value of WTI. Here, the complaint says nothing about what the directors did (or did not) know about WTI's value.

Id. at *8-9; *McGowan*, 859 A.2d at 1034 (granting summary judgment, "[t]he failure to conduct a market check, by itself, is insufficient to state a claim for breach of fiduciary duty"); *Herd v. Major Realty Corp.*, C.A. No. 10707, 1990 WL 212307, at *9 (Del. Ch. Dec. 21, 1990) (dismissing claim that directors breached their fiduciary duties by failing to employ an auction or market check mechanism); *In re KDI Corp. S'holders Litig.*, C.A.

No. 10278, 1990 WL 201385, at *3-5 (Del. Ch. Dec. 13, 1990) (dismissing claim that directors breached their fiduciary duties in evaluating competing acquisition proposals); *Freedman v. Rest. Assocs. Indus., Inc.*, C.A. No. 9212, 1990 WL 135923, at *6 (Del. Ch. Sept. 19, revised Sept. 21, 1990) (dismissing *Revlon* claim that directors breached their fiduciary duties by failing to hold an auction); *see also In re Fort Howard Corp. S'holders Litig.*, C.A. No. 9991, 1988 Del. Ch. LEXIS 110 (Del. Ch. Aug. 8, 1988) (accord).

Plaintiff has not produced, alleged, or come forward with any evidence suggesting that the Individual Defendants had divided loyalties, were uninformed about the value of Lyondell, or otherwise acted outside the range of reasonableness. Plaintiff's mere conclusory allegation that the Individual Defendants failed to conduct an adequate sale process for Lyondell (Compl. ¶ 5) does not state a violation of *Revlon*. *See, e.g., In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 706 (Del. Ch. 2001) (holding that the mere fact that the board decided to focus on negotiating a favorable price with one bidder and not to seek out other bidders is not one that alone supports a breach of fiduciary duty claim); *In re RJR Nabisco, Inc. S'holders Litig.*, C.A. No. 10389, 1989 WL 7036, at *19 (Del. Ch. Jan. 31, 1989) (holding under *Revlon* that defendants did not act unreasonably by ending the bidding process because asking one more time "for a highest and best bid *might* itself have costs. It is not inconceivable that [the bidder] . . . could have walked away from the transaction.") (emphasis in original).

In fact, the Proxy provides record evidence detailing the Individual Defendants' efforts to maximize value for Lyondell's stockholders and explains the basis

for their decision to support a merger with Basell. (Larkin Aff. Ex. 1 at 16-23). Therefore, even construing the record evidence in the light most favorable to Plaintiff, it cannot be disputed that the Lyondell board had a reasonable basis to conclude that the Basell merger was the best transaction reasonably available to Lyondell stockholders. Accordingly, "the director defendants were not required to abandon the transaction simply because a better deal *might* have become available in the future." *McGowan*, 859 A.2d at 1034-35 (emphasis in original).

Plaintiff also suggests that the Individual Defendants breached their fiduciary duties by agreeing to deal protection provisions in the Merger Agreement, such as a "no-shop" provision and a 3% termination fee. (Compl. ¶¶ 95-103). This claim has no merit. This Court has recognized that "no shop" and termination fee provisions are common in merger agreements, and has dismissed claims challenging such provisions when – as is the case here – there was no indication that the target board was uninformed about the value of the company and the "no talk" provision contained a fiduciary out.[5] *See, e.g.*, *McMillan*, 768 A.2d at 505-06 (dismissing claims and holding that the no-shop and termination fee provisions were "standard" deal protection provisions that were hardly indicative of a *Revlon* or *Unocal* breach); *Lewis v. Leaseway Transp. Corp.*, C.A.

[5] Indeed, Plaintiff himself concedes that the "no-shop" provision contains a fiduciary out such that the Individual Defendants may respond to a Superior Proposal. (Compl. ¶ 103; *see also* Larkin Aff. Ex. 4, ¶ 4.2(b)).

No. 8720, 1990 Del. Ch. LEXIS 69, at *16 (Del. Ch. May 16, 1990) (dismissing claims that defendants subjected the company to a breakup fee and a no shop clause).[6]

Further, the termination fee provision represents only 3% of the deal value and is well within the range of reasonable termination fees. *See, e.g., Goodwin*, 1999 Del. Ch. LEXIS 5, at *69 (granting summary judgment, holding that a 3.125% termination fee is commonplace and within the range of reasonableness); *McMillan*, 768 A.2d at 505-06 (dismissing action, holding that a 3.5% termination fee was within the range of reasonableness); *Lewis*, 1990 Del. Ch. LEXIS 69, at *16 (dismissing challenge to a transaction that included a breakup fee and related expenses of approximately 3% of transaction value); *In re Toys "R" Us*, 877 A.2d at 1021 (finding a termination fee of 3.75% to be reasonable).

3. Plaintiff's disclosure claims are not colorable.

Plaintiff also raises a host of disclosure claims, none of which have merit. (Compl. ¶¶ 79-89). For the most part, Plaintiff complains that the Proxy should contain additional information about the board's consideration of strategic alternatives and

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[6] *See also In re IXC Commc'ns, Inc. S'holders Litig. v. Cincinnati Bell, Inc.*, C.A. Nos. 17324, 17334, 1999 WL 1009174, at *6 (Del. Ch. Oct. 27, 1999) (applying business judgment rule and holding that the board did not breach its duty of care in agreeing to a "no talk" provision because the board was well-informed about the value of the company and the "no talk" provision was subject to a fiduciary out); *State of Wisconsin Inv. Bd. v. Bartlett*, C.A. No. 17727, 2000 WL 238026, at *9 (Del. Ch. Feb. 24, 2000) ("[I]n the absence of breach of fiduciary duty in agreeing to the lock-up devices [such as no-shops], these provisions are reviewable as business judgments and are, thus, granted deference."); *Yanow v. Scientific Leasing, Inc.*, C.A. Nos. 9536, 9561, 1991 WL 165304, at *10 (Del. Ch. July 31, 1991) (granting motions to dismiss and for summary judgment and rejecting claim that board violated Revlon by agreeing to a so-called "window shop" restriction that allowed the target to cooperate with a bidder making a superior offer).

information regarding Deutsche Bank's analyses. Though Defendants could always add "additional information" on any subject, "Delaware law does not require disclosure of 'all available information' simply because available information 'might be helpful.' The plaintiff has the burden of demonstrating materiality." *In re Siliconix Inc. S'holders Litig.*, C.A. No. 18700, 2001 WL 716787, at *9 (Del. Ch. June 19, 2001) (citations omitted). Plaintiff has not made such a showing here. Courts have long cautioned that "a lenient standard for materiality poses the risk that corporations will 'bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decisionmaking.'" *Skeen v. Jo-Ann Stores, Inc.*, C.A. No. 16836, 1999 WL 803974, at *4 (Del. Ch. Sept. 27, 1999), *aff'd*, 750 A.2d 1170 (Del. 2000) (citation omitted). Where, as here, "'arm's-length negotiation has resulted in an agreement which fully expresses the terms essential to an understanding by shareholders of the impact of the merger, it is not necessary to describe all the bends and turns in the road which led to that result.'" *Van de Walle v. Unimation, Inc.*, C.A. No. 7046, 1991 WL 29303, at *15 (Del. Ch. Mar. 6, 1991) (quoting *Repairman's Serv. Corp. v. Nat'l Intergroup, Inc.*, C.A. No. 7811, 1985 WL 11540, at *8 (Del. Ch. Mar. 15, 1985)).

Further, Plaintiff's quibbles about the substance of Deutsche Bank's opinion do not state a disclosure claim under Delaware law. *See, e.g., In re JCC Holding Co. S'holders Litig.*, 843 A.2d 713, 721 (Del. Ch. 2003) (stating that mere "quibble with the substance of a banker's opinion does not constitute a disclosure claim"). Indeed, as Vice Chancellor Strine explained in *JCC Holding*:

> The penalty for providing a full summary of the work of an investment banker that sets forth an informative description of the reasoning that led

> the banker to issue its fairness opinion would be subjection to a disclosure suit if the plaintiff can plausibly argue that the banker made subjective judgments in its valuation analysis that could be considered erroneous and that could have materially affected the outcome of its fairness determination. ***This is a perverse incentive system at odds with our law's encouragement of informative disclosure of the valuation analyses underlying fairness opinions supporting board recommendations of mergers***. The JCC board's duty was simply to make *fair disclosure* of the material facts in its possession bearing on the fairness of the merger it was putting before the stockholders. By setting forth a fair summary of the valuation work Houlihan in fact performed, the board met its obligation under our law.

Id. at 721-22 (emphasis added); s*ee also Abrons v. Marée*, 911 A.2d 805, 813 (Del. Ch. 2006) (stating that "Delaware courts must 'guard against the fallacy that increasingly detailed disclosure is always material and beneficial disclosure'"). And as this Court explained in *MONY*, a "fair summary" of an investment banker's valuation conclusions "does not require the Board to include [the banker's] entire report exactly as it saw it when it made its decision to recommend the Agreement." *In re MONY Group Inc. S'holder Litig*., 852 A.2d 9, 27-28 (Del. Ch. 2004); *see also General Motors*, 2005 Del. Ch. LEXIS 65, at *65 (declining to order disclosure of "raw data behind the advisors' updated summaries"); *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1073 (Del. Ch. 2001) ("Delaware courts have held repeatedly that a board need not disclose specific details of the analysis underlying a financial advisor's opinion.").

The Proxy does just that – it discloses a fair summary of the valuation analyses Deutsche Bank performed. (Larkin Aff. Ex. 1 at 26-33). Contrary to Plaintiff's contentions, the Individual Defendants are not required to disclose the most minute details of Deutsche Bank's analysis. Therefore, the Individual Defendants complied with

their disclosure duty under Delaware law, and Plaintiff has not stated a disclosure claim under Delaware law.[7]

For these reasons, Plaintiff has failed to state a fiduciary claim, and therefore his aiding and abetting claim must be dismissed.

B. Basell Did Not Knowingly Participate In An Alleged Wrongdoing.

In the alternative, even if the Court determines that there is a genuine dispute over whether the Individual Defendants breached their fiduciary duty, Plaintiff's aiding and abetting claim still fails because Plaintiff has not adequately shown that Basell "knowingly participated" in a breach of fiduciary duty. In fact, Plaintiff has presented no evidence from which "knowing participation" can be inferred, or from which it can be established that the Lyondell board members breached their fiduciary duties in an "inherently wrongful" manner. *See General Motors*, 2005 Del. Ch. LEXIS 65, at *116 (dismissing aiding and abetting claim for failure to state cognizable claim of either knowing participation or that the fiduciary breached its duty in an inherently wrongful manner); *see also Nebenzahl v. Miller*, C.A. No. 13206, 1996 WL 494913, at *7 (Del. Ch. Aug. 26, revised Aug. 29, 1996) (dismissing aiding and abetting claim because plaintiffs alleged only conclusion and conjecture that defendant knowingly participated in fiduciary's breach).

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[7] Further, it is also important to point out that Plaintiff makes no mention of Basell whatsoever in his disclosure violation allegations, and thus any aiding and abetting claim against Basell on that basis lacks merit. *Repairman's Serv. Corp. v. Nat'l Intergroup, Inc.*, C.A. No. 7811, 1985 Del. Ch. LEXIS 405, at *26-27 (Del. Ch. Mar. 15, 1985) (finding no likelihood of success on aiding and abetting claim where record contained no indication that third party conspired with fiduciary counterparts in preparation or issuance of the prospectus).

For example, Plaintiff does not put forth a shred of evidence suggesting that Basell attended Lyondell board meetings, directed those board members how to act, provided them with any advice, or otherwise knew or learned about any purported breach of duty. Moreover, Plaintiff has not shown that Basell was privy to, or involved in any way in, Lyondell's merger deliberations. Nor does Plaintiff demonstrate that Basell played a role in the Individual Defendants' ultimate merger decision or in the decision-making process whatsoever. *See Malpiede*, 780 A.2d at 1098 (dismissing aiding and abetting claim after finding that "there is no indication in the amended complaint that Knightsbridge participated in the board's decisions, conspired with board, or otherwise caused the board to make the decisions at issue").

Instead, the record reflects the arm's-length negotiations between Lyondell and Basell over the transaction at issue. (Larkin Aff. Ex. 1 at 16-23; Kassin Aff. at 2). "This Court has consistently held that evidence of arm's-length negotiation with fiduciaries negates a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries." *In re Frederick's of Hollywood, Inc. S'holders Litig*., C.A. No. 15944, 1998 Del. Ch. LEXIS 111, at *10 n.8 (Del. Ch. July 9, 1998); *see also Malpiede*, 780 A.2d at 1097 (holding that "a bidder's attempts to reduce the sale price through arm's-length negotiations *cannot* give rise to liability for aiding and abetting") (emphasis added); *see also General Motors*, 2005 Del. Ch. LEXIS 65, at *105. Thus, "an offeror who conducts arm's-length negotiations leading to an acquisition agreement cannot be said to be knowingly

participating in an alleged breach of fiduciary duty by the target board." *In re Frederick's*, 1998 Del. Ch. LEXIS 111, at *14.

Here, Plaintiff's own Complaint describes the ongoing negotiations between Access (on behalf of Basell) and Lyondell. (Compl. ¶¶ 58-59). Indeed, the record is clear that Lyondell rejected several offers from Access and only then accepted Access's best and final offer. (Compl. ¶¶ 59, 64, 70, 71, 75, 77; Larkin Aff. Ex. 1 at 16-23; Kassin Aff. at 2). Therefore, it cannot reasonably be disputed that the Proposed Transaction was the product of arm's-length negotiations between independent and disinterested boards and their financial and legal advisors.[8] Accordingly, under established Delaware law, Plaintiff's allegations are insufficient to state an aiding and abetting claim against Basell.

[8] In any event, Plaintiff cannot plausibly dispute that, as a matter of law, Basell was entitled to bargain to obtain the best deal for itself, and breached no duty in doing so. *In re Frederick's*, 1998 Del. Ch. LEXIS 111, at *16 (holding that acquiror's use of economic pressure in arm's-length negotiations to obtain "the best price that it could" did not constitute aiding and abetting a breach of fiduciary duty).

CONCLUSION

For the reasons set forth above, Basell respectfully requests that the Court grant its motion for summary judgment.

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