April 23, 2014

Chen v. Howard-Anderson

Delaware Court of Chancery Limits Scope of *Lyondell Chem. Co. v. Ryan* for Bad Faith Claims

SUMMARY

In a summary judgment opinion[1] issued on April 8, the Delaware Court of Chancery (VC Laster) held that in a change of control case governed by enhanced scrutiny, directors and officers could incur personal liability for a breach of their duty of loyalty if it is established that they acted unreasonably in conducting the sale process and allowed interests other than the pursuit of the best value reasonably available, i.e. an improper motive, to influence their decisions. The Court expressly rejected arguments that directors (or officers) could only be found to have acted in bad faith and thereby be personally liable for a breach of the duty of loyalty if it were determined that they were motivated by an intent to do harm or had consciously disregarded known obligations and utterly failed to attempt to obtain the best sale price, as articulated by the Delaware Supreme Court in *Lyondell Chemical Company v. Ryan*[2]. Applying the new standard to the case before it, the Court concluded that the evidence against the director defendants was not sufficient to impose personal liability under the new standard, but that the evidence was sufficient to proceed to trial against the officers on the same theory.

In particular, the Court found that the record, viewed as a whole, supported the inference that the directors of Occam Networks, Inc. ("Occam"), a NASDAQ-listed Delaware corporation, based on the totality of the circumstances, acted unreasonably in connection with the sale process they ran by favoring the ultimate acquirer in the challenged transaction, Calix Inc. ("Calix"), over another viable bidder and by failing to adequately explore alternatives that could have generated a higher sale value, citing in particular a 24-hour ultimatum given to the other bidder and the decision to conduct a limited, 24-hour market check over a holiday weekend. However, the Court granted summary judgment in favor of the defendant directors because the Court found that the plaintiffs failed to present evidence of any improper director motive and, consequently, if the case proceeded to trial, the director defendants would be exonerated of

any personal monetary liability for breach of the duty of care by the exculpatory provisions of Occam's certificate of incorporation. The Court declined to grant summary judgment in favor of the defendant Occam officers who are not entitled to benefit from the exculpatory provisions of Occam's charter[3], noting that the decision assumes without deciding that the same fiduciary principles apply to officers as directors[4].

The Court also declined to grant summary judgment in favor of the defendants with respect to whether Occam's proxy statement was false or misleading in its description of management projections and the sale process, holding that there were triable issues of fact as to whether the director defendants could avail themselves of the exculpatory provision in Occam's charter that would bar damages for disclosure violations resulting from breaches of the duty of care, particularly in view of the evidence that they had knowledge of the inaccuracies in the disclosure that could amount to bad faith.

The decision breaks new ground by limiting the director-protective standard for finding a bad-faith based breach of the duty of loyalty articulated in *Lyondell* to the narrow circumstances in which plaintiffs allege that a director demonstrates "conscious disregard" for his or her duties under *Revlon v. MacAndrews & Forbes Holdings, Inc.*[5] in a sale of control, and by applying that narrowed standard to both directors and officers involved in the sale. Among other things, the decision concludes that fairly routine change-in-control benefits available to an officer defendant were sufficient to raise triable issues of fact with respect to his proper motive. While the decision was made in the context of summary judgment motions by the defendant directors and officers (and the evidence viewed most favorably to the plaintiffs as a result) and in circumstances in which the Court may have believed the defendant directors had misled the Court with respect to certain factual matters at the preliminary injunction phase of the case, the rulings, if sustained in further proceedings, could have significant implications for directors and officers of Delaware corporations (and the financial advisors that counsel them).

The *Howard-Anderson* decision suggests that directors and officers could be found to be personally liable for monetary damages in circumstances where they have run a somewhat flawed sale process (which is deemed to be unreasonable at the summary judgment stage) if there is sufficient evidence of some improper motive, even if that improper motive did not lead them to knowingly disregard their responsibilities. The implications of the decision are particularly troubling for officers, who lack the statutory and charter protection from monetary liability for duty of care claims but may face liability for a sale process that is later found to be unreasonable. In addition, the bad faith standard adopted by the Chancery Court may expose both officers and directors to personal liability for defects in a sale process that are later found to have been the result of an improper motive. Moreover, because the Court was willing, in the circumstances, to consider that disclosure violations could amount to breaches of the duty of loyalty under the Court's newly articulated bad faith standard, the *Howard-Anderson* case also serves to emphasize the need for directors to review the proxy statement sent to stockholders in connection with the change of control. Finally, the emphasis placed by the Court on the potential disparate treatment of competing bidders highlights the importance of treating bidders equally or ensuring that any differences and the reasons for them are clearly discussed and documented.

BACKGROUND

In early 2009, Occam's chairman of the board discussed a possible sale transaction with Calix's CEO; in April, Occam engaged a financial advisor to evaluate strategic alternatives and, in May, Calix offered to acquire Occam for $7.02 per share (all stock). In July, Adtran Inc. ("Adtran") made overtures to Occam's president and CEO, Robert Howard-Anderson, regarding a possible transaction; Occam did not engage with Adtran until November, when the Occam board authorized management to pursue alternatives both for possible acquisitions as well as a sale of the company. The process continued until June of 2012, with Occam and its CEO taking action that could be viewed as favoring Calix over Adtran, with the possible motive for any favoritism not being clear. In June 2010, Calix and Adtran each submitted indications of interest to acquire Occam, with Calix offering $7.72 per share (cash/stock)[6] and Adtran offering a 30-35% premium to Occam's stock, or approximately $8.60 per share (all cash). Neither Adtran nor Calix were provided with management projections for 2012, which indicated significantly higher revenues than the public analyst projections on which their bids were based. When the Occam board met to consider its alternatives, Calix's CEO presented its proposal.[7] After the meeting, the Occam board directed Howard-Anderson to give Adtran, which had indicated a revised bid would be forthcoming by July 1, an ultimatum requiring the revised bid within 24 hours, and instructed its financial advisor to conduct a 24-hour market check. Adtran dropped from the process and, on the Thursday of the July 4th weekend, Occam's financial advisor emailed seven potential buyers (who do not appear to have been contacted previously), omitting Occam's name and requesting a response within 24 hours; five responded requesting additional information and time, but did not receive any follow-up.

On July 2, the Occam board authorized exclusive negotiations with Calix. Throughout July and August, Occam's financial performance exceeded expectations. When Occam's exclusivity agreement with Calix expired, Occam extended exclusivity without contacting other potential buyers or seeking to renegotiate price with Calix. In August, Occam's financial advisor received Occam's 2010 to 2012 management projections and was later told to disregard the 2012 numbers; its fairness opinion stated that management had advised that it did not prepare 2012 projections.

On September 16, 2010, Occam entered into a merger agreement with Calix for cash and stock valued at $7.75 per share, a 60% premium over Occam's then trading price. Plaintiffs holding approximately 19% of Occam's common stock filed suit on October 6, 2010, contending that the defendant Occam directors and officers breached their fiduciary duties by making sale transaction decisions that fell outside the range of reasonableness and disseminating a proxy statement that contained materially misleading disclosures and omissions. In February 2011, following the lifting of a preliminary injunction requiring corrective disclosure, approximately 50.5% of the Occam shares not subject to a support agreement with fifteen individual stockholders, including all seven director defendants and the two affiliated investment funds, and 64% of the total outstanding shares voted to approve the transaction, which thereafter closed. Following discovery, the defendants moved for summary judgment.

THE COURT OF CHANCERY'S DECISION

A. THE SALE PROCESS CLAIM

1. Enhanced Scrutiny Is the Standard of Review

Noting the relative value of the cash and stock components of the merger consideration was approximately 49.6% cash and 50.4% stock, the Court concluded that enhanced scrutiny review applied, notwithstanding that the merger already had closed.[8] While the Court found that CEO Howard-Anderson was interested as a result of the severance and other benefits that would accrue to him from the change of control[9], it nonetheless rejected plaintiff's argument that entire fairness review applied, finding that the majority of the directors were disinterested. In particular, the Court was unpersuaded that the two directors who were also general partners of investment funds that held approximately 15% and 10%, respectively, of Occam's shares were interested as a result of those multiple fiduciary obligations, noting that the interests of those funds and the Occam stockholders at large were fully aligned and therefore not in conflict. The Court stated that the mere fact that one of the funds was scheduled to wind down did not support a reasonable inference that the investment fund had a liquidity crisis that created a conflict of interest for the director who was also a general partner of that fund.

2. The Director and Officer Actions Fell Outside the Range of Reasonableness

The Court held that, viewed as a whole and in the light most favorable to the non-movant plaintiffs, the record supported the reasonable inference that the Occam directors and officers acted unreasonably by favoring Calix and failing to explore other alternatives that could have generated a higher sale value. While stressing that "there is competing evidence that supports the reasonableness of the Board's decisions"[10], the Court highlighted the fact that Occam's chairman of the board had initiated and maintained contact with Calix throughout the sale process and that Occam responded promptly to Calix, quickly signed a non-disclosure agreement, barely negotiated the term sheet and agreed to exclusivity, which it extended multiple times, in contrast to Occam's treatment of Adtran, even though Adtran submitted a letter of intent with an all-cash offer that was 11% higher than Calix's offer. The Court noted that not only did Occam not meet with Adtran or sign the nondisclosure agreement until five months after Adtran's initial request, but discussions with Adtran were delegated to Occam's financial advisor, whereas Occam's senior executives met with Calix. The Court focused on the fact that Occam did not "vigorously pursue other logical bidders"[11], notwithstanding that Occam's financial advisor had identified at least five other companies as first-tier bidders. The Court also noted that when Occam's financial advisor did reach out to perform a market check, it did so on the Thursday before the July 4th weekend, did not name Occam and established a 24-hour response deadline. Lastly, the Court noted that on the evidence, it seemed unreasonable for Occam to have given Adtran a 24-hour ultimatum to bid when there was no evidence that such a deadline was necessary.[12]

3. The Limited Scope of *Lyondell Chemical Company v. Ryan*

The Court next addressed whether the director defendants were entitled to summary judgment given the exculpatory provisions of Occam's charter, which the Court noted in turn depended upon whether the factual basis for the claim was solely attributable to a violation of the duty of care or whether it also entailed a bad-faith based breach of the duty of loyalty. The Court rejected defendants' argument that *Lyondell* required a grant of summary judgment in their favor unless the plaintiffs could show that the directors "utterly failed to attempt to obtain the best sale price."[13] Instead, the Court stated that "[t]he loyalty issue in this case is whether the directors allowed interests other than obtaining the best value reasonably available for Occam's stockholders to influence their decisions during the sale process, given that they made decisions falling outside the range of reasonableness."[14]

The Court held that *Lyondell* is dispositive only with respect to a duty of loyalty claim in which plaintiffs allege that the directors consciously disregarded known obligations imposed by *Revlon*, an argument the plaintiffs in this case had not advanced. The Court took pains to suggest that its holding was not a departure from the more director-protective standard seemingly established by the Delaware Supreme Court in *Lyondell*, which practitioners generally have regarded as establishing that plaintiffs must show that a director knowingly disregarded his or her duties to find bad faith, and that an imperfect attempt to carry out one's duties in the context of a sale of control does not equate with a knowing disregard of those duties.[15]

The Court cited to the Delaware Supreme Court's recitation in *Lyondell* of the three categories of fiduciary behavior set forth in *In re Walt Disney Co. Derivative Litigation*[16] that are candidates for bad faith, (i) conduct motivated by actual intent to do harm (subjective bad faith), (ii) gross negligence without malevolent intent (not bad faith) and (iii) the conscious disregard of one's duties (bad faith)[17], and to the *Lyondell* court's observation that the *Disney* decision did not purport to provide an exhaustive definition of bad faith.[18] The Court addressed *Lyondell'*s seeming rejection of bad faith being grounded on an inadequate or flawed sale process by confining the application of *Lyondell* to circumstances in which the plaintiffs allege that the directors consciously disregarded known obligations imposed by *Revlon*. The Court held that where plaintiffs invoke a different argument for bad faith — that an improper motive induced the unreasonable actions of the board — *Lyondell* is inapposite.[19]

Positing that bad faith could be inferred in "egregious circumstances" even where the Court applies the "any rational basis" standard of the business judgment rule, the Court noted that if *Lyondell* were to apply to exculpate directors in situations where directors have attempted, however incompetently, to meet their duties, "then the test for a transaction implicating enhanced scrutiny would be more lenient than the business judgment standard."[20] In arriving at this conclusion, the Court, citing with approval prior

Delaware jurisprudence suggesting that *Revlon* was essentially a duty of loyalty case[21], noted that enhanced scrutiny review is rooted in the concern that personal motivations might animate a board in the context of a change of control, and that the reasonableness standard of enhanced scrutiny provides the Court with the means to "smoke out mere pretextual justifications for improperly motivated decisions" and requires an inquiry into director motivation.[22] From there, the Court concluded that plaintiffs could defeat summary judgment by presenting evidence that supported an inference that director decisions that fell outside the range of reasonableness did so for reasons other than pursuing the best value reasonably available.[23]

Having established the new inquiry parameters, the Court concluded that the record did not support an inference that the directors were improperly motivated. The Court noted that the strongest suggestion of an improper personal interest motivating a director was the evidence of Occam's chairman's interactions with Calix and its CEO throughout the sale process, including evidence that the Occam chairman may have shared confidential information regarding internal Occam boardroom dynamics, but concluded that this evidence was not sufficient to support an inference that the chairman acted against his economic interests and did not support any inference other than an effort to achieve a transaction the chairman believed would maximize the value of his fund's — and all of Occam's other stockholders' — holdings. Similarly, the Court did not find that there was evidence that any other outside director was motivated by a "plausible non-stockholder-directed motive."[24] Consequently, the Court concluded that even if the director defendants' actions were found at trial to fall outside the range of reasonableness, the directors would at most have breached a duty of care and would be entitled to exculpation, thus warranting the granting of summary judgment in their favor.

However, the Court declined to grant summary judgment to Howard-Anderson in his capacity as CEO or to Occam's CFO on the basis that neither one was entitled to exculpation as a matter of law and the plaintiffs had assembled sufficient evidence to support a reasonable inference of favoritism toward Calix that was motivated by personal financial interests. In so holding, the Court, citing to the Delaware Supreme Court's decision in *Gantler v. Stephens*[25], stated that officers were subject to the same fiduciary duties as directors, but noted that the decision assumes without deciding that the same legal principles (including applicable standards of review) apply to officers as directors.[26]

B. THE DISCLOSURE CLAIMS

The Court denied the defendants' request for summary judgment that their disclosures in the proxy statement were accurate and any alleged omissions were disclosed or immaterial. The Court also rejected the defendants' contention that there was no post-closing remedy for the alleged breach of the duty of disclosure, stating that quasi-appraisal damages would be available if the defendants were shown at trial to have committed a non-exculpated breach of the fiduciary duty of disclosure.

In particular, the Court stated that plaintiffs had cited sufficient evidence that the 2012 projections, which had not been described in the proxy statement because, the defendants argued, they were unreliable and therefore not material, should have been disclosed, noting, among other things, that they (i) had been reviewed, vetted and adjusted for reasonableness by management (including after coordinating with Occam's financial advisor), (ii) may have been provided to Occam's financial advisor for purposes of its fairness opinion even though the financial advisor was later instructed by Occam's management to disregard them and (iii) may have been shared with Occam's board (which the defendants disputed). Similarly, the Court stated that there was evidence that the proxy statement characterization of the 2011 projections as standalone projections prepared without reference to whether the proposed transaction would be completed was inaccurate and misleading. The Court also found that there was sufficient evidence that disclosure relating to the financial advisor's fairness opinion was false insofar as it stated that the financial advisor had been provided with financial forecasts for 2010 and 2011 only and that Occam's management had advised it that it did not prepare any forecasts beyond 2011. Lastly, the Court noted that plaintiffs had produced extensive evidence indicating that the description of the sale process "more closely resembled a sales document than a fair and balanced factual description of the events leading up to the Merger Agreement"[27], citing particularly the omission of early contacts between Occam and Calix, the portrayal of Adtran as an unresponsive suitor and the failure to disclose that the Occam board ordered the 24-hour market check.[28]

Significantly, the Court held that it was not clear at the summary judgment stage whether the disclosure violations resulted from a breach of the duty of care or the duty of loyalty and that it was therefore premature to find that the director defendants could avail themselves of the exculpatory provision in Occam's charter that would bar damages for disclosure violations resulting from breaches of the duty of care. In particular, the Court noted evidence that the Occam directors knew about the 2012 projections and therefore knew that the fairness opinion falsely stated that Occam did not prepare post-2011 projections and knew that the Occam proxy statement misleadingly de-emphasized Occam's focus on Calix and mischaracterized the discussions with Adtran. The Court also noted that, in discovery and at the preliminary injunction phase of the case, defense witnesses denied the existence of the 2012 projections. As a result, the Court stated, it was unclear at the summary judgment phase whether the directors had acted in good faith.[29]

C. IMPLICATIONS

The *Howard-Anderson* decision breaks new ground by limiting the director-protective standard articulated in *Lyondell* to the narrow set of circumstances in which plaintiffs allege that a director or officer demonstrates "conscious disregard" for his or her *Revlon* duties in a sale of control by utterly failing to attempt to obtain the best price reasonably available. The decision, by articulating a new standard for bad faith in change of control cases, requires a court to look beyond the question of whether directors or officers have been motivated by an intent to do harm or have consciously disregarded known obligations, and, instead, to examine whether directors acted unreasonably for any reason other than the pursuit of the best value reasonably available, i.e. for an improper motive. This expanded standard raises the specter of more situations in which directors and officers will be found to have personal liability for their decisions in a change of control situation. The decision underscores that Delaware courts are focused on improper motives and conflicts and highlights the importance for a board of directors and officers to follow a careful and deliberative, well documented process in a sale of control. The decision also highlights the potential personal liability that could be imposed upon officers who participate in what a court finds to be an unreasonable sale process. Because the newly articulated bad faith standard also implicates whether a director has complied with his or her duty of disclosure, the *Howard-Anderson* case also serves to emphasize the need for directors to review the proxy statement sent to stockholders in connection with the change of control.

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ENDNOTES

1 *Chen v. Howard Anderson,* C.A. No. 5878-VCL slip op. (Del. Ch. April 8, 2014) (hereinafter, "*Slip Op*.").

2 970 A.2d 235 (Del. 2009).

3 The Court, in reaching this conclusion, noted that the Delaware General Corporation Law, which, in Section 102(b)(7), authorizes Delaware corporations to exculpate their directors (not officers) from liability for breaches of the duty of care if an enabling provision is included in the corporation's certificate of incorporation, has no corollary statute for officers. Slip Op. at 64.

4 The Court stated that while the Delaware Supreme Court has held that officers are subject to the same fiduciary duties as directors, it has not addressed the standard of review applicable to officer decision - making. *Id*. at 27 n.2.

5 506 A.2d 173 (Del. 1986).

6 At the end of May, Calix sent Occam an initial term sheet for a stock-for-stock transaction at $7.02 per share and asked for exclusivity. An internal Calix presentation indicated Calix would have been willing to pay over $9 per share and that they had access to information about Occam's board deliberations.

7 Occam's financial advisor presented the Calix and Adtran bids to the Occam board as equivalent for "illustrative purposes", and its analyses used the lowest public analyst revenue estimates for 2011 and 2010, although management projections indicated materially higher revenues for the same periods. The Court also noted that at the July 2nd meeting of the Occam board, Occam's financial advisor presented an updated analysis that used new, materially higher management projections, but there was no indication that the Occam board discussed the basis for the difference or how it would affect their decision-making.

8 Slip Op. at 30 (referring to *In re Smurfit-Stone Container Corp. Shareholder Litigation*, 2011 WL 2028076 (Del. Ch. May 20, 2011, revised May 24, 2011)). In dicta, the Court stated that a fully informed, non-coerced stockholder vote could have reduced the standard of review to business judgment, but that the defendants had not made the argument and, in any event, alleged disclosure deficiencies would have precluded the application of a lower standard. *Id*. at 33.

9 The Court concluded that Howard-Anderson was interested in the transaction with Calix because he received benefits from the transaction that were material to him—in excess of $840,500 in benefits, including $272,803 in cash severance. The Court also noted that Occam's board acted to increase the amounts due under Howard-Anderson's change-of-control severance agreement the same day that the merger agreement was executed. Slip Op. at 34.

10 *Id*. at 44.

11 *Id*. at 43.

12 *Id*. at 44.

13 *Id*. at 53 (quoting *Lyondell*, 970 A.2d at 244).

14 *Id*. at 48.

15 Slip Op. at 53. The Supreme Court, sitting in *de novo* review, cited three independent bases of error in the trial court's analysis and held: (1) *Revlon* duties do not apply before there is a decision to sell or the sale becomes inevitable; (2) *Revlon* and its progeny do not create a set of requirements that must be satisfied during a sale process; and (3) an imperfect attempt to carry out *Revlon* duties does not equate with a knowing disregard of one's duties that constitutes bad faith. *See Lyondell*, 970 A.2d at 241.

16 906 A.2d 27 (Del. 2006).

17 Slip Op. at 58 (quoting *Lyondell*, 970 A.2d at 240 (quoting *Disney*, 906 A.2d at 64-66)).

18 *Id*. at 58.

19 Notably, in *Lyondell*, the Supreme Court also observed that, in the transactional context, an "extreme set of facts is required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties. . . . The trial court denied summary judgment because the Lyondell directors' 'unexplained inaction' prevented it from determining that they had acted in good faith. But if directors failed to do all that they should have under the circumstances, they breached their duty of care.

(continued . . .)

ENDNOTES (CONTINUED)

Only if they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty." *Id*. at 243-44 (internal quotations omitted).

20 Slip Op. at 61; *see also id*. at 60 ("Imagine a field goal kicker who misses wide right. He failed, but did he 'utterly fail'? Certainly not: he tried and missed. But at what point does the failure become 'utter'? If his foot missed the ball? He still would have attempted the kick, and thus would not have 'knowingly and completely failed to undertake [his] responsibilities.' What if he picks up the ball, tries to run and fumbles, or tries to pass and throws an interception? In both instances he has failed to attempt a kick, his core responsibility, but he did try to do something. If an attempt is all that matters, as the 'utter failure' test suggest[]s, then one can well wonder how a board ever could 'utterly fail' in the change of control setting.") (quoting Bradley R. Aronstam & David E. Ross, *Retracing Delaware's Corporate Roots Through Recent Decisions: Corporate Foundations Remain Stable While Judicial Standards of Review Continue to Evolve*, 12 Del. L. Rev. 1, 13 n.73 (2010)).

21 Slip Op. at 50-52.

22 *Id*. at 52.

23 *Id*. at 61.

24 *Id*. at 63.

25 965 A.2d 695 (Del. 2009).

26 *See* Slip Op. at 28, 64-66.

27 *Id*. at 72.

28 *Id*. at 66-74.

29 *Id*. at 74-77.

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