IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALLISON INC., TIMOTHY MICHAELS, CLARE LIEBERMAN, RHANEY PATRICKS, JULIO LUIS-ROJAS, PATRICK AUSTIN, MARSHA FRANKLIN, ARI SINGH and ALLEN ENTERPRISES INCORPORATED	)	No. 162, 2013
Defendants Below, Appellants,	)	
v.	)	On Appeal from the Court of Chancery of the State of C.A. No. 7918-CN
GALENA CAPITAL PARTNERS, LLC., Delaware	)	
Plaintiff Below, Appellee.	)	

APPELLANTS' OPENING BRIEF

TEAM D
Attorneys for Defendants Below, Appellants Callison, Inc., Timothy Michaels, Clare Lieberman, Rhaney Patricks, Julio Luis-Rojas, Patrick Austin, Marsha Franklin, Ari Singh, and Allen Enterprises, Inc.

Dated: February 8, 2013

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Nature of Proceedings

This case comes before the Court on Defendants' appeal from the Court of Chancery opinion. Plaintiff, Galena Capital, brought suit against the Defendants (Callison, et al.), challenging whether Callison breached their fiduciary duty to stockholders by enforcing a Don't Ask, Don't Waive Standstill agreement (DADW). On January 14, 2013, the Court of Chancery for New Castle County found in favor of Plaintiff and granted a preliminary injunction to prevent the enforcement of the DADW Standstill. (Mem. Op. 23, 25). On January 15, 2013, the Court of Chancery filed the Preliminary Injunction Order. (Preliminary Inj. Order 1-2).

On January 23, 2013, Defendants timely filed a Notice of Appeal from Interlocutory Order. (Notice of Appeal). On January 25, 2013, the Supreme Court of the state of Delaware accepted the interlocutory appeal. (Order Accepting Appeal).

Summary of the Argument

1. The Callison Board agreed to include a DADW Standstill agreement in the private sale process. The Court of Chancery erred in finding that the Callison Board's failure to waive the agreement breached their fiduciary duties. The Callison Board had a duty to act on an informed basis, in good faith, and to maximize stockholder value. The Board acted in good faith when implementing the agreement to maximize stockholder value, disclosed the use of the DADW provision and the repercussions to potential suitors, and was fully informed regarding the sales transaction. Ultimately, a per se ruling banning DADW Standstill agreements implemented under a valid business judgment

would be detrimental to maximizing stockholder value.

2. Recognizing a the Board consisted of Allen executives, the Board established a special committee of three independent directors to negotiate a merger that would realize the highest value for all Callison stockholders. The Court of Chancery erred in finding that Callison Board's conduct under *McMullin* rebuts the presumption of the business judgment rule and triggers an entire fairness analysis. The Board's actions are valid under the deferential business judgment rule because the deliberate process and vast market check demonstrated they acted in an informed basis, in good faith, and in the best interest of the company. However, even under *Revlon*'s enhanced scrutiny test, the Board took reasonable steps to ensure to secure a transaction that offered the best value reasonably available and the least economic costs to the company. In addition, *McMullin*, which was decided on a motion to dismiss, does not apply because this case arises in the context of a motion for a preliminary injunction that requires the Plaintiff meet the higher burden of demonstrating the likelihood of success on the merits. Plaintiff is unable to meet that burden.

Statement of Facts

This case involves the sale of the entire company, Callison Inc. Callison is a Delaware corporation with approximately 85 million outstanding shares of common stock. (Mem. Op. 2). On December 14, 2012, Callison's common stock closed at $27.00. (Mem. Op. 2). Allen Enterprises Incorporated ("Allen"), a 72% stakeholder, controls Callison. (Mem. Op. 1-2). Allen is interested in monetizing its stake in Callison. (Mem. Op. 4).

On October 3, 2012, with Allen's consent, legal advisors from Reed Crystal discussed with the Callison Board the possibility of an all-cash transaction to maximize the value for all Callison stockholders. (Mem. Op. 4). All members of the Callison Board were made aware of the plans for the sales process. (Mem. Op. 4). On October 10, 2012, the Callison Board unanimously decided to create a Special Committee, consisting of the Board's three independent members, to negotiate the sale of the entire company on behalf of the Callison stockholders. (Mem. Op. 4-5). The Special Committee retained the investment banking firm of Bonchek Graycourt, Inc., and the Delaware law firm of Jenkins, Piper, Hitchens, & Ward, LLP, to provide independent economic and legal advice concerning the sale of the Company. (Mem. Op. 5).

Callison initiated a sales process by canvassing a "limited universe" of potential suitors. (Mem. Op. 1). The potential suitors were required to sign a "Don't Ask, Don't Waive" Standstill agreement to participate in the bidding process. (Mem. Op. 1). Eventually, six suitors were given a single opportunity to submit their best bid to purchase the entire company. (Mem. Op. 10). Every suitor was required to sign the DADW Standstill. The DADW provision contractually prevents the bidders from making further offers, topping bids, or requesting that Callison waive the DADW provision.

Vicente Capital, Inc., was the highest bidder of the six suitors at $34.00 per share. The merger agreement requires a market check, which excludes the original five unsuccessful suitors. On January 11, 2013, Vicente expressed a willingness to extend the expiration of their

tender offer until March 29, 2013, pending an interlocutory appeal to this court. (Mem. Op. 17).

Galena Capital Partners, LCC ("Galena"), Plaintiff in this case, owns 10,000 shares of Callison common stock. (Mem. Op. 2). Galena was also one of the original bidders. On December 19, 2012, Galena delivered a letter to Callison requesting the waiver of the DADW provision of the Standstill agreement. (Mem. Op. 15). Galena subsequently put forward a topping bid of $35.50 per share. The Callison Board, with the advice of their independent advisors, informed Galena that the DADW would be enforced and the Board should continue to enforce the DADW provision or risk breaching the Vicente Tender Agreement. (Mem. Op. 16). Additionally, if Callison breaches the Vicente Tender Agreement, they would have to pay an $87 Million termination fee. (Mem. Op. 13).

On December 21, 2012, Galena brought suit challenging the validity of the DADW agreement, which prevents them from making a topping bid or requesting that Callison waive the DADW provision. (Mem. Op. 16). Galena requested a preliminary injunction to prevent the enforcement of the DADW Standstill agreement as well as declaratory relief stating that enforcement of the DADW is a breach of the Callison Board's fiduciary duties and that Galena's attempt to acquire Callison are not a contractual breach of the DADW Standstill agreement. (Mem. Op. 2, 15-16).

On January 10, 2013, the Court of Chancery heard argument on Plaintiffs Motion for Preliminary Injunction. (Mem. Op. 17). On

January 14, 2013, the Court of Chancery granted the preliminary injunction. (Prelim. Injunction Order).

Argument

I. The Chancery Court erred in issuing a preliminary injunction, enjoining the Callison Board from enforcing the DADW Standstill agreement.

a. Question Presented

Whether the Court of Chancery erred in finding that the enforcement of Callison's DADW Standstill agreement, breached Callison's fiduciary duties to their stockholders.

b. Scope of Review

This Court reviews the grant or denial of a preliminary injunction for abuse of discretion, but without deference to the legal conclusions of the trial court. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998). This Court should consider *de novo* the legal principles applied by the Court of Chancery to the DADW Standstill agreement. *Wininger*, 707 A.2d at 40.

c. The Callison Board did not violate their fiduciary duties to their stockholders by enforcing the DADW Standstill agreement.

The Court of Chancery erred in granting the Plaintiff's request for a preliminary injunction to cease the enforcement of Callison's DADW Standstill agreement. A preliminary injunction requires that the court take into consideration three factors: 1) that there is a reasonable probability that the party seeking the preliminary injunction will be successful on the merits; 2) that there is an imminent threat of irreparable harm; and 3) a balancing of the

equities between the parties. *Revlon, Inc. v. MacAndrews & Forbes, Inc.*, 506 A.2d 173, 179 (Del. 1986). Defendants have conceded that the dispositive factor in this case is whether there is a reasonable probability of success on the merits. (Mem. Op. 17-18). Defendants' primary contention is that the Plaintiff is unlikely to succeed on the merits of their claim; that the Callison Board breached their fiduciary duty to Callison stockholders by enforcing the DADW Standstill agreement.

i. Duty of Good Faith

In transactions for the sale of an entire company, a Board of Directors has a duty to act in good faith, for the benefit of their shareholders. *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 37 (Del. 1994). This duty requires the Board to act reasonably to achieve the immediate value maximization for all shareholders. 8 Del. C. § 258 (2012). When the Board does act in good faith, their business judgment decisions should not be second guessed by a court. *Revlon*, 506 A.2d at 180.

The Callison Board acted in good faith to maximize stockholder value. The Board engaged in a due diligence private canvassing of the market of potential suitors interested in purchasing the company. This canvassing produced six potential suitors to take part in a limited auction to make their one best and final offer for the Company. (Mem. Op. 8). Even after the bids of the six suitors were revealed, there was a subsequent market check. The market check included a "Go Shop" period, which included solicitation of topping bids from potential bidders for a period of twenty-five (25) days, and

a "Window Shop" period, which included an additional fifteen (15) days to receive topping bids. (Mem. Op. 9). During neither of these periods were the any original bidders allowed to make topping bids.

Finally, the entire sales process is under the control of a Special Committee, which is composed of independent Callison Board members. The Committee is also being advised by independent and qualified financial and legal advisors. (Mem. Op. 11-12). The Committee, with the approval of the Callison Board, decided that a DADW Standstill agreement was the most effective way to maximize shareholder value. This decision is reasonable under the duty to act in good faith. 8 Del. C. § 258 (2012). The private auction process with the DADW provision attracted the six most likely suitors. This eventuality was confirmed by the results of the subsequent market check. During the Go Shop period of the market check, Bonchek "privately contacted in excess of [one hundred] potential suitors (both strategic and financial), but *no expressions* of interest have been received." (Mem. Op. 15)(emphasis added). Therefore, the Board acted in good faith by enforcing the DADW Standstill agreement as a reasonable way to maximize shareholder value.

ii. **Duty to Disclose**

A Board of Directors has a fiduciary duty to disclose completely all material information to minority shareholders regarding a sale of the company. 8 Del. C. § 211 (2012). The Court of Chancery reasoned that the Callison Board could not meet their fiduciary duty to disclose if they were precluded from waiving the DADW agreement or considering

Galena's topping bid. *McMullin v. Beran*, 765 A.2d 910, 926 (Del. 2000). The court believed that a possible superior bid from Galena is a material fact that the Board has a fiduciary duty to disclose to the Callison shareholders regardless of a possible contractual breach. (Mem. Op. 16-17). However, the Callison Board reasonably relied on the legal advice of their independent advisor regarding the enforceability of the DADW provision. Had the Board disclosed, in fact even listened to, the potential Galena tender offer, they would have breached the Vicente Merger Agreement. This act would not have only led to the termination of the tender offer, but also would require Callison to pay the $87 Million termination fee to Vicente. (Mem. Op. 13).

The Court of Chancery also cited *In re Complete Genomics*, as precedent for enjoining the enforcement of a DADW Standstill agreement. The court in *Complete Genomics* held that a DADW provision is similar to a bidder-specific no talk provision, which prevents Directors from being completely informed when making recommendations about the sale to their stockholders. *In re Complete Genomics, Inc. S'holder Litig.*, Consol. C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012). Unlike this case, the DADW agreement in *Complete Genomics* was preventing the Board from having knowledge about a possible topping bid. *Id.* In this case, the Callison Board reasonably believed that waiving the DADW provision for Galena would be a contractual breach of the Vicente tender offer. Because the Galena offer is illegitimate in light of their contractual obligations, their offer should be treated

as if it never occurred. Thus, it is not a material fact to disclose to the shareholders.

Additionally, *Complete Genomics* is not applicable to the current case. A recent Delaware opinion held that DADW provisions are not per se invalid. *In re Ancestry.com, Inc. S'holder Litig.*, Consol C.A. No. 7988-CS, 20-21 (Del. Ch. Dec. 17, 2012). "Per se rulings where judges invalidate contractual provisions across the bar are exceedingly rare in Delaware, and they should be. . . . I know of no statute, I know of nothing, that says that these provisions are per se invalid." *Id.* The court in *Ancestry.com* distinguished *Complete Genomics* from creating any per se rule banning DADW agreements. *Id.* at 21-23. "But the value-maximizing purpose has to be to allow the seller . . . to impress upon the people that . . . there is really an end to the auction for those who participate." *Id.* at 23. Therefore, the Board did not breach its fiduciary duty to disclose information to its stockholders. 8 Del. C. § 211 (2012). The Board had a reasonable belief that doing so would jeopardize their current contractual obligations under the Vicente tender offer.

iii. **Duty to be Fully Informed**

The Board has a fiduciary duty to be informed of all relevant facts to make an informed business judgment. 8 Del. C. § 251 (2012). The Board is also obliged to act in an informed manner to ensure maximization of value for the minority stockholders. *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 Del. Ch. LEXIS 202 (Sept. 27, 1999). However, unlike in *Phelps Dodge*, the Callison Board implemented the DADW provision specifically to ensure that they were

fully informed of the most likely suitors as early on in the process as possible. The DADW Standstill agreement encouraged all privately canvassed bidders to put forward their "only, best, and final offer." (Mem. Op. 8).

Although the DADW Standstill agreement does not allow any of the original six suitors to make a topping bid, this was well known to each suitor prior to entering into the DADW provision. The value of a DADW provision is to put potential bidders on notice of this situation and encourage them to make their best offer. Once the bidder agrees to this limited, private auction scenario, they were given access to Callison's private information. (Mem. Op. 7-8). Additionally, the subsequent market check, including both the Go Shop and Window Shop provisions, allowed the Callison Board to be fully informed about any other interest in purchasing the company. If a bidder is not willing to make this commitment, then they should refrain from entering into the first-stage auction and instead be available to take part in the subsequent market check.

The Delaware court held in *In re Celera*, that DADW agreements can be modified. *In re Celera Corp. S'holder Litig.*, 2012 Del. Ch. WL 1020471, at *7 (Del. Ch. Mar. 23, 2012). The modification in *Celera* allowed the invitation of "competing offers from parties of the agreement." *Id.* Although no topping bid occurred, the court thought that the modification was a valuable benefit to the DADW agreement. *Id.* at *30-*31. The court premised the need for a modification option because DADW provisions can create an "informational vacuum" for the Board. *Id.* at *20-*21. However, the

Callison Board knew of Galena's interest in putting forth a topping bid despite the DADW Standstill agreement. With the advice of their independent legal counsel, the Callison Board determined that it was in Callison's best interest to reject Galena's overtures. (Mem. Op. 16).

Additionally, in *Celera*, the court expressly did not make a per se rule banning DADW provisions. *Ancestry.com*, C.A. No. 7988-CS at 22. Therefore, the Callison Board was fully informed of all material facts regarding the sale when they decided to enforce the DADW provision. In the Callison Board's business judgment, the DADW agreement was the most effective way of avoiding a protracted public auction, in which stockholders would not be maximally compensated. This reasonable decision by the Board fits squarely within their fiduciary duties.

d. **A per se ruling banning all DADW Standstill agreements would be detrimental to maximizing stockholder value.**

Delaware courts have recognized the value of having Standstill agreements in a public sales transaction. *In re The Topps Co. S'holders Litig.*, 926 A.2d 58, 92-93 (Del. Ch. 2007). Although Delaware courts have recognized the potential for abuse in requiring a DADW provision in the Standstill agreement, that abuse is simply not present in this case. *In re Celera Corp. S'holder Litig.*, 2012 Del. Ch. WL 1020471, at *7 (Del. Ch. Mar. 23, 2012). The Callison Board, as well as all of the potential bidders, were aware of the effects of using a DADW Standstill agreement. (Mem. Op. 4).

The concern with invalidating all DADW Standstill agreements is that companies would be precluded from using the most effective tool to

maximize stockholder value. *McMullin v. Beran*, 765 A.2d 910, 918-19 (Del. 2000). The Callison Board and its independent advisors found that the DADW provision provided the best opportunity to induce all interested bidders to put their best offer forward at the outset of the process. In turn, the potential bidders that agreed to the DADW provision were assured that there would not be a topping bid from the other first-stage bidders. If the DADW provision were not utilized, Vicente would have put forth a lower opening bid. Had Vicente known that the DADW agreement would not be enforced against the other original bidders, they would have not had any incentive to put forth their best offer. Additionally, companies like Vicente, now knowing that topping bids can be made even with a DADW provision, will be unlikely to enter into Tender Offer Agreements without first negotiating a higher termination fee.

If a potential bidder were truly interested in purchasing the company, that bidder would make their absolute best offer, knowing that there would not be an opportunity to make a topping bid or to participate in the subsequent market check. *Ancestry.com*, C.A. No. 7988-CS at 20-23. Had Galena made their best offer in the first-stage of the bidding process, they would have won the auction; making this current action moot. However, Galena took the risk of not putting forth their maximum bid and lost out.

Traditionally, decisions regarding per se rules barring something as unlawful are left to the Legislature. *Id.* at 21. The *Ancestry* court found that a DADW provision can be very beneficial to maximizing shareholder value as long it is properly utilized. *Id.* at 22-

23. There are undoubtedly potential dangers of using DADW agreements in cases that are governed by *Revlon*, if the Board does not act reasonably in maximizing stockholder value. *McMullin v. Beran*, 765 A.2d 910, 918-19 (Del. 2000). Specifically, the *Ancestry* court emphasizes the "Don't Ask" provision of a DADW, in which a first-stage bidder cannot later request waiver of the DADW. *Ancestry.com*, C.A. No. 7988-CS at 20-23. The Board needs to make sure that the potential bidders understand that this is their only attempt to bid and that they should put forward their best bid.

The Callison Board made it abundantly clear to the six first-stage suitors that this would be their one and only chance to bid on Callison. Therefore, the Callison Board acted reasonably under current Delaware law in using a DADW Standstill agreement to maximize shareholder value. Any future per se ban to DADW provisions is a question for the people of Delaware. Because the Callison Board met all of its fiduciary duties, Plaintiffs are unlikely to succeed on the merits and therefore, the Court of Chancery erred in granting a preliminary injunction.

II. The Callison Board's approval of the merger was a valid exercise of its business judgment.

a. Question Presented

Whether the Court of Chancery erred in granting an injunction enjoining the business decision that was adopted by the Callison board in good faith, with reasonable care, and without conflict.

b. Scope of Review

This Court reviews the grant or denial of a preliminary injunction for abuse of discretion, but without deference to the legal conclusions of the trial court. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998). The Court of Chancery incorrectly applied *McMullin*, which was decided on a motion to dismiss, to Plaintiff's motion for a preliminary injunction. (Mem. Op. 25). Accordingly, this Court should consider *de novo* the legal principles applied by the Court of Chancery to the Callison Board's business decision. *Wininger*, 707 A.2d at 40.

c. **Plaintiff has not demonstrated that the Callison Board's conduct rebuts the presumption of the business judgment rule and warrants a preliminary Injunction.**

A preliminary injunction requires that the court take into consideration three factors: 1) that there is a reasonable probability that the party seeking the preliminary injunction will be successful on the merits; 2) that there is an imminent threat of irreparable harm; and 3) a balancing of the equities between the parties. *SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998). The plaintiff has the burden of demonstrating that all three factors are met. *Id.* The Chancery Court incorrectly applied the analysis from *McMullin* that enjoyed every favorable inference afforded by the factual allegations of the Plaintiff's complaint. (Mem. Op. 25). However, *McMullin* was decided on a motion to dismiss whereas here the matter arises in the context of a motion for preliminary injunction. *Id.*

Therefore, Plaintiff must demonstrate the likelihood of success on the merits, which this Court reviews "without deference to the embedded legal conclusions of the trial court." *Kaiser Aluminum Corp.*

v. Matheson, 681 A.2d 392, 394 (Del. 1996). The Plaintiff fails to demonstrate that the Callison Board's conduct under either the deferential or enhanced scrutiny tests establishes a reasonable probability of rebutting the business judgment rule and triggering an entire fairness review.

d. **Plaintiff fails to rebut the presumption of the business judgment rule.**

The business judgment rule is the fundamental principle that the board of directors manages the business affairs of a corporation without interference as long as "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (1984). When challenging a company's action, the plaintiff must demonstrate that the company's board, in reaching its decision, breached any one of its fiduciary duties. *McMullin v. Beran*, 765 A.2d 910, 917 (2000). "If a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (1993). However if the plaintiffs rebut the presumption of the business judgment rule, the defendant directors must prove the "entire fairness" of the transaction. *McMullin*, 765 A.2d at 917 (quoting Emerald Partners v. Berlin, 765 A.2d 1215, 1222 (1999)).

The Callison Board owed fiduciary duties of care and loyalty to all Callison shareholders in the sale of the entire corporation to

Vicente. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1988). Whether these duties are met requires an examination of the of Callison Board's fiduciary responsibilities to minority shareholders in the context of evaluating a sale of the entire corporation to a third party at the request of the majority shareholder. *McMullin*, 765 A.2d at 919. A sale of a corporation that is orchestrated by the majority shareholder requires the Court to determine whether the sale maximizes value for minority shareholders. *Id*. This objective requires the board to obtain the best value reasonably available. *QVC*, 637 A.2d at 44. However, "[w]hen the entire sale to a third-party is proposed, negotiated and timed by a majority shareholder, . . .the board cannot realistically seek any alternative because the majority shareholder has the right to vote its shares in favor of the third-party transaction it proposed for the board's consideration." *McMullin*, 765 A.2d at 919. Therefore, to protect the minority shareholder's interest, the majority shareholder has an obligation to "first, conduct a critical assessment of the third-party [t]ransaction . . . that was proposed by the majority shareholder; and second, make an independent determination whether that transaction maximized value for all shareholders." *Id.* at 920.

Plaintiff argues that Allen's financial interest in liquidity demonstrates a conflict of interest that rebuts the business judgment rule and implicates the entire fairness standard. Plaintiff contends under *McMullin* that Allen has a need for liquidity which is not shared by the minority stockholders. Thus Allen's liquidity interest creates

a disabling conflict that tainted the Callison Board's decision and violated its fiduciary duties to the minority shareholders. However, the Callison Board's actions demonstrate adequate process that protects and serves the interests of the minority shareholder. The Court should find the Callison Board met its fiduciary duties and the business judgment rule applies.

i. **Duty of Care**

Callison board reasonably informed itself and conducted a sufficient assessment of the third party transaction. Under Delaware law a director is required "to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders." 8 Del. C. § 251 (2012). The business judgment rule is rebutted if the Plaintiff shows that the directors failed to inform themselves before making their decisions. *Smith v. Van Gorkom*, 488 A.2d 858, 872-873 (Del. 1985). The Callison Directors were obligated to determine whether the third-party transaction being advanced by Allen would maximize value for the minority shareholders.

This Court has found a board that "unilaterally negotiate[ed] [a] merger without establishing any procedural safeguards to protect the interests of the minority shareholder" to benefit its own liquidity needs has failed to exercise due care. *McMullin*, 765 A.2d at 921. The majority shareholder in *McMullin* conducted negotiations, placed its own cash restrictions on potential bidders, and sacrificed value of the company at the expense of the minority shareholders. *Id.* Unlike the majority shareholder in *McMullin*, Allen

initiated the sale process but did not unilaterally negotiate the deal. The Callison Board, not Allen, determined how to negotiate the sale on behalf of the company in order to maximize value for all shareholders.

The Chancery Court in *In re Synthes* found a "a patient process" directed by independent directors and "reasonably calculated to generate the highest value the market would pay" met the fiduciary standards required by Delaware law. *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1037 (Del. Ch. 2012). The Board established a Special Committee of independent directors to manage the negotiations and to protect minority shareholders' interests. The Special Committee retained separate counsel and an investment firm that assisted in determining how to sell the company, valuing the offers, and administering an additional market check of the winning firm's offer.

The Chancery Court incorrectly applied *McMullin* where The majority shareholder gained a financial advantage from the transaction at the expense of the minority shareholders. (Mem. Op. 24-25); *McMullin*, 765 A.2d at 921. Callison Board's use of a special committee placed no restrictions on potential bidders nor sacrificed the company's value at the expense of the minority shareholders. In addition, the Special Committee isolated Allen's conflicting interests from the negotiation process. The Plaintiff asserts that the Callison Board failed to accept a higher offer that would have realized additional value for shareholders. However, the Plaintiff ignores that the Special Committee's informed decision to privately canvass the market for

firms to bid the best/highest price for the company protected Callison's value from a harmful public auction. Also, the Special Committee solicited 100 additional suitors in a market check, where no suitors were willing to pay higher price than Vicente. The Callison Board adequately informed itself and established sufficient safeguards to protect minority shareholders in the negotiation process.

Before making the final decision to sell the company, the Callison Board had a duty to inform themselves adequately about the transaction they are approving. *Van Gorkom*, 488 A.2d at 872-73. This Court has found "the imposition of time constraints on a board's decision-making process may compromise of the integrity of its deliberate process." *McMullin*, 765 A.2d at 922. Boards that are rushed and rely on limited information are frequently found to have failed to exercise due care. *Id.*

Directors breach their duty of care when approving a merger "without adequately informing themselves about the transaction and without determining whether the merger consideration equaled or exceeded . . . [the company's] appraisal value." *Id.* at 922. The directors in *McMullin* approved the sale at one meeting based on only the disclosures of the majority stockholder's financial advisor. *Id.* at 921-22. Unlike in *McMullin*, the Callison Board did not make a rushed decision at a surprise board meeting. The Callison Board made an informed decision based on a detailed presentation by the Special Committee and its legal and financial advisors. The Special Committee provided a summary and a detailed report that contained financial

analysis and fairness opinion on the proposed offer. Upon receipt of this information, the Callison Board approved the transaction.

Plaintiff contends the decision was made during a short meeting without fully assessing the company's entire value. However, the Callison Board's actions are similar to those of the Directors in *Van de Walle v. Unimation, Inc.*, which this Court relied on in *McMullin*. *McMullin*, 765 A.2d at 924. The *Unimation* Court held the directors were sufficiently informed despite the short meeting "because for months Unimation's directors had been kept fully apprised of all relevant facts on an ongoing basis, and they had already fully considered those facts before their formal meeting was convened." *Van de Walle v. Unimation*, Del. Ch., C.A. No. 7046, slip op. at 14, 1991 WL 29303 (1991). Like the *Unimation* directors, the Callison Board was informally kept appraised of the merger process throughout the several month search. The Callison Board made an informed decision to sell Callison based on the on-going discussion followed by the Special Committee's final presentation, which included detailed financial and fairness data. The Callison Board adequately informed itself and established sufficient safeguards to protect minority shareholders in the approval process.

ii. **Duty of Loyalty**

Plaintiff has not demonstrated that Allen's interest in liquidity diverges from the interests of the minority shareholders. Callison Directors owed minority shareholders a duty of loyalty that would not allow any improper influence to compromise their review of whether the proposed transaction would achieve maximum value for all

shareholders. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). Therefore the Callison Board has an obligation "to act independently and fully inform itself . . . in negotiating a sale of the entire company." *McMullin*, 765 A.2d at 924. Plaintiff asserts that Allen's external contractual obligation forced the Callison Board to breach its duty of loyalty by refusing a higher offer that would put Allen's obligation in jeopardy.

When faced with a liquidity conflict, the Callison Board has a fiduciary duty "to make an informed and independent decision on whether to recommend approval of the third-party [t]ransaction." *McMullin*, 765 A.2d at 924. The Chancery Court analyzed this duty under *McMullin*, where the Court held a majority shareholder directed negotiation process violated the duty of loyalty. (Mem. Op. 24-25). Unlike *McMullin*, the Callison Board established a Special Committee that isolated the conflicted shareholder and directors from the sale process. Instead this Court should analyze Callison' conduct under *Synthes*, where the Chancery Court held a strategic process conducted by independent directors satisfied the fiduciary duties when a majority shareholder seeks liquidity. *In re Synthes, Inc.*, 50 A.3d at 1037.

To prove a sufficient disabling liquidity conflict, Plaintiff must show Callison Board's intent to sell "the corporation without any effort to make logical buyers aware of the chance to sell, give them a chance to do due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair market value of the corporation." *Id.* at 1036. Callison Board conducted the sale

through a strategic process that identified favorable buyers, provided due diligence materials, and required bidders' highest and best offers. Callison Board selected a process to generate the highest reasonable value without undue influence by Allen's interests.

Even though the Callison Board did not consider the Plaintiff's higher offer, the Court should not "impose on controlling stockholders a duty to engage in self-sacrifice for the benefit of minority shareholders." *In re Synthes*, 50 A.3d at 1040. Plaintiff contends the Board should negate the timely strategic process and accept the higher offer at Allen' expense. However, neither the Callison Board nor Allen used the merger process to unfairly benefit themselves at the expense of the minority. *See Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883, 887 (Del. 1970) ("the fact that the parent owes a fiduciary duty to its subsidiary, the duty does not require self-sacrifice from the parent."). The Court should consider that Plaintiff's dual role as a minority shareholder and bidder that created an incentive to achieve the highest value for Plaintiff's firm as a whole. The fact that the Callison Board rejected Plaintiff's offer was a reasonable decision to uphold the strategic process and maximize Callison's value. *See In re Synthes, Inc.*, 50 A.3d at 1041. Allen's desire for liquidity did not diverge from the interests of the minority shareholders and does not create a disqualifying liquidity conflict. The Callison Board took appropriate steps to isolate Allen's interests and insure the negotiation would attain the highest value for all stockholders.

e. **Even under enhanced scrutiny, Plaintiff has failed to show that the Board's process and subsequent decision was unreasonable.**

Even if the Court were to apply enhanced scrutiny, the Court should find the Board acted in accordance with their fiduciary duties. This Court in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, established the enhanced judicial scrutiny test for director decisions in sale of control transactions. 506 A.2d 173, 182 (1986). Sale of Control transactions shift corporate control to a new majority shareholder leaving minority shareholders with little or no leverage to exercise their power to elect directors, amend the corporate charter, and effect various other fundamental corporate changes. *QVC*, 637 A.2d at 43. Thus, minority "stockholders are entitled to receive . . . a control premium and/or protective devices of significant value. There being no such protective provisions in the . . .transaction, the . . . directors ha[ve] an obligation to take the maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available." *Id.* Such minority shareholder protections require directors "to secure the transaction offering the best value reasonably available" in addition to director's duties of care and loyalty. *Id.* at 43-44.

Callison's merger was a sale of control transaction. Allen initiated the Callison Board to explore selling the company that would transfer control from Allen to Vicente and "would provide the new controlling stockholder with the power to alter" the company's vision. *QVC*, 637 A.2d at 43. Therefore, Plaintiffs contend the Callison Board's failure to accept Plaintiff's offer breached their duty under

Revlon/QVC to secure the best value for shareholders. *Revlon*, 506 A.2d at 182; *QVC*, 637 A.2d at 43. However, taking into consideration that "[t]here are many business and financial considerations implicated in investigating and selecting the best value reasonably available," the Callison Board's decision "was, on balance, within a range of reasonableness." *QVC*, 637 A.2d at 45.

In the face of two alternative offers, the Callison Board must determine which offer is likely to provide the best value reasonably available to stockholders. *QVC*, 637 A.2d 45. Directors' obligations are to use reasonable process that is reasonable in relation to advantage sought to further stockholders' interests. *Id.* Meeting this additional obligation increases the importance of independent directors, who are able to serve as an impartial decision maker in the face of such a large decision. *Id.* at 44. The Callison Board delegated a Special Committee comprised of independent directors and experienced financial and legal advisors to conduct the merger negotiations. The Special Committee canvassed the market for the highest offer through a private bidding process and an additional market test. *Id.*

In addition to the Special Committee, the Callison Board sought the advice of independent legal and financial advisors when determining whether to accept Plaintiff's higher offer and break the company's contractual obligations. Although the Callison Board rejected the slightly higher offer, the Board acted appropriately to ensure that stockholders received the highest value reasonably attainable without facing the economic costs of breaking any contractual agreements. The

Callison Board's use of the Special Committee and independent legal counsel demonstrated adequate process to attain the best value reasonably available to stockholders. The Callison Board's conduct isolated Allen's involvement from the negotiation process and thus the Plaintiff's allegations that the majority shareholder's "liquidity conflict" caused the Callison Board to choose the slightly lower Vicente offer should fail.

Conclusion

For the foregoing reasons, Appellants respectfully request that this Court reverse the decision of the Court of Chancery.

Respectfully submitted,

/s/ Team D Attorneys
TEAM D

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