IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CLEAN HARBORS, INC.,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 6117-VCP**
SAFETY-KLEEN, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: August 17, 2011
Decided: December 9, 2011

Christopher M. Winter, Esq., DUANE MORRIS LLP, Wilmington, Delaware; Gary S. Matsko, Esq., DAVIS, MALM & D'AGOSTINE, P.C., Boston, Massachusetts; *Attorneys for Plaintiff*.

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PARSONS, Vice Chancellor.

This action involves a challenge to a decision by the board of directors of a company to call certain of its outstanding shares. The purchaser of those shares claims that the company called the shares at a below market price in violation of the express terms of the contracts governing the shares as well as the implied covenant of good faith and fair dealing. In response, the company claims that the call price was based on recent arms'-length negotiated sales of its stock, and, therefore, the board exercised its good faith discretion in setting the call price at the same price at which those transactions occurred. Assuming the purchaser's allegations are true, this case involves an arguably clever move made by the company that left the purchaser, a competitor, empty-handed and tricked out of the benefit of its bargain. The question is whether the company acted too cleverly and thereby breached certain contractual obligations or the implied covenant of good faith and fair dealing.

The company has moved to dismiss the purchaser's complaint for failure to state a claim. To resolve this motion to dismiss, I first must determine, as a threshold matter, whether the purchaser has alleged sufficient facts to support the conclusion that the call price was less than the fair market value of the shares at the time they were called. If the purchaser has met that burden, I then must turn to whether the purchaser also has alleged facts that would support the conclusion that the board, in fact, set the call price in bad faith.

For the reasons stated in this Memorandum Opinion, I find that the purchaser has alleged facts that conceivably would support a conclusion that the call price was set below fair market value and that the company acted in bad faith by setting the call price at that value. Therefore, I deny the company's motion to dismiss.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Clean Harbors, Inc. ("Clean Harbors"), is a Massachusetts corporation with its principal place of business in Norwell, Massachusetts. It provides environmental and hazardous waste management services throughout North America.

Defendant, Safety-Kleen, Inc. ("Safety-Kleen" or the "Company"), is a Delaware corporation with its principal place of business in Plano, Texas. Safety-Kleen, through its subsidiaries, is in the business of re-refining and recycling used oil and other environmental services businesses.

B. Facts[1]

In the fall of 2010, Clean Harbors became interested in acquiring Safety-Kleen. Clean Harbors's Chairman and CEO, Alan S. McKim, approached Safety-Kleen's Chairman and acting CEO, Ronald Haddock, and offered to purchase all of Safety-Kleen's common stock at $13 per share. Haddock presented the proposal to Safety-

[1] Unless otherwise noted, the facts recited herein are drawn from the Complaint and certain agreements integral to the Complaint, including the Safety-Kleen Equity Plan (the "Equity Plan") and the Stock Option Agreement (the "Option Agreement"). *See Vanderbilt Income & Growth Assoc., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) ("The exceptions to the general Rule 12(b)(6) prohibition against considering documents outside of the pleadings are usually limited to two situations. The first exception is when the document is integral to a plaintiff's claim and incorporated into the complaint. The second exception is when the document is not being relied upon to prove the truth of its contents.") (internal citations omitted). For the purposes of this motion to dismiss, these facts are presumed to be true.

Kleen's board and, after reviewing financial projections for Safety-Kleen for the next three years, the board rejected the offer during the week of December 13, 2010. According to Safety-Kleen's financial projections, the Company was worth at least $20 per share. Haddock invited Clean Harbors to increase its offer to something above $20 and enter into a confidentiality agreement with Safety-Kleen. Clean Harbors demurred, however, and acquisition discussions between the two companies ceased.

At the end of 2010, after Safety-Kleen rejected Clean Harbors's offer, Frederick J. Florjancic Jr., a former senior employee of Safety-Kleen, approached Clean Harbors about the possibility of Clean Harbors acquiring shares of Safety-Kleen from him and other former senior employees who held stock options of the Company. Florjancic, along with T.R. Tunnell, Dennis McGill, Ed Genovese, Mike Williams, and Donald Budhu (collectively the "Selling Shareholders"), cumulatively held options to acquire 1,700,840 shares of Safety-Kleen at exercise prices between $2.73 and $4.09. Most of the options were set to expire by the end of January 2011, but the Selling Shareholders did not have the requisite funds to exercise those options. Therefore, the Selling Shareholders sought to negotiate a deal with Clean Harbors that would provide them with the funds needed to exercise their options before they expired so that they could salvage some value from them.[2]

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[2] The Selling Shareholders held options that were set to expire at the end of the respective twelve-month periods following the termination of their individual employment relationships with Safety-Kleen. *See* Def.'s Exs. C-E. Florjancic, the largest optionee, held options on 806,850 shares set to expire on December 31, 2010. *See* Def.'s Exs. C, G. In addition, Tunnell held options on 220,050 shares set to expire on January 11, 2011. *See* Def.'s Exs. D, G. Together, Florjancic's

Although Clean Harbors initially was uninterested in the proposal, the parties eventually entered into an agreement by which Clean Harbors would purchase the shares for $7.50 per share. The deal was structured so that the Selling Shareholders first would exercise the options and receive the shares from Safety-Kleen. Clean Harbors would then pay the exercise price, withholding taxes, and a small premium for each share. The Selling Shareholders then would have Safety-Kleen transfer the shares to Clean Harbors. Because the transaction would give Clean Harbors an equity interest in Safety-Kleen, Clean Harbors's counsel notified Safety-Kleen's Vice President and Assistant General Counsel of the transaction and asked if Safety-Kleen had any objections to it. Safety-Kleen responded that it did not object. In fact, as a party to the Stock Purchase Agreements executed between the Selling Shareholders and Clean Harbors, Safety-Kleen agreed to be bound by the terms of those Stock Purchase Agreements applicable to it.[3]

On December 23, 2010, the transaction was consummated. With the exception of Florjancic, who retained 300,000 of his 806,850 shares, the other Selling Shareholders sold to Clean Harbors all the shares they received from exercising their options. Later that same day, Safety-Kleen sent written notice to Clean Harbors that it was exercising its call rights on the shares pursuant to the Option Agreement under which the shares were issued.[4] According to the Option Agreement, Safety-Kleen could call the shares

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and Tunnell's options accounted for over 60% of the options held by the Selling Shareholders.

3 *See* Def.'s Ex. F.

4 *See* Def.'s Ex. B [hereinafter "Option Agreement"] §§ 7-8.

purchased pursuant to the Selling Shareholders' options for "Fair Market Value of such Share[s] on the date upon which the right is exercised."[5] "Fair Market Value" is defined under § 2(o) of the Equity Plan, which governs the Option Agreement, as "the fair market value of a Share as determined by the Committee[6] *in its good faith discretion*, taking into account such factors as it deems appropriate."[7] Pursuant to this right, Safety-Kleen called all of the Shares acquired by Clean Harbors in the transaction at $7.50 per Share, the same price Clean Harbors had paid for the Shares just hours before.

C. Procedural History

Clean Harbors filed its Complaint on January 2, 2011. Safety-Kleen responded on March 28, 2011 by moving to dismiss under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The parties briefed the motion and oral argument was heard on August 17, 2011.

D. Parties' Contentions

The Complaint contains three counts. Count I seeks a declaration that the determination by Safety-Kleen's board that $7.50 was the fair market value for the Shares was not made in good faith and, additionally, that the Shares had a substantially higher

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5 *Id.* § 8(a). "Share" is defined in the Equity Plan as "Common Stock and any successor security." Def.'s Ex. A [hereinafter "Equity Plan"] § 2(x). For the purposes of this Memorandum Opinion, the term "Shares" includes the shares purchased pursuant to the options, which, for convenience, also will be denominated "Shares."

6 "Committee" is defined under the Equity Plan as "any committee or subcommittee the Board may appoint to administer the Plan." Equity Plan § 2(i).

7 *Id.* § 2(o) (emphasis added).

value at the time they were called. Count II asserts that, by calling the Shares at the submarket price of $7.50, Safety-Kleen breached its contractual obligations to Clean Harbors under § 8(a) of the Option Agreement because it did not determine in good faith the fair market value of the Shares. Count III asserts that Safety-Kleen breached the implied covenant of good faith and fair dealing by calling the Shares at a submarket price in order to benefit unfairly the remaining Safety-Kleen shareholders at Clean Harbors's expense.

In opposition, Safety-Kleen emphasizes that the price of $7.50 per share was negotiated at arms'-length between Clean Harbors and the Selling Shareholders in six separate transactions and, therefore, represented the fair market value of the Shares on the day Safety-Kleen exercised its call right. Thus, Safety-Kleen contends that its directors acted within their "good faith discretion" in calling the Shares at that price. According to Safety-Kleen, therefore, Clean Harbors has failed to allege sufficient evidence of bad faith to support its claims of breach of contract or the implied covenant of good faith and fair dealing.

II. ANALYSIS

A. The Applicable Standard

Pursuant to Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As recently reaffirmed by the Supreme Court, "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[8] That is, when considering such a motion, a court must accept all well-pleaded factual allegations in the complaint as true, including even vague allegations if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[9]

This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[10] If the well-pleaded allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the Court must deny the motion to dismiss.[11] The Court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[12]

B. Has Clean Harbors Alleged Sufficient Facts to Support a Conclusion that Safety-Kleen's Decision to Call the Shares at $7.50 was Made in Bad Faith?

The central dispute in this action involves whether Safety-Kleen's board acted in bad faith by deciding to call the Shares at $7.50 per share on December 23, 2010, the same day that Clean Harbors purchased them from the Selling Shareholders at that price.

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8 *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. Aug. 18, 2011) (footnote omitted).

9 *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

10 *Id.* at *5 & n.13.

11 *Id.* at *6.

12 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. July 11, 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

The dispute presents two primary questions: (1) whether $7.50 was less than the fair market value of Safety-Kleen stock on December 23, 2010 and (2) whether Safety-Kleen acted in bad faith by determining that the fair market value of the Shares was $7.50 for purposes of exercising its call rights. For the reasons stated below, I find that Clean Harbors's Complaint alleges facts that conceivably could support a conclusion that $7.50 was not the fair market value of the Shares and that Safety-Kleen's board acted in bad faith by calling the Shares at that price. Therefore, I deny Defendant's motion to dismiss.

1. Clean Harbors Has Alleged Sufficient Facts to Support a Finding that $7.50 Was Less Than the Fair Market Value for Safety-Kleen Shares

Clean Harbors contends that $7.50 was a submarket price because the Selling Shareholders sold their Shares under compulsion stemming from the imminent expiration of their options, at least as to Florjancic and Tunnell.[13] According to Clean Harbors, "[t]he Selling Shareholders were anxious to obtain value for their Options before they expired, but they could not afford to exercise the Options and pay the necessary withholding taxes."[14] By selling to Clean Harbors, the Selling Shareholders allegedly salvaged some value from their options, albeit at a submarket price.

Safety-Kleen argues that the Selling Shareholders sold their Shares in six different transactions, negotiated at arms'-length, and, therefore, those transactions provided a

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13 *See United States v. Cartwright*, 411 U.S. 546, 551 (1973) ("The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, *neither being under any compulsion* to buy or to sell and both having reasonable knowledge of relevant facts.") (emphasis added) (internal quotation marks omitted).

14 Compl. ¶ 6.

reasonable measure of the fair market value of the Shares. Further, Safety-Kleen denies that the sales were made under compulsion, noting that while some of the Selling Shareholders faced serious time constraints, others had months until their options were to expire.[15] According to Safety-Kleen, the fact that the Selling Shareholders all sold at one time, even though some could have held out, proves that they believed they were receiving fair value for their Shares. Safety-Kleen further asserts that if the Shares were being sold for a submarket price, the Selling Shareholders would have sold only as many Shares as necessary to enable them to exercise all of their options and would have banked the rest. Yet, only one of the Selling Shareholders actually did that. The other five sold their entire holdings to Clean Harbors, even though each of them could have retained at least some of their Shares.

a. The Equity Plan is, at best, ambiguous as to whether it required Safety-Kleen to determine the "fair market value" of its common stock with or without regard for the fact that the Shares were burdened with call options

Preliminarily, I note the existence of a potential ambiguity as to whether the Equity Plan required Safety-Kleen to set the call price at the fair market value of a single share of unencumbered common stock, or whether it allowed Safety-Kleen to discount the Shares held by Clean Harbors because they were burdened with embedded call options. A basic premise of Safety-Kleen's argument is that $7.50 represented the fair

15 Under the "Agreement and General Release" agreements between the Selling Shareholders and the Company, the options were exercisable for a twelve-month period after the employee left the Company. *See supra* note 2. Because each Selling Shareholder terminated his employment at a different time, the options' expiration dates varied. For example, Williams had until October 2011 to exercise his options. Def.'s Ex. E.

market value of a Share on December 23, 2010. Safety-Kleen arrived at that price because it was the same price that Clean Harbors paid for the Shares just hours before the call. Those Shares, however, were burdened with call rights that may have depressed their value relative to common stock not subject to such call rights. If it is at least conceivable that the Equity Plan required Safety-Kleen to determine the fair market value of an unencumbered Share, as Clean Harbors alleges, then Clean Harbors conceivably could succeed in proving that the call price it received from Safety-Kleen was less than fair market value.

To resolve this dispute, the Court must interpret the relevant documents governing the call rights. These are the Equity Plan, the Option Agreement, and the Stock Purchase Agreements. The Equity Plan provides only that the Committee was to determine the value of a "Share."[16] "Shares" is defined as "Common Stock and any successor security"[17] and "Common Stock" is defined as "common stock, par value $1.00 per share, of the Company."[18] This language appears to require Safety-Kleen to set the call price at the fair market value of a regular share of common stock, without a call option. The Option Agreement, however, is less clear. It provides that the "Purchase Price per Share with respect to Shares purchased by the Company in connection with the exercise of a Call Right shall be the Fair Market Value of *such* Share."[19] The use of the modifier

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16 Equity Plan § 2(o).

17 *Id.* § 2(x).

18 *Id.* § 2(j).

19 Option Agreement § 8(a) (emphasis added).

"such" before "Share" could be read to mean that the share being valued is the actual share being called, which in this case arguably involves the valuation of shares with embedded call rights. In fact, Safety-Kleen appears to make that argument.[20]

From the facts alleged, however, one also reasonably could infer that the parties intended a different meaning. That is, because the Company would be exercising the call right, any share it called would be held by the Company free and clear of any future call rights. In that respect, it is conceivable that Clean Harbors could prove that the parties intended to require Safety-Kleen to determine the fair market value of a share of its common stock without regard to any call right.[21]

Thus, I find that the different language used in the Equity Plan and the Option Agreement creates a potential ambiguity as to whether those agreements required Safety-Kleen to determine the fair market value of a common share with or without a call option. To resolve that ambiguity, the Court would need to consider any relevant extrinsic

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20 Def.'s Opening Br. 17 & n.41.

21 This construction is consistent with the relevant agreements. Under those agreements, Safety-Kleen had the right to restrict the Selling Shareholders' sale of Shares to a third party by, for example, requiring that the purchaser acquire the Shares subject to the same call rights attached to the Shares in the hands of the Selling Shareholders. Option Agreement § 5. Moreover, it is reasonable to infer that Clean Harbors took the call rights into consideration in agreeing to pay a price of $7.50 per share, because the stock it was purchasing would be so encumbered. *Id.* §§ 3.1(E), 3.2(J). In contrast, once Safety-Kleen acquired the Shares, the call rights would be immaterial to the Shares' value because only Safety-Kleen could exercise those rights. By invoking its call rights, therefore, Safety-Kleen expected to receive shares with a value to Safety-Kleen equivalent to unrestricted shares of its own common stock. In those circumstances, it is at least conceivable that the parties intended to require Safety-Kleen to determine the fair market value of such unencumbered shares, and not shares burdened by call rights.

evidence to establish the intent of the parties as to the meaning of the terms in question.[22] In any event, for the purposes of this motion to dismiss, I tentatively adopt Clean Harbors's interpretation and assume Defendant was required to determine the fair market value of the Shares without regard to a call right.

b. Plaintiff sufficiently alleged that the Shares were sold under compulsion

Turning now to whether the Shares were sold under compulsion, it is reasonable to infer from the facts alleged that at least Florjancic and Tunnell were under serious time pressure to sell their Shares because their options expired on December 31, 2010 and January 11, 2011, respectively. Because Florjancic and Tunnell collectively held rights to over 60% of the total Shares held by the Selling Shareholders, their participation in the deal conceivably placed pressure on the other Selling Shareholders to sell at the same time.

As Defendant's counsel admitted during oral argument, Safety-Kleen is a thinly-traded, private company.[23] It is reasonable to infer, therefore, that the remaining Selling Shareholders would have been concerned about being able to find another buyer

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[22] *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("[If] the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity. Then the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.") (footnotes omitted); *see also Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009) ("Such extrinsic evidence may include overt statements and acts of the parties, the business context, prior dealings between the parties, and business custom and usage in the industry.") (internal quotation marks and footnote omitted), *aff'd*, 7 A.3d 486 (Del. 2010) (TABLE).

[23] Tr. 50.

interested in their comparatively small allotment of Shares. As alleged in the Complaint, it is conceivable that the other Selling Shareholders determined that, although the price offered by Clean Harbors was less than fair market value, it was the best, and perhaps only, opportunity they might have to exercise their options before they expired.[24]

Moreover, the fact that five of the six Selling Shareholders sold all of their Shares, instead of only what was necessary to fund the exercise price of the remaining options, does not compel an inference that the Shares were sold at fair market value. Florjancic, the largest optionholder of the group, retained 300,000 of his 806,850 Shares.[25] This suggests that he believed he was selling his Shares at a submarket price. Indeed, Florjancic's actions in banking more than a third of his Shares, which alone represents a larger number of Shares than any of the other Selling Shareholders' individual holdings, makes it at least reasonably conceivable that the transaction was not free of compulsion. The possibility that the other Selling Shareholders decided to sell all of their Shares and forego retaining what would have been relatively small amounts of Safety-Kleen stock simply illustrates the need for further development of the factual record to resolve this case.

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[24] Compl. ¶ 6.

[25] Selling Shareholders Williams, McGill, Genovese, and Budhu held options on 198,045 Shares, 293,400 Shares, 100,490 Shares, and 82,005 Shares, respectively. Def.'s Ex. A.

c. Plaintiff sufficiently alleged the fair market value of the Shares was substantially more than $7.50

Finally, in addition to alleging that $7.50 was not the fair market value of the Shares, Plaintiff also has alleged that their actual fair market value was substantially higher than $7.50. To support this claim, Clean Harbors points to Safety-Kleen's own statements, made only days before the exercise of the call rights, that Safety-Kleen was worth at least $20 a share. Clean Harbors also notes that, in 2008, Safety-Kleen had valued its stock at approximately $15-17 a share in the lead-up to an aborted initial public offering. At that time, Safety-Kleen allegedly had approximately the same EBITDA as was projected for the Company in 2010 and, therefore, could be expected to have had a similar valuation.

Although Safety-Kleen credibly questions the reliability of these measures as indicators of the value of a single share of Safety-Kleen stock, such measures are not unreliable as a matter of law. As to Safety-Kleen's estimate of at least $20 a share in the context of an acquisition, for example, that number is probably too high because it undoubtedly incorporated a control premium that would not be present in the valuation of a single share. Without the benefit of discovery, however, the size of that control premium is unknown.

It is also significant that the Safety-Kleen Committee or board apparently made no attempt to obtain expert financial advice regarding the fair market value of the Shares. Instead, it relied entirely on the price contemporaneously negotiated by the Selling Shareholders and Clean Harbors. As discussed *supra*, however, the $7.50 price conceivably was the product of compulsion and reflected a discount due to the existence of the call right. Drawing all reasonable inferences in favor of Plaintiff, I find that at this preliminary stage of the litigation, it is at least conceivable that the fair market value of a single share of Safety-Kleen stock on December 23, 2010, was substantially higher than $7.50.

C. Clean Harbors Has Alleged Sufficient Facts to Support a Conclusion that Safety-Kleen Acted in Bad Faith by Calling the Shares at $7.50

Having determined that $7.50 may have been a submarket value for the Shares, I next address whether Clean Harbors also has alleged sufficient facts that conceivably could support a conclusion that Safety-Kleen acted in bad faith by calling the Shares at that price. Absent a reasonable basis for concluding that Safety-Kleen did not set the price at $7.50 in its "good faith discretion," Defendant would be entitled to dismissal of the Complaint, regardless of whether $7.50, in fact, reflected fair market value for the Shares. The Complaint in this case, however, does sufficiently allege bad faith by Safety-Kleen to survive this motion to dismiss.

To determine whether Clean Harbors pled sufficient facts to support a claim of bad faith by Safety-Kleen, I first must examine what is required to plead "bad faith" in this context. Defendant argues that in order to plead a claim for "bad faith," Clean Harbors must allege facts that conceivably could support a finding that Safety-Kleen's conduct was "so far beyond the bound of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[26] According to Safety-Kleen, such conduct must constitute "subjective bad faith" which is "conduct motivated by an actual intent to do harm" or, at the very least, "an intentional dereliction of duty."[27] Thus, it contends allegations of mere negligence or even gross negligence are insufficient to plead bad faith. Rather, Safety-Kleen asserts that Clean Harbors must plead that Defendant acted with a culpable mental state.

Clean Harbors, on the other hand, contends that a complaint need only allege bad faith and some motivation on the part of the defendant to have acted in bad faith.[28] Plaintiff further argues that in pleading an improper motive, it is not necessary to plead a culpable mental state, but rather it is sufficient to allege that the defendant acted in an unreasonable or unfair manner in carrying out its contractual duties.[29] According to Clean Harbors, Safety-Kleen's reliance on cases dealing with claims for breach of fiduciary duty in the corporate or derivative context is misplaced, because, unlike the situation here, such claims must rebut the presumption of good faith under the business

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[26] Def.'s Opening Br. 13-14 (citing *McGowan v. Ferro*, 859 A.2d 1012, 1031 (Del. Ch. 2004)).

[27] *Id.* at 14 (citing *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006)).

[28] Pl.'s Ans. Br. 14 (citing *Winston v. Mandor*, 710 A.2d 835, 844 (Del. Ch. 1997) ("The relevant part of plaintiff's complaint, quoted in full in the Supreme Court opinion, contained only facts related to the alleged act taken in bad faith, and a plausible motivation for it.")).

[29] Pl.'s Ans. Br. 13 (citing *E.I. duPont de Nemours & Co., Inc. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)).

judgment rule to succeed.[30] The policy considerations underlying these principles in the corporate context do not necessarily apply to a dispute over express or implied contractual obligations of good faith.

1. The pleading standard for contractual "bad faith" claims

I agree with Clean Harbors that, to allege a breach of a contractual duty to act in good faith, a complaint need only allege "facts related to the alleged act taken in bad faith, and a plausible motivation for it."[31] This is a minimal standard, the purpose of which is to give the defendant notice of the claim being made against it.[32]

In *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, LP*,[33] the Supreme Court held that an allegation that the defendants "acted in bad faith and in a retaliatory manner" was sufficient to satisfy the notice pleading threshold.[34] The Court

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30 *Id.*; *see Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006) (In the corporate context, the Court stated: "[A] failure to act in good faith is not conduct that results, *ipso facto,* in the direct imposition of fiduciary liability. The failure to act in good faith may result in liability because the requirement to act in good faith 'is a subsidiary element[,]' i.e., a condition, 'of the fundamental duty of loyalty.' It follows that because a showing of bad faith conduct, in the sense described in *Disney* and *Caremark*, is essential to establish director oversight liability, the fiduciary duty violated by that conduct is the duty of loyalty.").

31 *Winston*, 710 A.2d at 844; *see also Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, LP*, 624 A.2d 1199, 1207 n.12 (Del. 1993) (noting that Rule 23.1 imposes a higher pleading standard as to the demand requirement for a derivative claim for breach of fiduciary duty than is required under notice pleading).

32 *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 535 (Del. Aug. 18, 2011); *McPadden*, 964 A.2d at 1269.

33 624 A.2d 1199 (Del. 1993).

34 *Id.* at 1206.

stated that, for the purposes of a motion to dismiss, the trial court was required "to accept as true the allegations that the [defendant] had acted in bad faith and in a retaliatory manner or, at the very least . . . infer such from the allegations in the complaint."[35] Similarly, in *Gale v. Bershad*,[36] this Court found the plaintiff sufficiently had pled "bad faith" by asserting "that the directors had a conflicting self-interested motivation to redeem the Preferred for an inadequately low price."[37] In *Winston v. Mandor*, this Court likewise noted that allegations of bad faith did not need to meet the heightened pleading standards of Court of Chancery Rule 9(b) and went on to find that the pleading burden had been satisfied there because the plaintiff had alleged that the company acted in bad faith in valuing its stock, chose an interested party to perform its valuation, and benefitted its controlling shareholders by the bad faith action.[38]

Applying this pleading standard, I find that Clean Harbors sufficiently has pled "bad faith." The Complaint alleges that Safety-Kleen failed to act in good faith in determining the fair market value of the Shares.[39] Moreover, Clean Harbors alleges a

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[35] *Id.*

[36] 1998 WL 118022 (Del. Ch. Mar. 4, 1998).

[37] *Id.* at *4.

[38] 710 A.2d 835, 844 (Del. Ch. 1997).

[39] Compl. ¶¶ 13, 19, 28, 34; *see also Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 240 n.8 (Del. 2009) ("Our corporate decisions tend to use the terms 'bad faith' and 'failure to act in good faith' interchangeably, although in a different context we noted that, "[t]he two concepts-bad faith and conduct not in good faith are not necessarily identical. For purposes of this appeal, we draw no distinction between the terms.") (citations omitted).

sufficient improper motivation, claiming that Safety-Kleen desired to benefit the remaining Safety-Kleen shareholders, which conceivably could include Safety-Kleen's directors, at Plaintiff's expense.[40] In addition, the Complaint suggests that Safety-Kleen intentionally sought to deprive its competitor, Clean Harbors, of the benefit it bargained for under the Stock Purchase Agreement. According to Plaintiff, "at the time that Safety-Kleen's in-house counsel was assuring Clean Harbors that Safety-Kleen had no objection to Clean Harbors being a Safety-Kleen shareholder, a committee of the Safety-Kleen Board had already determined that it was going to exercise the Call Right immediately after Clean Harbors acquired the Shares."[41]

Safety-Kleen attempts to characterize this allegation as one addressing the board's negligence or gross negligence in setting the price without sufficient deliberation, which Defendant claims is insufficient to establish "bad faith." As Defendant admits, however, an alternative implication from this allegation is that Safety-Kleen intentionally "lulled" or "tricked" Clean Harbors into entering into the transaction with the preconceived intent to call the stock immediately upon closing and deprive Clean Harbors of the benefit of its bargain. Such a claim, because it alleges that Safety-Kleen acted with a culpable mental state, would satisfy even the higher standard of "bad faith" behavior that it espouses.

Furthermore, as Clean Harbors alleges in the Complaint, Safety-Kleen recently had valued its stock in excess of $20 per share and, in the context of comparable

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[40] Compl. ¶¶ 28, 34.

[41] *Id.* ¶ 11.

EBITDA projections for 2010, had valued its stock between $15 and $17 a share during an aborted public offering two years earlier.[42] As discussed *supra*, these facts are less than compelling. Nevertheless, there is no dispute that Safety-Kleen's board did not undertake an independent analysis of the fair market value of its shares. Instead, it relied entirely on the fact that Clean Harbors purchased the Shares from the Selling Shareholders on the same day at a negotiated price of $7.50. As previously discussed, however, Clean Harbors conceivably could succeed in proving that the $7.50 price was established under compulsion and is materially below the fair market value of an unencumbered share. Because it also is conceivable that the value of an unencumbered share is what Safety-Kleen contractually was required to determine, Safety-Kleen's alleged failure to look beyond the price set for the Shares subject to call rights further supports the conclusion that Clean Harbors conceivably could prove that Safety-Kleen did not act in good faith. Stated differently, Safety-Kleen conceivably could have viewed $7.50 as a submarket price and, yet, designed to buy back its stock at that value by lulling Clean Harbors into the transaction and keeping its plans regarding the call rights close to the vest.

Therefore, even under the higher standard of "bad faith" asserted by Safety-Kleen, I find that Clean Harbors sufficiently has alleged "bad faith" to survive this motion to dismiss.

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[42] *Id.* ¶¶ 15, 16.

D. The Implied Covenant of Good Faith and Fair Dealing

Defendant claims that the implied covenant of good faith and fair dealing cannot be asserted here because the Equity Plan already contains an express provision governing the discretion afforded to Safety-Kleen in determining "fair market value." According to Safety-Kleen, because the express contractual term is "good faith discretion" and because the implied covenant similarly requires contractual parties to exercise their discretion in good faith, the implied covenant "cannot be invoked to override the express terms of the contract."[43]

As an initial matter, I do not read Clean Harbors's implied covenant claim as an attempt to "override" the express terms of the Equity Plan. The implied covenant of good faith and fair dealing is a "backstop" that "requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain."[44] As this Court noted in *Alliance Data System Corp. v. Blackstone Capital Partners V L.P.*, the implied covenant "only applies where a contract lacks specific language governing an issue and the obligation the court is asked to imply advances, and does not contradict, the purposes

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43 Def.'s Opening Br. 12-13 (citing *Kuroda v. SPJS Hldgs., LLC*, 971 A.2d 872, 888 (Del. Ch. 2009) ("The implied covenant cannot be invoked to override the express terms of the contract.")).

44 *Alliance Data Sys. Corp. v. Blackstone Capital P'rs V L.P.*, 963 A.2d 746, 770 (Del. Ch. 2009) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)), *aff'd*, 976 A.2d 170 (Del. 2009).

reflected in the express language of the contract."[45] Therefore, where express contractual terms govern the conduct of the parties, the implied covenant, by its own operation, cannot conflict with those terms.

Although it is possible that the express term of the Equity Plan requiring Safety-Kleen to determine the call price in its "good faith discretion" may displace the implied covenant as to that term, I reject Defendant's argument that the implied covenant claim must be dismissed as a matter of law. At this preliminary stage, I cannot rule out the possibility that the implied covenant might apply to other provisions of the contracts governing the Shares. For example, assuming the relevant contracts are ambiguous as to whether Safety-Kleen was required to value a share with or without an embedded call right, the allegations of the Complaint support a reasonable inference that (1) Clean Harbors did not understand the definition of "Shares" to include shares containing the call right; (2) Safety-Kleen had the opposite understanding; (3) Safety-Kleen knew that it intended to act on its interpretation as soon as the Stock Purchase Agreements closed and call the Shares; (4) if Clean Harbors had known Safety-Kleen's intentions, it would not have purchased the Shares; (5) Safety-Kleen had reason to know this, but did nothing to apprise Clean Harbors of the situation; and, indeed, (5) Safety-Kleen deliberately misled Clean Harbors in that regard when it responded to Clean Harbors's inquiry by saying it had no problem with Clean Harbors, a competitor, becoming a stakeholder by purchasing the Shares. These alleged facts and inferences reasonably drawn from them conceivably

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45 *Id.*

could support a claim for breach of the implied duty of good faith and fair dealing, even if they did not support an express breach of contract claim.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, therefore, I deny Defendant's motion to dismiss.

IT IS SO ORDERED.