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

BLACKMORE PARTNERS, L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 454-N
	)	
LINK ENERGY LLC, J. ROBERT CHAMBERS, JULIE H. EDWARDS, THOMAS M. MATTHEWS, ROBERT E. OGLE, JAMES M. TIDWELL, S. WIL VANLOH, JR., and DANIEL J. ZALOUDEK,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Submitted: August 10, 2005
Decided: October 14, 2005

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LAMB, Vice Chancellor.

Blackmore Partners L.P., instituted this action against Link Energy LLC and the members of its board of directors, alleging, *inter alia*, breaches of the defendants' fiduciary duties, arising out of a completed sale of Link's operating assets at a price likely to yield zero value to Link's equity owners. On November 1, 2004, this court denied the defendants' motion to dismiss, holding that the complaint alleged sufficient facts that, if true, would support a claim of disloyal conduct.[1] Following the conclusion of discovery, the defendants now move for summary judgment. Construing all evidence in favor of the plaintiff, the court nevertheless concludes that there are no material issues of fact in dispute, and that the defendants are entitled to the entry of judgment in their favor.

I.

A. Link's Emergence From Bankruptcy

The facts of this case, as developed in discovery, are largely uncontested. In October 2002, EOTT Energy Partners, L.P. filed for bankruptcy protection pursuant to Chapter 11 of the United States Bankruptcy Code.[2] On March 1, 2003, Link emerged from that reorganization as successor in interest to EOTT, planning to engage in the same business of purchasing, gathering, storing, transporting,

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[1] *Blackmore Partners, L.P. v. Link Energy LLC*, 864 A.2d 80 (Del. Ch. 2004).
[2] Matthews Dep. 13: 5-6, April 1, 2005.

processing and reselling crude oil, refined petroleum products, natural gas liquids, and other related products.[3]

As part of the plan of reorganization, Link issued $104 million in senior unsecured 9% notes ("Notes"), in lieu of $235 million of 11% senior notes owed to a range of EOTT creditors.[4] In addition, those same creditors received 95% of the newly issued common equity units in Link ("Units").[5] Three percent of the Units were distributed to the former holders of EOTT's common units, one of whom is the plaintiff in this case.[6] While these exchanges resulted in a reduction in debt, Link remained relatively highly leveraged when it emerged from bankruptcy. In addition, Link had access to working capital through a credit facility with Standard Chartered Bank, which provided $290 million in funding until August 2004, subject to liquidity requirements waivable by that bank in its discretion.[7]

The instrument governing the Notes contained a restrictive covenant requiring any purchaser of substantially all of Link's assets to assume the Notes.[8] The provision was designed to ensure creditors that any such purchaser would honor the Notes, or at least ensure that the Note holders had a seat at the negotiating table in any post-bankruptcy acquisition of Link. In contrast to this

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[3] Matthews Dep. 35-37, April 1, 2005.
[4] *Id.* at 19.
[5] *Id.* at 18-20.
[6] *Id.*
[7] Defs.' Answering Br. In Opp. To Pl.'s Motion for Class Action Determination, Ex. 1, 58.
[8] Defs.' Opening Br., Ex. 13, Section 4.1b.

power given to the Note holders, the Link operating agreement empowered the Link board of directors to authorize a sale of all or substantially all of Link's assets without a vote of the Unit holders.

Link was headed by CEO Thomas Matthews, who was joined on the board of directors by six persons appointed by EOTT's former note holders pursuant to EOTT's Restructuring Plan.[9] Of the six additional directors, none except J. Robert Chambers (a managing director at Lehman Brothers, which held the same 19.1% share of both Units and Notes) had any affiliation or connection with any of EOTT's former note holders or with holders of the newly issued Notes.[10]

The plan of operations devised by Link management hinged on its ability to attract a $100 million infusion of new equity into the company, which could be used to lower Link's debt levels and reduce its cost of credit. Link therefore entered the capital markets to search for an equity partner. Its efforts, however, were unsuccessful. Despite hiring Lehman Brothers in December 2003[11] to act as its financial adviser to assist the company in searching for new money, discussions failed with one investment group during the summer and early fall of 2003,[12] and with another by February 2004.[13]

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[9] Matthews Dep. 22, April 1, 2005.
[10] Ogle Dep., 8-9, April 28, 2005; Tidwell Dep., 10-14, April 7, 2005; Vanloh Dep., 6-13, May 9, 2005; Zaloudek Dep., 4-10, May 13, 2005.
[11] Defs.' Opening Br., Ex. 21.
[12] Defs.' Opening Br., Ex.15.
[13] Defs.' Opening Br., Ex. 26; Matthews Dep. 51: 7-12 April 1, 2005.

Link attempted to improve its financial state by selling some non-strategic assets during its search for equity, disposing of its West Coast natural gas liquids process, transportation, and marketing assets on June 26, 2003; certain crude oil marketing and transportation assets on October 1, 2003; and its remaining natural gas liquids assets on December 31, 2003.[14] Link also entered into a Crude Oil Joint Marketing Agreement with ChevronTexaco, effective as of January 1, 2004, allowing the company to reduce its letter of credit cost for oil by leasing a pipeline to ChevronTexaco in return for a fixed margin.[15] All these efforts, however, were insufficient to offset losses caused by a worsening business environment. Thus, Link's board of directors determined to explore new ways of reducing the company's debt to the Note holders.[16]

B. The Plains Transaction

This determination, combined with threats by the provider of Link's credit facility to force the company into bankruptcy,[17] caused Link to consider an acquisition offer by Plains All American Pipeline, L.P. of substantially all of the company's assets, first made in December 2003. In January 2004, the Link board of directors formed a Special Committee, consisting of all directors other than

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[14] Defs.' Opening Br., Ex. 19.
[15] Vanloh Dep. 93, May 9, 2005.
[16] *Id.* at 93-94.
[17] Chambers Dep. 167: 1-12, April 6, 2005.

Matthews and Chambers to consider potential transactions. Plains initially appeared willing to assume the Notes as required by the bonds' restrictive covenant. If it had done so, the market value of the Notes, which were then trading at a discount, would have increased substantially as a result of Plains's substantially stronger credit rating.[18] Plains ultimately made clear, however, that it would only assume the Notes upon a substantial, and probably prohibitive, discount to the purchase price for Link's assets. The company therefore began negotiating conditions under which the Note holders would be willing to waive their veto rights over potential transactions.[19]

In February 2004, Plains made an indication of interest of $310 million for Link's assets.[20] At this figure, there might have been some recovery for Unit holders, though such a desirable result was by no means assured.[21] That price, however, was not Plains's final offer. Rather, as Plains conducted due diligence on Link, the price that Plains was willing to offer for Link's assets dropped repeatedly.[22] The figure finally agreed upon after due diligence and negotiations between Link and Plains was $290 million.[23] At the same time, Note holders agreed to waive the restrictive covenant, in return for a commitment by Link to

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[18] Vanloh Dep. 60:1-9, May 8, 2005.
[19] Rodd Aff., Ex. 33.
[20] Defs.' Opening Br. Ex. 32.
[21] Matthews Dep. 141-142, April 1, 2005.
[22] *Id.* at 139: 7-12.
[23] Defs.' Opening Br. 12.

repay the Notes at par plus accrued interest, and to pay the Note holders their proportionate share of up to $25 million from any funds remaining after the company wound up its affairs, but before any distribution to Unit holders. As the press release announcing the finalized deal made clear, the transaction at $290 million was likely to provide no recovery at all for Unit holders, given the demands of Link's debt and the deal struck with the Note holders.[24]

On March 16, 2004, Link announced that it was in advanced negotiations with a potential buyer, that sale proceeds would be used to retire the company's debt, and that Unit holders were likely to receive a minimal amount after the payment of all Link's liabilities, obligations, and contingencies.[25] On the heels of that announcement, the market price of Link Units collapsed, dropping from over $5 to roughly $1. Nonetheless, over the next two weeks, negotiations with Plains progressed to completion, and the deal was ready to close by the beginning of April. With the board of directors' agreement that the sale was the best available option for Link, the company's Special Committee met on March 30, 2004 to consider the Plains transaction. At that meeting, the investment bank Petrie Parkman presented supporting information for its fairness opinion on the Plains transaction.[26] The Special Committee also heard an update to the fairness opinion

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[24] *Id.* at Ex. 12.
[25] Rodd Aff., Ex. 16.
[26] Defs.' Opening Br., Ex. 39.

presented by Lehman Brothers to the board of directors on March 29.[27] Upon a report by the board's counsel, and a full discussion of the Plains transaction, the Special Committee recommended the sale on March 30, 2004.[28] The transaction closed on April 1, 2004, and Link has now begun the process of winding up operations.

C. Link's Insolvency

The factual question of whether Link was insolvent or in the zone of insolvency during the contested period is an important one for the court's final disposition in this case, as it controls whether the board of directors owed fiduciary duties to the Note holders. The uncontraverted expert report of M. Freddie Reiss, introduced by defendants during discovery, examined Link's continued viability under three independent tests.[29] The first of these techniques, the so-called "balance sheet test," is "concerned with the relative value of a company's equity."[30] Under this test, a company's value can be determined either by individual asset valuation, in which each asset is valued on a going concern basis, or by business enterprise valuation, a more commonly used method which assumes that all assets are sold together, along with the business as a whole.[31] The second

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[27] *Id.*
[28] *Id.*, Ex. 39.
[29] Defs.' Opening Br., Ex. 28.
[30] *Id.* at 34.
[31] *Id.*

technique used by Reiss is known as the "cash flow test," and examines whether a company can "reasonably meet its anticipated fixed (on-balance sheet and contingent) obligations as they become due."[32] Finally, Reiss examined Link under the "unreasonably small capital test," which "relates to whether a company has enough capital to finance its planned future operations."[33] If a company's capital is inadequate under the "unreasonably small capital test," then it is insolvent unless it can (1) successfully issue new equity or (2) restructure existing debt.[34]

Reiss came to the conclusion that Link was insolvent during the period relevant to this case under all three of these tests. The fair value of the company's assets on a going concern basis was less than the fair value of the liabilities, which means that Link failed the individual asset valuation prong of the balance sheet test.[35] After using two methods of business enterprise valuation, moreover, Reiss came to a negative figure for the value of Link's equity.[36] Nor could Link meet its obligations as they became due, suffering from strained liquidity, negative cash flow, and operating losses.[37] Finally, Reiss concluded that Link had too little capital to finance its future operations, and could not rely on issuing new equity or

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[32] *Id.* at 58.
[33] *Id.* at 68.
[34] *Id.*
[35] *Id.* at 45.
[36] *Id.* at 57.
[37] *Id.* at 61.

refinancing existing debt.[38] The plaintiffs have produced no evidence at all contradicting Reiss's report, or presented any evidence of their own suggesting that Link was not insolvent. The Reiss report, therefore, is the only piece of evidence in the record directly on point of Link's insolvency.

D. The Plaintiff's Allegations

The plaintiff makes three key allegations. First, the plaintiff argues that because the Plains transaction deprived the Unit holders of consideration that would have gone to them but for the actions of the board in agreeing to the demands of the Note holders, the actions of the Link board of directors should be subject to enhanced scrutiny. Second, the plaintiff argues that even if enhanced scrutiny does not apply, the presumption of the business judgment rule should be rebutted in this case due to a litany of deficiencies they ascribe to the process that led to the Plains transaction. Specifically, the plaintiff alleges that Matthews and the board were ill informed, and that no independent financial adviser was hired by the board of directors or the Special Committee to opine on the fairness of the Plains transaction to Unit holders;[39] that the Special Committee was tainted by Matthews's and Chambers's presence and participation at most meetings of the Committee;[40] that Chambers himself was conflicted because his employer, Lehman

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[38] *Id.* at 68.
[39] Hutchinson Dep., 55: 7-11, May 12, 2005.
[40] Rodd Aff., Ex. 2 at 5-6; Ex. 5; Ex. 6; Ex. 8; Ex. 27.

Brothers, owns both Units and Notes; that Matthews failed to use the negotiating leverage provided by the threat of bankruptcy to persuade Note holders to accept an arrangement that would provide greater value to Unit holders;[41] and that Matthews and the Link board of directors ignored a potentially superior "alternative recapitalization proposal" forwarded by Jeffrey Priest,[42] the managing member, president, and sole originator and founder of Amajac (the general partner of the plaintiff Blackmore Partners).

According to Priest's deposition, the content of this alternative transaction proposal was essentially as follows: Priest attempted to contact Link first in January, leaving a voice mail with an unidentified person at Link indicating that Amajac would be interested in organizing financing for Link.[43] Receiving no immediate response to his voicemail, Priest claims to have called Link again three to five days later, and again received no response.[44] Finally, Priest spoke to an analyst who worked with Link in an attempt to make contact with the company's management, but succeeded only in learning that Link would do nothing without consulting Priest.[45] No other evidence was presented concerning any alternative transaction emanating from Priest.

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[41] Kaelber Dep., 180-81, April 18, 2005.
[42] Priest Dep. 5-16, March 11, 2005.
[43] *Id.* at 41-42.
[44] *Id.* at 62.
[45] *Id.* at 66: 20-25.

Finally, the plaintiff contends that the defendants violated their duty to disclose material facts to the Unit holders by waiting until March 16, 2004 to give any indication that the Plains transaction might leave the Unit holders without recovery. Because this fact was only confirmed in a press release on March 31, 2004, one day before the transaction closed,[46] the plaintiff argues that he was not given sufficient time to take action on the provided information.

The defendants deny that they violated any of their fiduciary duties, and argue the lack of any factual basis for the plaintiff's contentions about the handling of negotiations with Note holders,[47] and as to the supposed alternative proposal made by Priest.[48] The defendants also argue that although Matthews and Chambers were present during many Special Committee meetings, the record shows that they were there only as sources of information, and were asked to leave at crucial moments.[49]

II.

Under Court of Chancery Rule 56, summary judgment will be granted when the moving party demonstrates that there are no genuine issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law. When

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[46] Rodd Aff., Ex. 18.

[47] Matthews Dep., 177:15-24, April 1, 2005.

[48] The defendants claim never to have even heard of the plaintiff, Amajac, or Priest until the filing of the law suit. Matthews Dep. 51: 1-2, April 1, 2005; Chambers Dep. 163: 13-18, April 6, 2005. Vanloh Dep., 123: 20-21, May 9, 2005.

[49] Chambers Dep., 105:4-15, April 6, 2005; Vanloh Dep., 54:4-12, May 9, 2005.

determining whether to grant summary judgment, a court must view the facts in the light most favorable to the nonmoving party.[50]

Delaware's business judgment rule operates primarily as a presumption that directors making business decisions act in good faith, on an informed basis, and in the honest belief that their actions are in the corporation's best interest.[51] The burden is on the party challenging the decision[52] to allege particularized facts creating a reasonable doubt that (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.[53] The plaintiff here also alleges that the board's action in depriving the Unit holders of value is subject to a form of enhanced scrutiny. The court will examine this last claim, and then test the board's action against the business judgment rule.

III.

The plaintiff claims that Chancellor Allen's decision in *Orban v. Field*[54] requires "that when a board approves a transaction that favors one corporate constituency over another, they lose, at least as an initial matter, the cloak of

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[50] *Haas v. Indian River Volunteer Fire Co*., 2000 Del. Ch. LEXIS 116, *11, *aff'd,* 768 A.2d 469 (Del. 2001).
[51] *Aronson v. Lewis,* 473 A.2d 805, 812 (Del. 1984).
[52] *Id.* at 812, *citing Puma v. Marriot,* 283 A2d. 693, 695 (Del. Ch. 1971).
[53] *Id.* at 815.
[54] 1997 Del. Ch. LEXIS 48.

business judgment protection."[55] But the plaintiff's reliance on *Orban* for the proposition that the company owed the Unit holders a higher duty of care in this case is misplaced.

It is doubtless true, as Chancellor Allen noted in *Orban*, that a board deploying corporate power against a class of shareholders must specially demonstrate that it acted reasonably and in good faith.[56] But that duty, though important, is limited to circumstances where the board uses the very levers of corporate power against its own shareholders in order to achieve some purportedly higher end. In *Orban* itself, for example, the board did not simply make a business decision that hurt shareholders while repaying creditors, but engaged in an elaborate maneuver in which the defendant company intentionally diluted a major shareholder to a position where he was powerless to stop a merger favored by the directors.[57] In the face of such overwhelming force, it was clearly appropriate for the court to require the board to demonstrate the reasonableness and good faith of its action on a full evidentiary record. And even in that case, the court eventually upheld the board's action as necessary in otherwise pressing circumstances.[58]

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[55] Pl.'s Answering Br. In Opp'n to Defs.' Mot. for Summ. J. 28.
[56] *Orban,* 1997 Del. Ch. LEXIS at *28-29.
[57] *Id.* at *32-3.
[58] *Id.*

This case stands in sharp contrast to *Orban*. The corporate action complained of here, though it did result in Unit holders being left with no residual value, did not involve the use of corporate power against a shareholder class in the sense of *Orban*. The defendants did not act "solely or primarily for the express purpose of depriving a shareholder of effective enjoyment of a right conferred by law."[59] Crucially, the Unit holders, by charter, did not even retain the right to vote on the sale of substantially all of Link's assets. Thus, no extraordinary efforts were needed to secure approval, or to stop a vote, for no such approval or vote was necessary. In such a case, it seems plain that *Orban*'s enhanced scrutiny does not apply.[60] It is a test designed for different circumstances, ones raising the omnipresent specter of management entrenchment.

Even if one were to apply *Orban* to this case, however, the defendants meet the enhanced standard required by that case. Link was insolvent, teetering on the brink of bankruptcy. At any moment, the provider of its chief credit facility could have forced it into default. Business prospects were declining, reducing daily the amount of consideration the company could hope for in any non-bankruptcy alternative. Finally, no better transaction was available. These corporate interests are every bit as compelling as those that were served in *Orban*.

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[59] *Phillips v. Insituform*, 1987 Del. Ch. LEXIS 474, *18.
[60] *See Orban*, 1997 Del. Ch. 48. *See also Insituform*, 1987 Del. Ch. LEXIS at *12.

IV.

A. The Company's Fiduciary Duty To Creditors

The plaintiff claims that the defendants violated their fiduciary duties to Unit holders by concentrating on the interests of creditors to the exclusion of their fiduciary duties to Unit holders. This claim fails on summary judgment.

Under Delaware law, directors generally owe no fiduciary duties to creditors. In limited cases, however, such duties do arise. As this court held in *Geyer v. Ingersoll Publications Company*, "directors do not owe creditors duties beyond the relevant contractual terms absent 'special circumstances.'"[61] Under long established precedent, one of those circumstances is insolvency, defined not as statutory insolvency but as insolvency in fact, which occurs at the moment when the entity "has liabilities in excess of a reasonable market value of assets held."[62] When the insolvency exception arises "it creates fiduciary duties for directors for the benefit of creditors."[63] The court, therefore, must first decide whether the company was insolvent at the time of the disputed transaction, and second whether the defendants discharged their duties to Link's Unit holders.

As to the first question, the plaintiff apparently concedes in its brief that the company was indeed insolvent as a matter of fact at the time of the Plains

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[61] 624 A.2d 784, 787 (Del. Ch. 1992).
[62] *Geyer*, 621 A.2d at 789 .
[63] *Id*. at 787.

transaction. Even if the court reads the plaintiff's brief as trying to reserve the question of the company's insolvency,[64] the plaintiff does not contradict expert testimony introduced by the defendants as to the insolvency of the company in the relevant period.[65] The plaintiff is correct, of course, to say that having fiduciary duties to creditors does not excuse violations of fiduciary duty to Unit holders. During insolvency, the directors owe fiduciary duties to both the creditors and the Unit holders. But ultimately, the board of directors of an insolvent company may take into account the interests of creditors at the apparent expense of stockholders if, in doing so, the board meets its fiduciary duties to all relevant constituencies.

B. The Business Judgment Presumption

The plaintiff alleges that the business judgment rule's presumption of due care and good faith should be rebutted for two reasons. First, the plaintiff claims that the company's transaction with the Note holders was "wholly flawed" in part because Chambers was conflicted, therefore tainting board determinations. The claim that Chambers was conflicted rests primarily on the fact that Chambers was a managing director of Lehman Brothers, a holder of an equal percentage of both the

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[64] The plaintiff makes some ambiguous statements as to this point, but does not appear to contest the expert report presented by the defendants. ("[R]egardless of whether Link was insolvent, or in the zone of insolvency." Pl.'s Answering Br. in Opp'n to Defs.' Mot. for Summ. J. 35-36.)

[65] Ex. to Defs.' Opening Br. in Supp. of their Mot. for Summ. J. 42.

Notes and the Units.[66] To the extent the plaintiff has made a cognizable argument as to conflict, this court's decision in *Cooke v. Oolie*[67] is instructive. In that case, the defendants were both shareholders and creditors of a corporation considering an acquisition proposal, although their interests were not in proportion as Lehman's are here. As Chancellor Chandler noted, this left the defendants torn between their fiduciary duty of loyalty to shareholders, which required them to seek the best possible acquisition for that constituency, and their own status as creditors, knowing that "any acquisition of TNN might affect their financial interests."[68] The court frankly acknowledged that "the potential for a conflict of interest" was present.[69] But even amid that potential, the court granted summary judgment for the defendants, concluding that the plaintiffs bore the burden of showing that an actual conflict existed, and that the deal chosen by the defendants

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[66] It is unclear why Lehman's ownership of equal percentages of Notes and Units created a substantial conflict, at least as to the negotiation over whether to pay the Note holders more than was due to them by contract. Unlike the situation in *Cooke*, Lehman would seem to gain no financial advantage from allocating the residue of the Plains transaction to Notes rather than Units. Because it owns the same percentage of both instruments, Lehman would receive the same amount of consideration no matter how any remaining value after satisfying Link's creditors was divided. At most, therefore, Lehman's dual ownership served to make it indifferent as to whether funds were distributed to the Unit holders or to the Note holders. Hutchinson Dep. 46-49, May 12, 2005. The plaintiff also claims that Chambers was conflicted because Lehman Brothers issued a fairness opinion to the board in connection with the Plains transaction. But as the defendants note, Lehman's fairness opinion had nothing to do with the Note holder transaction. Rather, Lehman issued a fairness opinion relating to the entire Plains transaction. Rodd. Aff., Ex. 10.

[67] 2000 Del. Ch. LEXIS 89.

[68] *Id.* at *39.

[69] *Id.* at *40.

offered superior terms for creditors and inferior terms for the plaintiff shareholders compared to other proposals available to the defendant corporation.[70] Since the plaintiffs in *Cooke* did not present such evidence, their claims failed.

This case differs from *Cooke* on the fundamental basis that the defendants here did, in fact, owe fiduciary duties to creditors because the company was insolvent. The choice between creditors and Unit holders in this case, therefore, does not present the same clear conflict of interest this court perceived in *Cooke*. To the extent that a potential conflict of interest would arise by virtue of Chambers's membership on the board, there is no evidence of any other potential transaction that might have been better for Unit holders than the Plains transaction. The only possibility, Priest's shadowy proposal, remained at all times entirely hypothetical. Indeed, Priest conceded that the entirety of the so-called alternative proposal consisted of an ambiguous voicemail left with an undetermined person at Link to which an answer was never received.[71] This was, of course, far short of an alternative proposal.

Nor would the court's determination change if the court were to conclude that Chambers was indeed conflicted. The protections of the business judgment rule may still insulate a board decision from challenge so long as a majority of the

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[70] *Id*. at *41.
[71] Priest Dep. 43:1-24, March 11, 2005.

directors approving the transaction remain disinterested.[72] Aside from the unsubstantiated allegations discussed above as to Chambers, the plaintiff makes no claims that any other directors were interested, and therefore a clearly independent majority of the board made the relevant decisions.[73]

Second, the defendants do not rely solely on the independent board majority to justify their approval of the Plains transaction. Rather, even though the Link board was not required to delegate its responsibilities to a special committee in this case,[74] a special committee made up entirely of independent directors was indeed formed.[75]

The plaintiff claims that the Special Committee was rendered inutile by the presence of Matthews and Chambers during meetings of the Committee. But Delaware law does not require that special committees be segregated from sources of vital information. Moreover, there is no evidence at all that Chambers or Matthews influenced the Special Committee, or acted as anything more than necessary sources of information. Nor does the record reveal the kind of secret or subversive communications between Chambers and Matthews and others that

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[72] *Aronson*, 473 A.2d at 812.
[73] Though the plaintiff does not make this argument expressly in its response to the motion for summary judgment, the defendants are correct to note that debt holders may appoint the board majority without necessarily tainting the board's determinations. Absent a showing of personal financial interest, a board of directors is presumed to act in accordance with their fiduciary duties to the corporation. *Aronson*, 473 A.2d at 812.
[74] *Rand v. Western Air Lines*, 1994 Del. Ch. LEXIS 26, *9.
[75] *Id*.

troubled the court in *In Re Freeport-McMoRan Sulphur Inc*.[76] Even taking all the evidence in the light most favorable to the plaintiff, the court concludes that the Special Committee, created to reinforce the independence of a majority independent board, operated with sufficient independence to merit the cloak of business judgment protection.

C. Due Care

The plaintiff's claims as to the defendants' alleged breach of the duty of care can be summarized in the following way. First, the plaintiff claims that the directors approved the Plains transaction without sufficient expert information, blindly following the lead of a CEO acting on erroneous information. Second, the plaintiff claims that the defendants violated the business judgment rule by neglecting to use the leverage afforded by a potential bankruptcy filing against the Note holders in order to secure a better settlement for the Unit holders.

To the extent that the plaintiff's claims are based on allegations of insufficient care, their claim is precluded through the operation of Section 6.8 of Link's charter agreement, exculpating directors for all awards of damages for violations of the duty of due care. The plaintiff claims that Link's exculpatory clause is inoperable because of the defendants' bad faith.[77] But as the court

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[76] 2005 Del. Ch. LEXIS 96, *51.
[77] The plaintiff also claims that the exculpatory clause does not apply because the relief requested (purportedly the return of up to $11 million in cash) is equitable in nature, and thus

concludes below, the plaintiff has presented no evidence of bad faith or other circumstance that would render the exculpatory provision inoperable. That being so, the plaintiff's challenge to Link's exculpatory clause falls short.

The court nonetheless will briefly address the plaintiff's duty of care claims. The duty of due care requires directors to inform themselves of all material information reasonably available to them before making a corporate decision.[78] This duty, however, does not require any particular actions or roadmap. Exactly what procedures the law requires varies according to the nature and importance of the considered transaction.[79] The advice of an investment banker or other expert is never required, though it may be useful.[80]

The defendants' actions in this case cannot be said to have reached the level of gross negligence required to find a violation of the duty of due care. The record shows that the Special Committee met repeatedly over months to address the issue of the company's impending insolvency and to consider alternatives. Nor can the court find that the defendants' alleged negligence in not using the leverage

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falls outside the clause. But the transaction proceeds that the plaintiff claims can be equitably distributed are already contractually promised to Note holders. This court does not accept that paradigmatically legal damages such as those at issue here can be converted into equitable relief by the simple expedient of labeling them as such.

[78] *Aronson,* 473 A.2d at 812.

[79] *Citron v. Steego*, 1988 Del. Ch. LEXIS 119, *26 (holding that "there is no ritual in these matters with which thoughtless compliance will assure later judicial approval or from which thoughtful deviation will risk automatic judicial censure").

[80] *Kleinhandler v. Borgia*, 1989 Del. Ch. LEXIS 81, *14.

generated by the company's potential bankruptcy rises to the level of gross negligence required by Delaware law.[81] At its most simple, the Note holders, through the restrictive covenant that effectively allowed them to veto any proposed transaction, had substantial negotiating leverage against the company. They would rationally have stopped any transaction that did not at least promise them something more than their interest and principle. But even more important, the choices made in formulating a negotiating strategy are within the core of what is protected by the business judgment rule. Therefore, while it is regrettable that a solution salvaging some value for Unit holders was not found as a result of the board's efforts, the evidence does not support the plaintiff's claimed violation of due care.

The plaintiff alternatively claims that the defendants acted in bad faith in approving the Plains transaction. As this court has previously explained, in cases where the business judgment presumption applies, the subjective bad faith of directors may be inferred from corporate actions which are "so egregious as to be afforded no presumption of business judgment protection."[82] After examining the record, however, the court concludes that there is no basis to draw an inference of

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[81]It is not even clear that the plaintiff has alleged any facts at all as to this supposed breach of duty. The evidence on which the plaintiff relies, a statement by Kaelber, confesses only that Kaelber cannot recall whether such threats were made or not. Kaelber Dep., 180-81, April 18, 2005. This is in sharp contrast to Matthews's contention that the bankruptcy possibility was used in his negotiations. Matthews Dep., 182:18-183:4, April 1, 2005.

[82] *Aronson,* 473 A.2d at 815; *Grobow v. Perot,* 539 A.2d 180, 189 (Del. 1998).

bad faith or waste in this case. The directors were faced with a pressing situation that was only worsening over time. They acted as they plausibly thought necessary in order to extract value for the corporation. The fact that Unit holders were left with nothing at the end, given a context in which the chief alternative substantiated by evidence was an equally barren bankruptcy proceeding, does not suffice to rebut the presumption that the directors were acting in the good faith exercise of their fiduciary duties, or to establish a claim of waste.[83]

V.

For the foregoing reasons, the defendants' motion for summary judgment pursuant to Rule 56 is GRANTED. IT IS SO ORDERED.

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[83] The plaintiff additionally appears to claim in its brief that the defendants violated their duty to disclose material information to shareholders by "delay[ing]] any disclosure of the details of the Plains Transaction to the public or to Unitholders who were not also 9% Noteholders until it was too late for minority Unitholders to take any steps to save their investment." Pl.'s Answering Br. in Opp'n to Defs.' Mot. for Summ. J. 9. In cases where the corporation does not require shareholder action, however, a "stockholder must allege he received 'false communications' from directors who were 'deliberately misinforming shareholders about the business of the corporation.'" *Steinman v. Levine*, 2002 Del. Ch. LEXIS 132, * 47-48, *aff'd*, 822 A.2d 397, *quoting Malone v. Brincat*, 722 A.2d 5, 14 (Del. 1998). The plaintiff here makes no such accusations of deliberate false communications.