IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SMURFIT-STONE CONTAINER CORP. SHAREHOLDER LITIGATION

C.A. No. 6164-VCP

OPINION

Submitted: May 18, 2011
Decided: May 20, 2011
Date Revised: May 24, 2011

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PARSONS, Vice Chancellor.

This matter involves a stockholder challenge to a merger in which a third-party strategic acquiror has agreed to merge with the target corporation for consideration valued at $35 per share. The agreed-upon deal provides that each of the target's stockholders will receive approximately half of the merger consideration in cash and the other half in stock of the acquiror. Plaintiffs allege that the $35 merger price is unreasonable and that the target's board failed adequately to inform itself as to the true value of the company and maximize stockholder value under Delaware's *Revlon* line of cases. Furthermore, Plaintiffs allege that the target's board breached its fiduciary duties by agreeing unreasonably to a number of deal protection measures that had a preclusive, deterrent effect on any bidders who otherwise might have made a higher offer.

Importantly, this case provides cause for the Court to address a question that has not yet been squarely addressed in Delaware law; namely, whether and in what circumstances *Revlon* applies when merger consideration is split roughly evenly between cash and stock. Plaintiffs have moved for a preliminary injunction and request that the Court delay the target's stockholder vote and enjoin the deal protections for a period of 45 to 60 days so as to allow the target to seek higher bids. For the reasons stated in this Opinion, however, I deny Plaintiffs' motion for a preliminary injunction.

I. BACKGROUND

A. The Parties

The target in this consolidated action[1] is Defendant Smurfit-Stone Container Corp. ("Smurfit-Stone" or the "Company"), a Delaware corporation with its headquarters in Chicago, Illinois. It is a manufacturer of paperboard and paper-based packaging, including containerboard and corrugated containers. Smurfit-Stone also is a paper recycler and has 12 paper mills, 110 container plants, 29 reclamation plants, and 1 lamination plant worldwide. Plaintiffs, John M. Marks, Matthew Gould, and Melvin D. Spencer, are common stockholders of Smurfit-Stone.

On January 23, 2011, the board of directors of Smurfit-Stone unanimously approved an agreement and plan of merger (the "Merger Agreement" or "Agreement") to be acquired by Defendants Rock-Tenn Company ("Rock-Tenn") and Sam Acquisition, LLC ("SA") in a cash and stock transaction worth approximately $3.5 billion (the "Proposed Transaction" or "Transaction"). Rock-Tenn is incorporated in Georgia where it has its principal executive office. It is a leading manufacturer of paperboard, containerboard, and consumer corrugated packaging. SA is a Delaware limited liability company and a wholly-owned subsidiary of Rock-Tenn created for the sole purpose of effecting the Proposed Transaction.

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[1] This action is the result of a consolidation of three separate actions: *Marks v. Smurfit-Stone Container Corp.*, C.A. No. 6164-VCP (Del. Ch. filed Feb. 2, 2011); *Gould v. Smurfit-Stone Container Corp.*, C.A. No. 6291-VCP (Del. Ch. filed Mar. 17, 2011); and *Spencer v. Moore*, C.A. No. 6299-VCP (Del. Ch. filed Mar. 21, 2011). *See* Docket Item ("D.I.") 41 (Order Granting Consolidation). As discussed *infra* and for purposes of this Opinion, the operative case is C.A. No. 6164-VCP and the lead Plaintiff is John M. Marks.

In addition, the Amended Complaint ("Complaint") names ten individual defendants who make up Smurfit-Stone's board of directors (the "Board"). Defendant Ralph F. Hake currently is the nonexecutive chairman of the Board. Defendant Patrick J. Moore has been a director since January 2002 and currently serves as Smurfit-Stone's CEO. He also was the former chairman of the Smurfit-Stone Board. Defendants Timothy J. Bernlohr, Terrell K. Crews, Eugene I. Davis, Michael E. Ducey, Jonathan F. Foster, Ernst A. Haberli, Arthur W. Huge, and James J. O'Connor are outside directors.

B. Facts[2]

1. Smurfit-Stone emerges from bankruptcy and a new board is chosen

As a result of the economic downturn beginning in 2008 and the concomitant reduction in demand for packaging materials, Smurfit-Stone filed a voluntary petition on January 26, 2009 to restructure itself under Chapter 11 of the United States Bankruptcy Code. Approximately a year and a half later, on June 30, 2010, the Company emerged from bankruptcy after shedding significant debt, closing several underperforming mills, and reducing its workforce by approximately ten percent.[3]

Upon its exit from bankruptcy, Smurfit-Stone's creditors' committee chose a new board of directors based on an interview process conducted by an executive recruiting firm. The applicants chosen had substantial experience serving on boards of other major

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2 Many of the facts relevant to this controversy are not in dispute and are supported by documentation and other evidence submitted with and cited in the parties' briefs. Where a fact might be in dispute, I have provided appropriate citations to the record; otherwise, such citations are omitted for the sake of brevity.

3 Dep. of Patrick J. Moore ("Moore Dep.") 55-57.

corporations and in various business fields, including forest and paper products, investment banking, and others. The creditors' committee decided, however, to retain a few key directors from the previous Smurfit-Stone board. In particular, it negotiated with Moore, who allegedly had planned to retire at the end of 2009, to extend his contract with the Company for an interim period ending March 31, 2011 to permit the Board time to settle on a more permanent leadership structure.[4] The committee also retained Steven Klinger,[5] the former president and COO of Smurfit-Stone, as well as O'Connor, an outside director.

The reconstituted Board, thus, consisted of eleven individuals, including: two inside directors, Moore and Klinger; one hold-over outside director, O'Connor; and eight new outside directors, Hake, Bernlohr, Crews, Davis, Ducey, Foster, Haberli, and Huge.[6] According to Defendants, the Smurfit-Stone directors "educated themselves" about the Company before assuming their board positions on June 30, 2010.[7]

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4 *Id*. at 7-9.

5 There is no evidence that any of the eight new outside directors have any common affiliations or prior relationships with Moore, Smurfit-Stone, or Rock-Tenn. *See* Dep. of Jonathon F. Foster ("Foster Dep.") 11-12. According to Defendants, these directors, including O'Connor, are "completely independent." Smurfit-Stone Defs.' Ans. Br. ("DAB") 4. Similarly, I refer to Plaintiffs' opening brief as "POB," their reply brief as "PRB," and Rock-Tenn's answering brief as "RTAB."

6 At an October 2010 Board meeting, Klinger announced that he would resign his management and board positions with Smurfit-Stone effective December 31, 2010. Moore Dep. 17-18. After his resignation at the end of 2010, the Company retained Klinger in a consulting role, which meant that he would "continue[] to help [Moore] with the oversight and operation side of the business," similar to his role as president and COO. *Id*. at 18.

7 *See* DAB 4 (citing Foster Dep. 12-13).

A byproduct of the creditors' committee's work to create a new board was the extension of new employment contracts to Moore, Klinger, and Smurfit-Stone's chief administrative officer and general counsel, Craig A. Hunt.[8] The contracts provided for certain payments to these individuals in the event that the Company entered into a change of control transaction before certain specified dates. Moore's contract, for example, provides that if a change of control offer was received before March 31, 2011, with a closing before September 30, 2011, Moore would be entitled to receive a bonus. Moore estimated that his bonus would be approximately 15-20 million dollars if the Proposed Transaction is consummated.[9] In addition, he would receive a "gross up," covering any taxes on his change-of-control bonus.[10] These employment contracts were negotiated by the creditors' committee and approved by the federal bankruptcy judge; the new Board had no role in negotiating or approving them.[11]

Klinger's contract expired when he resigned at the end of December 2010. He then entered into a consultancy agreement with Smurfit-Stone, under which he would be an independent contractor for an interim period ending on March 31, 2011.[12] This

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8 Moore Dep. 19-21; Dep. of Ralph F. Hake ("Hake Dep.") 17-20; Foster Dep. 186-87.

9 *See* Moore Dep. 20-22; Hake Dep. 17.

10 *See* Moore Dep. 21.

11 *See* Hake Dep. 167; Foster Dep. 186 ("[Moore's] contract . . . was entered into by the creditor investors with Mr. Moore and approved by the bankruptcy court; we as a board inherited that, we had nothing to do with it.").

12 Hake Dep. 19; App. of Exs. to Pls.' Op. Br. ("Pls.' Ex.") 9, Form S-4/A, at 88.

agreement provides that Klinger would receive approximately $150,000 per month in salary and that, upon the expiration of his consultancy contract, "any unvested portion of [his] outstanding options and restricted stock unit awards . . . will immediately vest in full upon a change in control of Smurfit-Stone (including merger) occurring[] during the six-month period following" such expiration, *i.e.*, by September 30, 2011.[13] Based on Moore's employment contract and Klinger's consultancy contract, Plaintiffs estimate that the Proposed Transaction would net them each a total of approximately $19 million.[14]

2. The Board's postbankruptcy search for a new CEO and the Levin Report

Facing significant challenges in its efforts to return to profitability after bankruptcy,[15] the Company sought to find a permanent management team, in particular a new CEO to replace Moore once his interim contract expired. At a meeting on July 28, 2010, the Board resolved to begin a process to find the next Smurfit-Stone chief

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13 Form A-4/A, at 88; Moore Dep. 42-43. Klinger also would receive a gross-up. Form S-4/A, at 88.

14 POB 7.

15 The parties disagree about Smurfit-Stone's outlook as a stand-alone company after it emerged from Chapter 11 bankruptcy. Plaintiffs describe the Company as "restored [to] profitability" and having embarked on an "aggressive turnaround plan that has produced significant and continuing stock price increases." *See id*. at 4-5. They contend that the Company's earnings for the fourth quarter ended December 31, 2010 reflect improvements in earnings, margins, and cash flow as compared to the previous year. *See id*. at 6; Moore Dep. 56. Defendants, on the other hand, paint a bleaker picture. They allege that the Company faced substantial challenges postbankruptcy and remained the least profitable player in the corrugated industry. DAB 5 (citing a research report by the Buckingham Research Group). Defendants also assert that from the time Smurfit-Stone exited bankruptcy, it was the subject of market-wide takeover speculation. *Id*. (citing Foster Dep. 167-68).

executive. The Board began by looking at Klinger. Although it considered him to be "extremely competent" and to have performed "admirably" in his capacity as COO, the Board chose to go in a different direction by hiring someone from outside of the Company, and targeted candidates with previous CEO experience.[16]

During that meeting, the Board received a report from a financial advisor, the Levin Group ("Levin"), which suggested strategic initiatives the Company might pursue to reduce its selling, general, and administrative expenses.[17] Levin presented the Board with an "Initial Strategic Review" suggesting three different strategic plans for the Company on a stand-alone basis (the "Levin Report"), including: a scenario where the Company remained as is; an "11 Mill" scenario where the Company closed one mill and made certain operational improvements; and an "8 Mill" scenario where the Company divested three mills, among other things.[18] The Levin Report suggested that if the 8 and 11 Mill scenarios were successful, Smurfit-Stone's stock could have implied 2011 share prices of $40 and $35, respectively.[19] While several Board members had significant

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16 Hake Dep. 19. Evidently, Moore had recommended Klinger for the job. Moore Dep. 13-14. Although Defendants assert that the Board's search for a new CEO proved to be difficult, it allegedly was close to securing a candidate in early 2011 when it entered into the Proposed Transaction. DAB 6 (citing Foster Dep. 151-52).

17 Moore Dep. 58-59. Smurfit-Stone previously had retained Levin and the firm worked principally with Klinger. According to Foster, the Board did not commission Levin to prepare the report; Levin did so on the initiative of Klinger. Foster Dep. 91.

18 Aff. of Kathaleen S. McCormick ("McCormick Aff.") Ex. 74.

19 *Id*. at SSC0005021.

reservations about the reliability of Levin's projected valuations,[20] the Board still authorized management to explore some of the proposed divestitures and cost-reduction initiatives. The Company had little luck, however, in finding a willing buyer to acquire the mills it sought to unload.[21]

3. Company A makes an offer to buy Smurfit-Stone for $29 per share in an all-cash deal and the Board rejects it

On September 16, 2010, representatives of Evercore Partners ("Evercore") indicated to Davis that a prominent private equity firm, Company A, was interested in exploring a transaction with Smurfit-Stone. Davis thanked the Evercore representatives for their interest, informed them that the Company was "not for sale," and then reported the conversation to Hake.[22] At a meeting soon thereafter, the Board decided to investigate the nature of Company A's interest and authorized Hake to reach out to Company A's financial adviser and seek additional details.[23]

In addition, the Board prepared to share certain due diligence materials with Company A and selected Moore, Klinger, and Hunt to lead that effort.[24] Plaintiffs strongly criticize this decision. They contend that these individuals were conflicted because they stood to receive large bonuses if Smurfit-Stone experienced a change of

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20 Foster Dep. 105-06; Hake Dep. 136.

21 Dep. of William Levin ("Levin Dep.") 45; Foster Dep. 88.

22 McCormick Aff. Ex. 24.

23 Hake Dep. 81; Foster Dep. 27.

24 Hake Dep. 76-77.

control and potentially could obtain new employment contracts from Company A if it purchased the Company and sought to retain its high-level executives. The Board recognized these potential conflicts, but as Hake explained in his deposition, "they were the ones that have the knowledge [and the] ability to articulate [Smurfit-Stone's business]. We are dependent on that management team to talk to any potential bidder."[25]

Hence, the Board authorized Moore and Klinger, with Hunt's assistance, to make a presentation to Company A on October 7. Moore and Klinger continued to meet with Company A representatives through the rest of that month, often without any other directors present.[26] These efforts resulted in Company A making an offer on October 10 to enter into a recapitalization in which Smurfit-Stone would raise $500-$700 million in new debt and Company A would become a major Smurfit-Stone stockholder.[27] The Board rejected this offer at a regular Board meeting on October 27 and directed Moore to so advise Company A. Undeterred, Company A expressed continued interest in a possible transaction with Smurfit-Stone.

On November 11, Evercore informed Moore that Company A likely was interested in purchasing the entire company.[28] Eleven days later, Company A sent Hake a

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25 *Id*. at 78.

26 *Id*. at 86.

27 Pls.' Ex. 9 at 41.

28 At this point, the Board began preparing to receive a written offer and, in doing so, instructed Moore that the independent directors needed to be involved in all interactions between management and Company A. The Board also began discussing the need to form a special committee to consider any offer from Company A.

nonbinding, all-cash offer to buy the Company for $29 per share, which constituted a premium of 24.2% to the prior day's closing price. The offer was subject to a 30-day exclusivity agreement and additional due diligence. The next day, on November 23, the Board convened a special meeting without the participation of Moore and Klinger. After reviewing the terms of the offer, the Board created a special committee composed of the entire Board except Moore and Klinger, the only inside directors (the "Special Committee" or "Committee"). The Special Committee also formed an informal subcommittee consisting of Hake, Foster, and Haberli (the "Subcommittee"), to oversee the deal process on a day-to-day basis.[29]

The Committee's first order of business was retaining Lazard Freres & Co. LLC ("Lazard") and Wachtell, Lipton, Rosen & Katz ("Wachtell") to be its independent financial and legal advisors, respectively. Plaintiffs characterize Lazard as "inexperienced" in the M&A space concerning the paper and fiberboard industries.[30] In that regard, they note that Lazard never pitched their qualifications to handle the proposed deal to the Committee and the Committee never bothered to interview Lazard.[31] In addition, Plaintiffs complain that the terms under which the Special Committee

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[29] McCormick Aff. Ex. 5.

[30] POB 9.

[31] Dep. of Maxence De Gennaro ("De Gennaro Dep.") 8-10.

retained Lazard included a "significant success fee," which incentivized Lazard to recommend even a bad deal to them.[32]

Defendants disagree and defend the hiring of Lazard. They note first that the Special Committee selected Lazard based on the recommendations of certain Smurfit-Stone outside directors and Lazard's ability to get up to speed quickly because it had worked on the Company's bankruptcy.[33] In addition, Defendants claim that Lazard was "entirely independent" because it had no ongoing relationship with any member of the Special Committee or the Company. As to Lazard's success fee, Defendants assert that they "pushed Lazard hard" to reduce the amount payable to it upon the closing of a transaction.[34]

Over the next three weeks, Lazard worked on preparing its valuations and Company A continued to perform due diligence.[35] Among other things, the Board asked Lazard to evaluate the Levin Report and determine whether its estimate that Smurfit-

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32 POB 9. In particular, the Lazard retention letter provides that Lazard will receive \$1 million for entering into the agreement; an additional \$2 million payable upon the earlier of an announcement of a transaction, definitive transaction agreement, or the rendering of any Opinion (as defined therein); and, if a transaction is consummated, .5% of the aggregate transaction consideration. Pls.' Ex. 19.

33 DAB 9 (citing Foster Dep. 71).

34 *Id*. (citing McCormick Aff. Exs. 33-37 and Hake Dep. 113).

35 Management provided Lazard with its 2011 budget and management-prepared five-year projections. Defendants also note that Lazard inquired as to why management's sales and EBITDA forecasts were, in certain respects, more conservative than some analysts' estimates. DAB 10. Among other things, management explained that they believed the analysts' expectations did not properly account for the intensely cyclical nature of the containerboard industry. De Gennaro Dep. 129-30.

Stone's stock could garner $40 per share was realistic. Hake made clear to Lazard that the Board would focus on reconciling Levin's projections with Lazard's own valuations and, in particular, asked Lazard to analyze the legitimacy of Levin's methodology.[36]

On December 15, 2010, Lazard and Wachtell met with the Special Committee to review Lazard's valuations.[37] Lazard explained to the Committee that its discounted cash flow ("DCF") analyses yielded per share prices ranging from $27.50 to $37.50 on a tax-affected basis.[38] It walked through several potential alternatives to the Company A transaction, including remaining a stand-alone company, exploring a recapitalization, and seeking a potential sale or other strategic transaction at a later point in time.[39] As the Committee requested, Lazard also reviewed the Levin projections. Lazard determined that the materials Levin relied upon yielded 2011 implied share prices ranging from $27 to $35 and 2014 implied share prices ranging from $24 to $30 for the "11 Mills" scenario, when expressed in present value terms with an industry-standard cost of equity.[40] Plaintiffs contend, however, that Lazard entirely dismissed Levin's analysis, citing a December 10 email to Hake in which a Lazard representative refers to Levin's $40 per share finding as a "back of the envelope" calculation and suggests that the

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36 McCormick Aff. Ex. 40.

37 Before Lazard presented its findings, Moore and Klinger were excused.

38 McCormick Aff. Ex 12 at SSCC0000149.

39 *Id*. at SSCC0000161.

40 DAB 11 (citing McCormick Aff. Ex. 13 at SSCC000058).

Committee directors "be careful" with their emails referencing that calculation.[41] Defendants dispute that characterization and assert that Lazard carefully compared Levin's analysis with its own on a like-for-like basis, and determined that Lazard's conclusions were not "dramatically different" than Levin's.[42]

After Lazard presented its findings, the Special Committee discussed the possibility of reaching out to other potential bidders, but concluded that the benefits of doing so were outweighed by the "risk of leaks, the disruption to management of multiple parties conducting due diligence, and the potential impact on customers, employees, and the Company's business."[43] In addition, both the Special Committee and Lazard allegedly believed that, as a practical matter, Smurfit-Stone had conducted the functional equivalent to a two-year market check in the form of its bankruptcy because it had engaged in discussions with potential financial and strategic acquirors during that time.[44]

Ultimately, the Special Committee directed Lazard to tell Company A that its $29 per share offer was inadequate, but the Company would entertain a possible transaction at a "significantly higher valuation range."[45] On December 17, Company A withdrew its offer and notified Smurfit-Stone that it would not proceed with the process further.[46]

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41 Pls.' Ex. 24.

42 *See* DAB 11; De Gennaro Dep. 66.

43 McCormick Aff. Ex. 8.

44 *See* Foster Dep. 178-79; De Gennaro Dep. 43.

45 McCormick Aff. Ex. 6.

46 *Id*. Ex. 42.

4. Rock-Tenn enters the picture

Rock-Tenn became interested in contacting Smurfit-Stone about a potential acquisition in late 2010. According to its CEO, James Rubright, Rock-Tenn regularly monitors publicly available information about its competitors, including Smurfit-Stone, and was aware of the Company's bankruptcy, the fact that by the middle of 2010 it still had not appointed a permanent CEO, and that industry analysts speculated that it might be an acquisition target. Although Rubright believed that Smurfit-Stone was "not . . . for sale" and knew of nothing that suggested it was "actively seeking to do a transaction," he, along with Rock-Tenn's financial advisor, Wells Fargo Securities ("Wells Fargo"), began investigating the possibility of such a transaction in November 2010.[47]

Sometime in November, Rubright called Klinger, a somewhat estranged friend, to discuss, among other things, Klinger's future with Smurfit-Stone after he had been passed over for CEO. They also discussed other business matters, including whether the Company "would be receptive to a transaction."[48] During this conversation, Klinger told Rubright he believed the Board was "dysfunctional."[49]

On December 21, Wells Fargo contacted Foster to tell him that Rock-Tenn was interested in discussing a potential stock-for-stock merger of equals. After Foster relayed this message to Hake, the Special Committee directed Lazard to contact Wells Fargo to

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47 Dep. of James Rubright ("Rubright Dep.") 22.

48 *Id*. at 21-25.

49 Rubright Dep. 21.

obtain additional details about Rock-Tenn's proposal.[50] Wells Fargo suggested that Rubright meet with Smurfit-Stone's senior management, but Lazard eschewed such a meeting as premature. Instead, Lazard proposed a meeting between the two financial advisors so it could obtain additional information before proceeding further.

Meanwhile, the Special Committee met on December 23 to discuss Rock-Tenn's potential interest in a transaction. It unanimously agreed to permit Lazard to meet with Wells Fargo to gather additional details, but without indicating that Smurfit-Stone might be interested in proceeding. Later that day, Wells Fargo presented its proposal to Lazard: an all-stock, no-premium merger that would provide Smurfit-Stone stockholders with an approximately 55% equity stake in the combined entity, which principally would be managed by Rock-Tenn executives. Lazard advised Wells Fargo that the Board would be more receptive to a transaction involving a premium and a significant cash component.[51]

5. Rock-Tenn's $30.80 per share offer

On January 4, 2011, Rubright called Hake to request a meeting to discuss Rock-Tenn's formal proposal to acquire the Company at a significant premium with 50% of the consideration in cash. Three days later, on January 7, Rubright and certain other Rock-Tenn senior management met with the Subcommittee and a Lazard representative. Rubright presented an "indicative" offer, which involved a premium price of $30.80 per share, 50% in cash and 50% in stock, and three seats on Rock-Tenn's board after the

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[50] *See* McCormick Aff. Ex. 43.

[51] Dep. of Ryan Nelson ("Nelson Dep.") 38. Wells Fargo responded that Rock-Tenn would be receptive to a premium and a cash component. Aff. of Bradley D. Sorrels ("Sorrels Aff.") Ex. D.

merger, but no offers of future employment or board membership for any other Smurfit-Stone executives or directors. After Hake informed Rubright that $30.80 was inadequate, the parties agreed to have their financial advisors continue to discuss a potential transaction at a higher share price.

6. Rock-Tenn's $32 per share offer

On January 9, Rock-Tenn made a nonbinding offer to acquire all of the Company's shares at a price of $32 per share,[52] including consideration of 50% cash and 50% stock at a fixed exchange ratio, subject to the negotiation of a definitive merger agreement, limited confirmatory due diligence, and stockholder approval.

The next day, the Special Committee, along with Moore and Hunt, convened to consider Rock-Tenn's offer and request for additional due diligence.[53] The Committee determined that $32 per share was inadequate, but authorized Lazard to permit Rock-Tenn to conduct reasonable additional due diligence to improve its offer.

The Committee also discussed whether it should attempt to reopen negotiations with Company A or solicit offers from other potential acquirors. In particular, it discussed the "risks involved in contacting other parties," including burdens of multiple parties conducting due diligence at the same time, the risk of information leaks, the potential negative impact on customers, employees, and other constituencies, as well as

[52] This price represented a premium of 26% to the Company's 30-day average share price of $25.43 and a 47% premium to the Company's share price when it began trading in July 2010 after the Company exited bankruptcy. Sorrels Aff. Ex. G.

[53] Pls.' Ex. 26. The Committee believed it was reasonable for Rock-Tenn to receive limited additional diligence, but it was reluctant to accept a prolonged delay at the risk of information leaks and other burdens. *See* Foster Dep. 183.

the possibility of jeopardizing a proposed transaction with Rock-Tenn.[54] The Committee also discussed certain analysts' speculation that Smurfit-Stone was a takeover candidate and the possibility that another acquiror would be interested in offering a higher price than Rock-Tenn. On the subject of trying to reopen negotiations with Company A, Lazard advised the Committee that, based on "the history of the prior discussions with [Company A], [it] did not believe that such party would be likely to offer a higher price than Rock-Tenn would be willing to offer."[55] In addition, the Committee recognized that, even if the Company entered into a transaction with Rock-Tenn, it still could consider competing offers, if they should arise, subject to "customary no-shop and breakup fee provisions."[56] As such, the Committee resolved not to contact Company A or other parties about a potential transaction.[57]

After the meeting, Hake authorized Moore and Hunt, along with Lazard, to prepare and present additional due diligence materials to Rock-Tenn and attend due diligence meetings on the Company's behalf. The parties met on consecutive days beginning on January 17 so management for each company could present to its counterpart reciprocal due diligence.

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[54] McCormick Aff. Ex. 8. The Committee believed that if word got out that Smurfit-Stone was contacting multiple acquirors, it might prove quite difficult to retain a permanent CEO and maintain employee morale. Foster Dep. 166.

[55] McCormick Aff. Ex. 8.

[56] *Id*.

[57] *Id*.; Foster Dep. 166. Similarly, the Committee never asked Lazard to perform analyses regarding other potential transactions for the Company. De Gennaro Dep. 31-33.

Contemporaneously, Wachtell, on behalf of the Committee, and King & Spalding, LLP ("King & Spalding"), Rock-Tenn's counsel, negotiated a draft merger agreement. The Committee "set objectives" for Wachtell so that Smurfit-Stone could obtain a merger agreement that would not "deter[] another bidder in the unlikely event that another bidder came along."[58] After rejecting King & Spalding's first draft agreement circulated on January 18, which certain representatives of Smurfit-Stone characterized as "problematic" and "a complete non-starter," Wachtell negotiated for reciprocal deal protection devices and a significantly reduced termination fee.[59] In particular, Foster explained that the Board wanted a breakup fee that was "consistent with similar-sized transactions, so if there was another interested party [the Company] would not unduly

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58 Foster Dep. 176.

59 *See* McCormick Aff. Ex. 66. Rock-Tenn originally proposed a breakup fee equivalent to 4% of fully diluted equity value based on the merger consideration. The Special Committee countered with a proposal for 2.5% of equity value. Rock-Tenn rejected this and proposed a fixed $130 million termination fee and, after further negotiations, agreed to reduce this fee to $120 million, or 3.4% of the equity value of the Proposed Transaction.

Plaintiffs contend, however, that members of the Committee accepted the deal protection devices recommended by Wachtell "without any real understanding of how they worked or any knowledge as to whether Wachtell negotiated anything in return for them." POB 15-16. The evidence does indicate that the Committee did not devote much attention to the deal protection measures. I am convinced, however, that the Committee understood that provisions Wachtell obtained in its negotiations were relatively standard market terms. The evidence also shows that the directors on the Special Committee were sophisticated business persons with broad experience, including with mergers and acquisitions. Plaintiffs, therefore, are not likely to succeed in showing that the Committee did not understand the general operation and import of the deal protection measures in the Agreement.

jeopardize doing a deal away from Rock-Tenn . . . ."[60] In addition, Moore negotiated a drop-dead date for the proposed merger transaction of September 30, 2011, the same date on which a change-of-control transaction had to close in order to trigger certain bonus payments under his employment contract.[61] Defendants credibly respond, however, that the drop-dead date was a subject of "considerable discussion" with Rock-Tenn, was extended beyond the date Rock-Tenn originally proposed, and ultimately coincided with the expiration date of Rock-Tenn's financing commitment.[62]

7. Rock-Tenn's best and final offer: $35 per share

Following the reciprocal due diligence presentations and the initial draft merger negotiations, Rock-Tenn informed the Company that any deal between the parties had to be finalized by January 23. Smurfit-Stone then asked for Rock-Tenn's best and final offer. On Thursday, January 20, Rubright indicated to Hake that Rock-Tenn would offer $35 per share, split equally between stock and cash as in its previous offer. This price represented a 27% premium to the Company's then-current trading price. The effect of the deal would be that Smurfit-Stone stockholders would own approximately 45% of outstanding Rock-Tenn common shares following consummation.

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60 Foster Dep. 173.

61 POB 13.

62 DAB 18. Defendants explain that Rock-Tenn initially proposed a six-month date and, after back and forth negotiations in which Smurfit-Stone requested a longer period of time, the parties settled on an eight-month period. *See* Rubright Dep. 115-16; McCormick Aff. Ex. 68.

Later that day, Hake convened a meeting of the Special Committee, in which Moore and Hunt also participated. Moore and William M. Lewis of Lazard led the meeting and updated the Committee on "recent developments" concerning meetings between the two companies, due diligence efforts, Rock-Tenn's business, draft merger agreements, the terms of Rock-Tenn's best and final proposal, and other matters concerning negotiations with Rock-Tenn.[63] Hake and Lewis also reported that Rock-Tenn threatened to suspend the merger discussions if the proposed transaction could not be finalized before the end of the weekend and the release of both companies' earnings announcements the following week.[64] The Committee decided to authorize its advisors to enter into further negotiations with Rock-Tenn and to proceed toward finalizing a merger agreement.

On Sunday, January 23, the Smurfit-Stone directors convened a joint meeting of the Board and the Special Committee to consider Rock-Tenn's latest offer.[65] Hake, Moore, Wachtell, and Lazard reviewed with the Board the negotiations and discussions between the two companies since the previous meeting on January 20. Moore also

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63 McCormick Aff. Ex. 9.

64 *See id*. As to this apparent time crunch, Hake reflected that while he didn't "think there was a rush at all," his philosophy on the matter was to "bring [the deal] to conclusion as rapidly as possible consistent with getting done what you need to do." Hake Dep. 162-63.

65 McCormick Aff. Ex. 11.

expressed his view that it was not to Smurfit-Stone's advantage to remain a stand-alone company.[66]

Lazard presented its analysis regarding the fairness of Rock-Tenn's offer, including valuations of Smurfit-Stone, Rock-Tenn, and the combination of the two companies. Lazard's analyses of the Company generated a valuation range of $27-$39 per share.[67] In addition, Lazard answered numerous questions from Board members in a relatively robust discussion of their projections and industry conditions. This discussion covered Lazard's finding that the Company's net operating loss carryforwards ("NOLs") were worth between $1 and $3 per share, but that these values were highly contingent and uncertain. The Board members also inquired whether Rock-Tenn, if pushed, might agree to a higher share price. Hake and Lewis indicated that, based on their discussions with Rock-Tenn executives, they believed Rock-Tenn's offer was its best and final one. The Board also reviewed with Wachtell its ability to consider a better offer, should one arise after the Board approved the deal.

After Lazard reported that it found the offer to be fair from a financial point of view and Wachtell reviewed the terms of the proposed Merger Agreement, Moore excused himself so the Special Committee could put the offer to a vote. The Committee

66 Moore Dep. 85.

67 McCormick Aff. Ex. 14. Lazard told the Board that certain of management's projections were lower on average than those of some Wall Street analysts. According to Foster, however, the Board did not think that management "intentionally . . . shar[ed] with [the Board] projections that were excessively conservative." *See* Foster Dep. 218-19.

unanimously agreed to recommend to the Board that it accept Rock-Tenn's offer. Upon Moore's return, the Board unanimously voted to accept Rock-Tenn's offer.

8. Terms of the Merger Agreement

Under the Agreement, Smurfit-Stone will become a wholly-owned subsidiary of Rock-Tenn and its stockholders are entitled to receive $17.50 in cash and .30605 shares of Rock-Tenn common stock for each share of Smurfit-Stone common stock (the "Merger Consideration").[68] Based on the closing price of Rock-Tenn stock immediately prior to the announcement of the merger, this Consideration was worth $35 per share. Upon closing, the Company's stockholders will own approximately 45% of Rock-Tenn's outstanding common stock.

Also of note, the Merger Agreement contains several so-called deal protection devices, which Plaintiffs claim are unreasonable. In particular, the Agreement contains a "no shop" clause which prevents Smurfit-Stone from "initiat[ing], solicit[ing], induc[ing], or knowingly encourag[ing] or facilitat[ing]" a potentially superior acquisition bid from another prospective acquiror.[69] This restriction is tempered by a "fiduciary out" clause,

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68 Pls.' Ex. 9 at Annex A, the Merger Agreement, §§ 1.1, 1.6; McCormick Aff. Ex. 69 at Ex. 99.1, Smurfit-Stone Jan. 24, 2011 Form 8-K. The exchange ratio has no collar or mechanism that acts as a floor or cap on the stock component of the Transaction's consideration to protect against market fluctuations of Rock-Tenn's stock. *See In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *2 (Del. Ch. Sept. 30, 2009). I also note that Rock-Tenn will assume Smurfit-Stone's net debt and pre-tax pension liabilities. McCormick Aff. Ex. 69 at Ex. 99.1.

69 Merger Agreement § 6.4(b). This obligation is reciprocal and likewise prevents Rock-Tenn from pursuing certain transactions with other companies. *Id*. § 6.5(a)-(b).

whereby the Company retains the ability to consider an unsolicited "Company Superior Proposal," as defined in the Agreement, in line with the Board's fiduciary duties.[70]

In addition, the Agreement contains a "matching rights" provision. In pertinent part, that provision gives Rock-Tenn the right to receive details of an unsolicited Superior Proposal received by the Company, as well as the bidder's identity, and, within three calendar days, revise its proposal to try to match or exceed the competing bid.[71]

Finally, the Agreement contains a termination fee of $120 million. This amount would be payable to Rock-Tenn if the Smurfit-Stone Board fails to recommend the Proposed Transaction to its stockholders in the companies' joint proxy statement or if it terminates such transaction in favor of a Superior Proposal.[72]

C. Procedural History

The lead Plaintiff, Marks, filed his complaint on February 2, 2011 and, on February 8, moved for expedited discovery. On February 22, Defendants filed motions in both this Court and in the Circuit Court of Cook County, Illinois (the "Illinois Court"),

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70 *Id*. § 6.4(e). A Company Superior Proposal is defined as "any bona fide written Company Acquisition Proposal . . . made by a third party that the Company Board determines in good faith, after receiving advice from its outside legal counsel and financial advisors, would be more favorable to the Company Stockholders than the Merger, taking into account (i) any proposal by Parent to amend or modify the terms of this Agreement, (ii) the identity of the Person making such Company Acquisition Proposal and (iii) the terms, conditions, timing, likelihood of consummation and legal, financial, and regulatory aspects of such Company Acquisition Proposal." *Id*. § 6.4(i).

71 *Id*. § 6.4(e). Like the no shop clause, this obligation is reciprocal. *Id*. § 6.5(e).

72 *Id*. §§ 8.1(g), (i), 8.2(ii). This obligation also is reciprocal. *See id*. §§ 8.1(h), (j), 8.2(iv).

where multiple similar actions against the same Defendants were pending, to request that the Illinois and Delaware Courts confer and attempt to determine a single forum in which the entire litigation effort should proceed and that the other court stay or dismiss the actions pending before it.[73] Consistent with Defendants' motion, I conferred with Judge Novak of the Illinois Court, and she ultimately decided to stay the actions before her pending resolution of this action. I also advised the parties that I intended to set this matter for expedited discovery and hold a preliminary injunction hearing before the Proposed Transaction went to a stockholder vote in late May.[74]

On March 11, Marks filed a Verified Amended Class Action Complaint (the "Complaint"), which is the operative complaint in this action.[75] Soon thereafter, on March 24, I consolidated the actions pending in this Court and appointed co-lead counsel in Delaware. That same day, Plaintiffs moved for class certification, which I granted on May 2.

On April 25, I entered an amended scheduling order, scheduling a preliminary injunction hearing for May 18. After extensive briefing by the parties, I heard argument

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73 *See* D.I. 5. According to Defendants' motion, four cases, *Gold v. Smurfit-Stone Container Corp.*, Case No. 11-CH-3371, *Roseman v. Smurfit-Stone Container Corp.*, Case No. 11-CH-3519, *Findley v. Smurfit-Stone Container Corp.*, Case No. 11-CH-3726, and *Czeck v. Smurfit-Stone Container Corp.*, Case No. 11-CH-4282, were pending in the Illinois Court and were consolidated under docket number 11-CH-3371 before the Honorable Rita Novak. *Id*.

74 *See* D.I. 33, Tr. of Arg. held on Mar. 4, 2011, 17, 25-27.

75 Defendants moved to dismiss this Complaint on April 13.

on Plaintiffs' application for a preliminary injunction on that date (the "Argument"). This Opinion constitutes my ruling on Plaintiffs' application.

D. Parties' Contentions

Count I of the Complaint accuses the Board of breaching its fiduciary duties of care and loyalty by failing to take steps to maximize the value of Smurfit-Stone to its public stockholders. Specifically, Plaintiffs argue that the Proposed Transaction constitutes a "change of control" transaction as to which the Board failed to comply with its obligations under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*.[76] by conducting an inadequate sales process and obtaining an inadequate price from Rock-Tenn. They also contended that the Board impermissibly failed to disclose all material facts pertaining to the Proposed Transaction in the companies' joint Preliminary Proxy Statement. Defendants have since mooted Plaintiffs' disclosure claims by making various supplementary disclosures. Count II accuses Rock-Tenn of aiding and abetting the Board in violating its fiduciary duties by way of the challenged conduct. Plaintiffs seek, among other types of relief, a preliminary injunction to delay the stockholder vote on the Proposed Transaction and lift temporarily the deal protection devices.

Defendants begin by challenging Plaintiffs' contention that the Proposed Transaction warrants heightened scrutiny under *Revlon* and argue that the Court, instead, should review the Board's actions under the more deferential business judgment rule. But, even if *Revlon* does apply, Defendants assert that the Board fully complied with its

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[76] 506 A.2d 173, 179 (Del. 1986).

fiduciary duties to secure the best value reasonably available for Smurfit-Stone stockholders.

II. ANALYSIS

A. Standard for a Preliminary Injunction

Plaintiffs seek to preliminarily enjoin the Proposed Transaction with Rock-Tenn. To succeed in that effort, they must demonstrate: (1) a reasonable probability of success on the merits; (2) that they will suffer irreparable injury if an injunction does not issue; and (3) that the balance of the equities favors the issuance of the injunction.[77]

B. Likelihood of Success on the Merits

1. The applicable standard

Plaintiffs contend that the Proposed Transaction constitutes a "change of control" transaction and, as such, the Court should apply the heightened *Revlon* standard.[78] They bolster this argument by characterizing the Transaction as the Smurfit-Stone stockholders' relinquishing majority ownership of the Company in favor of minority ownership of Rock-Tenn and arguing that, because approximately half of the Merger Consideration is in cash, the stockholders are losing the last opportunity to maximize the value of a significant amount of their investment in Smurfit-Stone.

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77 *E.g.*, *Revlon v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 179 (Del. 1986); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595 (Del. Ch. 2010).

78 POB 21-24. Plaintiffs also argue, in the alternative, that even if the Court applies the business judgment standard of review, the Transaction still should be enjoined. *Id*. at 21.

Defendants, for their part, argue that heightened *Revlon* scrutiny is inapplicable here and urge the Court to review Plaintiffs' claims through the lens of the business judgment rule.[79] They contend that the Board never put Smurfit-Stone up "for sale" and the Proposed Transaction is not a "change of control" transaction under relevant Supreme Court precedent. Specifically, Defendants assert that control of the postmerger entity here will remain, as it was in Smurfit-Stone's case before the merger, in a large, fluid, changeable and changing public market. This, they argue, gives Smurfit-Stone stockholder's a "tomorrow" whereby they, by virtue of the stock portion of the Merger Consideration, can participate in Rock-Tenn's future successes and possibly obtain a future control premium should Rock-Tenn be acquired in a change of control transaction. In Defendants' view, the fact that the Transaction contemplates an approximately 50/50 mix of cash and stock consideration does not change this conclusion.[80]

Based on my review of the law and facts of this case, I conclude that Plaintiffs have not shown a reasonable probability of success on their claim that the Board breached its fiduciary duties by approving the Rock-Tenn merger. As to the governing standard, I believe Plaintiffs are likely to prevail on their argument that *Revlon* applies here, even though the Delaware Supreme Court has not yet addressed this issue directly. As such, this position is not free from doubt.

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79 Defendants also argue that even if *Revlon* does apply, Plaintiffs have not shown a likelihood of success on the merits.

80 Defendants also note that, because the parties did not structure the Transaction with a collar, "the value of the merger consideration is no longer split evenly between cash and stock, [] rather [it] has shifted to approximately 44% cash and 56% stock," which they argue further supports their position that *Revlon* is inapplicable here. DAB 24.

Nevertheless, in the circumstances of this case, even if I assume without deciding that the *Revlon* standard applies, the result would be the same. That is, Plaintiffs have not demonstrated that they are likely to succeed on the merits of their claim that the actions of the admittedly independent and disinterested Special Committee (as well as the vast majority of the Company's Board) in negotiating and approving the Merger Agreement failed to satisfy their obligations under *Revlon*.

Thus, I begin by addressing the applicable standard. I then examine this Transaction under the lens of *Revlon*.

a. Business Judgment Rule or *Revlon*?

Under § 141(a) of the Delaware General Corporation Law, a corporation's board of directors is empowered to manage the business and affairs of the corporation.[81] The business judgment rule ("BJR"), a deferential standard of review, reflects the common law's recognition of § 141(a).[82] In short, it is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[83] This

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[81] *See* 8 *Del. C.* § 141(a); see also *Revlon, Inc.*, 506 A.2d at 179.

[82] *See MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127-28 (Del. 2003).

[83] *See id*. (internal quotation marks omitted); *see also, e.g.*, *Emerald P'rs v. Berlin*, 787 A.2d 85, 90-91 (Del. 2001); *Revlon, Inc.*, 506 A.2d at 180; *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985). Generally, the party challenging director action has the initial burden of adducing evidence to rebut this presumption. *See Liquid Audio, Inc.*, 813 A.2d at 1127-28; *Emerald P'rs*, 787 A.2d at 90-91. Plaintiffs can rebut the presumption by showing, among other things, that the board violated its fiduciary duties of care or loyalty in connection with a challenged transaction or committed fraud or self-dealing. *See, e.g.*, *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 746-47 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). If the presumption properly is rebutted, the burden then

standard of review is respectful to director prerogatives to manage the business of a corporation; in cases where it applies, courts must give "great deference" to directors' decisions and, as long as the Court can discern a rational business purpose for the decision, it must "not invalidate the decision . . . examine its reasonableness, [or] substitute [its] views for those of the board . . . ."[84]

In limited circumstances, however, the Delaware Supreme Court has imposed special obligations of reasonableness on boards of corporations who oversee the sale of control of their corporation.[85] When a board leads its corporation into so-called *Revlon* territory, its subsequent actions will be reviewed by this Court not under the deferential BJR standard, but rather under the heightened standard of reasonableness. In addition, and as discussed in greater detail below, the Board's fiduciary obligations shift to obtaining the best value reasonably available to the target's stockholders.[86]

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shifts to the director defendants to establish that the challenged transaction was "entirely fair" to the corporation and its stockholders. *See, e.g.*, *id.* If the plaintiffs fail to rebut the presumption, the board's decision will be upheld unless it cannot be attributed to any "rational business purpose." *See, e.g.*, *id.*; *Emerald P'rs*, 787 A.2d at 90-91.

84 *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 n.17 (Del. 1994) (internal quotation marks omitted); *see also, e.g.*, *Liquid Audio, Inc.*, 813 A.2d at 1127-28; *Emerald P'rs*, 787 A.2d at 90-91.

85 *See, e.g.*, *QVC Network Inc.*, 637 A.2d at 42; *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986).

86 *Revlon, Inc.*, 506 A.2d at 182-84; *QVC Network Inc.*, 637 A.2d at 44.

While the differences between directors' obligations under business judgment and *Revlon* review are not insignificant,[87] the standard of review is not necessarily outcome determinative. Nonetheless, "absent a limited set of circumstances as defined under *Revlon,* a board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term . . . ."[88] Therefore, a question of much ongoing debate, and one to which the parties devoted much ink in this case, is *when* does a corporation enter *Revlon* mode such that its directors must act reasonably to maximize short-term value of the corporation for its stockholders.

The Delaware Supreme Court has determined that a board might find itself faced with such a duty in at least three scenarios: "(1) when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company[]; (2) where, in response to a bidder's offer, a target

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87 *See In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 192 (Del. Ch. 2007) ("Unlike the bare rationality standard applicable to garden-variety decisions subject to the business judgment rule, the *Revlon* standard contemplates a judicial examination of the reasonableness of the board's decision-making process.").

88 *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989); *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 101-02 (Del. Ch. 2011) ("It is not until the board is under *Revlon* that its duty 'narrow[s]' to getting the best price reasonably available for stockholders in a sale of the company."). In *Lyondell*, for example, the Supreme Court held that "*Revlon* duties do not arise simply because a company is 'in play.'" *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 244 (Del. 2009) ("The duty to seek the best available price applies 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."). Moreover, in *Paramount Communications v. Time*, the Supreme Court held that Time's board of directors did not enter *Revlon* mode solely by virtue of either entering into the initial merger agreement with Warner or adopting structural safety devices. *See Time Inc.*, 571 A.2d at 1142, 1151.

abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or (3) when approval of a transaction results in a sale or change of control[.]"[89]

Here, Plaintiffs do not allege that the Board initiated an active bidding process to sell itself or effected a reorganization involving the break-up of Smurfit-Stone. Nor do they argue that the Board abandoned its long-term strategy in response to a bidder's offer and sought an alternative transaction involving the break-up of the Company. Rather, they allege that *Revlon* should apply to this case because the Merger Consideration was comprised of 50% cash and 50% stock at the time the parties entered into the Agreement, which qualifies the Proposed Transaction as a "change of control" transaction.[90] A question remains, however, as to when a mixed stock and cash merger constitutes a change of control transaction for *Revlon* purposes.

On the one hand, pure stock-for-stock transactions do not necessarily trigger *Revlon*. If, for example, the resulting entity has a controlling stockholder or stockholder group such that the target's stockholders are relegated to minority status in the combined entity, Delaware Courts have found a change of control would occur for *Revlon*

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89 *See, e.g.*, *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995) (citing *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42-43, 47-48 (Del. 1994) (internal quotation marks and citations omitted); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1289-90 (Del. 1994).

90 POB 21-22. Alternatively, Plaintiffs seem to contend that even if the Proposed Transaction is held not to involve a "change of control" as defined in the relevant precedents, this 50/50 cash/stock scenario in the circumstances of this case still qualifies for *Revlon* review under an as yet unarticulated fourth *Revlon* category. *See* PRB 10 n.6.

purposes.[91] But, if ownership shifts from one large unaffiliated group of public stockholders to another, that alone does not amount to a change of control.[92] In this event, the target's stockholders' voting power will not be diminished to minority status and they are not foreclosed from an opportunity to obtain a control premium in a future change of control transaction involving the resulting entity.[93]

On the other hand, *Revlon* will govern a board's decision to sell a corporation where stockholders will receive cash for their shares.[94] *Revlon* applies in the latter instance because, among other things, there is no tomorrow for the corporation's present stockholders, meaning that they will forever be shut out from future profits generated by

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[91] *See Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42-23 (Del. 1994) ("When a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together, there is a significant diminution in the voting power of those who thereby become minority stockholders.").

[92] *See, e.g.*, *In re Santa Fe Pac. Corp.*, 669 A.2d at 71 (noting that a corporation does not undergo a change in control where control of the postmerger entity remains in a "large, fluid, changeable and changing market") (internal quotation marks omitted); *Arnold*, 650 A.2d at 1289-90 (same); *Time Inc.*, 571 A.2d at 1150; *Krim v. ProNet, Inc.*, 744 A.2d 523, 527 (Del. Ch. 1999) (noting that *Revlon* "does not apply to stock-for-stock strategic mergers of publicly traded companies, a majority of the stock of which is dispersed in the market.").

[93] *See Arnold*, 650 A.2d at 1290 ("[P]laintiff argues that there was a 'sale or change in control' of Bancorp because its former stockholders are now relegated to minority status in BoB, losing their opportunity to enjoy a control premium. As a continuing BoB stockholder, plaintiff's opportunity to receive a control premium is not foreclosed. Thus, plaintiff's claim that enhanced scrutiny is required under the circumstances of this case lacks merit . . . .").

[94] *See, e.g.*, *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *5 (Del. Ch. Sept. 30, 2009); *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 64 (Del. Ch. 2007); *TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290, at *1184 (Del. Ch. Mar. 2, 1989).

the resulting entity as well as the possibility of obtaining a control premium in a subsequent transaction.[95] Heightened scrutiny is appropriate because of an "omnipresent specter" that a board, which may have secured a continuing interest of some kind in the surviving entity, may favor its interests over those of the corporation's stockholders.[96]

The Supreme Court has not yet clarified the precise bounds of when *Revlon* applies in the situation where merger consideration consists of an equal or almost equal split of cash and stock. Thus, to make such a determination, I evaluate the circumstances of the Proposed Transaction based on its economic implications and relevant judicial precedent.

As to judicial precedent, I note that, on a few occasions, Delaware courts have provided guidance on this issue. In *In re Santa Fe Pacific Corp.*, for example, the Supreme Court considered on a motion to dismiss the plaintiffs' claim that *Revlon* should apply to a transaction in which Burlington would acquire up to 33% of Santa Fe common shares through a tender offer (*i.e.*, cash) and then acquire the balance of Santa Fe shares

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95 *See, e.g., Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 101-02 (Del. Ch. 2011); *TW Servs., Inc.*, 1989 WL 20290, at *1184 (noting that "for the present shareholders [of a company that will be sold for cash], there is no long run. For them it does not matter that a buyer who will pay more cash plans to subject the corporation to a risky level of debt, or that a buyer who offers less cash will be a more generous employer for whom labor peace is more likely. The rationale for recognizing . . . the appropriateness of sacrificing achievable share value today in the hope of greater long term value, is not present when all of the current shareholders will be removed from the field by the contemplated transaction.").

96 *See In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 732 n.6 (Del. Ch. 1999), *aff'd sub nom., Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000).

through a stock-for-stock exchange.[97] The Court declined to apply *Revlon* because it found that the plaintiffs failed to allege that the Santa Fe board decided to pursue a transaction, including the one finally settled upon, which would result in a sale of control of Santa Fe to Burlington.[98] Notably, the Court highlighted the plaintiffs' failure to describe Burlington's capital structure, which left it with little reason to doubt that "control of Burlington and Santa Fe after the merger would [] remain 'in a large, fluid, changeable and changing market.'"[99]

Similarly, in *In re Lukens Inc.*, Vice Chancellor Lamb considered a transaction in which Bethlehem Steel would acquire 100% of Lukens' common stock for a value of $25 per common share. Under the terms of the merger, which were subject to dispute on the defendants' motion to dismiss, "each Lukens shareholder would have the right to elect to receive the consideration in cash, subject to a maximum total cash payout equal to 62% of the total consideration."[100] As in *Santa Fe*, the parties disputed whether *Revlon* should control the transaction. While the Court did not have occasion to determine definitively whether *Revlon* should apply—it assumed that it did—it offered sage guidance on transactions involving both cash and stock merger consideration, which informs this Court's opinion here. Vice Chancellor Lamb opined that, though the Supreme Court had not yet established a bright line rule for what percentage of merger consideration could be

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[97] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 64-65 (Del. 1995).

[98] *Id*. at 71.

[99] *Id*.

[100] *In re Lukens Inc.*, 757 A.2d at 725.

cash without triggering *Revlon*, he would find that under the circumstances of the *Lukens* case *Revlon* would apply.[101] In pertinent part, he explained as follows:

> I cannot understand how the Director Defendants were *not* obliged, in the circumstances, to seek out the best price reasonably available. The defendants argue that because over 30% of the merger consideration was shares of Bethlehem common stock, a widely held company without any controlling shareholder, *Revlon* and *QVC* do not apply. I disagree. Whether 62% or 100% of the consideration was to be in cash, the directors were obliged to take reasonable steps to ensure that the shareholders received the best price available because, in any event, for a substantial majority of the then-current shareholders, "there is no long run." . . . I do not agree with the defendants that *Santa Fe*, in which shareholders tendered 33% of their shares for cash and exchanged the remainder for common stock, controls a situation in which over 60% of the consideration is cash. . . . I take for granted . . . that a cash offer for 95% of a company's shares, for example, even if the other 5% will be exchanged for the shares of a widely held corporation, will constitute a change of corporate control. Until instructed otherwise, I believe that purchasing more than 60% achieves the same result.[102]

Thus far, this Court has not been instructed otherwise, and, while the stock portion of the Merger Consideration is larger than the portion in *Lukens,* I am persuaded that Vice Chancellor Lamb's reasoning applies here, as well. Defendants attempt to distinguish *Lukens* on its facts, arguing that "they offer no support to plaintiffs'

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101 *Id*. at 732 n.25; *see also In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *5 (Del. Ch. Sept. 30, 2009) (similarly noting that the Supreme Court has not established a bright line rule). In *In re NYMEX*, this Court considered a mixed consideration transaction consisting of 56% stock and 44% cash, but determined that it did not need to address whether *Revlon* applied. *See In re NYMEX*, 2009 WL 3206051, at *5-6.

102 *In re Lukens*, 757 A.2d at 732 n.25.

position."[103] I disagree. While the factual scenarios are not identical, there are some material similarities. Most important of these is that the Court in *Lukens* was wary of the fact that a majority of holders of Lukens common stock potentially could have elected to cash out their positions entirely, subject to the 62% total cash consideration limit. In this case, Defendants emphasize that no Smurfit-Stone stockholder involuntarily or voluntarily can be cashed out completely and, after consummation of the Proposed Transaction, the stockholders will own slightly less than half of Rock-Tenn. While the facts of this case and *Lukens* differ slightly in that regard, Defendants lose sight of the fact that while no Smurfit-Stone stockholder will be cashed out 100%, 100% of its stockholders who elect to participate in the merger will see approximately 50% of their Smurfit-Stone investment cashed out. As such, like Vice Chancellor Lamb's concern that potentially there was no "tomorrow" for a substantial majority of Lukens stockholders, the concern here is that there is no "tomorrow" for approximately 50% of each stockholder's investment in Smurfit-Stone. That each stockholder may retain a portion of her investment after the merger is insufficient to distinguish the reasoning of *Lukens*, which concerns the need for the Court to scrutinize under *Revlon* a transaction that constitutes an end-game for all or a substantial part of a stockholder's investment in a Delaware corporation.

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[103] DAB 26-27.

Defendants' other arguments, while cogent, similarly are unavailing. Citing to *Arnold*,[104] they contend that because control of Rock-Tenn after closing will remain in a large, fluid, changing, and changeable market, Smurfit-Stone stockholders will retain the right to obtain a control premium in the future and, as such, the Proposed Transaction is not a change of control transaction under *Revlon*. As with their attempt to distinguish *Lukens*, Defendants assert that even though a significant part of the Merger Consideration is in cash, there is a "tomorrow" for the Company's stockholders because they will own approximately 45% of Rock-Tenn after the merger. They aver that "[h]olding that *Revlon* applies in this type of case would require directors to behave as if there is no long run for their shareholders when in fact there is, and to pretend that shareholders will not participate in the future of the combined entity when in fact they will."[105] This statement, however, is only half correct. While the Company's stockholders will see approximately half of their equity transformed into Rock-Tenn equity such that they potentially can benefit from Rock-Tenn's future value, the other half of their investment in Smurfit-Stone will be cashed out. Even if Rock-Tenn has no controlling stockholder and Smurfit-Stone's stockholders will not be relegated to a minority status in the postmerger entity, half of their investment will be liquidated.

Citing to *Santa Fe*, Defendants note that the Supreme Court did not suggest that cashing out 33% of shares out would transform Santa Fe's transaction with Burlington

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[104] 650 A.2d 1270.

[105] DAB 24.

into a change of control transaction. As the Court noted, the plaintiffs in that case did not allege that control of Burlington would not remain in a large, fluid, changing, and changeable market postmerger. The approximately 50% being cashed out of each stockholder's investment in Smurfit-Stone obviously falls between the 33% cash out that the Supreme Court held did not trigger *Revlon* in *Santa Fe* and the 62% proportion of cash consideration that Vice Chancellor Lamb determined would trigger *Revlon* in *Lukens*. Mathematically, this situation is closer to *Lukens*, but only marginally.[106] Thus, assuming the Court's analysis in *Lukens* was correct, as I do, this case is necessarily approaching a limit in relation to the Supreme Court's holdings in *Santa Fe* and *Arnold*, which, again, involved a stock-for-stock transaction. As previously noted, however, my conclusion that *Revlon* applies here is not free from doubt.

Finally, I note that factors identified by Plaintiffs and Defendants as having been considered by Delaware courts in determining whether to apply *Revlon* review in cases

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106 Indeed, Defendants also argue that, because there is no collar on the stock portion of the Merger Consideration, Smurfit-Stone stockholders can benefit from the market's anticipation of future synergies. Moreover, because Rock-Tenn's share price has risen since the announcement of the Transaction, the Merger Consideration now stands at 56% stock and 44% cash. In my view, a more logical and workable analysis here focuses on the relative proportion of cash and stock as of the time the parties entered into the Merger Agreement, which was 50/50 cash and stock. Accepting Defendants' position would require the Court to base its determination as to whether to apply *Revlon* on its best guess as to the price of Rock-Tenn's stock as of the date the Transaction closes. Leaving this determination up to the vagaries of the stock market is not a workable method and potentially may lead to inequitable results. Therefore, I consider Plaintiffs' claims in light of the 50% cash and 50% stock Merger Consideration that was in effect as of the date the parties entered into the Merger Agreement.

like *QVC* and others are important to a robust analysis of the issue.[107] In *QVC*, for example, the Supreme Court noted the importance of considering whether a target's stockholder's voting rights would be relegated to minority status in the surviving entity of a merger and whether such stockholders still could obtain a control premium in future transactions as part of the postmerger entity in determining whether a "change of control" had occurred.[108] But, the fact that control of Rock-Tenn after consummation will remain in a large pool of unaffiliated stockholders, while important, neither addresses nor affords protection to the portion of the stockholders' investment that will be converted to cash and thereby be deprived of its long-run potential.

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107 *See* DAB 27 ("Taken together, these cases suggest the questions that should inform the applicability of *Revlon* in a mixed cash/stock deal: Does control of the post-merger company remain in a large, fluid, and changeable market? Do the target's shareholders retain a significant economic interest in the combined company? Must the directors, in considering the transaction, exercise their business judgment, or is price the only question they must consider to protect shareholders' interest? Do the shareholders retain the future opportunity to receive a control premium? Is there a "long run" for every target shareholder in the combined company?"); POB 23-24 & PRB 10 n.6 (urging the Court to consider the fact that Moore and Hunt will collect "change of control" bonuses in the range of $19 million if the Proposed Transaction closes as supporting the proposition that the Transaction represents a change of control). While the Board's treatment of certain of its management's change of control bonuses arguably may be relevant to the Court's analysis, the subjective beliefs of the Board members are not sufficient alone to invoke *Revlon*. *See Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1151 (Del. 1989).

108 *See Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42-43 (Del. 1994).

Based on the foregoing, therefore, I conclude that Plaintiffs are likely to succeed on their argument that the approximately 50% cash and 50% stock consideration here triggers *Revlon*.

b. The *Revlon* standard

When the Board explored whether to enter into the Proposed Transaction, which, as discussed above, warrants review under *Revlon*, its fiduciary duties required it to obtain the best value reasonably available to Smurfit-Stone stockholders.[109] There is no single path that a board must follow in order to maximize stockholder value,[110] but directors must follow a path of reasonableness which leads toward that end.[111] Importantly, a board's actions are not reviewed upon the basis of price alone.[112] In reviewing a board's actions under *Revlon*, the Court must (1) make a determination as to whether the information relied upon in the decision-making process was adequate and (2) examine the reasonableness of the directors' decision viewed from the point in time

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109 *Revlon v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 184 (Del. 1986); *QVC Network Inc.*, 637 A.2d at 44.

110 *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).

111 *QVC Network Inc.*, 637 A.2d at 45.

112 *In re J.P. Stevens & Co. S'holders Litig.*, 542 A.2d 770, 781-82 n.6 (Del. Ch. 1988).

during which the directors acted.[113] Director defendants have the burden of proving they were adequately informed and acted reasonably.[114]

2. Application of *Revlon*: the sales process undertaken by the Smurfit-Stone Board

Plaintiffs first attack the process the Special Committee undertook in the run up to its recommendation to the Smurfit-Stone Board that it approve the Proposed Transaction. Specifically, they assert that the Committee impermissibly: (a) engaged in exclusive negotiations with Rock-Tenn and approved a deal with it based on inadequate information and without previously canvassing the market; (b) agreed to restrictive deal protections that preclude a meaningful post-signing market check and discourage the submission of competing bids; (c) permitted certain members of senior Smurfit-Stone management with conflicting interests to play significant roles in negotiating the deal terms; (d) relied on a financial advisor with no experience in the containerboard industry and with a financial incentive to close a transaction; and (e) accepted an inadequate price. I address each of these contentions in turn.

a. Exclusivity, market check, and inadequate information

Plaintiffs contend that the Board breached its fiduciary duties by engaging in a flawed negotiating process, approving the Proposed Transaction without having adequate

113 *QVC Network, Inc.*, 637 A.2d at 45.

114 *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 596 (Del. Ch. 2010) (citing *QVC Network, Inc.*, 637 A.2d at 45).

information, and agreeing to deal exclusively with Rock-Tenn even though the latter never requested such a restriction.[115]

At the outset, I note that the process followed by the Board and Special Committee was not perfect. But, reasonableness, and not perfection, is what *Revlon* requires.[116] After carefully reviewing the record, I find that the process undertaken by the Board included sufficient indicia of reasonableness under the circumstances to satisfy *Revlon*.

Preliminarily, I reject Plaintiffs' contention that the Board and Special Committee were not adequately informed when they authorized the signing of the Merger Agreement. First, the record reflects that nine out of the current ten Smurfit-Stone directors are outside, independent directors. These individuals are sophisticated business executives with experience in a diverse range of industries.[117] Although a substantial majority of these directors took their seats after Smurfit-Stone exited bankruptcy, they educated themselves about the Company and took their positions as directors seriously.[118] Moreover, upon receiving notice of the first offer from Company A, the Board created a Special Committee, which retained competent advisors. Specifically, it obtained

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115 In addition, Plaintiffs argue that the Board should have conducted a presigning market check, but deliberately chose not to do so. They also criticize the Board's decisions not to reach out to other potential bidders after being contacted by Rock-Tenn and not to conduct a postsigning market check.

116 *Dollar Thrifty*, 14 A.3d at 595.

117 *See* Compl. ¶¶ 10-19.

118 *See* Foster Dep. 12-13; Hake Dep. 11-20. This involved considering, among other things, Smurfit-Stone's operations and growth opportunities, as well as the industry in which it operated.

financial counsel from Lazard, an advisory company with significant experience working with Smurfit-Stone in its bankruptcy, and legal counsel from Wachtell Lipton, an established leader in the M&A space. Finally, Plaintiffs have not demonstrated any reason to doubt the independence or disinterestedness of any of the outside Board members.

In addition, despite Plaintiffs' claims otherwise, the Board made appropriate use of the Special Committee, which was comprised of all nine of the Company's outside directors. The Committee asserted its control over the negotiations with Company A and Rock-Tenn, as well as their own personnel, from a very early stage. Indeed, Hake appointed a special Subcommittee of three outside directors to "drive the nitty-gritty work that gets done in analyzing a proposal" on a day-to-day basis because of his belief that the process should be driven by the Company's outside directors.[119] While management did play an active role in negotiating with Company A and Rock-Tenn, as discussed further below, members of the Special Committee made clear that potential acquirors needed to direct their communications and inquiries to the outside directors, through their financial advisor, Lazard.[120] Furthermore, the Committee did not accept projections from management or other sources at face value and held regular and robust discussions regarding them, including pushing back against management to make sure

[119] Foster Dep. 70; McCormick Aff. Ex. 5.

[120] *See*, *e.g.*, Sorrels Aff. Ex. C at SSCC0000013.

they were not "in any way . . . intentionally or unintentionally . . . sharing with us projections that were excessively conservative."[121]

Further, Plaintiffs took issue with the relatively short duration between the date the Board received Rock-Tenn's first concrete indication of interest, approximately January 4, 2011, and the date the Board approved the Proposed Transaction, January 23, 2011. They contend this was an insufficient amount of time to understand adequately the Company's value, especially to other potential strategic bidders. While the length of time a company has to determine its options is important in assessing the reasonableness of a board's actions under *Revlon*, it is not dispositive, and a relatively quick sales process is not a *per se* ground for a *Revlon* violation.[122]

In *Lyondell Chemical Co. v. Ryan*, for example, the Supreme Court indicated that the Lyondell directors did not breach their duties of loyalty to the company even though they took only approximately one week to consider Basell's offer to purchase the company for $48 per share[123]—one-third the time the Smurfit-Stone Board spent negotiating with Rock-Tenn. Importantly, the Supreme Court explained that the Lyondell board's process, while short in duration, was thorough enough to satisfy the directors' fiduciary duty of loyalty under *Revlon* because, among other things, they: (1) met several times during the week they considered Basell's offer; (2) permitted their

121 Foster Dep. 218-19; McCormick Aff. Ex. 40.

122 *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009).

123 The Supreme Court found that the "time for action under *Revlon* did not begin until July 10, 2007, when the directors began negotiating the sale of Lyondell [to Basell]." *Id*. at 242.

CEO to try to negotiate better terms with Basell; (3) evaluated the price offered and the likelihood of obtaining a better price; (4) were generally aware of their company's value and understood its market; (5) solicited the assistance of competent financial and legal advisors; and (6) attempted to persuade Basell to improve its offer even though evidence indicated that $48 was a "'blowout' price."[124]

Similarly, in this case, the Board met multiple times in January to consider Rock-Tenn's offers, permitted Lazard and Hake to try to persuade Rubright to improve Rock-Tenn's $35 offer, evaluated that offer using Lazard's valuations, Wachtell's legal expertise, and its own knowledge of the Company's market, and discussed the likelihood that a better offer would materialize.[125] Moreover, the Board benefited not just from its and Lazard's work in January, but also from their work in previous months when the Special Committee was evaluating Company A's offer.

I also note that, notwithstanding Plaintiffs' pejorative characterizations, the Special Committee's conduct in January 2011 was assertive and apparently devoid of undue influence by management. Indeed, the Committee not only pushed back against management at times, it also pushed both of the companies that expressed interest in acquiring it to increase the attractiveness of their offers on multiple occasions. For

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124 *See id*. at 242-44. Unlike the *Lyondell* case, where the surviving claims sought only money damages, this case seeks preliminary injunctive relief and, therefore, I consider both Defendants' duty of care as well as their duty of loyalty.

125 *See* McCormick Aff. Exs. 8-11. The Committee also directed Lazard to take a hard look at the Levin projections and determine whether they were reliable. *Id*. Ex. 40.

example, the Committee entertained two different offers from Company A and rejected its more recent one, for $29 per share, as inadequate. The Committee also negotiated two separate price increases from Rock-Tenn before the latter offered its best and final price of $35 per share, up from its original offer of $30.80 per share.[126] Moreover, the Committee extracted other concessions from Rock-Tenn as well, including reciprocity with respect to certain deal protection devices and an undertaking by Rock-Tenn to assume certain of Smurfit-Stone's liabilities. These negotiations demonstrate that the Special Committee did not bow to management pressure and, instead, engaged in real, arm's-length dealings with potential acquirors, a characteristic often considered by this Court in evaluating the reasonableness of special committees' actions.[127] From these facts, I conclude that Plaintiffs are not likely to succeed on their claim that the Board was not adequately informed and failed to take sufficient actions toward the goal of maximizing stockholder value in its sales process.

Similarly, and for many of the same reasons, I do not find that Plaintiffs are likely to succeed on their claim that the Board breached its fiduciary duties by agreeing to deal exclusively with Rock-Tenn and failing to conduct a presigning market check. In the context of a merger transaction, directors have a duty to maximize stockholder value, but they are under "no duty to employ a specific device such as the auction or market check

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[126] Rubright made clear to Lazard and Hake that Rock-Tenn was not prepared to go any higher than $35. *Id*. Ex. 9.

[127] *See generally In re Inergy L.P.*, 2010 WL 4273197, at *14-15 (Del. Ch. Oct. 29, 2010).

mechanism."[128] Even without such a market check, I find that the members of the Special Committee had enough information by the time they received Rock-Tenn's best and final offer reasonably to determine that a topping bid was unlikely. First, Smurfit-Stone was in Chapter 11 bankruptcy for approximately a year and a half, ending on June 30, 2010, and had received some interest from potential acquirors during this time, but nothing concrete had materialized. The Board was notified about these indications of interest and considered the bankruptcy time period to be a functional equivalent of a market check.[129]

Merely being notified about interested potential bidders during a bankruptcy that occurred several months before a number of new directors are thrust into *Revlon* mode, on its own, is not an adequate substitute for a board's duty reasonably to consider alternative transactions to maximize stockholder value. It may be relevant, however, to the Court's analysis from an informational standpoint. That is, the Smurfit-Stone bankruptcy provides an important backdrop to the other information the Board considered when it decided not to conduct a presigning market check in regard to accepting Rock-Tenn's final offer. In particular, the Board also considered that no bidder

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128 *See, e.g.*, *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 n.28 (Del. 2009) (citing *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1287 (Del. 1989), for the proposition that "[d]irectors need not conduct a market check if they have reliable basis for belief that price offered is best possible."); *Herd v. Major Realty Corp.*, 1990 WL 212307, at *9 (Del. Ch. Dec. 21, 1990) ("*Revlon* certainly does not . . . require that every change of control of a Delaware corporation be preceded by a heated bidding contest, some type of market check or any other prescribed format.").

129 *See* Foster Dep. 178-79, 114-15; McCormick Aff. Ex. 6.

approached it during the time it sought to divest certain of its assets in response to the Levin Report and that by mid-2010 the containerboard industry was aware that the Company likely was a takeover target.[130] Furthermore, the Board considered that Company A had made a significantly lower offer of $29 per share and elected not to return to the negotiating table with a higher bid when Smurfit-Stone invited it to do so.[131] The Board also received Lazard's independent advice that Rock-Tenn's offer was fair and that a topping bid was not likely to materialize by January 10, 2011.[132] Finally, the Committee considered it important that under the terms of the Merger Agreement, it still could consider Superior Proposals even after it entered into such Agreement.

In the face of this information, the Board also considered the dangers of delaying a signing with Rock-Tenn. Conducting a prolonged presigning market check would have increased the risk of information leaks pertaining to a possible imminent sale of Smurfit-Stone, which may have disrupted the Company's personnel and business,[133] and

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[130] *See* Foster Dep. 116-17.

[131] McCormick Aff. Ex. 6.

[132] *Id*. Ex. 8.

[133] *Id*. Plaintiffs dismiss as inherently inconsistent Defendants' position that the market knew Smurfit-Stone was a takeover target but, at the same time, the Board was wary of information leaks about Rock-Tenn's possible interest in taking over the Company through the Proposed Transaction. I disagree. First, there is an appreciable difference between market participants' knowledge that a company might be in play and a company's public announcement that it definitely is for sale. In the latter case, the company risks jeopardizing employee morale, long-term business relationships with customers, and the like. More importantly, Defendants credibly assert that at the time the Board was considering the Rock-Tenn offer, it had not definitively decided to sell itself; rather, the Committee considered remaining a stand-alone company a real alternative. As such, it was

potentially could have further frustrated an already difficult search for a permanent CEO, in the event a sale never took place. In addition, the Board understood that there were only a few potential strategic buyers who might be interested in acquiring Smurfit-Stone and, by virtue of being in the same industry, those potential buyers likely would have been aware of Smurfit-Stone's receptiveness to a transaction.[134] Plaintiffs also make much of the fact that Smurfit-Stone, and not Rock-Tenn, requested exclusive dealings, but this duty was reciprocal. With the knowledge that other bidders were not likely to step forward and a reasonable belief that Rock-Tenn's offer was superior to remaining as a stand-alone company, the Board reasonably could have sought to sign an exclusive deal with Rock-Tenn to prevent the latter from considering other acquisitions, subject to its fiduciary duties.

Therefore, I find that the Board possessed a sufficient amount of reliable evidence from which it reasonably could conclude that a market check was not worth the risks of jeopardizing the Rock-Tenn Transaction and that dealing exclusively with Rock-Tenn would maximize stockholder value.[135] As such, Plaintiffs are not likely to prevail on

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not inconsistent for the Board to think the market knew the Company might be a takeover target, but still seek to avoid leaking information about its talks with Rock-Tenn.

[134] *See* Hake Dep. 25. Defendants contend that the fact that none of these potential buyers stepped forward further supports the reasonableness of the Board's actions. DAB 36.

[135] *Cf. Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1287 (Del. 1989) ("When . . . directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market.").

their claim that the Board unreasonably failed to perform a formal market check before or after signing the Merger Agreement.

b. Deal protection devices

Plaintiffs next argue that, having decided to forego conducting a presigning market check, the Board impermissibly agreed to several preclusive deal protection devices in the Merger Agreement.

First, Plaintiffs attempt to paint the members of the Special Committee as aloof and lacking the interest or ability to understand the import of the deal provisions Wachtell negotiated on their behalf. Based on a careful review of the deposition transcripts from which Plaintiffs selectively quote to support this contention, I do not agree. Rather, the record reflects that the Board actively and keenly focused on instructing Wachtell to negotiate terms that would be reciprocal in force and preserve Smurfit-Stone's ability to consider potential topping bids even after the Merger Agreement was signed.[136] In fact, Wachtell secured more favorable terms for Smurfit-Stone than initially were offered to it by Rock-Tenn. The matching rights period, for example, was reduced from five days to three days, the no-shop provision included by Rock-Tenn in its first merger draft proposal was made reciprocal, and the termination fee of approximately 4% of equity value first proposed by Rock-Tenn was reduced to approximately 3.4%.[137]

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136 Foster Dep. 174-75, 198; Hake Dep. 43-45, 56 (noting that the Board had multiple discussions with Wachtell about "key provisions" of the Merger Agreement).

137 *Compare* McCormick Aff. Ex. 67 *with* Merger Agreement § 8.2.

Plaintiffs argue that, even if the Board understood these provisions, the Board should not have agreed to them without first conducting a presigning market check.[138] I agree with Defendants that this does not accurately state Delaware law. Indeed, in *Dollar Thrifty*, Vice Chancellor Strine found the Dollar Thrifty board's use of no-shop, matching rights, and termination fee provisions to be reasonable and not preclusive or coercive, even though, as the plaintiffs argued, the company had agreed to deal exclusively with Hertz without conducting a presigning market check.[139] Thus, I evaluate each of these provisions individually and cumulatively under the circumstances of this case to determine whether the Board acted reasonably in agreeing to them and whether, in fact, they are preclusive or coercive.

Specifically, the three items challenged by Plaintiffs are the no shop provision, the matching rights provision, and the termination fee, which are included in §§ 6.4, 6.5, and 8.2 of the Merger Agreement, respectively. According to Plaintiffs, the no shop

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[138] POB 28. They assert that the Board could have foregone a presigning market check, but only if it conducted a postsigning market check in the absence of these deal protection devices. *Id.* In addition, they argue that the Board should have negotiated for a go-shop provision rather than agree to a no shop provision. But, as discussed in the text, I find no fault with the Board's decision to agree to a no shop and, moreover, *Revlon* does not compel a board to use a specific type of deal protection device; it may use such devices as long as it does not deter from the directors' ultimate duty to maximize stockholder value. *See In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *8 (Del. Ch. Sept. 30, 2009) ("The mere failure to secure deal protections that, in hindsight, would have been beneficial to shareholders does not amount to a breach of the duty of care.").

[139] *See In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 612-13, 615 (Del. Ch. Sept. 8, 2010) ("Of course, in signing up a deal without a pre-signing market check, it was incumbent upon the Board to consider whether it had extracted all the value it could and whether it was ensuring the viability of a post-signing market check.").

provision, which, as mentioned *supra*, contains a fiduciary out that allows the Board to consider Superior Proposals, substantially reduces the likelihood of a topping bid because it prohibits the Board from actively soliciting potential interested parties. Similarly, they object to the matching rights provision, under which Rock-Tenn has three days to match a Superior Proposal, on the ground that it significantly reduces the likelihood of such a proposal. Moreover, Plaintiffs allege that the $120 million termination fee, which constitutes approximately 3.4% of equity value, is excessively large and significantly diminishes the probability of a competing buyer making a bid. Lastly, Plaintiffs contend that these three protective devices have an unreasonably preclusive effect in combination, even if none is preclusive in isolation.

Under the relevant case law, Plaintiffs are not likely to succeed in showing that the no shop and matching rights provisions are unreasonable either separately or in combination.[140] Potential suitors often have a legitimate concern that they are being used as a stalking horse merely to draw others into a bidding war. This presumably was a concern for Rock-Tenn based on the facts that while the Company had been the subject of persistent takeover rumors for several months, potential buyers had shown little interest, with the exception of Company A, and that Rock-Tenn's initial draft of the Merger Agreement contained both a no shop and matching rights provisions. Therefore,

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140 *See, e.g.*, *id*. at 618 (refusing to enjoin a strategic deal with matching rights and no shop provisions because these deal provisions were neither preclusive nor unreasonable); *In re Toys 'R' Us, Inc., S'holder Litig.*, 877 A.2d 975 (Del. Ch. 2005) (declining to enjoin merger with no shop provision and temporally limited match rights).

in an effort to entice an acquirer to make a strong offer, it is reasonable for a seller to provide a buyer some level of assurance that he will be given an adequate opportunity to buy the seller, even if a higher bid later emerges.[141] Plaintiffs have not shown that any alternative bidder was precluded by the challenged provisions from successfully making a higher offer. Accordingly, they have not demonstrated a likelihood of success on the merits of their objections to either the no shop or matching rights provisions.

Plaintiffs also take issue with the $120 million termination fee, which represents approximately 3.4% of equity value. While the termination fee is toward the upper boundary of permissibility under Delaware law, this Court has approved several termination fees of similar size.[142] The relative size of the Termination Fee is further mitigated by the fact that it is reciprocal, applying to Rock-Tenn as well as Smurfit-Stone. Accordingly, because the Termination Fee is generally within the range previously found to be reasonable and appears to have resulted from good faith, arm's-

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141 Indeed, no shop and matching rights clauses of the kind included in the Merger Agreement are customary in public company mergers today. *See, e.g.*, *In re Toys 'R' Us, Inc. S'holder Litig.*, 877 A.2d 975, 1017 (Del. Ch. 2005) ("neither a termination fee nor a matching right is *per se* invalid. Each is a common contractual feature . . . ."); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000) (noting that deal protections, including no shop provisions, are "rather ordinary"); *see also NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 14 (Del. Ch. 2009) (referring to no shop provision as using "customary language"); McCormick Aff. Ex. 94, ABA *2010 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study* (Dec. 29, 2010), 63.

142 *See, e.g.*, *In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *4 (Del. Ch. Apr. 11, 2011) (upholding termination fee of 4.4%); *Dollar Thrifty*, 14 A. 3d at 614 (upholding 3.5% termination fee); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505-06 (Del. Ch. 2000) (upholding 3.5% termination fee).

length negotiations, I conclude that Plaintiffs are not likely to succeed on their claim that the Board acted unreasonably in assenting to that fee.

In addition, I am not persuaded that, collectively, the Merger Agreement's three primary deal protections unreasonably inhibit another bidder from making a Superior Proposal. The challenged provisions are relatively standard in form and have not been shown to be preclusive or coercive, whether they are considered separately or collectively. Accordingly, on the record presented, I am not convinced that Plaintiffs are likely to be able to prove that the Board acted unreasonably in agreeing to give Rock-Tenn these deal protections.

c. Conflicted management

Plaintiffs next take issue with the Special Committee's decision to permit Moore and Hunt, whom they characterize as having significant conflicts, to take active roles in negotiating the Proposed Transaction with Rock-Tenn. Plaintiffs cite as the source of these conflicts the employment agreements of Moore and Hunt, which provide for change of control bonuses that, according to Plaintiffs, incentivized them to negotiate a change of control without regard to whether it was in the Company's stockholders' best interests.

First, Plaintiffs complain that the Committee permitted Moore and Hunt to lead the due diligence process with "no involvement" from the outside directors on the Committee. The record does not support this argument. The Committee fully understood that Moore and Hunt potentially faced conflicts of interest as a result of the change of control bonuses they stood to receive if a transaction closed. The evidence also shows that the Committee believed that Moore and Hunt, as management with an intimate knowledge of the Company, were better equipped to effectively and efficiently negotiate due diligence matters with Rock-Tenn than the nonemployee directors on the Committee.[143]

In addition, the evidence demonstrated that, because management's potential conflicts were recognized, the Board took firm control of the sales process and management's involvement in it.[144] Moore, for example, was permitted to participate in Special Committee meetings, but only when he was updating the Committee on negotiations and other business matters. He always was excused and not present during important Committee votes. Furthermore, Moore and Hunt were involved primarily in the due diligence aspect of the sales process and only took actions in this capacity that were expressly authorized by the Committee.[145] Despite authorizing management to negotiate due diligence issues with Rock-Tenn, the Committee, through Wachtell and

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143 *See* Hake Dep. 78-79.

144 McCormick Aff. Ex. 29 (in response to news of a potential Company A offer, Foster stated "[i]f the offer is forthcoming, I suggest the independent directors quickly take control and drive this without [Moore] or [Klinger]."), 86 (Hake emailing Lewis, stating "I had dinner with [Moore, Klinger, and Hunt] and they were upset about the perceived lack of trust and being excluded from our board discussions but understand we need to run a clean process."); Moore Dep. 38 ("Hake instructed us to go through a special committee and that he wanted to be involved in all discussions with [Company A].").

145 *See, e.g.*, McCormick Aff. Exs. 54, 50; Rubright Dep. 112-14 (noting that he contacted Moore only to discuss due diligence issues and that Rock-Tenn "tried to follow the protocols that Smurfit established for us exactly, and those protocols were . . . [']don't call me, call Lazard.[']. Lazard said you can call Mr. Hake . . . they were in control of the process and we followed it."); Sorrels Aff. Ex. C (the Board controlled who Rock-Tenn and its advisors could talk to at Company and when).

Lazard, and not management, served as the primary negotiator for many of the substantive terms of the Merger Agreement.[146]

Next, Plaintiffs find support for their argument that the process was tainted by management's conflicted involvement in the Committee's delegation to Moore of the task of negotiating the drop-dead date for the Merger Agreement. They stress that the drop-dead date of September 30, 2011 conveniently coincides with the last date on which a change of control transaction may be completed to trigger Moore's bonus. While the Committee did delegate this task to Moore, the record indicates that the parties' chosen date was dependent at least as much on Rock-Tenn's ability to secure financing as on Moore's self-interest. Indeed, Rock-Tenn originally sought a six month drop-dead date and Smurfit-Stone sought a longer one to increase the likelihood of consummating the transaction.[147] It was only when Rock-Tenn's bank agreed to extend its financing commitment from six to eight months that the parties agreed upon September 30, 2011, approximately eight months after signing, as the drop-dead date.[148]

Plaintiffs merely have established that certain of Smurfit-Stone's management had potential pecuniary conflicts of interest based on the existence of change of control

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146 *See* Rubright Dep. 112-14; Foster Dep. 173 (noting the Committee's firm position as to a termination fee), 175 ("Q. Were . . . negotiations [about deal protection devices] handled primarily by outside counsel? A. The direct conversations were, but [the Special Committee] had a number of briefings and [outside counsel] certainly [was] guided by not only their market knowledge but by the direction of the special committee.").

147 Rubright Dep. 115-16.

148 *Id*. at 116.

bonuses in their employment contracts. The evidence shows that the Defendant outside directors had nothing to do with negotiating or approving those contracts. Moreover, Plaintiffs have not shown that the executives involved acted on their conflicts at Smurfit-Stone's expense or that the Committee impermissibly permitted them to do so. Therefore, Plaintiffs are not likely to succeed in proving that Moore and Hunt, and Klinger to the extent Plaintiffs include him in their conflict argument, materially tainted the sales process here through their involvement in it.

d. Inexperienced and conflicted financial advisor

Plaintiffs further contend that the Special Committee's hiring and reliance on Lazard, whom they characterize as conflicted and inexperienced, contributes to the unreasonableness of their conduct under *Revlon*. They argue first that the Lazard team had no experience in the paper and fiberboard industry or with mergers involving corporations that recently had exited bankruptcy. In addition, Plaintiffs fault the Committee for hiring Lazard without conducting a formal interview process or receiving a presentation by Lazard.

These criticisms are largely unfounded. While the Board did not conduct a formal interview process or "beauty pageant," it did meaningfully consider the issue of hiring an experienced and independent financial advisor.[149] Several members of the Special Committee recommended hiring Lazard based on their belief that it had significant M&A experience and that it would be independent because it had no previous relationship with

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[149] *See*, *e.g.*, Foster Dep. 71; Hake Dep. 112.

the Special Committee or the other Transaction participants. Equally important, the Committee determined Lazard would be a good fit because of its prior experience advising Smurfit-Stone when it was in bankruptcy and its resultant ability to get up to speed quickly.[150] I also note that the Board did not take lightly the terms under which it retained Lazard. In that regard, the Board negotiated to reduce Lazard's fees and obtained a lower contingent success fee.[151]

This segues into Plaintiffs' next criticism; namely, that the Special Committee agreed to retain Lazard under terms that include a "significant success fee, whereby Lazard will receive substantially greater compensation if a deal closes – even a bad deal – than if there is no transaction."[152] Plaintiffs argue this type of fee structure is appropriate in an auction setting where a corporation is choosing among competing bids, but not where the corporation is choosing between selling itself or remaining as a going concern. In the latter situation, Plaintiffs assert that a success fee creates a "strong incentive" for Lazard to push through any deal, even a bad deal, to collect its fee. This, they contend, is what happened here because Lazard made no good faith attempt to push Rock-Tenn to increase its offer above $35 per share.

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150 Foster Dep. 71; Hake Dep. 111.

151 Hake Dep. 112-13.

152 POB 33 (noting that under the terms of its retention, Lazard will receive up to $3 million if no transaction is consummated, but will receive 50 basis points relative to the total consideration paid in a consummated transaction, which would be approximately $23 million for the Proposed Transaction).

Contingent fees for financial advisors in a merger context are somewhat "routine" and previously have been upheld by Delaware courts.[153] Moreover, a sales process is not unreasonable under *Revlon* merely because a special committee is advised by a financial advisor who might receive a large contingent success fee, even if the special committee is considering only one bidder. Rather, the Court can take that fact into consideration in determining whether the financial advisor failed to assist the committee in maximizing stockholder value or whether the committee failed to oversee adequately the advisor's work. Here, Plaintiffs failed to allege any colorable wrongdoing or conflict on the part of Lazard.[154] Even if they did, I find that the Special Committee maintained continuous and diligent oversight of Lazard's work and negotiations with Rock-Tenn and Wells Fargo. Indeed, even if Lazard merely "went through the motions" in half-heartedly asking Rock-

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153 *See In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *8 (Del. Ch. Mar. 4, 2011) ("Contingent fees are undoubtedly routine; they reduce the target's expense if a deal is not completed; perhaps, they properly incentivize the financial advisor to focus on the appropriate outcome."); *Toys "R" Us*, 877 A.2d at 1005.

154 Plaintiffs' chief support for its contention that Lazard failed meaningfully to push Rock-Tenn to exceed its $35 dollar offer is an incomplete email chain between Lewis and certain of Rock-Tenn's financial advisors at Wells Fargo. Pls.' Ex. 50. The chain has the subject line "We will take you at your word that this is best and final . . ." and includes an email from Lewis telling his counterpart at Wells Fargo that he will inform the Board that $35 is Rock-Tenn's best and final price. Because Plaintiffs did not file the entire email chain, I am unable to determine what was said before Lewis's email, the contents of the original email, or the full context of these communications. Therefore, I afford only limited weight to this exhibit.

Tenn to improve its $35 bid as Plaintiffs claim, the Special Committee independently verified that Rock-Tenn would not budge past $35.[155]

Therefore, I find that the Special Committee's decision to retain and rely upon the work of Lazard was not unreasonable and, as such, is not likely to provide a predicate for a violation of its members' fiduciary duties.

e. Inadequate price

Plaintiffs further contend that the price of the Proposed Transaction is inadequate. They have provided little basis, however, on which to question the reasonableness of the Board's decision that $35 per share was a fair price. To support their claim, Plaintiffs rely primarily on the projections made by Rock-Tenn's investment banker, Wells Fargo, and those made by the Levin Group in July 2010. The Smurfit-Stone Board, however, was not privy to the calculations made by Wells Fargo. Moreover, reasonable minds may differ as to the value of the Company because, ultimately, valuation is an art and not a science. As to the presentation by the Levin Group, Lazard and the Special Committee specifically focused on that information. Moreover, it was acknowledged that the Levin Group's analysis was based on several speculative assumptions, some of which, including the Company's ability to divest certain of its Mills, later proved to be unrealistic.[156]

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155 *See, e.g.*, McCormick Aff. Ex. 9; Hake Dep. 193-94, 197-200 (describing multiple discussions with Rubright and how Rubright made clear that Rock-Tenn's best and final offer was $35 per share and that it was a "take it or leave it" offer).

156 The Board concluded that certain of the recommended divestitures could not be made, a suggested plant closure would be costly, and there was significant

On the whole, I am not convinced Plaintiffs are likely to be able to prove that the Board's decision was unreasonable. With that in mind, there were a number of pieces of information to support $35 per share as a fair price. First, Defendants already had rejected as inadequate an offer from Company A of $29 per share. This provided the Board with at least some sense of how much at least one significant financial buyer might be willing to pay and also indicates that the Board was willing to reject an offer that it deemed to undervalue the Company. Second, Defendants considered certain standalone options as presented by Levin, some of which they rejected explicitly as infeasible. Third, Lazard provided extensive analysis that indicated that $35 per share was a reasonable price based on measures such as a discounted cash flow, EBITDA multiples for comparable companies, and comparable transactions. While Plaintiffs question whether Lazard offered unbiased advice, I have rejected that argument for the reasons discussed *supra*. Furthermore, a quasi-appraisal process is inappropriate at this point because even a dispute over valuation between two financial advisors will not support a preliminary injunction.[157]

3. Aiding and abetting

Rock-Tenn contends that the Court should deny Plaintiffs' claim for injunctive relief as to it for two independent reasons: (1) Plaintiffs waived their aiding and abetting

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execution risk associated with certain other aspects of the Levin analyses. *See* Levin Dep. 45; Foster Dep. 39, 55, 86.

[157] *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 118-19 (Del. Ch. 2007) (positing that a motion for a preliminary injunction regarding an upcoming merger, as opposed to an appraisal proceeding, was an inappropriate juncture to issue an opinion as to the value of the seller's shares).

arguments against Rock-Tenn by failing to include them in their opening brief; and (2) Plaintiffs failed to establish a likelihood of success on the merits of their claim against Smurfit-Stone.

To prevail on their aiding and abetting claim against Rock-Tenn, Plaintiffs must establish a likelihood of success in proving: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, and (3) a knowing participation in that breach by Rock-Tenn.[158] Because Plaintiffs have failed to demonstrate a likelihood of success on their claims against Smurfit-Stone, their claim for preliminary injunctive relief against Rock-Tenn for aiding and abetting Smurfit-Stone's alleged wrongdoing must fail.[159]

4. The alleged disclosure violations

In their briefs, Plaintiffs alleged that the disclosures contained in the Preliminary Proxy Statement contained material deficiencies. By the time of the preliminary injunction Argument, however, Defendants had provided supplemented disclosures,[160] which Plaintiffs acknowledged at the Argument mooted their disclosure complaints.[161]

C. Irreparable Harm

As I discussed in *In re Cogent, Inc. Shareholder Litigation*, the Court of Chancery is reluctant to interfere with a stockholder's right to make fully informed and

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158 *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995).

159 As such, I need not reach Rock-Tenn's waiver argument.

160 D.I. 117 Ex. A.

161 *See* Tr. of Prelim. Inj. Arg. held May 18, 2011 at 31-32.

disinterested business decisions relating to her shares.[162] Therefore, before this Court will enjoin a merger transaction, a plaintiff must demonstrate harm for which she has no adequate remedy at law and that a refusal to issue an injunction would be a denial of justice.[163] The alleged harm must be imminent and genuine, as opposed to speculative.[164] For example, this Court has found a threat of irreparable harm "in cases where an after-the-fact attempt to quantify damages would 'involve [a] costly exercise[ ] in imprecision' and would not provide full, fair, and complete relief for the alleged wrong."[165]

Plaintiffs initially alleged two sources of potential irreparable harm here: (1) harm from forcing Smurfit-Stone stockholders to vote on the Proposed Transaction without the benefit of adequate disclosures; and (2) harm resulting from the Board's breaches of its *Revlon* duties, which will have the effect of forever preventing the Company's stockholders from obtaining the maximum value for their shares.[166] Because the disclosures arguments are now moot, I focus on Plaintiffs' claims of irreparable harm based on the Board's alleged *Revlon* violations.

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162 *See In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 513 (Del. Ch. Oct. 5, 2010) ("This Court has long afforded significant respect to the stockholder's ability to make business decisions through an informed, disinterested vote, whether through the corporate franchise or a tender of her shares.").

163 *See, e.g., CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC*, 2011 WL 353529, at *11 (Del. Ch. Jan. 28, 2011); *Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 208 (Del. Ch. 2002).

164 *In re Inergy L.P.*, 2010 WL 4273197, at *17 (Del. Ch. Oct. 29, 2010).

165 *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2367669, at *5 (Del. Ch. June 7, 2010).

166 POB 46-48.

In some situations where a target's board breaches its duties under *Revlon*, a Court may find that stockholders face a threat of irreparable harm because the board failed to adequately shop the company in advance of recommending that stockholders approve a proposed merger.[167] This is because after-the-fact inquiries into what might have been had directors adequately tested the market necessarily involve speculation and guesswork.[168] Yet, in the absence of concomitant disclosure violations and where a plaintiff's complaint boils down to an allegation of inadequate price, Delaware courts have found that money damages can provide a sufficient remedy for a board's *Revlon* violations.[169]

In the circumstances of this case, Plaintiffs have not established that permitting the Proposed Transaction to close would cause irreparable harm to Smurfit-Stone stockholders. First, as discussed above, the Board reasonably concluded that a topping bid was not likely to materialize imminently. Company A, for example, had submitted a much lower bid than Rock-Tenn and, despite being invited back to the table in December 2010, declined to improve that bid. In addition, Rock-Tenn told Smurfit-Stone that it had given its best and final offer and indicated that it would suspend negotiations if Smurfit-

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167 *See Netsmart*, 924 A.2d at 207; *Cogent*, 7 A.3d at 515.

168 *See Netsmart*, 924 A.2d at 207.

169 *See Norberg v. Young's Mkt. Co.*, 1989 WL 155462, at *3 (Del. Ch. Dec. 19, 1989) ("Norberg's fundamental contention is that the $3,500 purchase price does not represent fair and full value for Young's commonstock. Assuming that he is correct in that assertion, and assuming that he can prove he is entitled to recover on his *Revlon* claim, there is no reason why Norberg cannot be made whole through an award of damages following trial.").

Stone did not agree to a deal by approximately January 24, 2011.[170] Finally, the Special Committee was cognizant that there was a general awareness in the market that the Company was a potential takeover target, it had erected no structural barriers to such a takeover, including a poison pill, and no company had made a definitive offer to buy Smurfit-Stone during its Bankruptcy, the period when it was looking to divest certain of its mill assets, or any other time. Moreover, the Company arguably has been "for sale" for approximately four months since the Board approved the Transaction and no other bidder has indicated an interest in making an offer, or even indicated that the Merger Agreement's lock up provisions chilled it from doing so. In addition, Plaintiffs concede that all relevant facts relating to the Transaction are before the stockholders including, for example, the rise in the price of Rock-Tenn's stock since the announcement of the Transaction, which Plaintiffs assert reflects the market's view that Rock-Tenn is purchasing Smurfit-Stone "on the cheap." On these facts, I find Plaintiffs' argument that an injunction might provide a possibility of permitting a topping bid to materialize is speculative and insufficient to constitute irreparable harm.[171]

In addition, Smurfit-Stone stockholders who agree with Plaintiffs that $35 per share undervalues their investment in the Company are not without recourse in the absence of injunctive relief. Plaintiffs still may seek money damages as compensation

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170 McCormick Aff. Ex. 9.

171 *See Norberg*, 1989 WL 155462, at *4-5 (Del. Ch. Dec. 19, 1989).

for the Board's alleged breaches of their fiduciary duties.[172] They also may vote against the merger and seek appraisal for their shares under 8 *Del. C.* § 262.[173] Thus, I hold that Plaintiffs have failed to carry their burden to show they face a threat of irreparable harm in the absence of preliminary injunctive relief.

D. Balance of the Equities

In addition to determining whether Plaintiffs have satisfied the requirements of showing a reasonable likelihood of success on the merits and that they will suffer an imminent threat of irreparable harm if relief is not granted, I must consider whether Plaintiffs have demonstrated that "this Court's failure to grant the injunction will cause [them] greater harm than granting the injunction will cause [the other party]."[174] Thus, I also must engage in a pragmatic balancing of the equities, for which I have considerable discretion, based on the facts of this case.[175]

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172 Admittedly, however, this remedy may be of limited value based on the presence of an 8 *Del. C.* § 102(b)(7) exculpation clause in Smurfit-Stone's certificate of incorporation.

173 8 *Del. C.* § 262; *see also In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 123 (Del. Ch. 2007); *La. Mun. Police Empls. Ret. Sys. v. Crawford*, 918 A.2d 1172, 1192 (Del. Ch. 2007) ("So long as appraisal rights remain available, shareholders fully apprised of all relevant facts may protect themselves. They need no further intervention from this Court.").

174 *See, e.g.*, *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2367669, at *5 (Del. Ch. June 7, 2010); *Braunschweiger v. Am. Home Shield Corp.*, 1989 WL 128571, at *5 (Del. Ch. Oct. 26, 1989).

175 *CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC*, 2011 WL 353529, at *13 (Del. Ch. Jan. 28, 2011); *In re Holly Farms Corp. S'holders Litig.*, 564 A.2d 342, 348 (Del. Ch. 1989).

Here, Plaintiffs have not made a strong showing of a likelihood of success on the merits or the existence of irreparable harm if injunctive relief is denied. Moreover, the Proposed Transaction offers a significant premium to Smurfit-Stone's stockholders and, as of the date of this Opinion, no topping bid has been made or even suggested.[176] Enjoining the Transaction now would create a risk that Smurfit-Stone's stockholders could lose out on this Transaction altogether.

Furthermore, Plaintiffs have offered no proof to support their aiding and abetting claim against Rock-Tenn. Hence, there is nothing in the record to show that Rock-Tenn acted improperly. To the contrary, the record suggests that it engaged in arm's-length bargaining permissibly to advance its self-interests. Thus, to the extent the equities favor either side, I find that they favor Defendants.

III. CONCLUSION

For the reasons stated, I find that Plaintiffs have failed to carry their burden to prove they are likely to succeed on the merits of their claims, will suffer imminent irreparable harm if injunctive relief is not granted, and are favored by the equities. Therefore, I deny Plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED.

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176 *See Netsmart*, 924 A.2d at 208 ("[W]hen this court is asked to enjoin a transaction and another higher-priced alternative is not immediately available, it has been appropriately modest about playing games with other people's money.").