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,	)	
Defendants Below, Appellants,	)	No. 162, 2013
v.	)	Court Below: Court of Chancery, Civil Action No. 7918-CJ
GALENA CAPITAL PARTNERS, LLC,	)	
Plaintiff Below, Appellee.	)	

APPELLANT'S OPENING BRIEF

Team C
Counsel for Appellants

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NATURE OF THE PROCEEDINGS

On December 16, 2012, Appellee, Galena Capital Partners, LLC ("Galena"), brought an action to enjoin a negotiated merger agreement between Appellant, Callison, Inc., ("Callison") and Vicente Capital Inc. ("Vicente") alleging that the Callison Board breached its duties to the shareholders.

Following an expedited hearing on January 10, 2013, Chancellor Nelson granted Galena's motion for preliminary judgment and enjoined Callison from taking any further action regarding the negotiated merger without first evaluating whether the Galena offer is a "superior proposal" within the meaning of the Agreement.

The Court found that a "Don't Ask, Don't Waive" standstill agreement that prevents a bidder from submitting additional bids after the conclusion of a private auction violated the Board's fiduciary duty of loyalty to Callison shareholders even though the agreement sought the "only, best and final" offer. Specifically, the Court found that the Board of Directors cannot fulfill their fiduciary duties when they insist on enforcing the "Don't Ask, Don't Waive" ("DADW") Standstill Agreement which prohibits additional bids from Galena. Further, the Court declined to address Galena's fairness or liquidity conflict claims, thereby failing to address the level of judicial scrutiny required in evaluating the Vicente Agreement.

Callison now appeals the Court of Chancery's Judgment and seeks reversal of the preliminary injunction and judicial validation of DADW standstill when the Board is informed and acting within their rights.

SUMMARY OF THE ARGUMENT

I. This Court should reverse the Chancery Court's ruling because DADW Standstill Agreements serve legitimate business purposes. Standstills maximize shareholder value by requiring private bidders to submit their "only, best and final offer" or risk losing the opportunity to acquire the target. Additionally, DADW tandstills limit favoritism amongst bidders. By not enforcing a standstill, the Chancery Court is creating a blueprint for sale of control situations that will ultimately punish the shareholders it is attempting to help.

II. This Court should reverse the Chancery Court's decision because the Chancery Court declined to evaluate the lack of disqualifying financial conflict of Allen. The lack of disqualifying financial conflicts places the Callison Board's decisions squarely within the business judgment presumption of fairness. Additionally, even if the agreement is subject to enhanced judicial scrutiny under Revlon and its progeny, the agreement is still valid and enforceable. This Court should also find that the decision to implement the entire fairness analysis in McMullin is limited to the facts of that case and is at dissonance with the later ruling in In re Synthes, Inc.

STATEMENT OF THE FACTS

A. Background Facts

The facts of the case are uncontroverted. Callison is a publicly traded Delaware corporation whose major shareholder is Allen Enterprises Inc. ("Allen"). Memorandum Opinion ("Op.") 2. Callison manufactures and sells off-brand athletic apparel to major retailers such as Kohl's Corp. and Target Corp. (Op. 2).

Allen is a holding company that owns 72% of Callison's outstanding common stock. (Op. 2). It employs four of Callison's seven directors. (Op. 3). The other three directors were considered by the Chancery Court to be independent, disinterested "outside" directors. (Op. 3).

Galena is a private equity firm with $18 billion of capital under its management. (Op. 2). Included in their holdings are 10,000 shares of Callison common stock. (Op. 2).

B. Allen's Desire to Sell its Callison Shares

In July 2012, Allen began searching for a major restaurant chain to acquire. (Op. 3-4). Allen engaged the services of Reed Crystal, LLP ("Reed"), an investment banking firm. After a month of searching, Reed identified Ca'Foscari, an Italian restaurant chain with over 200 locations, as a suitable acquisition candidate. (Op. 3-4). Once Ca'Foscari was identified, it became clear that Allen would sell its ownership in Callison to finance the purchase.[1] (Op. 4).

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[1] Allen and FVP Restaurants Inc. agreed on the purchase of Ca'Foscari for $2.4 billion. The agreement set a closing date no later than March 31, 2013 and a termination date of May 31, 2013.

C. Callison's Board Decides how to Maximize Shareholder Value

Reed informed Callison of Allen's intent to liquidate its shares, and on October 10, 2012, the Callison Board met to consider its options. (Op. 4). At the meeting, they established a special committee of the Board's three independent directors ("Special Committee") to investigate and pursue all possible options. (Op. 4-5). This Special Committee retained the investment banking firm of Bonchek Graycourt, Inc. ("Bonchek") and the law firm of Jenkins, Piper, Hitchens & Ward, LLP ("Jenkins Piper") to provide financial and legal counsel. (Op. 5).

On October 20, 2012, the Special Committee met with Allen and its advisors to discuss various methods to accomplish an efficient and non-disruptive sale process. (Op. 6). In order to avoid a protracted public auction that could demoralize employees and jeopardize long term commitments with important Callison customers, the parties agreed that Callison, through Bonchek, would privately canvass the market for potential buyers. (Op. 7). Callison would require any interested suitor to enter into a confidentiality and standstill agreement with Callison containing a DADW provision before obtaining access to Callison's confidential information. (Op. 7).

Upon invitation to bid from the Special Committee, the potential suitors would be encouraged to put forth their "only, best and final offer" with the understanding that they may only bid once. (Op. 8). Bids would be placed simultaneously and the highest bidder would win the Company. (Op. 8). The losing bidders would be contractually prevented from making a later higher bid as well as from requesting

permission from the Special Committee to waive the DADW Standstill. (Op. 8).

To ensure value maximization for all shareholders, the DADW Standstill provided that approval of the winning bid by Allen and the Callison Board would be subject to a limited market check, excluding losing DADW bidders, with a fiduciary out and right of termination by Callison in favor of any "superior proposal". (Op. 8-9). The winning DADW bidder would have five days after being notified of any superior offer to match it or else a 3% termination fee would apply. (Op. 9).

The Board, at the October 20th Meeting, further recognized that Allen's power to potentially block any transaction, as a majority shareholder, might discourage potential bidders. (Op. 9). Thus, Allen agreed to sign a separate agreement with each bidder that obligated Allen to tender all of its shares to the winning bidder as decided by the Special Committee. (Op. 9-10). This separate contract would be subject to the same fiduciary out for superior offers as the agreement between the winning bidder and the Callison Board. (Op. 10).

D. Sale Process

Meanwhile, Bonchek, on behalf of the Special Committee, privately canvassed the market for potential suitors and identified seven (7) interested parties, six (6) of whom signed DADW Standstills. (Op. 10). The parties thereafter received confidential information used to conduct due diligence. (Op. 10).

Upon invitation by the Special Committee, all six (6) suitors submitted timely bids on December 14 by 5:00 p.m. EST. At 6:00 p.m.,

the Special Committee met with its advisors to review the bids. (Op. 10-11). With advice from Bonchek, the Special Committee determined that Party B, later revealed as Vicente, made the best and most valuable proposal: an all-cash all-shares offer for $34 per share.[2] (Op. 11).

Bonchek delivered a detailed presentation of Vicente's offer to the Special Committee. Bonchek concluded that Vicente's $34 per share offer, a 26% premium over the trading price for Callison stock on Friday December 14, was financially fair. (Op. 11). This opinion was based on a discounted cash flow analysis, a comparable company analysis, and a comparable transactions analysis. (Op. 11). The Special Committee unanimously agreed to recommend the proposed transaction to the Callison Board. (Op. 11).

Later that night, the Board met to discuss the results of the bidding process. (Op. 12). After first conferring with Allen and Reed by telephone, the Special Committee informed the Board of Bonchek's fairness opinion. Consequently, the Board unanimously approved the Vicente offer. (Op. 12).

E. Vicente Agreement

Callison and Vicente negotiated a two-step merger agreement. (Op. 12). First, Vicente would announce a tender offer for all Callison shares at $34 per share in cash. (Op. 12-13). As part of the merger agreement, Allen agreed to tender all of its shares to Vicente. (Op. 13). Under the agreement, the Callison Board retained the right to

[2] Galena offered an inferior bid of $32.50 per share.

terminate the agreement in favor of a superior proposal during a forty (40) day market check period. (Op. 13).

On December 16, 2012, the entire Callison Board met to determine the viability of the Vicente Merger Agreement. Attorneys from Jenkins Piper explained the Agreement, the fiduciary out and termination provisions, and the DADW Standstill Agreements to the Callison Board. (Op. 14). Subsequently, the Board unanimously approved the Vicente Merger Agreement and publicly announced such Agreement on Monday, December 17, before the stock market opened. (Op. 14). At 9:00 a.m., Vicente submitted its tender offer to the shareholders while Bonchek immediately began the forty (40) day market check. (Op. 15).

F. Galena's Response

Following the announcement of the Vicente Merger Agreement, Galena privately asked Callison's permission to make a topping bid, admitting that the request was in conflict with the terms of the DADW Standstill. (Op. 15). The Callison board, after consulting its lawyers, decided to adhere to the terms of the DADW Standstill and instructed Galena to cease all further communication. (Op. 16). Contrary to the agreed upon DADW Standstill, Galena announced a tender offer for any and all shares of Callison at $35.50 per share and has conditioned that offer on the judicial invalidation of its contractual Standstill Agreement. (Op. 16).

ARGUMENT

I. THIS COURT SHOULD REVERSE THE GRANTING OF THE PRELIMINARY INJUNCTION BECAUSE THE CHANCERY COURT INCORRECTLY APPLIED DELAWARE PRECEDENT WHEN IT INVALIDATED THE DADW AGREEMENT.

Question Presented

Whether the enforcement of a standstill agreement violates a board's fiduciary duty under Revlon when Galena, a sophisticated minority shareholder, agreed to the standstill in order to gain access to a private auction for the sale of Callison?

Standard of Review

It is axiomatic that, to the extent the Court of Chancery's decision rests on a finding of fact, this Court will not set aside its factual findings "unless they are clearly wrong and the doing of justice requires their overturn." Montgomery Cellular Holding Co. v. Dobler, 880 A.2d 206, 219 (Del. 2005). However, if the Court of Chancery articulated "incorrect legal precepts or applied those precepts incorrectly," then this Court shall review the lower court's legal decision *de novo*. In re Celera Corp. S'holder Litig., 2012 WL 6707736 (Del. Dec. 27, 2012).

This appeal challenges the validity of the Court of Chancery's conclusions of law, not fact, in its grant of Galena's Preliminary Injunction. Consequently, the applicable standard of appellate review in the instant case is *de novo*. Lawson v. Meconi, 897 A.2d 740, 743 (Del. 2006).

Merits of Argument

This Court should reverse the Chancery Court's grant of Galena's motion for preliminary injunction because DADW standstill agreements

serve a legitimate purpose. Standstills increase shareholder value by requiring the private bidders to submit their "only, best and final offer" or risk losing the opportunity to acquire the target. Additionally, DADW standstills limit favoritism amongst bidders. Moreover, by not enforcing a DADW standstill, the court is creating a blueprint for sale of control situations that will ultimately punish the very shareholders it is attempting to help.

A. THE DADW STANDSTILL AGREEMENT SERVED LEGITIMATE BUSINESS PURPOSES BY MAXIMIZING SHAREHOLDER VALUE, PREVENTING FAVORITISM, AND MAINTAINING CORPORATE VIABILITY.

It is a fundamental principle of Delaware Corporate law that the management of the business is entrusted to the directors of that corporation who are elected and authorized to represent the interests of the stockholders. Del. Code Ann. tit. 8, § 141(a) (2012); Aronson v. Lewis, 473 A.2d 805, 811-12 (Del. 1984). This deference is known as the business judgment rule. Id. at 812. However, the courts have determined that there are certain circumstances “which mandate … a more direct and active role in overseeing the decisions made and actions taken by directors.” Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 927-28 (Del. 2003). Within these situations, a court subjects the directors' conduct to enhanced scrutiny to ensure that the conduct is reasonable. Aronson, 473 A.2d at 812. After the action is determined reasonable, the protections of the business judgment rule are reapplied to the Board. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985).

Circumstances where board action must be subjected to enhanced judicial scrutiny before the presumptive protection of the business

judgment rule can be invoked are varied. E.g., Paramount Commc'ns v. QVC Network, 637 A.2d 34, 42-44 (Del. 1994); Mills Acq. Co. v. MacMillan, Inc., 559 A.2d 1261, 1287 (Del. 1989); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1985); Moran v. Household Int'l, 500 A.2d 1346, 1350 (Del. 1985); Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 953 (Del. 1985).

Further, the board must have at its disposal adequate information from which it could make a reasonable decision regarding the sale of the company. See Barkan v. Amsted Indus., 567 A.2d 1279, 1287 (Del. 1989). Thus, corporate directors should seek out and evaluate all reasonably available material information before making any business decision affecting the sale of control. QVC, 637 A.2d at 44; Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

Material information is not just the price per share, but also: the bidder's proposed financing; the offers fairness and feasibility; the industry in which the companies operate; past business dealings; the financial stability of each corporation; similar corporate structure or goals; questions of illegality; risk of non-consummation; or the management abilities of the bidding corporation. QVC, 637 A.2d at 44; MacMillin, 559 A.2d 1282, 1282 n.29 (?YEAR?). The assessment of all of these factors is a difficult process, but the board's goal remains the same – to "decide which alternative is most likely to offer the best value reasonably available to the stockholders." QVC, 637 A.2d at 45 n.14. Importantly, Delaware courts have repeatedly stated that the reviewing court must be careful not to second guess

the directors' choices so long as their decisions are reasonable. QVC, 637 A.2d at 45; See also, (Op. 19).

Revlon and its progeny are implicated by the present sale of control of Callison; however, there is little guidance from the Delaware Courts regarding the limits of a DADW standstill provision. See City Capital Assocs. L.P. v. Interco Inc., 551 A.2d 787, 803 n.21 (Del. Ch. 1988)("[standstill] agreements rarely get litigated."); In re Celera, 2012 WL 1020471 (Del. Dec. 27, 2012); In re Ancestry.com S'holder Litig., CA 7988-CS (Del.Ch. Dec. 17, 2012); In re Complete Genomics, Inc. S'holder Litig., C.A. No 7888-VCL (Del. Ch. Nov. 27, 2012).

Although the Delaware courts have yet to define the constraints of a standstill clause, they have examined standstills to determine whether the target board was using the standstill for an inequitable purpose. See generally, In re Topps Co. S'holder Litig., 926 A.2d 58 (Del. Ch. 2007). In his opinion, Chancellor Strine indicated that standstills will not be upheld when the standstill does not further "any apparent legitimate purpose." In re Topps Co. S'holder Litig., 926 A.2d 58 at 92. Chancellor Strine went on to list but a few examples of legitimate purposes of a standstill provision, including: the ability of the board to create "rules of the game" that maximize shareholder value, to control the dissemination of corporate information, and to create leverage during merger negotiations. Id. at 91.

Following In re Topps and consistent with Unocal, the DADW Standstill at issue should be enforced so long as it has a legitimate business purpose. Here, the DADW Standstill promotes a fair, orderly, and good faith auction process for the sale of Callison corporate control. Specifically, the DADW serves three legitimate purposes: (1) value maximization; (2) prevention of unreasonable favoritism during the bidding process; and (3) maintaining critical business relationships.

1. The DADW Allows for Value Maximization for the Shareholders when there is a Private Sale of Control.

In the sale of control, directors must focus on one purpose: to secure the best value reasonably available for the shareholders. Paramount Commc'ns, 637 A.2d at 44. The board of directors should be diligent and active in their quest for shareholder value maximization. Id.; See also Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 66 (Del. 1989) (discussing "a board's active and director role in the sale process").

The lack of binding guidance necessitates a survey of other jurisdictions to determine how best to proceed. The most illustrative case of a courts value maximization analysis can be found in Ventas, Inc. and Health Care Property Investors ("HCPI") battle for control. See, e.g., Ventas, Inc. v. HCP, Inc., 647 F.3d 291 (6th Cir. 2011); Ventas Inc. v. Sunrise Living Real Estate Investment Trust, 85 O.R.3d 254 (Can. Ont. C.A. 2007). There, Sunrise Real Estate Investment Trust held an auction to sell the corporation. Ventas, 647 F.3d at 297-303. HCPI and Ventas, Inc. each submitted bids after executing a standstill

agreement. Id. at 321. Ventas emerged as the winner and entered into a purchase agreement with Sunrise; however, HCPI, in violation of the standstill agreement, submitted another bid. Id. at 299.

Although it was argued that the standstill provision violated the board's fiduciary duty to maximize shareholder value, the Canadian Court ruled that the fiduciary out clause was not applicable to an unsolicited proposal which violated the standstill agreement. Ventas, 85 Or. 3 (?YEAR?)3d at ¶ 34-35. Further the court concluded that enforcing the standstill agreement did not violate the board's fiduciary duty to maximize shareholder value. Id. at ¶ 55, 56. Specifically, the court noted that the board fulfilled its duties by conducting an auction and requiring the participants to submit their highest bid. [3] Id. If the participants knew that they could submit unsolicited bids after the final bid, this knowledge would encourage them to submit lower bids during the auction. 2 Arthur Fleischer, Jr. & Alexander R. Sussman, Takeover Defense: Mergers and Acquisitions § 14.04 (discussing Ventas' implications).

Therefore, all the Callison directors must do in order to satisfy their Revlon duties is seek shareholder value maximization in the sale of corporate control. See generally Revlon, 506 A.2d 173; In re Topps

[3] Although the Canadian decision deals with a different topic, its decision was implicitly affirmed by later U.S. Court Cases involving the same litigation where the court awarded punitive damages to Ventas for HCPI's intentional interference with the business venture by submitting the bid in violation of the standstill. Ventas, Inc. v. Health Care Prop. Investors, Inc., 2009 U.S. Dist. LEXIS 106986 (W.D. Ky. Nov. 16, 2009), aff'd 647 F.3d 291 (6th Cir. 2011).

Co. S'holder Litig., 926 A.2d 58; In re Celera, 2012 WL 1020471; In re Ancestry.com, CA 7988-CS; In re Complete Genomics, C.A. No 7888-VCL.

The DADW Standstill accomplishes this goal by creating an environment where every bidder is encouraged to submit their "best, only, and final offer." (Op. 8). Presumably, that would be the highest offer that the bidder could possibly submit and if every bidder did that, then the shareholders would receive the maximum value they could reasonably achieve through an active auction.

As an eminent investment banker once observed, a standstill maximizes value by ensuring that only serious bidders who are willing to pay reasonable prices for the corporation are allowed to bid. BRUCE WASSERSTEIN, BIG DEAL: MERGER AND ACQUISITIONS IN THE DIGITAL AGE 689 (2000). The willingness to sign a standstill clause at the beginning of the bargaining process serves as an indication of the bidder's true intent. Id.

Finally, a DADW allows the target's board of directors more leverage during the negotiations from which they may negotiate, absent bad faith, for the best deal favoring their shareholders. Without this leverage, target directors are at a severe disadvantage and cannot effectively obtain maximum value for the shareholders.

For example, in Safety-Kleen Corp., the court observed that if it were to grant an injunction against the merger, then it would be "hard to see why anyone would bid in a controlled auction." Safety-Kleen Corp. v. Laidlaw Envtl. Servs., Inc., 1999 WL 601039, at *17 (N.D. Ill. Feb. 4, 1998) Thus, the leverage generated by defensive measures

would not be taken seriously. Id. The court went on to say that it would be "[b]etter just to let someone else negotiate and then make an equivalent, or slightly higher, proposal in order to get an injunction to remove the defensive measures. Id. The court concluded that, in the long run, this "wait and see" approach would be bad for shareholders because it would leave boards with substantially reduced negotiating leverage. Id.

Here, the Callison Board gained leverage over the bidders by creating a private auction where those bidders were required to abide by the DADW Standstill. (Op. 9-10). The bidders were required to submit their best and final offer or else risk losing the auction. (Op. 9-10). The leverage created by this risk of loss allowed the Callison board to simultaneously solicit the highest bids from all of the auction participants, excluding Galena. (Op. 10-12, 15). Moreover, it allowed the Board to confidently negotiate with Vicente regarding the Merger Agreement because the DADW Standstill Agreements prevented any further bids from the auction participants. (Op. 9-10). When the Chancery Court invalidated the DADW Standstill, it stripped the Callison Board of any leverage that it might have had in the negotiations with Vicente as well as any leverage the board may have had against Galena. The Chancery Court materialized the very harm that the court in Safety-Kleen feared.

2. **Preventing Pre-signing and Post-signing Favoritism*.***

The DADW Standstill Agreement should be upheld because it allows the Callison board to avoid preferential treatment of the auction

participants both before and after signing the purchase agreement. Because the DADW Standstill was uniformly required of and applied to all participants within the bidding process, to overturn the DADW Standstill would amount to favoritism toward one bidder.

Delaware courts insist that a target's board should not favor one bidder over the other. See QVC, 637 A.2d at 46; Revlon, 506 A.2d at 184. When there are multiple bidders competing for a corporation, Revlon prohibits directors from using mechanisms to favor one bidder over the other when it would harm shareholder value. Barkan v. Amsted Indus., 567 A.2d 1279, 1286-87 (Del. 1989); Revlon, 506 A.2d at 182-85

Here, all auction participants were sophisticated parties who understood the ramifications of the DADW Standstill and, presumably, expected it to apply equally to all involved parties. (Op. 2-3, 10). Moreover, the Special Committee did not know the identity of the parties while it was evaluating each offer. (Op. 11). They applied the same analysis to each of the bid proposals before determining which bidder had won the auction. (Op. 11). If Callison waived the DADW standstill agreement for one of the parties, then it would constitute favoritism toward that particular party.

3. Maintaining Corporate Viability

A Board's interest in keeping current and future business contacts protected from a protracted bidding war is a legitimate business purpose for which a DADW standstill may be used. Under Unocal, a board is permitted to adopt reasonable protective measures to preserve the business entity in response to external threats. Unocal,

493 A.2d at 956-57. In a change of control, the board may protect a wide variety of legitimate business interests, including the corporation's current and future business relationships. See generally, Unocal, 493 A.2d 946; In re Topps, 926 A.2d 58. The corporation's relationship with its employees, business partners, and competitors are all extremely important to the continuation of the business after the sale. In re Del Monte Foods Co. S'Holders Litig., 24 A.3d 813, 820 (Del.Ch. 2011). A heated bidding contest may cause relationships with business partners and employees to deteriorate. Id. If the business is perceived as weak or failing due to diminishing relationships with its employees or retailers, then the price for the company would be depressed and current shareholders would suffer by not receiving maximum value for their shares.

Here, the Callison Board's decision to require DADW Standstill Agreements was intended to prevent a hostile bidding war between the interested parties. (Op. 6-9). Callison and Allen discussed ways to avoid this result because they feared that a bidding contest would cause a diminution or cancelation of the retail contracts with the company's major retail partners, Kohl's and Target. (Op. 6-7). The Board's decision to use a DADW Standstill was reasonably calculated to prevent any possible disruption of business activity thereby preventing any diminution of current shareholder value.

B. THE CHANCERY COURT IS CREATING A DE FACTO BLUEPRINT FOR SALE OF CONTROL SITUATIONS BY LIMITING THE CALLISON BOARD'S ABILITY TO CONTROL THE SALE PROCESS.

Delaware courts have frequently stated that there is "no single blueprint" for directors executing their Revlon duties. Barkan, 567

A.2d at 1286-87; Citron, 569 A.2d at 68; Mills Acq. Co., 559 A.2d at 1287; QVC, 637 A.2d at 44. The Revlon Court used the "auctioneer" analogy; however, the court subsequently ruled in MacMillan that the board has the right and obligation to use its best business judgment in deciding between a "panoply of devices" regarding how to maximize immediate stockholder value. Mills Acq. Co., 559 A.2d at 1288.

A traditional auction is one accepted method but it is not the required method. See Glenn Freedman v. Restaurant Assocs. Indus. Inc., C.A. No. 9212 (Del.Ch. 1990) ("A board may conduct an auction sale, …[but] an auction is not always necessary."); Herd v. Major Realty Corp., C.A. No. 5296-VCL (Del. Ch. Apr. 22 2010)(transcript) ("Revlon certainly does not … require that every change of control … be preceded by a heated bidding contest, some type of market check or any other prescribed format.").

In a number of cases, various forms of "market-testing" mechanisms have been viewed as valid alternatives to an auction that fulfill the board's Revlon duty to maximize value. See, Barkan, 567 A.2d at 1286 (noting that while there is "no single blueprint" in satisfying duties under Revlon a variety of evolving techniques may be employed in connection with the sale of a company). While there are various ways to appropriate a sale, in In re Lear, Chancellor Strine stated that "reasonableness, not perfection" is how courts should measure the methods used by a board. In re Lear Corp. S'holder Litig., 926 A.2d 94, 118 (Del. Ch. 2007). Thus, while this Court has stated numerous tests for sale situations, each stemmed from the

reasonableness of the sale terms.

Therefore, by limiting the applicability of DADW standstills on their face, without regards to their reasonableness, this Court is eroding its prior precedent and creating a de facto blueprint that will prevent boards from pursuing their own methods. The reasonableness, as articulated by Chancellor Strine, is the center of all inquiries into the Board' enacted sales measures. In re Lear, 926 A.2d at 118. A bright-line rule declaring this method of Board action invalid would constructively narrow a board's power to suggest its own informed sales process, regardless of whether or not it is reasonable.

In the present case, the Special Committee deliberately created a DADW Standstill to protect its confidential information and maximize shareholder value by seeking "only, best and final" offers. (Op. 6-10). The Special Committee did this with the advice of an informed and knowledgeable legal and investment teams. (Op. 5-7, 10-12). To invalidate a sales method that was reasonably informed, deliberative, and pursued in good faith would hog-tie the legs of any future board decisions and create a blueprint for future sales.

II. THIS COURT SHOULD EVALUATE THE DADW STANDSTILL AGREEMENT UNDER THE BUSINESS JUDGEMENT RULE BECAUSE THERE IS NO DISQUALFYING FINANCIAL CONFLICT WITH ALLEN.

Question Presented

Whether Allen's interest in liquidating his shares caused Allen to have a unique financial interest which would remove the Vicente Agreement from deferential treatment under the appropriate Business Judgment rule and place it under an entire fairness analysis?

Standard of Review

This Court typically reviews the grant or denial of a motion for preliminary injunction under an abuse of discretion standard. Lawson, 897 A.2d at 743. However, errors of law committed by the Court of Chancery are subject to *de novo* review. SI Mgmt. L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998). As noted above, this appeal challenges the Court of Chancery's conclusions of law, not fact. Thus, the applicable standard of appellate review is *de novo*. Lawson, 897 A.2d at 743.

Merits of Argument

This Court should reverse the granting of the preliminary injunction preventing the merger between Vicente and Callison since Allen had no disqualifying financial interest and the decision to accept the merger is within the range of reasonableness.

A. BECAUSE ALLEN AND MINORITY SHAREHOLDERS WILL RECEIVE IDENTICAL CONSIDERATION ON A PER SHARE BASIS, THEY HAVE IDENTICAL INTEREST.

As stated above, the Court should enforce the DADW Standstill Agreement because its purpose is to maximize value per share for *all* shareholders. See Arg. I.A.1. Typically, where a majority shareholder has such an enormous investment that they cannot easily remove themselves without a sizable transaction, the shareholder should determine how they wish to remove themselves. In re Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1034 (Del. Ch. 2012).

Stockholders with a controlling interest often attempt to attain the highest return on their holdings because they have the largest financial stake in the transaction. Goodwin v. Live Entm't, Inc., 1999 WL 64265, at *27 (Del. Ch. Jan. 25, 1999). However, it is the burden of the challenging party to plead that a majority shareholder, by

selling his shares, has a conflicting interest in a merger agreement. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 363 (Del. 1993). Conflicting interests can be characterized as personal financial benefit received by the majority shareholder "to the exclusion of, and detriment to, the minority stockholders." Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

It is important to note that financial interest in a transaction typically does not alone establish a disabling conflict of interest when the transaction treats all stockholders equally. In re Synthes, 50 A.3d at 1037. When a majority stockholder receives the same consideration as all other stockholders, all stockholders have an aligned interest in the proposed transaction. In re CompuCom Sys., Inc. S'holders Litig., 2005 WL 2481325, at *6 (Del. Ch. Sept. 29, 2005). A majority shareholder can level the playing field by subrogating their interest and allowing the board to distribute the control premium pro rata to all shareholders. In re Synthes, 50 A.3d at 1040. Distributing the control premium is a "powerful indication" that the price received under the merger agreement was fair to *all* shareholders. Id.

If a court wishes to protect minority stockholders, it should ensure that controlling shareholders are allowed safe harbor under the business judgment rule when they grant minority stockholders pro rata treatment. Id. at 1035. Otherwise, if controlling stockholders are subject to entire fairness review when they share the control premium pro rata among all stockholders, their incentives to give minority

shareholders extra value disappear and they would likely seek a control premium. Id.

Some limited circumstances have been identified where a controlling stockholder's need for liquidity could constitute a disabling conflict. Id. at 1036. However, those circumstances would likely involve a fire sale combined with a lack of due diligence and a value that does not reflect the true value of the target company. Id.

In the present case, Allen and the minority shareholders were offered an equivalent per share buyout price, regardless of the amount of shares they held. (Op. 11). Allen did not receive, nor request, any control premium for its 72% stake. (Op. 10-11). Since Allen and all other shareholders would receive the control premium pro rata, Allen's interest in maximizing value was directly aligned with the minority shareholders. Allen and the minority shareholders allowed the Special Committee to maximize this interest by negotiating on their behalf. (Op. 11). Thus, Allen's lack of disabling financial interest, and its agreement to share the control premium pro rata, should afford the Vicente Agreement a safe harbor under the Business Judgment Rule.

B. ALLEN HAD NO DISQUALIFIYING LIQUIDITY CONFLICT.

The Callison Board can show that they "acted on an informed basis, in good faith," by adopting a deliberate sales process with an appropriate market check and fiduciary out in favor of any "superior offers." Revlon, 506 A.2d at 180 (citing Aronson, 473 A.2d at 812).

As explained above, this transaction falls under the enhanced scrutiny review required by Revlon and its progeny. Pursuant to the Board's Revlon/Unocal duties, any action taken by the board is

evaluated under a reasonableness standard. Revlon, 506 A.2d at 180; Unocal, 493 A.2d at 949. This reasonableness standard is determined by factors such as independence of the board, the type and scope of information to be considered by the board, good faith negotiations, and a focus on what constitutes the best value for the shareholders. Revlon, 506 A.2d at 180. Thus, the Board's case for meeting the Revlon duties is materially advanced when it can show that the Board was independent, highly informed, and acted in good faith.

In the instant case, the Callison Board, upon realizing that Allen would be selling its majority stake, formed a Special Committee of independent directors. (Op. 4-5). That Special Committee retained legal and investment professionals to guide them during the sales process. (Op. 5). These investment and legal professionals aided the Special Committee in structuring the process to include a private auction and a follow up market check with appropriate fiduciary out for "superior offers." (Op. 7-8). This was done in a good faith attempt to maximize shareholder value. (Op. 7-8). The professionals aided the Special Committee by preparing a report articulating how the Vicente Agreement was financially fair. (Op. 7).

By establishing an independent and disinterested Special Committee, retaining legal and investment professionals, and acting in good faith the Board did everything in its power to carry out its enhanced duties. Therefore, the decisions of the Board meet the enhanced standard and should be afforded the deferential treatment of the Business Judgment Rule.

C. THE ENTIRE FAIRNESS STANDARD ARTICULATED IN MCMULLIN IS NOT APPLICABLE AND SHOULD BE LIMITED TO THE FACTS OF THAT CASE.

The entire fairness standard articulated in McMullin was based on a very unique situation that cannot be made into a bright line rule for when a stockholder has a disqualifying financial interest.

Galena contends that the merger agreement between Vicente and Callison should be evaluated under the entire fairness standard articulated in McMullin because they are under the assumption that Allen has a unique financial interest adverse to that of the minority shareholders. (Op. 24).

McMullin advances the idea that directors have one primary objective to achieve in the complete sale of a company at the behest of a majority shareholder; value maximization. McMullin v. Beran, 765 A.2d 910, 918 (Del. 2000). In carrying out that duty, the Board must be diligent and exercise their fiduciary duties. Id. McMullin acknowledged that when there is a single entity controlling a corporation, the minority shareholders rely on the protections provided by the Board's duties. Id. at 920. However, when a majority shareholder negotiates, proposes and times the sale of the entire company and not only his own shares, the Board is not relieved of its duties and the agreement should be evaluated under an entire fairness standard. Id. at 917.

In McMullin, the Board allowed ARCO, its 80% majority shareholder to initiate, unilaterally negotiate and time a merger transaction. Id. at 921. The Board refused to establish any safeguards and met only once to discuss the actions of ARCO. Id. Additionally, at the only

meeting of the Board, interested directors were allowed to participate in discussions about the issue. Id. at 923.

The Court evaluated the actions of the McMullin board under an entire fairness test because of the unique interest of the majority shareholder. McMullin, 765 A.2d at 917. However, an entire fairness test was unwarranted since the Board's decisions likely would not have passed a simple Revlon test because of the blatant abdication of the Board's duties.

In contrast to McMullin, Allen and the minority shareholders had identical interest and received the same consideration. (Op. 11). Allen removed itself from all negotiations and relied exclusively on the Special Committee's informed decisions. (Op. 10-14). Allen did not initiate, control, time or participate in the sales process. (Op. *Passim*). Thus, Allen, removing himself from the process, allowed the Board to control the process and the Board's decisions should not be evaluated under the entire fairness standard articulated in McMullin.

CONCLUSION AND REQUEST FOR RELIEF

Based on the foregoing, the Appellant respectfully requests that this Court REVERSE the Chancery Court's ruling and recognize the validity of the DADW Standstill Agreement.

Respectfully submitted,

_____

Team C
Counsel for Appellants
February 8, 2013

CERTFICATE OF SERVICE

I hereby certify that Team C have served one (1) electronic copy and six (6) print copies of the above and foregoing brief on all counsel of record by placing signed copies thereof in the United States mail, postage prepaid, on this _____th day of February, 2013, addressed to the following:

Ryan Cox, Vice President
Ruby R. Vale Interschool Corporate Moot Court Competition
c/o Moot Court Honor Society
Widener University School of Law
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_____

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Counsel for Appellants

February 8, 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font type, font size, margins, and volume limitations in accordance with the Delaware Supreme Court Rules and Internal Operating Procedures.

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February 8, 2013