

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALLISON INC., a Delaware Corporation,)
TIMOTHY MICHAELS, CLARE LIEBERMAN,)
RHANEY PATRICKS, JULIO RUIS-ROJAS,)
PATRICK AUSTIN, MARSHA FRANKLIN,)
ARI SINGH, AND ALLEN ENTERPRISES)
INCORPORATED,)
)
Defendants-Below,) No.162, 2013
Appellants,)
)
V.)
)
GALENA CAPITAL PARTNERS, LLC,)
A Delaware Corporation,)
)
Plaintiff-Below,)
Appellee.)

ON APPEAL FROM
THE COURT OF CHANCERY
FOR THE STATE OF DELAWARE

APPELLANT'S BRIEF

LAW FIRM B
ATTORNEYS FOR DEFENDANTS BELOW,
APPELLANTS

DATE FILED: FEBRUARY 8, 2013

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NATURE OF PROCEEDINGS

On October 20, 2012, Defendant-below Callison Inc. agreed to search for potential acquirers for Callison Inc. On October 29, 2012, Defendants-below and Plaintiffs-below Galena entered into a DADW standstill agreement ("the agreement"). On December 14, 2012, Plaintiff's-below Galena submitted a bid of \$32.50 for Callison Inc., which was below the winning bid of \$34 submitted by Vicente. On December 15-16, 2012, Callison and Vicente negotiated a merger agreement.

On December 21, 2012, Galena filed a lawsuit in Chancery Court for injunctive relief and simultaneously commenced a tender offer.

On January 15, 2013, the Court of Chancery granted Plaintiff's interlocutory motion for preliminary injunction. On January 17, 2013, defendants-below applied for certification of the interlocutory order. On January 25, 2013, the Supreme Court of Delaware accepted the interlocutory appeal dated January 15, 2013. This is Callison's opening brief on appeal.

SUMMARY OF THE ARGUMENT

I. The Court of Chancery incorrectly issued the preliminary injunction preventing Callison's board of directors from enforcing the "Don't Ask, Don't Waive" standstill agreement with Galena because the standstill agreement is valid. The agreement is valid because the Callison board satisfied its fiduciary duties by maximizing shareholder value through a market check process and because all interested parties were fully informed about the agreement. Furthermore, Callison board implicitly waived the "don't ask"

provision when it entertained Galena's offer with the guidance of its legal counsel and financial advisors. Therefore, the Standstill agreement is valid and enforceable because the Callison board in no way breach its fiduciary duties.

II. There has been no misuse of the standstill agreement by the Defendants, and the proper standard of review in this matter should be the business judgment rule because Galena has failed to demonstrate that the Callison board breached its fiduciary duties. Because there has been no breach of fiduciary duties by the Callison board, the entire fairness standard is not applicable here. However, if the Court chooses to apply enhanced scrutiny, this standard would be proper because the present matter concerns a voluntary change of control transaction where there was no breach of fiduciary duty by the board of directors. Under any of these degrees of scrutiny, the standstill agreement was not misused because the Callison board acted in an informed and deliberate manner, in good faith in the company's best interest, and with the assistance of independent legal and financial advisors to ensure fairness in the transaction.

STATEMENT OF FACTS

Callison Inc. ("Callison") is a publicly traded Delaware corporation that manufactures and sells athletic apparel to popular retailers such as Kohl's and Target. R. at 2. It currently has approximately 85 million shares of common stock, of which its majority shareholder, Allen Enterprises Incorporated ("Allen"), own 72%. Id. The plaintiff, Galena, a Delaware limited liability company, owns 10,000 shares of Callison common stock Id. at 1-2.

In the summer of 2012, Allen began to explore the possibility of liquidating its 72% stake in Callison in order to acquire a restaurant chain Ca' Foscari Italian Grill ("Ca' Foscari"). Id. at 3. Allen agreed to purchase Ca' Foscari in November 2012 through a \$2.4 billion cash acquisition with a closing date on March 31, 2013 and a termination date of May 31, 2013. Id. at 6. The deal contained a \$60 million liquidation provision imposed on whichever party fails to complete the transaction. Id.

With plans to purchase Ca' Foscari, Allen hired Reed Crustal LLP ("Reed Crystal") to advise Allen in regard to its strategic alternatives and to provide advice for maximizing the highest price for its 72% stakehold in Callison. Id. at 4. In October, Allen authorized Reed Crystal to approach Callison to discuss the sale of Callison and how to maximize the value Allen and the other shareholders could receive for the Callison shares. Id.

Aware of Allen's plans, the Callison Board met on October 10th. Id. The Callison board agreed to create an independent committee of the three independent directors to negotiate the sale of Callison. Id. at 4-5. The committee had "full authority and negotiating power" but the entire board would still be required to approve any sale. Id. at 5. The special committee quickly hired an outside investment firm, Boncheck Graycourt ("Boncheck"), and legal counsel, Jenkins, Piper, Hitchens & Ward, LLP ("Jenkins Piper"). Id. These legal and financial advisors were employed to independently offer advice on how to strategically maximize the value of the shares. Id.

On October 20, the special committee met to discuss an approach to selling all the shares of Callison. Id. at 6. Due to the limitations of a public auction, including the potential harm to shareholders, Callison's relationship with its retailers, and to Callison's key employees, the special committee decided to make use of a "Don't Ask, Don't Waive" standstill agreement ("DADW"), thereby creating a short and value maximizing sale. Id. at 7.

The DADW allowed at most twenty suitable purchasers to access Callison's confidential information before the purchaser could make a bid. Id. However, to have access to the confidential information, the potential purchaser agreed to keep the information confidential, was limited to one bid, and could not ask to waive the "don't ask" provision to make a second bid. Id. at 8. The special committee believed that the single bid strategy would create an "efficient, non-disruptive, and value maximizing auction process" by ensuring that each bidder would make their best offer first. Id. The special committee also reserved a market check period after the bidding process to solicit superior proposals. Id. at 8-9. If the special committee accepted a superior proposal, they would be subject to a 3% penalty, payable to the winner of the DADW standstill bid. Id. at 9.

After agreeing to use the DADW, Bonchek canvassed the markets for potential bidders, finding seven suitable parties. Id. at 10. Six of these parties eventually agreed to all the terms of the DADW, performed due diligence on Callison, and each made their single bid on December 14. Id. Plaintiff, Galena, was one of these six parties. Id.

The winning bid was a \$34 per share, all cash offer from Vicente. The committee determined that this was the best and most valuable bid. Id. at 11. Galena's all cash bid of \$32.50 per share was rejected. Id. With the special committee's recommendation and Bonchek's approval of the bid as fair, the entire Callison Board agreed to the Vincente bid. Within days of accepting the Vincente bid, Galena delivered a confidential letter to Callison's CEO on January 19th. Id. at 15. The letter asked Callison to waive the "Don't Ask" provision of its standstill agreement, and allow Galena to make a fully financed bid of \$35.50. Id.

In haste, the Callison Board met on January 19th to discuss the new Galena development. Id. at 16. The board decided to reject the financed bid from Galena and with their legal and financial council, decided to standby the agreement. Id. After receiving the rejection, Galena filed this suit and commenced an all-cash, all shares offer for Callison at \$35.50 per share. Id.

ARGUMENT

I. THE DADW STANDSTILL AGREEMENT IS VALID UNDER THE BUSINESS JUDGMENT RULE AND RECENT CASE LAW.

A. Question Presented

Whether the agreement used by the Callison board is valid under the business judgment rule or alternatively, under recent case law?

B. Scope of Review

This Court generally reviews grants or denials of preliminary injunctions without deference to the embedded legal conclusions of the court below. Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 394 (Del. 1996). Therefore, the applicable Standard of Review is de novo. Lawson v. Meconi, 897 A.2d 740, 743 (Del.2006).

C. Merits of Argument

It is a longstanding principal that the Delaware courts have never required any specific "blueprint" for how a board must go about the process of realizing value for its shareholders when selling the company. McMullin v. Beran, 765 A.2d 910, 917 (Del. 2000). Under the Business Judgment Rule ("BJR"), the court will not substitute its judgment for that of the board. Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) (citing Del. Code Ann. tit. 8, § 141(a) (West 2010)). Rather, in accordance with the BJR, courts adopt a presumption that in making a business decision, the board "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." Id. at 812; Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958-59 (Del. 1985); Solomon v. Armstrong, 747 A.2d 1098, 1111 (Del. Ch. 1999). The Callison board's use of a agreement should be presumed reasonable under the BJR because they

formed an independent committee and hired independent legal and financial counsel to guide them in the transaction. R. at 4-5. Plaintiff's allegations are nothing more than an invitation to second guess the decision of the board.

Furthermore, it is settled law that "standstill provisions are per se legal." Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183 (Del. 1986); Thompson v. Enstar Corp., 509 A.2d 578, 583 (Del. Ch. 1984); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1284 (Del. 1989); In re Ancestry.com Inc. S'holder Litig., C.A. No. 7988-CS, transcript op. at 21 (Del. Ch. Dec. 17, 2012).

i. The BJR is the proper standard to evaluate the validity of the agreement because the Callison board sought to maximize shareholder value, taking into consideration multiple factors and not just price.

Deference should be given to the board's tactical decision in determining which offer was the highest in value. In In re Cogent, Inc. Shareholder Litigation, the court determined that price and value are not synonymous with regards to shareholder value, thereby upholding the board's decision to choose a bidder who offered less in price but a more valuable offer in sum, under the business judgment rule. 7 A.3d 487, 503-504 (Del. Ch. 2010); see also In re Lear Corp. S'holder Litig., 926 A.2d 94, 118-19 (Del. Ch. 2007). Accordingly, the Callison board measured the value of the Vincente bid by considering both price and other factors, such as employee morale and relationships with retail business partners.¹

¹ The agreement was designed to incentivize potential suitors to put forth their most valuable bid during an orderly and timely auction,

Furthermore, both Galena and Vicente's offers were well above Callison's publicly traded stock price of \$27.00 prior to the bid. R. at 11. Galena's first bid was determined to be less valuable because the \$32.50 all-cash bid was less than Vicente's \$34 all-cash bid. Id. Galena's second bid of \$35.50, while greater than Vicente's \$34 bid, was fully financed. Id. at 15. Fully financed bids are inherently less valuable than all-cash bids because of the risk involved of the bidder failing to secure financing and burdening the acquired corporation with debt. As such, the Callison Board used its business judgment to determine that the Vicente bid was the most valuable offer for all its shareholders in terms of price and risk.

ii. Callison's use of a DADW standstill agreement is valid because stockholder value was maximized and all interested parties were fully informed.

In In re Ancestry.com, the court held that for DADW agreements to be valid the board of directors must maximize stockholder value or waive the "don't ask" provision of the agreement, and that all interested parties must be fully informed about the agreement. In re Ancestry.com, C.A. No. 7988-CS, transcript op. at 23, 24, 26.² The Callison board of directors satisfied each of these requirements.

avoiding the pitfalls of a public auction. R. at 7. The agreement would protect and kept confidential the terms of the ongoing relationships with Kohl's and Target and not demoralize dedicated key employees. Id.

² For an in depth discussion of the factors see In re Ancestry.com Inc. Shareholder Litigation, Sullivan & Cromwell LLP (Jan. 9, 2013), http://www.sullcrom.com/files/Publication/9ed56469-7044-4595-a2ef-f65074bf86ae/Presentation/Publication Attachment/2a8e61f7-44bb-4098-9c30-f751a4bb556b/SC_Publication_In_re_Ancestry_com_Inc_Shareholder_Litigation.pdf.

a. Callison's use of the agreement was value maximizing and the board waived the "don't ask" provision.

The first requirement under In re Ancestry.com is that the directors maximize shareholder value or waive the "don't ask" provision. Id. at 23-24.

1. The Callison board maximized value for shareholders

The agreement employed by the Callison board of directors was an honest forthright attempt to realize the best value for the Callison stockholders because it allowed Callison to get a high premium over the list price.

The Chancery Court has held that an agreement may be used to attempt to get the buyers to pay as full a price as possible, to create a competitive dynamic. Id. at 1-2, 23-24. The Chancery Court has also noted that agreements can give the corporation leverage to extract concession from the parties who seek to make a bid. In re Celera Corp. S'holder Litig., C.A. No. 6304-VCP, transcript op. at 21 (Del. Ch. Dec. 27, 2012) (citing In re Topps S'holder Litig., 926 A.2d 58, 91 (Del. Ch. 2007)).

In this case, Callison's board elected to implement an agreement in the auction process in order to extract the highest value possible from the bidders. R. at 8. The internal workings of the agreement ensured that the Callison stockholders would receive the best value. First, the agreement made clear to each potential buyer that only one bid would be allowed and therefore, each bidder should put forth their best and final offer because no further bids would be allowed. R. at 8-9. Second, the agreement ensured a market check period, which allowed outside bidders to outbid the final auction price further

guaranteeing that share value would be maximized. Id. at 9. Both measures ensured that shareholders would receive the highest value possible.

In In re Celera, the board of directors implemented an agreement that allowed Celera to extract the best value out of the bidder Quest. In re Celera, C.A. No. 6304-VCP, transcript op. at 3. Celera was able to obtain a 28% premium over the market for Celera stockholders. Id. at 5. However, Celera did not perform a market check to ensure that Quest's bid was the highest possible. Id. at 22. As a result, the Chancery Court required Celera to waive the agreement and allow those who were not a party to the agreement to submit a bid in order to maximize the shareholder value. Id. at 22-23.

Here, the Callison board of director's use of the agreement extracted a 26% premium over the unaffected trading price of \$27. R. at 11. This premium is similar to the premium achieved by the Celera board. However, the Callison board, unlike the board in In re Celera, implemented a market check provision. Id. at 9. Through the market check process, the Callison board avoided the mistake made by the Celera board by permitting those outside the agreement to submit a bid. By creating this market check period, the Callison board ensured the possibility of maximizing shareholder value.

In In re Complete Genomics, Inc. Shareholder Litigation, the Court held the DADW agreement was invalid due to the board's willful blindness. C.A. No. 7888-VCL, transcript op. at 13 (Del. Ch. Nov. 27, 2012). However, the Court acknowledged that the DADW agreement drove

up profit for shareholders, allowing the company to extract a 5% premium over the merger consideration. Id. at 17.

Here, the Callison board obtained a 26% premium far exceeding the 5% achieved by the Genomics board. R. at 11. Unlike the Genomics board, the Callison board was fully informed of Galena's second offer. Id. at 15-16. On Wednesday, December 19, 2012 the Callison board met with its independent advisors to discuss the merits of the Galena offer and after which decided not to pursue the offer. Id. at 16. The Callison board's actions demonstrate that they were fully informed and not acting willfully blind as was the case in In re Genomics. In the absence of willful blindness and evidence of the Callison board's genuine consideration of Galena's offer, the agreement should be considered valid.

Therefore, contrary to the Chancery Court's ruling, the agreement was an active and successful attempt by the Callison board to maximize shareholder value. Id. at 21.

2. The Callison board implicitly waived the "don't ask" provision.

Callison implicitly waived the "don't ask" provision when they entertained Galena's offer. "In order to make a superior offer," the bidder would have to "directly or indirectly" request a waiver. In re Ancestry.com, C.A. No. 7988-CS, transcript op. at 26. In this case, Galena indirectly asked for a waiver by submitting a superior offer and directly contacting Callison's CEO. R. at 15. Instead of ignoring the offer completely, the Callison board met the same day to discuss the offer. Id. at 16. The Callison board even had their counsel present to advise them on the agreement and how to respond to Galena.

Id. This demonstrates that the board implicitly waived the "don't ask" provision by considering Galena's second offer. While the Callison board decided to reject the proposed offer, the board had already implicitly waived the "don't ask" provision by engaging in communication with Galena.

Callison further indicated that they were still negotiating a buyout by rejecting Galena's offer. This negotiation with Galena indicated that they had waived the "don't ask" provision. While Callison dissuaded Galena's attempts, Callison was playing hardball trying to maximize value for their shareholders. Id. This is analogized with the negotiations Dollar Thrifty had with Hertz in their 2010 buyout negotiation. In re Dollar Thrifty S'holder Litig., 14 A.3d 573 (2010). There, Dollar Thrifty took a strict negotiating position by walking away from Hertz bid. Id. at 591-92. Hertz in turn returned to the negotiating table after they were rebuffed and made a higher offer. Id. Similarly, Callison's dismissal was merely a negotiating tactic to get Galena to return a higher bid. This negotiating tactic was an indication that Callison waived the "don't ask" provision and was seeking additional bids.

b. The board of directors, bidders and stockholders were informed about the agreement

The second requirement is that all parties to the transaction, including the board,³ shareholders, and bidders, must be informed. In re Ancestry.com, C.A. No. 7988-CS, transcript op. at 23-24.

³ Courts place a high importance on the board being informed. In re Genomics, C.A. No. 7888-VCL, transcript op. at 14 (finding that a

1. Board of Directors

The Callison board was fully informed about the agreement and the buyout transaction throughout the entire process.

In In re Celera, the court invalidated a second DADW agreement because the agreement prevented the board of the target company from being fully informed of any potential topping bids, resulting in the board's inability to make an informed decision. In re Celera, C.A. No. 6304-VCP, transcript op. at 21.

In this case, the Callison board never lacked for information. On Wednesday, December 19, 2012, Callison's CEO received a letter from Galena which stated an additional offer, after which he called a meeting of the board. R. at 15-16. The board considered Galena's letter and ultimately rejected the offer. Id. at 16. The board assessed the situation as a whole, including the fact that Callison had already entered into an agreement with Vicente three days prior to receiving the letter. Id. Ultimately, the board decided to continue with its agreement with Vincente after discussing Galena's offer with legal and financial counsel. Id.

Because the Callison board received and considered Galena's second bid, they were completely informed about the agreement and all events surrounding the transaction.

board has a fundamental "duty to take care to be informed of all material information reasonably available") (citing Phelps Dodge Corp. v. Cyprus Amax Minerals Co., C.A. No. 17398, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999)); In re Celera, C.A. No. 6304-VCP, transcript op. at 21 ("The need for adequate information is central to the enlightened evaluation of a transaction that a board must make.") (citing Paramount Commc'n Inc. v. QVC Networking Inc., 637 A.2d 34, 44 (Del. 1994)).

2. Bidders

All bidders, including Galena, were informed about the agreement. Every bidder, including Galena, that wished to proceed in the auction signed the DADW acknowledging that they received and agreed to the agreement. R. at 10.

3. Stockholders

The Callison stockholders that are involved in this transaction were informed about the agreement prior to or at the time of its implementation. At the time of this transaction Allen maintained a 72% controlling stake in Callison. Id. at 1. The record further reflects that Galena owned 10,000 shares of Callison. Id. at 2. The record does not reflect that any other shareholders were not informed about the agreement. Therefore, this court need not consider whether there are other stockholders that were not informed, rather only that the two present in this litigation were informed.

Both Allen and Galena were informed about the agreement. Allen was made aware of the agreement by the Callison board. Id. at 9. Allen is a controlling shareholder in Callison and was present and contributed it's impute in the decision to adopt an agreement. Id. at 7. The Galena shareholders were made aware of the agreement in a different way. Upon initial bidding for Callison, Galena signed the agreement. Id. at 10. By the very act of signing the agreement and voluntarily subjecting itself to its provisions, Galena as a shareholder was, made aware of its existence and terms. Only after failing to offer the winning bid did Galena object to the agreement. Galena was in effect trying to have its cake and eat it too.

II. THE BUSINESS JUDGMENT RULE IS THE APPROPRIATE STANDARD OF REVIEW BECAUSE GALENA HAS NOT ALLEGED SUFFICIENT FACTS TO REBUT THE BUSINESS JUDGMENT RULE PRESUMPTION NOR ESTABLISHED THAT THE CALLISON BOARD TREATED ANY BIDDERS ON UNEQUAL TERMS.

A. Question Presented

Whether the business judgment rule, enhanced scrutiny, or entire fairness is the proper standard of review?

B. Scope of Review

The formulation of the duty of loyalty and duty of care involves questions of law which are, of course, subject to de novo review by this Court. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993). Therefore, the proper scope of review is de novo.

C. Merits of Argument

Delaware employs three tiers of review for evaluating director decision-making: (1) the business judgment rule, (2) enhanced scrutiny, and (3) entire fairness. Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011). It is well settled that the BJR is the default standard of review and assigns the burden proof to the challenging party. McMullin, 765 A.2d at 917. The BJR creates a rebuttable "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 interest of the company." Id. at 916. In order to rebut this presumption a challenging party must establish that the directors

breached one of their fiduciary duties of loyalty, good faith,⁴ or due care. Id. at 917. Galena fails to allege sufficient facts to establish that the Callison board breached any of these fiduciary duties; thus requiring the presumptive BJR standard to stand and the application of the entire fairness standard to be improper.

Though the entire fairness standard is inapplicable here, Courts may decide to apply the enhanced scrutiny standard in instances involving a change in control transaction. Revlon, 506 A.2d at 180-82. While there are two unique versions of enhanced scrutiny, Unocal and Revlon, the only applicable standard for this case, other than the BJR, would be Revlon.⁵ However, before Revlon can be applied, a plaintiff must establish that "bidders in the corporate auction were treated on unequal terms." See Portia Policastro, When Delaware Corporate Managers Turn Auctioneers: Triggering the Revlon Duty After the Paramount Decision, 16 Del. J. Corp. L. 187, 195 (1991). Because the six participating bidders were all subject to exactly the same terms and plaintiff fails to allege facts showing that any participating bidders were treated on unequal terms, Revlon is inappropriate.

i. Galena failed to rebut the BJR presumption because Galena has not demonstrated that the directors failed to act in "an informed

⁴ Good faith is technically encompassed within the duty of loyalty. Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

⁵ The Unocal standard derives from Unocal Corp. v. Mesa Petroleum Co. 493 A.2d 946 (Del. 1985). The Unocal standard applies only in circumstances where directors take defensive actions in response to a threatened change of control (i.e. hostile takeovers). Revlon, 506 A.2d at 180-82. Since this case involves a voluntary change of control transaction, an application of the Unocal standard would be improper.

and deliberate manner" or with a good faith belief that their actions were in the best interest of the company.

The entire fairness standard is inappropriate in the present case because Galena has not alleged sufficient facts to demonstrate that the Callison directors breached any of their fiduciary duties. Consequently, this Court should not apply entire fairness because the Callison board acted on an informed basis and in good faith.

a. The facts show that the Callison board satisfied its duty of care by behaving in an "informed and deliberate manner".

A judicial analysis of the duty of care requires an examination of whether director's reasonably behaved in an informed and deliberate manner in their decision-making. McMullin, 765 A.2d at 921; State of Wis. Inv. Bd. v. Bartlett, No. C.A. 17727, 2000 WL 238026, at *5 (Del. Ch. Feb. 24, 2000). In McMullin, this Court held that the McMullin directors, while negotiating a merger, breached their duty of care by failing to adequately inform themselves about the transaction. McMullin, 765 A.2d at 922. In McMullin, a majority shareholder was allowed to unilaterally negotiate the transaction. Id. at 921. The board breached its duty of care because it met with that shareholder just once before immediately approving the transaction solely on information provided by his financial advisor. Id. at 921-22.

The facts in the present case are distinguishable from those of McMullin. First, the Callison directors created a Committee comprised of three independent board members, which was delegated the authority to negotiate the transaction, in order to ensure that the deal would be fair to all shareholders, not just the majority shareholder. R. at 5. Thus, unlike McMullin, there was no unilateral grant of authority

to negotiate the transaction to a majority shareholder. R. at 10. Further, the committee, with advice from independent financial and legal advisors, presented its findings to the board only after it was satisfied that the transaction was financially fair to all of its shareholders. R. at 11. Because the Callison board met with the committee and approved the transaction only after reviewing the Committee's independent fairness opinion regarding Vicente's tender offer, the Callison board cannot be found to have been uninformed of the transaction.

The facts of this case are quite similar to those in State of Wis. Inv. Bd. In State of Wis. Inv. Bd., the court denied a plaintiffs' motion for injunction against a merger while considering whether a board breached its duty of care. State of Wis. Inv. Bd., 2000 WL 238026, at *1. The plaintiff argued that the directors failed to be adequately informed and failed to supervise their chairman, who negotiated the deal alone despite having financial interest in the merger. Id. at *2. The Court found the allegations were insufficient to demonstrate that the board breached its duty of care because the board used an investment advisor to canvas the market for a more viable option, relied upon its financial advisor's concern that appearing "over shopped" could frustrate the transaction, and was regularly briefed by the chairman. Id. at *5.

Similarly, here, the committee relied on its financial advisor's concern that a "protracted" public auction could harm the company and its stockholders by demoralizing employees and jeopardizing important long-term commitments with Callison customers. R. at 7. Also similar

to State of Wis. Inv. Bd., the committee relied on its financial advisor to canvas the market during an initial canvassing period and again during the twenty-five day "window shop" period. R. at 8.

As the Callison board was fully informed of the terms of the transaction, the plaintiff cannot allege facts showing that the board violated its duty of care. Therefore, the BJR presumption must stand.

b. The facts alleged demonstrate that the Callison board acted with a good faith belief that their actions were in the best interest of the company, thus satisfying its duty of loyalty.

To determine whether directors breached their duty of loyalty, Courts must analyze whether the directors had a good faith belief that they were acting in the best interest of shareholders. McMullin, 765 A.2d at 917. "A fiduciary's financial interest in a transaction as a stockholder (such as receiving liquidity value for her shares) does not establish a disabling conflict of interest when the transaction treats all stockholders equally." In re Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1035 (Del. Ch. 2012).

In State of Wis. Inv. Bd., plaintiffs sought an injunction against a merger, arguing that directors' had breached their duty of loyalty. State of Wis. Inv. Bd., 2000 WL 238026, at *3. Plaintiffs reasoned that the directors' close ties with the chairman, who was allowed to negotiate the transaction despite his own financial interest in the merger, limited their independence and influenced their decision-making. Id. To support this argument, plaintiffs alleged that the board allowed the chairman to advance his own interests by structuring the transaction to ensure its completion rather than to maximize value, and noted that the board implemented a termination fee and no

talk/no shop provision, while permitting its chairman to pass on more favorable potential deals. Id. at *3. The Court disagreed, holding that directors acted consistent with what they believed to be the best interest of the shareholders because the board gave thorough consideration to the analysis prepared by its financial advisor, to the due diligence, and to discussions with other bidders. Id. at *7.

Similar to State of Wis. Inv. Bd., here, the board gave thorough consideration to the analysis prepared by the Committee's independent financial advisor. The Committee followed its financial advisors analysis: using a standstill agreement to avoid harming the company in a protracted public auction, accepting Vicente's bid only after its financial advisor determined it was fair, and performing an additional canvas of potential bidders after Vicente made its offer. R. at 8-12.

More recently, the Court of Chancery determined in In re Synthes that a company's controlling shareholder's need for liquidity did not create a disabling conflict that prompted the application of entire fairness. In re Synthes, 50 A.3d at 1035. The Court held that four factors must be met in order to establish that the directors had a disabling conflict of interest: 1) the majority shareholder's need for liquidity forced a crisis sale; 2) without making efforts to canvas for logical buyers; 3) give them an opportunity to do due diligence; and 4) to raise the financing necessary to make a fair bid. Id.

Like in In re Synthes, all Callison shareholders received equal treatment under the transaction. According to the terms of the agreement, all shareholders are to receive \$34 per share from Vicente. Furthermore, the plaintiff is unable to fulfill the four-part conflict

test laid out by the Synthes Court. First, Allen made no proposals and conveyed no interest regarding its plan to acquire Ca' Foscari to FVP until October 15; twelve days after the Callison board was first informed of Allen's plans to liquidate its shares and two days after the Callison board established the special committee. R. at 5. Secondly, Allen did not reach an agreement with FVP until November 28, 2012, about a month after Allen and the committee had already agreed upon the terms of the DADW transaction and the committee started canvassing the market. R. at 6, 10. Plainly, the terms being challenged, which Galena alleges were put in place because of Allen's deal with FVP, were agreed to and implemented prior to Allen's deal with FVP being finalized. Moreover, Allen had more than enough time to abandon the deal with FVP, renegotiate the terms of the deal, or at the very least, stall the deal if it found itself in a monetary "crisis." Finally, the committee's independent financial advisor, not Allen, introduced the terms of the agreement. R. at 7. Thus, these facts do little to advance the argument that Allen somehow pressured the directors into a crisis sale because of its need for liquidity. As such, the plaintiff is unable to allege a breach of the duty of loyalty, and the BJR presumption must stand.

c. Alternatively, if this Court chose to apply a heightened standard of scrutiny, the appropriate standard of review would be Revlon enhanced scrutiny, and not "Entire Fairness."

While entire fairness is not an appropriate standard of review in this case, the Court may decide to apply a Revlon enhanced scrutiny standard. Revlon, 506 A.2d at 180-82. In Revlon, this Court examined the appropriate standard of review in a change of control transaction.

Id. at 176. The Court found that enhanced scrutiny was the appropriate standard of review in cases involving a voluntary change of control, where plaintiffs failed to demonstrate that directors breached a fiduciary duty. Id. at 184. Further, in Paramount Commc'n, the appropriate standard of review was reexamined in a voluntary change of control transaction, and Revlon was found to be the appropriate standard when a plaintiff has not established an initial breach of a fiduciary duty. Paramount Commc'n, 637 A.2d at 37.

The only instance in which "entire fairness" would apply under these circumstances is where the board has in breach one of their fiduciary duties, and as discussed above, the Callison board of directors did not breach any of their fiduciary duties. Thus, Revlon enhanced scrutiny is the only viable alternative to the BJR.

ii. Alternatively, the standstill agreement remains valid under "Entire Fairness" because the transaction satisfies the fair dealing and fair price requirements.

Once the entire fairness standard has attached, directors bear the burden of proof and must demonstrate that the transaction was entirely fair. Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994). In order to demonstrate entire fairness, directors must establish fair dealing and fair price. Id.; Van de Walle v. Unimation, Inc., C.A. No. 7046, 1991 WL 29303, at *9 (Del. Ch. Mar. 7, 1991). If a truly independent special committee approves the transaction, the burden shifts and the plaintiff must prove that the transaction was unfair. Kahn, 638 A.2d at 1117. A review of a committee's independence involves an analysis of whether the special committee 1) was truly independent, 2) was fully informed, and 3) could negotiate at arm's

length. Id. at 1120-21. Here, the plaintiff bears the burden of proof since the Callison board used a special committee that was truly independent, fully informed, and could negotiate at arm's length. Alternatively, even if this Court were to disagree, Callison has alleged sufficient facts to establish fair dealing and fair price.

a. Galena bears the burden of proof to show unfairness because the Callison board used a special committee that was truly independent, fully informed, and had the freedom to negotiate.

In this case, the burden is on the plaintiff to prove that the transaction was unfair as the Callison board's special committee was truly independent, fully informed, and had the freedom to negotiate.

This case is analogous to Rosenblatt v. Getty Oil Co. 493 A.2d 929 (Del. 1985). In Rosenblatt, an investment company and majority shareholder of Skelly Inc., sought to merge Skelly with Getty, the investment company's majority shareholder. Id. at 931-33. In order to insulate itself, Getty used an independent committee established by Skelly. Id. at 936. This Court concluded that although Getty was present on both sides of the transaction, it had met its initial burden by having a truly independent board approve the transaction, as well as an informed ratification by a majority of the minority shareholders. Id. at 945. Similarly, the special committee here was truly independent because although Allen was on both sides of the transaction, the special committee was fully independent from Allen and approved and even recommended the DADW transaction to the board.

This case is distinguishable from Kahn, where Lynch Communication System's majority shareholder proposed a merger between an indirect affiliate and Lynch. Kahn, 638 A.2d at 1112. To ensure fairness, the

Lynch board, comprised of mostly interested directors, created an independent special committee to negotiate the transaction. Id. This Court determined that the use of this committee did not shift the burden since the committee was not truly independent. Id. The committee's independence was limited because its ability to negotiate at arm's length was compromised as the majority shareholder threatened to make a hostile tender offer if the committee did not approve the price. Id. at 1121. Unlike Kahn, here, the committee had the freedom to negotiate at arm's length because Allen did not threaten the special committee in any way. Allen was supportive of the special committee but allowed the committee to exist independent of its control. As such, the special committee was truly independent and able to negotiate at arm's length for a fair deal.

b. This transaction satisfies the fair dealing and fair price requirement of the entire fairness standard.

Even if the court determines that the burden should not be shifted to the plaintiff to establish the unfairness of the transaction, Callison is able to prove that the transaction was fair because it satisfies the fair dealing and fair price requirements.

Fair dealing requires directors: 1) to negotiate and implement a transaction in a manner that is reasonable to the shareholders, and 2) to make full disclosure to shareholders of all material information relating to the transaction, including any information relating to any personal benefit that the directors may obtain from the transaction. Van de Walle, 1991 WL 29303, at *11-17. Here, the transaction meets the fair dealings requirement as the transaction resulted in value

maximization of the shares for all shareholders and the shareholders had knowledge of the entire transaction.

Additionally, the transaction price was fair because it was within the range of prices that would be expected to result from arm's length negotiations. Fair price relates to economic considerations of the proposed merger, including "elements that affect the intrinsic or inherent value of the company's stock" such as assets, market value, earnings, or future prospects. Id. at *9 (citing Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)). Fair price generally requires a price within the range of prices that would be expected to result from arm's-length negotiations between the two independent parties with relatively equal information and bargaining power. Id. at *17.

Here, the transaction price was a 26% increase on the public trading price of each share. R. at 11. Additionally, the \$34 per share was determined to be fair by the independent counsel advising the special committee. Id. at 11. As this special committee was independent, negotiated at arms-length, and the sale price was significantly over the market value of the stock, the transaction price must be considered fair.

As the both the price and transaction were fair as a matter of law, this transaction must be upheld under the entire fairness standard.

CONCLUSION

For the foregoing reasons, this Court should reverse the preliminary injunction issued by the Court of Chancery.

Respectfully submitted,

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