IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALLISON INC., TIMOTHY MICHAELS, CLAIRE LIEBERMAN, RHANEY PATRICKS, JULIO LUIS-ROJAS, PATRICK AUSTIN, MARSHA FRANKLIN, ARI SINGH and ALLEN ENTERPRISES INCORPORATED.	)	No. 162, 2013
Defendants Below, Appellants	)	Court Below: Court of the Chancery of the State of Delaware in and for New Castle County
v.	)	
GALENA CAPITAL PARTNERS, LLC.	)	Civil Action No. 7918-CN
Plaintiff Below, Appellee.	)	

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's Memorandum Opinion submitted on January 14, 2013 ("Op."). The present action was commenced in the Court of Chancery on December 21, 2012 by Plaintiff Galena Capital Partners, LLC ("Galena") against Defendants: (1) Callison, Inc. ("Callison"); (2) members of Callison's board of directors: Timothy Michaels, Clare Lieberman, Rhaney Patricks, Julio Luis-Rojas, Patrick Austin, Marsha Franklin, and Ari Singh (collectively "The Board") and (3) Allen Enterprises Incorporated ("Allen"), the majority shareholder of Callison.

On December 21, 2012, Galena moved for a preliminary injunction to prevent Callison's Board from enforcing a "Don't Ask, Don't Waive" standstill agreement ("DADW Standstill"), thereby permitting Galena to proceed with its proposed tender offer (the "Galena Tender Offer") and subsequent cash-out merger. (Op. 17). Galena emphasized The Board's duty to maximize shareholder value in any change of control transaction and denounced the Defendant's use of the DADW Standstill. (Op. 21). It claimed that the DADW Standstill amounted to a breach of The Board's fiduciary duties to all Callison stockholders (Op. 19), and represented a liquidity conflict with Allen. (Op. 24).

On January 15, 2013, Chancellor Aaron Nelson granted Galena's motion for a preliminary injunction, thereby enjoining Callison from taking any action to enforce the terms and conditions of the DADW Standstill. ("Inj."). Callison was also precluded from preventing Galena from further communicating with The Board. (Inj.).

Pursuant to Supreme Court Rule 42, Callison appealed the interlocutory order on January 23, 2013, which was granted on January 25, 2013. Callison emphasized the reasonableness of the disinterested Special Committee's decision to utilize the DADW Standstill in conjunction with a 40-day market check and argued that The Board fulfilled their fiduciary duties in all aspects of the transaction. Given The Board's strict adherence to an efficient, non-disruptive, and value-maximizing process, Callison asserted that Galena cannot demonstrate a reasonable probability of success on the merits, and a preliminary injunction is, therefore, inappropriate. (Op. 8, 20).

SUMMARY OF ARGUMENT

1. The Court of Chancery incorrectly granted Galena's motion for a preliminary injunction. Galena does not have a reasonable probability of success on the merits. When directors initiate a process to sell control of the corporation, the process must be reasonable, and its objective must be to maximize shareholder value. A DADW Standstill agreement—in conjunction with a subsequent market check—satisfies Callison's fiduciary duty to maximize shareholder value under *Revlon*. First, Callison's DADW agreement passes the enhanced scrutiny analysis required by *QVC*. Not only did The Board act on an informed basis and in the interest of fairness to its minority shareholders, it also adopted a reasonable course of action given its desire to achieve an efficient bidding process while simultaneously preserving existing contracts. Second, DADW Standstills are not *per se* invalid under Delaware law, and the 40-day market check distinguishes Callison's

DADW provision from other deal protection measures. Finally, *Revlon* duties cannot exist in perpetuity.

2. Galena's liquidity conflict and entire fairness arguments also fail to satisfy the reasonable probability of success standard. In merger transactions, the business judgment rule can be rebutted in favor of entire fairness only when the record clearly demonstrates that a controlling shareholder received materially different terms than the minority shareholders. The opposite is true here. First, the appropriate standard of review is business judgment or, at most, enhanced scrutiny. The Board's actions were reasonable because Allen's interests aligned with the minority shareholders, and the decision to sell was the result of an independent and disinterested deliberation process. Second, even if entire fairness was applied, the sale still resulted in both fair price and procedure, and thus was entirely fair to Callison's minority shareholders. The fact that Galena's entire case rests on an admitted breach of contract is further proof that The Board exercised proper business judgment by insisting on Galena's compliance with the DADW Standstill. Therefore, Galena fails to establish the reasonable probability of proving any liquidity conflict, and Plaintiff respectfully requests that this Court reverse.

STATEMENT OF FACTS

Callison is a Delaware corporation headquartered in Raleigh, North Carolina. The corporation manufactures and sells off-brand athletic apparel to large retail outlets such as Kohl's and Target (Op. 2). Of Callison's 85 million outstanding shares of common stock, 61.2 million, or 72%, are owned by Allen. *Id.* Allen is a holding

company incorporated under Delaware law and is privately owned by its founder, Allen D. Fairmount III. *Id.*

In August 2012, Allen retained an investment banking firm to discuss its interest in monetizing its 72% stake in Callison with The Board. (Op. 4). Two months later, Allen agreed to a $2.4 billion cash acquisition of Ca' Foscari Italian Grill ("Ca' Foscari") (Op. 5). The seven-member Board established a Special Committee ("The Committee") of three independent directors to negotiate on behalf of the Company and its minority shareholders. *Id*. The Committee had full investigative authority and retained the independent services of investment banking firm Boncheck Graycourt ("Boncheck") and Delaware law firm Jenkins, Piper, Hitchens & Ward, LLP ("Jenkins Piper"). (Op. 5). However, any proposed sale or merger transaction would remain subject to approval by the entire Callison Board. (Op. 4).

On October 20, 2012, The Committee met with Allen and its advisors to recommend selling Callison as a going concern. (Op. 6). To retain key employees and preserve customer contracts, the parties agreed that The Committee would privately canvas the market for potential suitors with "Don't Ask, Don't Waive" standstill agreements. (Op. 7). The Standstill limited each potential suitor to making one "best and final offer" upon invitation from The Committee and contractually barred a losing bidder from making a later topping bid. (Op. 8). The process also included a subsequent market check excluding any DADW bidders, consisting of a 25-day Go-Shop and 15-day Window Shop period. (Op. 9) The market check notably contained fiduciary out allowing The Board to recommend a superior proposal. (Op. 8).

Throughout October and November 2012, the canvassing process produced six parties whose interest in conducting due diligence was unhampered by the requirement of the DADW Standstill. (Op. 10). All six signed the DADW without objection, one of whom was Galena, a private equity firm and owner of 10,000 shares of Callison common stock. (Op. 2). After all six suitors submitted their "best and final offers" on December 14, 2012, The Committee and its advisors determined that the $34 per share all-cash, all-shares bid from Vicente was the most valuable proposal. (Op. 11). Galena's bid, though also an all-cash, all-shares offer, fell short at $32.50 per share, thereby precluding it from making any subsequent bids or communicating further with Callison. (Op. 11).

After legal representatives for Callison and Vicente negotiated a definitive merger agreement, Vicente launched a first step tender offer for all Callison shares on December 17, 2012. (Op. 14). During The Committee's subsequent 40-day market check, Galena approached Callison and requested The Board waive the DADW provision to permit Galena to make topping bid of $35.50. (Op. 15). On December 19, 2012, The Board and its advisors acknowledged Galena's proposal but concluded that the Delaware Courts would likely uphold the DADW Standstill and that The Board was within its proper business judgment to insist on its enforcement. (Op. 16). The Board informed Galena of its position on December 20, 2012 and, in accordance with the DADW Standstill, instructed Galena to cease all further communication with Callison. *Id.* In response, Galena filed this lawsuit on December 21, 2012 and commenced a tender offer for Callison shares. *Id.*

ARGUMENT

I. This Court should reverse the Chancery Court's preliminary injunction because Don't Ask, Don't Waive Standstills are not *per se* invalid under Delaware law, and the sale of control process implemented by Callison satisfies *Revlon*.

A. Question Presented

Is a voluntarily contractual provision granting a select number of bidders a one-time bidding opportunity valid under *Revlon* when coupled with a 40-day market check?

B. Scope of Review

The Court of Chancery's legal conclusions underlying its ruling on a preliminary injunction are subject to *de novo* review by this Court. *SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. Merits of the Argument

1. Callison's DADW Standstill satisfies this Court's holding under *Revlon* and is valid under Delaware law.

Don't Ask, Don't Waive ("DADW") agreements are not *per se* invalid under Delaware law, and the DADW provision adopted by Callison's Board should be deemed valid and enforceable by this Court. The business judgment rule grants directors the freedom to make a business decision protected by the presumption that they "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." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). When a board initiates a bidding process seeking sale of the corporation as a whole, the board must satisfy the enhanced scrutiny analysis under *Revlon* before deferring to the business judgment rule. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1989). Because Callison's DADW provision passes

enhanced scrutiny, this Court should reverse the Chancery Court's injunction and the Callison-Vicente merger should move forward.

i. Callison's DADW Standstill maximizes shareholder value and aligns with the holding in *Revlon*.

Revlon dictates that a board has a duty to seek the highest bidder when it initiates an active bidding process for the sale of corporate control; in other words, it must act reasonably to maximize the company's short-term value. *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). Under *Revlon*, sale of control by the board triggers enhanced judicial scrutiny. *Paramount Commc'ns v. QVC Network*, 637 A.2d 34, 36 (Del. 1994). But as long as a board acts with "scrupulous concern for fairness" to its shareholders, a "heated bidding contest" is not required for a court to determine a board is acting reasonably in the sale process. *Barkan v. Amsted Industries, Inc.*, 567 A.2d 1279, 1286-87 (Del. 1988). Indeed, there is "no single blueprint" directors must follow in order to achieve the best value reasonably available. *Id.* at 1286. *QVC*, 637 A.2d at 44.

Barkan illuminates the variety of methods a board may use to seek the highest price in a sale of control. In the case, Amsted Industry's board approved a management-sponsored buyout ("MBO") of the company's common stock to deter a hostile bidder. *Barkan*, 567 A.2d at 6. To finance the change of control, the board's special committee ended pension plans of Amsted employees. *Id.* The committee hired investment advisors to give a fairness opinion, but did not perform a market check. *Id.* Yet, this Court found the board's actions were consistent with *Revlon* because there is no stereotypical approach to a sale of control "in the face of evolving techniques and financing devices

employed in today's corporate environment." Various ways of attaining the highest bidder satisfy *Revlon* if a board ultimately shows good faith and due diligence under the circumstances. *Id.* at 19–21.

Callison's DADW Standstill satisfies the good faith and due diligence required under *Barkan*. Although the Chancery Court likened the DADW Standstill to a defensive mechanism similar to Amsted's MBO, such defensive mechanisms are permissible if they do not "thwart an auction or . . . favor one bidder over another." *Id.* at 1286–87. The intent of The Board is dispositive. Far from intending to thwart an auction to favor one bidder over another, Callison's Board adopted the DADW provision for efficiency purposes— to quickly discern the highest price on the market at the onset of the bidding process. (Op. 20). Indeed, the 40-day market check allowed Callison's directors to "conclude in good faith that they had approved the best possible deal for shareholders." *Id.* at 1288. Under *Barkan*, where good faith is found, "essential fairness" to the shareholders follows. *Id.* at 1281.

ii. The DADW Standstill adopted by Callison passes enhanced scrutiny required by *Revlon* and *QVC*.

Paramount v. QVC sets forth a two-part test requiring directors to act on an informed and reasonable basis to satisfy enhanced scrutiny under *Revlon*. The test requires: (1) "a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision"; and (2) "a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing." *QVC*, 637 A.2d at 45. The first part of

the test—examining reasonableness of the sale process—states that when a board treats two competing bidders unequally, a court must ask "whether the directors properly perceived that shareholder interests were enhanced." *Id.* at 34 (citing *Mills Acquisition Co.*, 559 A.2d 1261 (Del. 1989)). However, *QVC* warns that although enhanced scrutiny requires "a [court's] more direct and active role in overseeing" a board's decision process, the court must keep in mind the "complexity of the directors' task in a sale of control." *Id.* at 23, 36. Because Callison's board satisfies *QVC*'s enhanced scrutiny test, this Court should uphold the Callison-Vicente merger agreement and reverse.

a. Callison's board acted on an informed basis and adopted a decisionmaking process that ensured fairness to minority shareholders.

Callison's sale process satisfies the requirement for sound decisionmaking under the first prong of the enhanced scrutiny test. Under *Aronson v. Lewis*, a board must be "adequately informed" during sale of control negotiations. 473 A.2d at 812 ("[D]irectors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available . . ."). The key requirement is reasonableness. As long as a board sought the highest bidder with the information at its disposal, it cannot be blamed for failing to predict all potential bidders into the infinite future. *See In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 830 (Del. Ch. 2011) ("The key verb is 'sought.' Time-bound mortals cannot foresee the future. The test therefore cannot be whether, with hindsight, the directors actually achieved the best price."); *Smith v. Van Gorkom*,

488 A.2d 858, 873 (Del. 1985) (limiting the scope of information "reasonably available" to information at time of the merger proposal).

Here, Callison's board used information reasonably available during the sale process, without breaching the terms of its DADW contracts, to make an informed decision about the merger. Although Appellees suggest the DADW Standstill deliberately limits the universe of information required by *Revlon*, "reasonably available" does not preclude the use of information from a limited universe of potential suitors. Indeed, there is "no single method a board must employ to acquire adequate information." *Barkan*, 567 A.2d at 1287. Moreover, the DADW Standstill did not limit the information at Callison's disposal to six possible bidders; the 40-day market check alerted The Board to any bidders left on the market offering a price higher than Vicente's, and the fiduciary out clause allowed The Board to accept a higher post-agreement bid. This additional feature of Callison's sale process distinguishes it from the "informational vacuum" in *In re Celera Corp. Shareholder Litig.*, 2012 Del. Ch. LEXIS 66 at *81 (Del. Ch. Mar. 23, 2012), and satisfies a board's fiduciary duties of care and loyalty underlying *Revlon* and its progeny. Because the DADW Standstill acting in conjunction with the 40-day market check ensured Callison's board was adequately informed the first prong of *QVC* is satisfied.

b. Callison adopted a reasonable course of action to achieve an efficient bidding process and preserve its sales contracts with customers.

Callison's DADW Standstill satisfies the second prong of *QVC*, requiring "a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing." Case

law suggests this is not a stringent assessment: as long as a decision was made in good faith and ultimately falls into a broad "range of reasonableness," the court should defer to the board's business judgment. *Del Monte Foods*, 25 A.3d at 831 ("If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination.").

Here, circumstances required a method of sale that would quickly lock in a bidder's best and final offer. The cost-benefit analysis performed by Callison's board in evaluating the DADW Standstill illuminates the reasonableness of its actions: The Board weighed the advantages of using "an efficient, nondisruptive and value maximizing private auction process" against engaging in a protracted public bidding war that could devalue the company by "demoralizing key employees and jeopardizing future long term commitments with important Callison customers." (Op. 7-8). Although The Board later discovered Galena's topping bid, the potential value lost by refusing to consider the offer was regained by using a quick bidding process the DADW Standstill afforded. *See In re Ancestry.com*, Consol. C.A. No. 7988-CS at *28 (Del. Ch. Dec. 17, 2012) (noting that in adopting a DADW provision, "the board made the cost/benefit trade-off that the best way to get the value was to draw the highest bid out from those people while they were in the process; . . . in order to do that, it had to incur the cost of giving to the winner the right to enforce it.").

The method Callison's board used to satisfy its *Revlon* duties— the DADW Standstill and a 40-day market check— may not have been

perfect, but it was reasonable under the circumstances. *QVC*, 637 A.2d at 45 ("[A] court applying enhanced judicial scrutiny should be deciding whether the directors made **a reasonable** decision, not **a perfect** decision."). Because Callison's sale process ultimately falls into a "range of reasonableness," the DADW provision and 40-day market check satisfies the two prong test under *QVC*, and thus passes the enhanced scrutiny analysis required by *Revlon* in a sale of control. *Id.* Accordingly, this court should reverse.

2. DADW provisions are not *per se* invalid under Delaware law, and they should be distinguished from deal protection measures adopted in a hostile bidder context.

Don't Ask, Don't Waive provisions have never been declared *per se* invalid under Delaware common or statutory law, and this Court should refrain from invaliding such provisions when coupled with a market check. The Chancery Court's most recent rulings on the validity of DADW agreements fail to create a bright line rule prohibiting such agreements, and this Court should refrain from doing so when such provisions have value-enhancing characteristics.

Likening DADW agreements to a "bidder-specific no-talk clause," the Chancery Court has suggested that these provisions interfere with a board's duty to continually review its recommendation to shareholders and hold discussions with third parties. *In re Complete Genomics*, Consol. C.A. No. 7888-VCL at *14 (Del. Ch. Nov. 27, 2012)(citing *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 Del. Ch. LEXIS 202(Sept. 27, 1999)). Enjoining the standstill, Chancellor Laster suggested that DADW provisions should be judged using the criteria from *Phelps Dodge*, which asks "whether the provision

impermissibly prevented the board 'from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party.'" Id. at 15.

Callison's DADW Standstill belies Chancellor Laster's presumption in *Complete Genomics* that a board cannot make an informed judgment in a sale of control transaction in the presence of a DADW agreement. Callison was not prevented from "considering whether to negotiate" with Galena; the Special Committee decided at the outset of the sale process to forego negotiations with *all six* DADW bidders, not just Galena. If any other DADW bidder approached Callison, The Board would have treated each preliminary bidder the same. Indeed, "a board doesn't necessarily have an obligation to negotiate." *Id.* at 16-17 (internal citation omitted). Moreover, the DADW Standstill did not prevent The Board from soliciting higher offers —exactly what the 25-day Go-Shop period afforded. (Op. 9).

i. The DADW Standstill is not equivalent to a no-talk provision in a hostile bidder situation.

Complete Genomics falls short of drawing a direct parallel between no-talk provisions and DADW Standstills. Unlike the concern for the "omnipresent specter" of board self-interest that inevitably arises in evaluating lock-ups intended to deter a hostile bidder, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985), this Court should refrain from holding that DADW standstills necessarily serve to favor one bidder over another. Here, no distinction was made between the six initial bidders, and there is no indication Callison favored any one bidder. Even if a DADW Standstill equated to a lock-up, *Revlon* ultimately controls: "Since

Revlon, . . . differing treatment of various bidders is not actionable when [it] reasonably relates to achieving the best price. . .” *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1151, n.5 (Del. 1989) (citing *Mills Acquisition Co.*, 559 A.2d at 1286-87).

ii. DADW Standstills have an inherent value that Complete Genomics ignores.

Even if DADW Standstills are likened to deal protections, *Complete Genomics* discounts the fact that these agreements provide certainty to corporate transactions. Perhaps Former Chief Justice Veasey’s language in *Omnicare’s* dissent says it best: “Certainty itself has value. The acquirer may pay a higher price for the target if the acquirer is assured consummation of the transaction.” *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 942 (Del. 2003). Echoing the Chief Justice’s sentiments in the context of DADW provisions, *In re Ancestry.com* limits the scope of *Complete Genomics* (“I know of no statute, I know of nothing, that says that these provisions are per se invalid.”). Consol. C.A. No. 7988-CS at *21 (Del. Ch. Dec. 17, 2012).

In *Ancestry.com*, Chancellor Strine narrowly enjoined a DADW Standstill because the target board was not made fully aware of the potency of the provision. *Id.* at 19. Strine notes, however, that although DADW contracts are “potent” and “directors need to use [them] consistently with their fiduciary duties,” when used properly they can serve to maximize shareholder value. *Id.* at 22–23. DADW provisions not only foster a “competitive dynamic,” they also signal the end of an active bidding process for those who choose to participate. *Id.* at 23. These benefits should not be ignored by this Court.

Callison's DADW Standstill encouraged participation in a sale of control. Indeed, no additional bidders had emerged in the 40-day market check at the time this lawsuit was filed. (Op. 15). Further, it is not clear that any of the six DADW bidders would have engaged in negotiations with Callison but for the added assurance of winning a merger agreement with Allen's pre-commitment contract. Rather than deter potential suitors from making an offer, the DADW contract acted as *additional incentive* to encourage bidders in the sale process.

The 40-day post-agreement market check sets Callison's sale of control transaction apart from those in *Complete Genomics* and *Ancestry.com*. The sale process leading up to the Callison-Vicente merger ensured The Board that the highest bidder would emerge. Indeed, the Chancery Court has ruled that a market check period following a limited universe auction satisfies *Revlon*. *In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9, 21 (Del. Ch. 2004)(enjoining the merger on other grounds) ("Single-bidder approaches offer the benefits of protecting against the risk that an auction will be a failed one, and avoiding a premature disclosure to the detriment of the company's then-ongoing business."). *Id.* at 21. By noting the added value of DADW Standstills and by distinguishing the facts of the current transaction with recent precedent, this Court will create a line of demarcation between valid and invalid DADW Standstill provisions.

3. Ultimately, Delaware law is enabling, and *Revlon* duties cannot exist in perpetuity.

A ruling against Callison's Board and DADW agreements implicates this Court's increasing inflexibility to honor the uniqueness of a board's deal structure. *See Complete Genomics,* C.A. No. 7888-VCL at

*7; *Phelps Dodge Corp.*, C.A. No. 17398 at *2; *ACE Ltd. v. Capital Re Corp.*, C.A. No. 17488 at *109 (Del. Ch. 1999). Such a decision opposes the deal-enabling incentive of Delaware law and discourages companies from incorporating in the State. DADW agreements follow the "no single blueprint" language echoed throughout *Revlon* and its progeny. *Barkan*, 567 A.2d at 1286-87. Thus, if this Court believes a *per se* rule of invalidity should exist for such agreements, it is for the legislature to decide. *Ancestry.com*, C.A. No. 7988-CS at *20-21.

Furthermore, *Revlon* duties cannot exist in perpetuity. "When it is widely known that some change of control is in the offing and no rival bids are forthcoming over an extended period of time, that fact is supportive of the board's decision to proceed." *Barkan*, 567 A.2d at 1289. When a board has valid reasons for believing no rival bidder will surpass the price offered, it can conclude in good faith that it approved the best possible deal for all shareholders. *Id.*

Callison had valid reasons for believing that no rival bidder would surpass the price offered by Vicente. *See Barkan*, 567 A.2d at 1287. After each bidder made its "only, best and final offer" during the private auction, (Op. 8), Callison contacted over 100 potential suitors, but received no expressions of interest. (Op. 15). This lack of rival bids was "supportive of the board's decision to proceed," and its directors were free to conclude they achieved the best possible deal for the shareholders. *Barkan*, 567 A.2d at 1287. The only alternative to this rationale demands that a company like Callison, involved in a sale of control, continue to auction itself off in perpetuity. But such strict adherence to the idea of value

maximization would eviscerate the deal-enabling nature of Delaware law altogether. Thus, *Revlon* duties must be subject to an implicit limiting principle, placing those boards that conclude, in good faith, they have maximized shareholder value, within the safe harbors of Delaware law. The Callison Board's independent and deliberative sale process, in which all shareholders received identical consideration, aptly illustrates the practice of this principle. Consequently, this Court should reverse the judgment of the Court of Chancery.

II. Entire fairness is not the appropriate standard of review, even in light of Appellee's liquidity claim.

A. Question Presented

Must entire fairness be applied to a sale of control organized by an independent Special Committee, where all shareholders received identical consideration?

B. Scope of Review

As in Part I, this Court exercises *de novo* review of the Chancery Court's legal conclusions underlying its preliminary injunction ruling. *SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. Merits of the Argument

1. Even though Allen has a need for financial liquidity, the appropriate standard of review is the business judgment rule or, in the alternative, enhanced scrutiny.

Despite Allen's liquidity needs, this case should not be evaluated under entire fairness, but instead, under the business judgment rule, or at most, enhanced scrutiny, because: (1) Allen's interests were aligned with the minority shareholders; (2) the sale of Callison was the result of an independent and disinterested

deliberation process; and (3) Galena's waiver request and public tender offer breached its agreement with Callison. Shareholder plaintiffs in a merger transaction with a third party can rebut the business judgment rule and invoke entire fairness when a controlling shareholder receives materially different terms than the minority shareholders. *In re Synthes, Inc. S'holder Litig.,* 50 A.3d 1022, 1033 (Del. Ch. 2012). However, the business judgment rule applies to a merger resulting from an open and deliberative sale process when a controlling shareholder ratably shares that control premium with the minority. *Id.* at 1033. Alternatively, this Court has used enhanced scrutiny to evaluate the reasonableness of directors' conduct in a sale of control. *QVC*, 637 A.2d at 41-42. The inquiry turns on whether the directors made a reasonable, and not a perfect, decision. *Id.*

i. Callison's actions were reasonable because Allen's interest aligns with the minority shareholders.

When a stockholder who is also a fiduciary receives the same consideration for her shares as the rest of the shareholders, their interests are aligned. *Synthes*, 50 A.3d at 1035. In *Synthes*, the Chancery Court refused to invoke entire fairness, reasoning that a controlling stockholder with a liquidity need is well-suited to bargain on the minority shareholders' behalf because his large stake in the transaction gives him a natural incentive to obtain the best share price for all. *Id.*, citing *Goodwin v. Live Entm't, Inc.,* 1999 Del. Ch. LEXIS 5, at *72 (Jan. 25, 1999) (stating that a failure to produce evidence dampening a seller's "natural desire to obtain the best price" is fatal to the claim, *aff'd,* 741 A.2d 16 (Del. 1999)). There, the board's active solicitation of buyers over "an unhurried

time period," the bidders' access to due diligence, and a lack of discrimination by The Board among bidders were reasonable steps to maximize the company's sale price, and evidenced the aligned interests of the majority and minority shareholders. *Synthes*, 50 A.3d at 1025.

This Court should not apply entire fairness because Allen's interests were aligned with the minority shareholders. Allen's need for liquidity gave it every incentive to maximize Callison's sale price, and all shareholders received identical consideration for their shares. *See id.* at 1035. Allen exemplified this interest alignment throughout the acquisition and sale process. *See id.* It kept Callison's Board informed of its plans in "virtual real time" and included them in its search for acquisition candidates. (Op. 4). While Allen employed these board members, they owed fiduciary duties to Callison's shareholders and could not legally endorse any acquisition contrary to the best interests of that constituency. Thus, Callison believed Allen's acquisition served its own shareholders' interests.

Callison's Board reinforced this interest alignment through reasonable steps aimed at maximizing sale price. *See Synthes,* 50 A.3d at 1025. Both boards felt an auction of Callison was not in their respective shareholders' best interests; Allen had liquidity needs given its agreement to purchase Ca' Foscari, and Callison feared demoralizing key employees and jeopardizing long-term commitments with important customers. (Op. 7). These concerns motivated the chosen sale process, which featured Callison's active solicitation of buyers over "an unhurried time period," the bidders' access to due diligence, and a lack of discrimination by The Board among bidders. *Id.*

Appellee's failure to produce evidence dampening Allen's "natural desire to obtain the best price for its shares," as well as the wealth of evidence illustrating the reasonable steps taken to maximize Callison's sale price, prove Allen's interests aligned with Callison's minority shareholders. *See Goodwin,* 1999 Del. Ch. LEXIS 5, at *72.

ii. Callison's Board was not self-interested, and the decision to sell was a result of an independent and disinterested deliberation process.

Callison's Board's conduct was also reasonable because it created and fostered an independent and disinterested sale process. The *QVC* court emphasized the importance of outside, independent directors in a board's evaluation of a transaction due to the potential impartiality of other interested directors. *QVC*, 637 A.2d at 44. It is the "intense scrutiny and participation" of these independent directors that ensures a Board's conduct meets this Court's standard of independence. *Mills Acquisition*, 559 A.2d at 1285 (citing *Aronson,* 473 A.2d at 816). Further, a board's decisions based on reports of independent officers and other experts selected with reasonable care will not be disturbed when made in the proper exercise of business judgment. *Id.* at 1283-84.

Mills Acquisition upheld a preliminary injunction due to the Macmillan Board's failure to establish an effective Special Committee to independently evaluate the proposed transaction. *Id.* at 1267. The Committee was handpicked by Macmillan's CEO, and not formed until *after* management had conducted over 500 hours of extensive discussions with the Committee's assigned investment banking advisor. *Id.* at 1267-68. Most notably, the CEO gave himself, and not the independent Committee, full authority to negotiate with the bidder. *Id.* at 1268.

In contrast, the Chancery Court approved a sale of control negotiated by an inside director who stood to gain millions in compensation through the transaction. *MONY Group*, 852 A.2d at 20. The Court reasoned that the director's diligent negotiations, The Board's active supervision of the director, and its repeated demonstrations of independence satisfied the demands of enhanced scrutiny. *Id.*

The sale of Callison was the result of an independent and disinterested deliberation process that satisfied enhanced scrutiny. *See id*. Unlike the board in *Mills Acquisition*, Callison's Board established a Special Committee of three independent directors only days after being notified of the possible sale and well before it could conduct any conversations with potential advisory firms hired by the Committee. (Op. 5); *Mills Acquisition*, 559 A.2d at 1267-68. More importantly, The Board delegated full authority and negotiating power to the Committee on behalf of Callison and its minority stockholders, instead of entrusting that power to an interested director. (Op. 5); *See Mills Acquisition*, 559 A.2d at 1268; *MONY Group*, 852 A.2d at 20.

The Special Committee's "intense scrutiny and participation" was instrumental in maintaining The Board's independence throughout the sale process. *See QVC*, 637 A.2d at 44. It met the same day it was established, and agreed to retain the undisputedly independent services of both Bonchek and Jenkins Piper. (Op. 5). Additionally, it was the Special Committee that expressed concern to Allen about the detrimental effects of a protracted auction on Callison, agreeing, at the behest of Jenkins Piper, that a private canvass of the market followed by a market check was the most appropriate sale method. (Op.

7). The Committee and its advisors conducted the entire sale process, soliciting the firm to the eventual six bidders, and presenting the winning bid to The Board after being advised by Bonchek of its value maximization. (Op.11). Thus, when Callison's Board agreed to sell to Vicente, it was the product of the opinions and reports of independent officers and other experts selected with reasonable care in the proper exercise of business judgment. *See Mills Acquisition*, 559 A.2d at 1283-84. Accordingly, the decision should not be disturbed. *Id.*

iii. Galena's post-sale conduct constituted a breach of contract under the DADW Standstill.

Assuming the DADW provision is valid, this Court should apply a less exacting standard of review because Galena breached its contract with Callison upon its private waiver request of the provision and its subsequent public tender offer for all of Callison's shares. "The general rule applies as with all contracting parties: [a] valid contract will be enforced . . . unless the contract violates positive law or its non-performance is excused." *In re Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 977 (Del. Ch. 1997).

Here, Galena signed the DADW agreement knowing that "their invited bid would be [its] one and only opportunity to bid for Callison." (Op. 8). Upset after yielding an inferior offer, Galena illegally circumvented the process. It breached its contract twice: first, by privately requesting Callison waive the DADW provision—an action it admits was "facially in conflict" with the terms of the signed DADW agreement (Op. 15)—and second, through commencement of its own tender offer for Callison shares. (Op. 16). Each breach demands enforcement of the valid contract. *Ford Holdings*, 698 A.2d at 977.

Moreover, Galena's breach of the DADW agreement placed Callison in a "lose/lose" situation. Submitting to Galena's bid would have exposed it to breach of contract actions with each of the other initial bidders, including Vicente. Conversely, refusing Galena's overtures rendered it victim to a *Revlon* attack on an efficient private auction process used to maximize and protect inherent corporate value. (Op. 7). Thus, Callison's Board exercised proper business judgment within the most literal meaning of the term when it insisted on Galena's compliance with the DADW Standstill, and honored its agreement with Vicente. Its decision was reasonable under the circumstances, and withstands the more exacting lens of enhanced scrutiny. Accordingly, this Court should reverse.

2. Even if evaluated under entire fairness, the sale should be approved because it was entirely fair to Callison's minority shareholders.

The sale of Callison overcomes the hurdle of entire fairness because each minority shareholder received identical consideration in a transaction diligently executed by a group of independent advisors. Although entire fairness examines both price and dealing in a transaction, "all aspects of the issue must be examined as a whole since the question is one of entire fairness." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1244 (Del. 2012). "A fair process usually results in a fair price," and an entire fairness review is "significantly influenced by . . . a properly functioning special committee of independent directors." *Id.* at 1243-44.

The sale of Callison meets entire fairness because it was "structured, negotiated, disclosed [by], and approved by" the Special

Committee and its independent advisors. *Id.* at 1244. In addition to independently conducting the entire bidding process, the Committee received Bonchek's detailed valuation analysis, stating that the $34 all-cash, all-shares offer by Vicente was financially fair to Callison and its minority shareholders. (Op. 11). Only after this approval of both procedure and price did The Committee unanimously agree to recommend the proposal to Callison's Board. (Op. 11).

The Chancery Court incorrectly analogized the present case to *McMullin v. Beran*, where this Court ruled that Chemical Company breached *Revlon* during its sale from one controlling shareholder, ARCO, to another, Lyondell, to satisfy ARCO's liquidity needs. *McMullin v. Beran*, 765 A.2d 910 (Del. 2000). The Court held that time constraints surrounding the need for liquidity compromised the integrity of the Chemical board's decision-making process. *Id.* at 922. Furthermore, ARCO "unilaterally initiated, structured and negotiated the transaction" and the Chemical board made no determination of its value as a going concern before recommending approval of ARCO's proposed third-party transaction with Lyondell. *Id.* at 924.

McMullin cannot be the blueprint for the case at hand because the behavior of Callison's Board differs greatly from that of Chemical. While both controlling shareholders had liquidity needs, Allen did not structure nor negotiate the sale of Callison, but left that task to the Special Committee. (Op. 5); *See id.* Further, the entire process spanned seven months and Allen's time constraints regarding its liquidity needs never compromised the integrity of the Committee's decision-making process. *McMullin*, 765 A.2d at 922. Like the

controlling shareholder in *Synthes*, "[Allen] took its time . . . bidders [were given] access to non-public information, and the chance to consider the risks of making a bid and to raise financing." *Synthes*, 50 A.3d at 1037. Finally, the Special Committee and its advisors kept Callison's Board adequately informed, meeting several times outside the presence of Allen to assess the sale process and, eventually, the fairness of the Vicente offer. (Op. 12). This behavior of "a properly functioning special committee of independent directors" not only demonstrates the misguided analogy of the present case to *McMullin*, it satisfies the standard of entire fairness. *Americas Mining*, 51 A.3d at 1244; *See McMullin*, 765 A.2d at 924. Accordingly the Callison-Vicente merger should move forward.

CONCLUSION

This Court should overturn the Chancery Court's grant of Galena's motion for a preliminary injunction. Callison's Board satisfied its *Revlon* duties to maximize shareholder value in a change of control transaction. The combination of a DADW agreement with a 40-day market check represented an informed and reasonable decision by an independent Special Committee. Furthermore, Allen's interests and those of the minority shareholders remained aligned, and the proper standard of review is at most enhanced scrutiny. The DADW Standstill is enforceable and, therefore, this Court should reverse.

Respectfully submitted,

/s/ Team A

Team A, Counsel for Plaintiffs - Below, Appellants

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