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The Delaware Supreme Court has set a very high hurdle for plaintiffs challenging directors' good faith in the sale of a company. In *Lyondell Chemical Company v. Ryan*, the court held that unconflicted directors could be found to have breached the good faith component of their duty of loyalty in the transactional context only if they "knowingly and completely failed to undertake," and "utterly failed to attempt" to discharge, their duties.[1]

In this paper I argue that the *Lyondell* standard effectively imports into the transactional context the exacting standard previously applied in the oversight context—a move clearly aimed at substantially limiting directors' liability exposure for conscious disregard of duty. Part I of the paper traces the evolution of the good faith concept over recent decades, including the Delaware Supreme Court's acceptance in its 2006 *Disney* opinion of a formulation of non-exculpable bad faith conduct by unconflicted directors in the employment context involving "intentional" and "conscious" disregard of duty.[2] Part II contrasts this strict state of mind requirement with an even stricter standard applied later that year in *Stone v. Ritter* to establish bad faith in the board oversight context.[3] I then turn to *Lyondell*, where the Delaware Supreme Court in 2009 extended the exacting standard of *Stone* to the transactional context.[4]

Commentary on *Lyondell* has suggested that the decision effectively forecloses monetary liability for unconflicted directors in the transactional context. I argue in Part III, however, that while the opinion undoubtedly limits directors' liability exposure, it is amenable to a reading that preserves some limited capacity for the good faith component of the duty of loyalty to discipline boards in the sale of a company.

I. WHAT IS "GOOD FAITH"?

While "good faith" in the corporate context has historically been associated with "honesty of purpose" in discharging one's duties,[5] as a practical matter there was little reason to expend much effort fleshing out the concept before 1986, when the Delaware General Corporation Law (DGCL) was amended to include a new section 102(b)(7).[6] In response to a perceived liability crisis resulting from a Delaware Supreme Court decision imposing personal liability on unconflicted directors for gross negligence in the sale of a company, the DGCL was amended to permit charter

1. *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243–44 (Del. 2009). In its opinion, the court drew no distinction between "bad faith" and "failure to act in good faith." *Id.* at 240 n.8. Neither do I here.

2. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 64–67 (Del. 2006).

3. *See* Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006).

4. *Lyondell*, 970 A.2d at 243–44.

5. For an extensive etymological discussion of the term, see Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law* 19–34 (Harvard John M. Olin Discussion Paper No. 630, 2009), *available at* http://ssrn.com/abstract=1349971.

6. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

provisions eliminating directors' monetary liability for breaches of the duty of care.[7] Rather than saying as much, however, the statute more broadly permitted exculpation for "breach of fiduciary duty," and then carved out exceptions specifying fiduciary breaches that could not be exculpated—notably, breaches of the "duty of loyalty" and "acts or omissions not in good faith."[8]

This approach simultaneously suggested that good faith differed from care (only the latter being exculpable) *and* from loyalty (a separately enumerated exception), rendering uncertain the doctrinal status of good faith.[9] In its 1993 opinion in *Cede & Co. v. Technicolor, Inc.*,[10] the Delaware Supreme Court suggested that good faith might represent its own distinct fiduciary duty, famously explaining that a shareholder could rebut the business judgment rule by showing that directors "breached any one of the *triads* [sic] of their fiduciary duty—good faith, loyalty or due care."[11] However, neither *Cede* nor any subsequent opinion by the Delaware Supreme Court would shed any light on what this third fiduciary duty would embrace. Indeed, the Court of Chancery never accepted the "triad" framework; Vice Chancellor Strine, in particular, missed no opportunity to emphasize its conceptual redundancy with the duty of loyalty.[12] In *Nagy v. Bistricer*,[13] Strine dismissed the "so-called 'duty of good faith,'" rejecting the notion that a director could "simultaneously act in bad faith and loyally towards the corporation and its stockholders."[14] In *Guttman v. Huang*,[15] he reiterated this position, criticizing both the "triad" framework for "separat[ing] the duty of loyalty from its own essence," and section 102(b)(7) itself for "balkaniz[ing] the duty of loyalty" by enumerating distinct exceptions all of which in fact "illustrate conduct that is disloyal."[16]

Within a few years, the doctrinal association of good faith with a broad conception of loyalty would become clear. In *Disney*, the Delaware Supreme Court offered

7. On the Delaware Supreme Court's decision in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), and events leading up to the adoption of section 102(b)(7), see Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 1131, 1139–47 (2006).

8. Other exceptions include "intentional misconduct or a knowing violation of law," improper dividends, and transactions involving "improper personal benefit." *See* § 102(b)(7)(i)–(iv).

9. *See* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 14 (2005). *But see* Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 590 (2008) (arguing that the Delaware Supreme Court should not have "allowed the section 102(b)(7) tail to wag the dog" in defining the relationship between good faith and loyalty).

10. 634 A.2d 345 (Del. 1993).

11. *Id.* at 361.

12. For an overview of the cases, see Bruner, *supra* note 7, at 1150–62.

13. 770 A.2d 43 (Del. Ch. 2000).

14. *Id.* at 48 n.2.

15. 823 A.2d 492 (Del. Ch. 2003).

16. *Id.* at 506 n.34.

"conceptual guidance to the corporate community" in the context of litigation over the hiring and firing of Michael Ovitz, who allegedly received $130 million in severance for a single uninspired year as Disney's president.[17] While not straightforwardly addressing the "triad" framework, the court did explain that a care-based violation—that is, "fiduciary action taken solely by reason of gross negligence and without any malevolent intent"—cannot amount to bad faith, because section 102(b)(7) sharply distinguishes the two for exculpation purposes.[18] The court then accepted a formulation of non-exculpable bad faith conduct articulated by Chancellor Chandler—"intentional dereliction of duty, a conscious disregard for one's responsibilities."[19] This requirement that the lapse be "intentional" and "conscious" set a high hurdle, effectively rejecting calls for liability upon a showing of "reckless" disregard of duty.[20] Yet the *Disney* standard clearly established that monetary liability could be imposed—notwithstanding a section 102(b)(7) charter provision—for bad faith conduct not involving financial conflicts of interest.

II. WHEN SHOULD DAMAGES BE AVAILABLE FOR BAD FAITH CONDUCT?

The *Disney* standard, however, was far from the last word on the duty of good faith in Delaware corporate law. In *Stone v. Ritter*,[21] another 2006 decision addressing a board's alleged failure to meet its oversight duties, the court clarified a number of fundamental issues. The court notably rejected the "triad" and established that good faith is a component of the duty of loyalty (for which it cited Vice Chancellor Strine's opinion in *Guttman v. Huang*).[22]

By rejecting the "triad" formulation, *Stone* brought to a close two decades of debate over the doctrinal status of good faith. Simply defining good faith as a branch of loyalty does not, however, resolve the distinct question of what the liability standard ought to be in any given context.[23] *Disney* required an "intentional" and "conscious" disregard of duty in the employment context, but it remained to be seen how this standard might be applied in other circumstances. *Stone* began to answer this question as well, addressing the standard for oversight liability in a manner that would significantly impact the future development of good faith jurisprudence.

17. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 35, 64 (Del. 2006).

18. *Id.* at 64–65.

19. *Id.* at 66–67.

20. *See, e.g.*, Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 488–91 (2004).

21. 911 A.2d 362 (Del. 2006).

22. *Id.* at 369–70. For further discussion of the intrinsic relationship between concepts of good faith and loyalty, and the capacity of the duty of loyalty to reach well beyond financial conflicts of interest, see generally Bruner, *supra* note 7; Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457 (2009); Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27 (2003); Strine et al., *supra* note 5.

23. *See, e.g.*, Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on* Disney, *Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 401 (2007) ("[D]efining good faith does not resolve its place in litigation.").

Concluding that the standard articulated by Chancellor Allen in his 1996 *Caremark* opinion is "fully consistent with" the *Disney* standard, the court held that "the lack of good faith" required for oversight liability is established by "'a sustained or systematic failure of the board to exercise oversight—such as *an utter failure to attempt* to assure a reasonable information and reporting system exists.'"[24]

Stone styled this approach as a situation-specific endorsement of a standard for oversight liability "consistent with" the more general *Disney* standard for bad faith conduct. However, it would not be long before the more stringent *Stone/Caremark* standard—requiring "sustained or systematic failure . . . such as an utter failure to attempt"[25] to meet one's duties—would effectively displace the *Disney* standard as the core test for bad faith conduct. This next stage in the evolution of good faith would occur in the transactional context, where the Delaware Supreme Court has held that once the sale, break-up, or change of control of a company is "inevitable," the board's duty becomes "maximization of the company's value at a sale for the stockholders' benefit."[26]

Lyondell involved a shareholder class action suit alleging that approval of the $13 billion merger of Lyondell Chemical Company with an acquisition subsidiary of Basell AF was tainted by the Lyondell board's financial conflicts of interest, disclosure failures, and failure to discharge its duty under *Revlon* to maximize the value received by shareholders.[27] In his July 2008 opinion, Vice Chancellor Noble granted the Lyondell directors' motion for summary judgment with respect to the alleged financial conflicts of interest and disclosure failures.[28] This meant that the plaintiff could overcome Lyondell's section 102(b)(7) charter provision only by showing that the board failed to act in good faith in discharging its *Revlon* duty.[29] Ultimately Noble denied the motion for summary judgment with respect to the *Revlon* claims, finding that "the Board's failure to engage in a more proactive sale process may constitute a breach of the good faith component of the duty of loyalty as taught in *Stone v. Ritter*."[30]

Noble focused heavily on the Lyondell board's inaction during a two-month period following the filing of a Schedule 13D with the Securities and Exchange

24. *Stone*, 911 A.2d at 369 (emphasis added) (quoting *In re* Caremark Int'l Inc. Derivative Litig., 968 A.2d 959, 971 (Del. Ch. 1996)).

25. *Id.*

26. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); *see also* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 43–44 (Del. 1994) (applying this duty to "a sale of control").

27. Lyondell stockholders received $48 cash per share ("a substantial premium to market"). *See* Ryan v. Lyondell Chem. Co., C.A. No. 3176-VCN, 2008 Del. Ch. LEXIS 105, at *2 (Del. Ch. July 29, 2008).

28. *Id.* at *119.

29. *Id.* at *48.

30. *Id.* Noble also granted summary judgment with respect to claims that Basell aided and abetted the Lyondell board's breaches of fiduciary duty, and denied plaintiff Ryan's application for additional discovery. *See id.* at *112–19.

Commission. The filing on May 11, 2007, disclosed a Basell affiliate's right to buy a block of Lyondell stock—apparently putting the company "in play."[31] Characterizing the board as "indolent, making no effort to value the Company or to assess what options might be on the table *if* Basell (or another acquirer) made a move to acquire Lyondell,"[32] Noble concluded that they "never made an effort to conduct a formal market check of any kind; instead, [the board] languidly awaited overtures from potential suitors reacting to [the] 13D filing."[33]

While acknowledging that "every transaction is different and every board confronts unique circumstances," such that there is "'no single blueprint'" that a board must follow, Noble nevertheless read *Revlon* and progeny as "suggest[ing] that in most instances a board contemplating a sale of control is duty bound to engage actively in the sale process."[34] The Lyondell board, however, had done essentially nothing during the two-month period before Basell offered to acquire the company on July 9, 2007, and Noble found "very little evidence that the Board actually negotiated . . . or actively participated in the sale process" before voting in favor of the deal.[35] Citing to *Stone's* reiteration of the *Disney* standard—permitting a finding of non-exculpable bad faith "'[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities'"—Noble explained that *Revlon* represented "a known set of 'duties' requiring certain conduct or impeccable knowledge of the market in the face of Basell's offer to acquire the Company."[36] Because the board "appear[ed] never to have engaged fully in the process to begin with," and to have made "no discernible effort at salesmanship either before or after the Merger was announced,"[37] Noble concluded that the defendants' motion for summary judgment could not be granted because non-exculpable bad faith might be demonstrated.[38]

In his August 2008 opinion denying the directors' motion for certification of an interlocutory appeal to the Delaware Supreme Court, Noble clarified his understanding of the good faith standard following *Stone*. That he viewed the oversight and transactional contexts as fundamentally dissimilar was implicit in his denial of summary judgment, where he cited to *Stone's* reiteration of the *Disney* standard, rather than to its endorsement of the more exacting *Caremark* standard. As he would explain in the August 2008 opinion:

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31. *Id.* at *18–19.

32. *Id.* at *21.

33. *Id.* at *65.

34. *Id.* at *51 & n.72 (quoting Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989)).

35. *Id.* at *21–34, *66–71.

36. *Id.* at *86–87.

37. *Id.* at *84–85.

38. *Id.* at *87–88.

> 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.[39]

Here, Noble illuminates a critical step in his analysis of good faith in the *Revlon* context. Recall that in *Stone*, the court concluded that the *Caremark* standard is "fully consistent with" the *Disney* standard, and held that "the lack of good faith" required for oversight liability is established by "'a sustained or systematic failure of the board to exercise oversight—such as *an utter failure to attempt* to assure a reasonable information and reporting system exists.'"[40] Effectively *Stone* presented Noble with two options—the more plaintiff-friendly (but still demanding) *Disney* standard, requiring a showing of "intentional" and "conscious" disregard of one's duties, or the less plaintiff-friendly *Caremark* standard, requiring a showing of "a sustained or systematic failure . . . such as an utter failure to attempt" to discharge one's duties.[41] Noble chose the former. The Delaware Supreme Court, however, would come to a different view of the appropriate application of good faith.

Notwithstanding Noble's denial of the defendants' motion for certification of an interlocutory appeal, the Delaware Supreme Court accepted the application[42] and ultimately issued its opinion in March 2009. The court reversed, concluding that "[t]here is no evidence . . . from which to infer that the directors knowingly ignored their responsibilities, thereby breaching their duty of loyalty."[43] Consequently, the Lyondell directors were entitled to summary judgment on the *Revlon* claims.[44] In her opinion for a unanimous en banc court, Justice Berger rejected Noble's interpretation of *Revlon* and progeny, as well as his understanding of the applicable good faith standard after *Stone*.

Like Noble, the court cites to *Stone* for its formulation of the applicable good faith standard.[45] Unlike Noble, however, who saw the oversight and transactional contexts as fundamentally dissimilar and adhered more closely to the *Disney* standard, the Delaware Supreme Court articulated a standard for the transactional context that is essentially derivative of the more demanding *Caremark* standard for oversight cases. Noting that "'[i]n the transactional context, [an] extreme set of facts" would be required to establish bad faith,[46] Justice Berger explained:

39. Ryan v. Lyondell Chem. Co., C.A. No. 3176-VCN, 2008 Del. Ch. LEXIS 125, at *35 n.45 (Del. Ch. Aug. 29, 2008).

40. Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) (emphasis added) (quoting *In re* Caremark Int'l Inc. Derivative Litig., 968 A.2d 959, 971 (Del. Ch. 1996)).

41. *See supra* notes 23–24 and accompanying text.

42. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 237 (Del. 2009).

43. *Id.*

44. *Id.*

45. *See id.* at 244 n.36.

46. *Id.* at 243 (quoting *In re* Lear Corp. S'holder Litig., 926 A.2d 94 (Del. Ch. 2007)).

> Only if they *knowingly and completely failed to undertake* their responsibilities would they breach their duty of loyalty . . . . Instead of questioning whether disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price, the inquiry should have been whether those directors *utterly failed to attempt* to obtain the best sale price.[47]

Just as *Caremark* suggested that "*an utter failure to attempt* to assure a reasonable information and reporting system exists"[48] could establish bad faith in the oversight context, the court in *Lyondell* said that the issue in the transactional context is whether the directors "*utterly failed to attempt* to obtain the best sale price."[49] In *Revlon* cases, then, the court applies not the *Disney* standard, but a stricter one—effectively the *Disney* standard as refracted through *Caremark* in the *Stone* opinion. As Gordon Smith observed, "[t]he influence of *Caremark* is apparent here, and we know from experience that *Caremark* liability is almost unheard of in Delaware."[50]

In addition to deriving too plaintiff-friendly a standard from *Stone*, the court found that Noble took from *Revlon* and progeny too exacting a duty of board conduct. Justice Berger explained that "Revlon duties do not arise simply because a company is 'in play,'" but arise "only when a company embarks on a transaction—on its own initiative or in response to an unsolicited offer—that will result in a change of control."[51] Consequently, the two months of inaction following the Schedule 13D filing were irrelevant to the *Revlon* analysis, which should have focused exclusively on the period following the commencement of negotiations.[52] In evaluating the board's actions, Noble erred by effectively mandating that the board follow one of three procedures—an auction, a market check, or demonstrating "'impeccable' market knowledge."[53] As Justice Berger reiterated, "there are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties."[54] This meant that "the directors' failure to take any specific steps during the sale process could not have demonstrated a conscious disregard of their duties."[55] Focusing solely on the brief period following the offer, observing that "no legally prescribed steps" are required, and applying the *Stone/Caremark*-based standard, the Delaware Supreme Court saw

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47. *Id.* at 243–44 (emphasis added).

48. *See supra* note 24 and accompanying text.

49. *Lyondell*, 970 A.2d at 243–44 (emphasis added).

50. Gordon Smith, *Is the New "Bad Faith" an Empty Set in Delaware Fiduciary Law?*, CONGLOMERATE BLOG (Mar. 26, 2009, 12:01 PM), http://www.theconglomerate.org/2009/03/is-the-new-bad-faith-an-empty-set-in-delaware-fiduciary-law.html.

51. *Lyondell*, 970 A.2d at 242 (citing Paramount Commc'ns Inc. v. Time Inc., 571 A.2d 1140, 1151 (Del. 1990) and *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 71 (Del. 1995)).

52. *See id.*

53. *Id.* at 243.

54. *Id.*

55. *Id.*

"only one possible conclusion."[56] In that period, the board "met several times," was "generally aware of the value of the company," had financial and legal advisors on hand, and "attempted to negotiate a higher offer"—a record on which bad faith could not be found.[57]

III. THE FUTURE OF GOOD FAITH IN *REVLON*-LAND

The Delaware Supreme Court's *Lyondell* opinion has been widely interpreted as substantially limiting—if not practically eliminating—the ability to pursue monetary damages for bad faith conduct in the *Revlon* context, and perhaps beyond it.[58] In prior work I have written in support of the *Disney* standard's relatively strict state of mind requirement (i.e., that the disregard of duty be "intentional" and "conscious"), largely because a less rigorous requirement (say, "reckless" disregard of one's duties) would risk "a slippery slope back into monetary damages for lesser forms of negligence—an outcome both the [business judgment rule] and section 102(b)(7) were devised to prevent."[59] This concern is particularly salient given that state of mind—whether the disregard of duty is intentional, reckless, or merely negligent—will almost always have to be inferred from actual conduct.[60] However, it is far from obvious that a finding of bad faith would be justified only where directors "completely failed to undertake," or "utterly failed to attempt" to discharge, their fiduciary duties—if by that we mean doing literally nothing at all in the face of a known duty to act. As Andrew Lund observes, "there are undoubtedly processes short of utter failures that might still evince conscious disregard of duties by directors."[61]

Does the Delaware Supreme Court's opinion in *Lyondell* mean that bad faith disregard of duty can be found only where the directors in question do virtually nothing at all? There are certainly commentators who believe so.[62] That the opinion sets out to establish an exceedingly high hurdle for plaintiffs is clear, particularly given the superlative language used. Having found that *Revlon* kicked in only when actual negotiations began—rendering the prior two-month period of inactivity irrelevant—the court could easily have justified summary judgment based on established *Revlon* principles and the *Disney* standard of "intentional" and "conscious"

56. *Id.* at 243–44.

57. *Id.* at 244.

58. *See, e.g.*, Stephen Bainbridge, Ryan v Lyondell: *Del Sup Ct Speaks*, PROFESSORBAINBRIDGE.COM (Mar. 26, 2009, 3:53 PM), http://www.professorbainbridge.com/professorbainbridgecom/2009/03/ryan-v-lyondell-del-sup-ct-speaks.html; Gold, *supra* note 22, at 501–02; Andrew C. W. Lund, *Opting out of Good Faith*, 37 FLA. ST. U. L. REV. 393, 438–40 (2010); Smith, *supra* note 50.

59. *See* Bruner, *supra* note 7, at 1180–82; *see also* William T. Allen et al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002); Bainbridge et al., *supra* note 9, at 571; Griffith, *supra* note 9, at 29–33.

60. *See* Bruner, *supra* note 7, at 1179–80 n.229.

61. Lund, *supra* note 58, at 439.

62. *See supra* note 58.

disregard.[63] It is telling that the court chose to raise a hurdle that was already too high for the plaintiffs to clear.

Early indications from the Court of Chancery tend to recognize this. Recent opinions of Vice Chancellor Noble and Chancellor Chandler, addressing claims of bad faith failure to discharge *Revlon* duties, similarly incant the mantra of "no single blueprint" and "a reasonable decision, not a perfect decision"—well-established principles of *Revlon* review[64]—but now add *Lyondell's* requirement that the directors must have "knowingly and completely failed to undertake," and "utterly failed to attempt" to discharge, their duties.[65] This standard certainly tends to invite dismissal based on little more than a recitation of a handful of actions taken by the board in the sale process (particularly given that *Revlon* and progeny mandate no specific actions in the first place).[66] Chandler, in granting a motion for expedited preliminary injunction proceedings in another case, reflected that following *Lyondell*, "the shareholders' only realistic remedy for certain breaches of fiduciary duty in connection with a sale of control transaction may be injunctive relief."[67]

All of this said, however—and reiterating that I favor a demanding state of mind requirement—I do not consider it inevitable that *Lyondell* will literally foreclose non-exculpable bad faith in *Revlon* transactions not involving financial conflicts of interest. Good faith would appear to maintain some vitality where, as opposed to passively failing to pursue maximum price, directors actively pursue something else. It is worth recalling that *Revlon* itself involved such dynamics. In *Revlon*, the Delaware Supreme Court held that having entered a lock-up agreement with a favored bidder involving waiver of restrictive covenants in outstanding notes, and then bolstering the notes' market value to avoid litigation, "the Revlon board could not make *the requisite showing of good faith*."[68]

More pertinently, I believe that *Lyondell* is amenable to a reading permitting a finding of bad faith where the board has undertaken some action in connection with

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63. *See* Lund, *supra* note 58, at 439 n.234.

64. *See, e.g.*, Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286–87 (Del. 1989); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1000–01 (Del. Ch. 2005); *In re* Lear Corp. S'holder Litig., 926 A.2d 94, 115, 118 (Del. Ch. 2007).

65. *See In re* NYMEX S'holder Litig., Nos. 3621-VCN, 3835-VCN, 2009 Del. Ch. LEXIS 176, at *25–26 (Del. Ch. Sept. 30, 2009); Wayne County Employees' Ret. Sys. v. Corti, No. 3534-CC, 2009 Del. Ch. LEXIS 126, at *33–34, *51–53 (Del. Ch. July 24, 2009). *Cf. In re* Dow Chem. Co. Derivative Litig., No. 4349-CC, 2010 Del. Ch. LEXIS 2, at *39 (Del. Ch. Jan. 11, 2010) (assessing allegations of bad faith by an acquiring company's board).

66. *See, e.g.*, *Corti*, 2009 Del. Ch. LEXIS 126, at *52–53.

67. Police & Fire Ret. Sys. of Detroit v. Bernal, No. 4663-CC, 2009 Del. Ch. LEXIS 111, at *6–7 (Del. Ch. 2009).

68. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (emphasis added). Admittedly, the court does identify an element of financial conflict of interest, in that the directors' actions "avoided personal liability to a class of creditors." *Id.* at 184. In any event, this holding placed a constraint on language in *Unocal* permitting regard for "other corporate constituencies" in deploying defensive measures. *Id.* at 182; *see also* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

the sale, yet the board's conduct taken as a whole nevertheless reveals a total lack of commitment to discharging its duties. Situations where directors "knowingly and completely failed to undertake," and "utterly failed to attempt" to discharge, their duties represent a narrow set of cases indeed—particularly given the court's insistence that "the directors' failure to take any specific steps" cannot itself demonstrate this.[69] The question for now, however, is whether it is literally a null set. It has been argued that the *Lyondell* standard effectively amounts to something like "irrationality" review.[70] I am not convinced, however, that *Lyondell's* standard must be interpreted to mean that only an outright irrational process permits a finding of bad faith in the sale of a company. To say that an "extreme set of facts" is required to find bad faith in the *Revlon* context is to suggest that a finding of bad faith may occur at least where there are extreme procedural shortcomings (and not only where there is no conceivable business justification for the actions taken).[71]

I think it is also worth noting that the language used—"completely fail[ing] *to undertake*" and "utterly fail[ing] *to attempt*"—does not literally foreclose a finding of bad faith simply because some action was taken.[72] Each formulation requires that the director at least minimally try—reflecting a continuing focus on genuine intent to discharge one's duties. Had the court meant "utterly fail to act"—rather than "to undertake" or "to attempt"—it could have said so. A court applying *Lyondell* could reasonably find that directors knowingly, completely, and utterly failed to try to discharge their duties, even where some minimal action was taken in purported response to such duties.

IV. CONCLUSION

Lyondell imports into the transactional context the very high hurdle for a finding of bad faith previously applied in the oversight context. I have suggested that the *Lyondell* standard is amenable to a reading preserving some minimal capacity for the good faith component of the duty of loyalty to discipline boards in *Revlon* transactions. It is not remotely what proponents of a robust conception of good faith have sought. But in light of the degree of risk aversion historically prevailing among corporate directors,[73] even this slight exposure may amount to something more than nothing.

69. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243–44 (Del. 2009).

70. *See* Stephen M. Bainbridge, *Does Irrationality = Bad Faith?*, PROFESSORBAINBRIDGE.COM (Apr. 27, 2009, 3:37 PM), http://www.professorbainbridge.com/professorbainbridgecom/2009/04/does-irrationality-bad-faith.html.

71. *Lyondell*, 970 A.2d at 243.

72. *E.g.*, OXFORD ENGLISH DICTIONARY ONLINE, attempt, *v.* (2d ed. 1989) (including "To try, endeavour, essay"); OXFORD ENGLISH DICTIONARY ONLINE, undertake, *v.* (2d ed. 1989) (including "To take upon oneself").

73. *See* Bernard S. Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055 (2006).

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