

IN THE SUPREME COURT OF THE STATE OF DELAWARE

:

:

No. 162, 2013

CALLISON INC., TIMOTHY MICHAELS,
CLAIRE LIEBERMAN, RHANEY PATRICKS,
JULIO LUIS-ROJAS, PATRICK AUSTIN,
MARSHA FRANKLIN, ARI SINGH and
ALLEN ENTERPRISES INCORPORATED,

Defendants Below,
Appellants,

v.

GALENA CAPITAL PARTNERS, LLC.,

Plaintiff Below,
Appellee.

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Court Below:

Court of Chancery of the
State of Delaware in and
for New Castle County
Civil Action No. 7918-CN

OPENING BRIEF FOR APPELLANTS

ORAL ARGUMENT REQUESTED

TEAM E
ATTORNEYS FOR DEFENDANTS BELOW, APPELLANTS
FILED: FEBRUARY 8, 2013

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NATURE OF THE PROCEEDINGS

Plaintiff below, Galena Capital Partners, LLC, ("Galena") filed suit in the Court of Chancery of Delaware, Civil Action No. 7918-CN, challenging the validity of a "Don't Ask, Don't Waive" standstill provision ("DADW standstill") used by Defendants below, Callison Inc. ("Callison"). Subsequently, Galena moved for a preliminary injunction to enjoin Callison from enforcing the DADW standstill. On January 14, 2013, the Court of Chancery, by the Honorable Aaron Nelson, issued an opinion granting Galena's motion for a preliminary injunction to enjoin Callison from enforcing the DADW standstill. The Court of Chancery issued its Preliminary Injunction Order on January 15, 2013.

On January 17, 2013, Callison filed an application for certification of the interlocutory order with the court, and Galena filed its response on January 18, 2013. The court granted Callison's application on January 21, 2013. Pursuant to Supreme Court Rule 42, Callison filed a Notice of Appeal from Interlocutory Order with the Supreme Court of Delaware on January 23, 2013, and the Court accepted the application on January 25, 2013. This is the Appellant's brief seeking to reverse the Court of Chancery's preliminary injunction.

SUMMARY OF THE ARGUMENT

I. This Court should reverse the Court of Chancery's decision to grant Galena's request for a preliminary injunction. "Don't Ask, Don't Waive" provisions are not per se unenforceable, and provide value-maximizing objectives in an auction process by establishing clear "rules of the game," protecting confidential information from misuse, and by adding credibility to the process by limiting topping bids.

The Callison Board used the provision as an "auction gavel" when it was aware of the effect of the provision, the Board and thoroughly evaluated its use in the sales process. Because the provision was coupled with an extensive market check, the provision did not preclude value maximization in the sales process and was reasonable under an enhanced scrutiny standard.

II. This Court should hold that the business judgment rule is the appropriate standard of review when the Callison Board successfully safeguarded Allen's liquidity interest by appointing a disinterested and independent Special Committee to oversee all aspects of the sales process. *McMullen* does not apply because the Committee objectively pursued options for a sale of Allen's share or the entire company. Additionally, the Committee was directly involved in the negotiations and independently dictated the timing of the sale.

STATEMENT OF THE FACTS

Defendant Callison, Inc. ("Callison"), a publicly-traded Delaware corporation, manufactures and sells athletic apparel to national retail outlets. Mem. Op. at 2. In October 2012, investment banking firm Reed Crystal LLP, on behalf of Allen Inc. ("Allen"), a privately owned holding company with a 72% stake in Callison, approached Callison's Board ("the Board") and communicated its desire for a disposition of its stake in Callison, preferably through the sale of the entire company. *Id.* at 4. In response, the Board, acknowledging that four of its members were also Allen executives, created a Special Committee consisting of the three independent, disinterested members

of the Board. *Id.* at 4-5. The Board gave the Special Committee full authority to negotiate for Callison as to the potential sale of either Allen's interest, or the entire company, whichever should prove more profitable for all Callison shareholders. *Id.* at 5. Any transaction recommended by the Special Committee would then be subject to a vote of the entire Board. *Id.* at 5. The Special Committee retained investment banking firm Boncheck Graycourt Inc. ("Boncheck") and the Delaware law firm of Jenkins, Piper, Hitchens & Ward, LLP to independently advise it on any potential transaction. *Id.* at 5.

On October 20, 2012, the Special Committee met with Allen to discuss a process to maximize shareholder value in a sale of Callison. *Id.* at 6. The Special Committee, its independent advisors, and Allen were concerned that a protracted public auction posed a strong threat to existing customer relationships and retention of key employees. *Id.* at 7. Thus, the Special Committee sought a sales process that (1) avoided a protracted auction and (2) minimized the risk that Allen would block a proposed transaction using its majority stake. *Id.* The Special Committee decided to privately canvas a limited group of strategic and financial buyers. Mem. Op. at 7. The process included a required agreement containing a "Don't Ask, Don't Waive" standstill provision ("DADW standstill"), a market check, and assurance of a pre-commitment tender agreement from Allen. *Id.* at 8. The DADW standstill provided that any potential buyer, by signing the agreement, would obtain due diligence access and could only bid once, therefore encouraging all bidders to put forth their "only, best and final offer." *Id.* Potential buyers understood that they were contractually

barred from later making a topping bid or contacting the Board to request approval to make a topping bid. Mem. Op. at 8.

The first-stage winning proposal from the private auction would be accepted by the Board subject to a two-phase limited market check. *Id.* at 8-9. The Board was permitted to solicit topping bids for 25 days, then could receive, but not solicit, bids for an additional 15 days. *Id.* at 9. The market check also provided a right of termination if the Board determined in good faith that there was a "superior proposal." *Id.* Should the Board find a "superior proposal", a 5-day right to match provision protected the first-stage winning bidder. *Id.* at 9, fn 4. If the first-stage winning bidder declined to exercise the right, Callison agreed to pay a termination fee of 3% of the aggregate market value of the first-stage bidder's proposed transaction. *Id.* The agreement also required Allen to enter into a pre-commitment tender agreement with the winning first-stage bidder, subject to the same fiduciary out as the market check. Mem. Op. at 9-10.

On November 28, 2012, Allen entered an agreement with FPV Restaurants Inc. to purchase its Ca' Foscari restaurant division. *Id.* at 5-6. The \$2.4 billion agreement required a closing no later than March 31, 2013, a transaction termination of May 31, 2013, and included a \$60 million reciprocal liquidated damages provision. *Id.*

Throughout October and November, Boncheck privately canvassed the market on behalf of Callison and identified 20 potential buyers. *Id.* at 10. Of these companies, only seven expressed serious interest, and one of the seven declined to sign and was therefore not invited to proceed with due diligence. *Id.* The remaining six suitors signed the

agreement without any objection as to its terms or the timeframe of the process. Mem. Op. at 10. Throughout November and December, the six suitors conducted extensive due diligence and, on December 14, 2012, submitted what was to be their "only, best, and final" offer. *Id.* at 10-11.

On December 14, upon receipt and review of the anonymous bids, the Special Committee and its advisors determined that Vicente Capital's ("Vicente"), all-cash, all-shares bid of \$34 per share, a \$2.3 billion offer, was the "best and most valuable proposal." *Id.* at 11. Plaintiff Galena Capital Partners ("Galena") submitted a bid with identical terms but fell short of Vicente, offering only \$32.50 per share.¹ Mem. Op. at 11. Boncheck presented the Special Committee with an extensive valuation analysis and its written opinion that Vicente's offer was "financially fair to Callison and its minority stockholders." *Id.* The Special Committee unanimously agreed to recommend the Vicente Merger to the Board. *Id.*

Later that evening, the Special Committee presented the Board with its own fairness opinions and findings, as well as Boncheck's analysis and recommendation. *Id.* at 12. The Board voted unanimously to approve the Vicente offer and authorized Callison's management to negotiate a two-step merger agreement with Vicente, including a first-step tender offer followed by a cash-out merger at the same price. *Id.* Following the Board's authorization, representatives from Callison and Vicente successfully negotiated a definitive two-step merger agreement

¹The remaining four companies' bids were also inferior. *Id.* at 11.

("The Agreement").² *Id.* At this time, Allen was pre-committed to tender its entire 72% stake of Callison to Vicente. Mem. Op. at 13-14. On December 16, the Board and its advisors discussed the Board's fiduciary duties, the essential terms of the Agreement, and unanimously approved the Vicente Merger Agreement.³ *Id.*

Prior to the opening of the stock market on December 17, the three companies issued a press release announcing the Agreement at \$34 per share. *Id.* at 14. After the press release, Vicente commenced its first-step offer, not set to expire before January 25, 2013, to allow for the required 40-day market check. *Id.* Boncheck immediately initiated the first-stage market check, contacting over 100 companies, but after three weeks received no interest. *Id.*

Two days after the press release, Galena privately contacted Callison to request a waiver of the DADW standstill. *Id.* at 16. Galena acknowledged that this communication conflicted with the DADW standstill it signed. *Id.* After receiving Galena's letter, the Board met telephonically to discuss the recent events. *Id.* The Board decided to adhere to the DADW standstill. *Id.* Callison's counsel informed Galena of the Board's decision and asked that it cease all further communication with Callison. *Id.* The next morning, Galena commenced this lawsuit and simultaneously launched an all-cash, all-shares tender offer for Callison's shares at \$35.50 per share. *Id.* at 15.

²The fiduciary out at this stage permits Callison to terminate the agreement in favor of a "superior proposal" identified during the market check. The termination fee payable to Vicente would be \$87 million, calculated as 3% of the \$2.9 billion value of the Vicente Merger Agreement. *Id.* at 13.

³On behalf of Callison, Timothy Michaels signed the contract in his capacity as Chairman and Chief Executive Officer. On behalf of Vicente, Sara Holt signed the agreement in her capacity as Executive Vice President. *Id.* at 14.

ARGUMENT

I. THE COURT OF CHANCERY'S RULING SHOULD BE REVERSED BECAUSE A BOARD OF DIRECTORS USE OF A "DON'T ASK, DON'T WAIVE" STANDSTILL PROVISION AS AN AUCTION GAVEL IS CONSISTENT WITH ITS *REVLON* FIDUCIARY DUTIES.

A. QUESTION PRESENTED

Whether the Callison Board's use of a "Don't Ask, Don't Waive" Standstill provision as an auction gavel was consistent with its *Revlon* fiduciary duties.

B. SCOPE OF REVIEW

This Court "generally reviews the denial of a motion for a preliminary injunction under the abuse of discretion standard." *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006). "However, the Court of Chancery's legal conclusions are subject to *de novo* review." *Id.* Here, Callison is asking this Court to review the lower court's legal conclusions as to the "Don't Ask, Don't Waive" Standstill provision, so the applicable standard of review is *de novo*.

C. MERITS OF ARGUMENT

This Court should reverse the Court of Chancery's decision to grant Galena's motion for a preliminary injunction. To reach that result, this Court should adopt the rule set forth by Chancellor Strine in *Ancestry.com*: that a board of directors using a "Don't Ask, Don't Waive" Standstill ("DADW") provision as an auction gavel can enforce that provision in the "final stage" of the transaction, while acting consistently with its *Revlon* fiduciary duties. *In re Ancestry.com Inc., S'holder Litig.*, Consol. C.A. 7988-CS (Del. Ch. Dec. 17, 2012) (Transcript of Telephonic Ruling).

First, this Court should find that the objectives of a DADW provision in a sale-of-control auction are legitimate and value-maximizing. A DADW provision establishes "rules of the game" in an auction process, protects confidential information from being misused by bidders, and gives the board of directors "leverage to extract concessions from bidders." *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 91 (Del. Ch. 2007). Delaware courts have refused to make DADW provisions per se unenforceable. See *In re Celera Corp. S'holder Litig.*, 2012 Del. Ch. LEXIS 66, 81 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part on other grounds*.

Next, this Court should look at the reasonableness of the directors' decision to use the DADW provision, which is a matter of first impression for this Court. Chancellor Strine addressed this issue in *Ancestry.com*, and his three-step approach is particularly instructive. See *Ancestry*, Consol. C.A. No. 7988-CS. The first step examines the directors' awareness of the DADW's existence and effect. See *id.* The second step examines the adequacy of the directors' cost-benefit analysis to use the provision. *Id.* The third step examines the directors' use of the DADW provision in combination with other deal provisions. *Id.* After combining the information and facts from the three steps, it is reasonable for a board of directors to use a DADW standstill as an auction gavel to draw out "full bids," add "credibility" to the sale process, and "create a competitive dynamic." *Id.* This Court should adopt this approach.

In so doing, this Court would solidify the well-established principle that the board is "the corporate decision making body best

equipped" to make decisions and retain control in a *Revlon* transaction. *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994). Additionally, by adopting Chancellor Strine's approach, this Court would advance a case-by-case approach that is needed to strike an appropriate balance between the board's dual objectives: obtaining and protecting the best deal reasonably available and preserving its ability to be informed. This approach also requires sophisticated bidders to "play by the rules" and "take[] legal obligations seriously." *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. at 26-27.

Using this approach, the Supreme Court of Delaware should reverse the Court of Chancery's decision to grant Galena's preliminary injunction motion.

1. "Don't Ask Don't Waive" provisions have legitimate value-maximizing objectives in the auction process and are not per se unenforceable.

Delaware courts have repeatedly recognized that DADW provisions have legitimate value-maximizing objectives. *See, e.g., Topps*, 926 A.2d at 91; *Celera* 2012 Del. Ch. LEXIS at 79. These provisions contractually restrict a bidder from making an additional, unsolicited offer for a company. *Id.* They also prevent the bidder from asking the board of directors to waive the restriction. *Id.* Therefore, DADW provisions are designed to extract the highest possible offer from the bidder because the bidder only has one opportunity to make an offer for the company. *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. at 23-24.

The design of a DADW provision maximizes value in various ways. First, it establishes clear "rules of the game" to promote an orderly

auction enabling the board of directors to retain control over the sales process. *Topps*, 926 A.2d at 91. Next, it protects confidential information from being misused by bidders because due diligence is allowed only after the DADW provisions are signed. *Id.* Additionally, the provision gives the board of directors “leverage to extract concessions from the bidders” because the DADW impresses upon bidders that the auction process is limited. *Id.* Lastly, the DADW provision adds “meaning and credibility” to the auction, which in turn maximizes the value that shareholders will receive. *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. at 23.

Delaware courts recognize the value-maximizing effects and have refused to make these provisions per se unenforceable. *See Topps*, 926 A.2d 58; *see also Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. 21. Despite approving a settlement which included a waiver of the DADW standstill, the *Celera* court expressly held that “[it is] not making a per se rule” barring DADW provisions. *Celera*, 2012 Del. Ch. LEXIS 66. After echoing Vice-Chancellor Parson in *Celera*, Chancellor Strine’s opinion in *Ancestry.com* emphasized that it is not the court, but the “legislature that [usually] determine[s] when something is per se unlawful.” *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. 21.

A board of directors can use a DADW provision and still have access to the information needed to adequately consider alternative offers. *Id.* at TR. 22. The concern in *Complete Genomics*, that the use of a DADW provision will result in an “informational vacuum,” is misplaced. *See In re Complete Genomics, Inc. S’holder Litig.*, Consol. C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (Transcript of Telephonic

Ruling). Vice-Chancellor Laster's analogy of a DADW provision to a "bidder-specific no-talk" clause mischaracterizes the value-maximizing effect of a DADW in the board-controlled auction context. *Id.* By using a DADW, a board of directors is not "willfully blind[ing]" itself to superior bids, nor contracting away its ongoing *Revlon* duty to remain informed. *Id.* A board of directors is in fact *complying* with its *Revlon* duty by designing a sale process to ensure that bidders submit their best offers, without fear that the winning party will be used as a stalking horse for other bidders.

Since a DADW standstill is a value-maximizing tool for directors, these provisions are not per se unenforceable. Moreover, this Court should adopt a case-by-case approach in determining whether a board properly used a DADW provision to maximize shareholder value.

2. The Board's decision to use the DADW was consistent with its *Revlon* duties because the provision was used as an "auction gavel."

A Board properly uses a DADW provision when it uses the provision consistently with its *Revlon* duties. *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. 22. Directors act consistently with their *Revlon* duties so long as they act reasonably to achieve value maximization for all shareholders. *McMullin v. Beran*, 765 A.2d 910, 918-919 (Del. 2000). A Board acts reasonably to maximize value when it uses the DADW provision as an "auction gavel." *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. 24-25. The judicial inquiry into whether a board met its *Revlon* duties is limited to whether the board "made a *reasonable* decision, not a *perfect* decision." *Paramount Commc'ns, Inc. v. QVC*

Network, Inc., 637 A.2d 34, 45 (Del. 1994) (emphasis in original). This Court should be mindful not to “second guess the [board’s] reasonable, but debatable, tactical choices,” especially when “subsequent events may have cast doubt on the board’s determination.” *Id.*

This Court, in determining whether the board’s decision to use a DADW provision achieved value maximization as an auction gavel, should adopt the multi-factor analysis set forth by Chancellor Strine in *Ancestry.com*. See *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. 22-26. Under these parameters, this Court should examine 1) the Board’s awareness of the provision’s existence and effect, 2) the adequacy of the Board’s cost-benefit analysis of using the provision, and 3) the other deal provisions used in combination with the provision. *Id.*

This Court should reverse the Court of Chancery’s decision to grant Galena’s motion for preliminary injunction because the Board used the DADW provision as an auction gavel, thus acting reasonably to maximize shareholder value.

i. The Board was fully aware of the DADW’s existence and effect because it actively participated in the sales process.

A board must be aware of the DADW provision’s existence and effect in order to properly use the provision as a gavel. *Id.* at Tr. 24. A Board’s awareness is measured by the facts and information known to it at the time of the decision, including information acquired from financial advisors. See *id.* at Tr. 23-25. When a board is “not supine, [and is] actively engaged throughout the sales process” there is an assumption that the board is aware of the deal provisions being used. See *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1281 (Del. 1989). Awareness of the use of a DADW standstill permits the board to

use the provision as a tool to draw out "full bids" by impressing upon the bidders that the "process is meaningful." See *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. 23-25.

The Callison Board was fully aware of the existence of and the effect of the DADW standstill. The *decision* to use the DADW provision occurred at the October 20th Meeting only "after a discussion among all present." Mem. Op. at 7. Every member of Callison's Special Committee was present at that meeting, so all members partook in the discussion. *Id.* Also present were the Special Committee's investment banking team, who the Court of Chancery acknowledged were "independent, knowledgeable and experienced professional advisors." *Id.* at 5. In fact, the decision to use the DADW clause was "based on" advice from its investment advisors. *Id.* at 7. Therefore, the Special Committee's awareness of the DADW's existence and effect cannot be disputed.

The Special Committee's level of awareness and involvement in the sales process stands in sharp contrast to the board in *Ancestry.com*. In that case, the use of the DADW provision was considered unreasonable, in large part because "[n]one of the board seem[ed] to be aware" of the provision. *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. 24-25. In fact, Chancellor Strine explained that it was also unlikely that the banker was aware of it. *Id.* at Tr. 25. When a board or its advisors is wholly unaware of the DADW's "potency," the provision cannot impress upon the bidders the need to make their fullest bid, thus the utility of the provision fails to provide a maximization of value. *Id.* Unlike the board in *Ancestry.com*, however,

Callison's Special Committee actively debated and chose the DADW as a tool to maximize value.

ii. The Board extensively evaluated the appropriateness of using a DADW provision in its sales process.

A board's decision to maximize value through utilizing a DADW as an auction gavel is consistent with its *Revlon* duties when that decision is reasonable. See *Ancestry.com*, Consol. C.A. No. 7988-CS, Tr. 24-25. The reasonableness of a board's decision includes a consideration of the "real world risks...confronting" the board at the time. In re *Toys "R" Us*, 887 A.2d 975, 1016. Because each board faces a "unique combination of circumstances, many...outside of their control," this Court has repeatedly emphasized there is "no single blueprint" that a board must follow for such decisions. See, e.g., *Lyondell Chem. Co. v. Ryan*, 970 A.2D 235, 242 (Del. 2009), *Barkan v. Amsted Indus.*, 567 A.2d 1279, 1286-87 (Del. 1989). As such, many decisions and actions may be reasonable ones. See *QVC*, 637 A.2d at 45-47.

The Callison Board faced a very difficult and unique set of circumstances. The Board was unexpectedly approached by its majority shareholder Allen, who wanted to "monetiz[e] its stake" in the company. Mem. Op. at 1. The Special Committee was well aware that Allen owned 72% of Callison's outstanding shares and its billionaire owner wanted to sell his shares to "pursue his interest" in acquiring a major restaurant chain. *Id.* at 2. The "practical reality" for the Special Committee, therefore, was that Allen and Fairmount III could block any proposed transaction not in Allen's best interest. *Id.* at 6.

Accounting for this "real world risk," the Special Committee engaged in a carefully supervised cost-benefit analysis. Based on advice from its investment banking team, the Special Committee knew it needed to avoid a "protracted auction," especially a public auction, because it would seriously harm the shareholders. *Id.* at 7. More specifically, a lengthy drawn-out sales process would have jeopardized future long-term commitments with key customers. *Id.* at 7. Knowing that Callison is the business of not only manufacturing, but also selling off-brand apparel to retail outlets, the Special Committee knew the gravity of losing vital customers such as Target and/or Kohl's - Callison would have to reduce its production output, possibly even close certain locations. Therefore, the Board had to carefully design a sales process that would minimize the risk of alarming its key customers and still satisfy Allen's desire to monetize its shares.

With the purpose of making the sales process value-maximizing and non-disruptive as possible, the Special Committee decided that it "would be optimal in this context" to utilize DADW provisions. *Id.* at 7-8. The DADW provisions would attract only serious suitors and would solicit full bids from these suitors because they knew that their bid was it "only, best and final offer" for Callison. *Id.* at 8. No bidder ever complained about the quality of confidential information received. *Id.* at 10. Plus, each bidder was fully informed that the DADW's purpose was to maximize value and put a contractual definitive end to the auction. *See id.* at 9-10. Further, each bidder knew the others were submitting bids simultaneously and were subject to an

identical DADW provision, thus the provision impressed upon the bidders that the auction process had "credibility." *Id.* at 7-8.

The Special Committee acted consistently with its *Revlon* duty when it engaged in its cost-benefit trade-off analysis. The decision to achieve value-maximization by encouraging interested bidders to pay as full of a price possible did not have to be "perfect," only reasonable. It was reasonable for the Special Committee to "incur the cost" of giving to the winner the right to win outright. While the Special Committee's use of the DADW provisions was "tactically debatable," the Special Committee had legitimate business reasons. Therefore, this Court should not "second guess" its decision.

iii. The Board properly used the DADW provision in combination with other deal provisions, thus it remained informed throughout the entire sales process.

A board has an ongoing duty to stay "adequately informed" throughout the entire sales process. *Celera*, C.A. No. 6304-VCP. A board is adequately informed so long as it has access to all material information reasonably available. See *Complete Genomics*, Consol. C.A. No. 7888-VCL, Tr. 14-16. A board does not have access to the requisite information when it "willfully blind[s]" itself from all discussions with third parties, such that it cannot properly evaluate competing offers. *Id.* The information needed to adequately evaluate competing offers, however, is not absolute and has limits. *Id.*

The Special Committee did not impermissibly limit its duty to fully evaluate competing offers. Out of the entire universe of potential suitors, the Special Committee was only contractually prohibited from receiving offers from five bidders. Mem. Op. at 7-8.

This is hardly an unreasonable limitation that results in an "information vacuum." Plus, the five DADW bidders voluntarily (and strategically) chose to sign the DADW, get access to confidential information and begin due diligence. *Id.* Every DADW bidder could have chosen to not contractually bind itself by simply offering a topping bid during the post-agreement market check. *See id.*

Additionally, unlike the board in *Celera* that collectively operated a DADW in combination with a No Solicitation to create an "informational vacuum," the Special Committee retained the power to receive virtually any superior offer. *Celera*, C.A. No. 6304-VCP. In fact, the Special Committee intentionally designed the sales process to enable Bonchek to actively test the DADW winning bid through an extensive 25-day, post-agreement Go Shop period. Mem. Op. at 15. In this period, Bonchek personally contacted "in excess of 100 potential suitors" and solicited topping bids. *Id.* The Special Committee also negotiated an additional 15-day Window Shop period to entertain any non-DADW suitor with a superior bid that emerged. *Id.* at 10.

While a non-DADW topping bid did not emerge, the Special Committee would have been properly situated to accept it and change its recommendation to shareholders. *Id.* Galena does not contest the reasonableness of the 3% termination fee with the DADW winner should a superior bid emerge. *See id.* at 9.

The Special Committee used the DADW as an auction gavel to maximize value for shareholders and acted consistently with its *Revlon* duties. Therefore, this Court should reverse the Court of Chancery's decision granting Galena's motion for a preliminary injunction.

II. THE BUSINESS JUDGMENT RULE IS THE APPROPRIATE STANDARD OF REVIEW BECAUSE A DISINTERESTED AND INDEPENDENT SPECIAL COMMITTEE MANAGED THE SALES PROCESS TO ENSURE ADEQUATE PROTECTION OF MINORITY SHAREHOLDER INTERESTS.

A. QUESTION PRESENTED

Whether the Callison Board is entitled to the business judgment presumption when the directors used a disinterested special committee assigned to oversee the sales process, and all shareholders' interests were aligned to maximize value in the sale.

B. SCOPE OF REVIEW

The Court of Chancery's grant of a preliminary injunction is reviewed for abuse of discretion, but without deference to the legal conclusions of the trial court. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Because this issue was not discussed by the Court of Chancery, this Court reviews *de novo* whether the evidence presented justifies the grant of a preliminary injunction. *See id.*

C. MERITS OF THE ARGUMENT

This Court should defer to the business judgment of the Callison board of directors ("The Board"), who through its use of an independent Special Committee, pursued a deliberative, value-maximizing process resulting in the unbiased recommendation to sell Callison to Vicente. The Board's conduct is entitled to the business judgment presumption because the Board was disinterested and independent from the transaction, and sufficient safeguard mechanisms were in place to assure that all shareholder interests were aligned. Because the transaction will result in a sale of control, at most, the standard of review should be the enhanced scrutiny standard of reasonableness under *Revlon*.

Delaware corporate law authorizes the directors of a corporation to manage the business and affairs of every corporation. Del. Code Ann. Tit. 8 §141(a). Directors owe the fiduciary duties of care and loyalty to the shareholders when deciding to sell and when determining the process to be used for a sale of the company. *Mills Acq. Co.*, 559 A.2d at 1280.

The business judgment rule is a presumption that directors, in exercising their duty of care and loyalty, act on an "informed basis, in good faith, and in the honest belief that action was taken in the best interests of the company." *In Re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006). A plaintiff has the burden of rebutting this presumption, and the business judgment standard is substituted for an entire fairness analysis only by a showing that a board breached its duty of care or loyalty or that the board acted in bad faith. *McMullin*, 765 A.2d at 910; *See also, Aronson v. Lewis* 473 A.2d 805 (Del. 1984), *overruled on other grounds by Brehm v. Eisner* 746 A.2d 244 (Del. 2000).

The duty of care requires a director to take an active role in the context of a sale, from beginning to end, and to fully inform themselves before voting on a proposed merger or sale of the company. *See Cede & Co. v. Technicolor Inc.*, 634 A.2d 345, 368 (Del. 1993), *See also Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). The duty of loyalty requires that directors refrain from "self-dealing" by putting the best interests of the corporation and its shareholders above any interest "possessed by a director...and not shared by the stockholders generally." *Cede*, 634 A.2d at 361.

A majority shareholder's liquidity interest alone is not enough to trigger an entire fairness analysis. A majority shareholder has the same right to sell its shares just as any minority shareholder. *In re Synthes*, 50 A.3d 1022, 1041 (Del. Ch. 2012.) In the context of a sale to a third party buyer with a controlling shareholder, Delaware courts defer to the business judgment of a board when the transaction is approved by a majority of disinterested and independent directors. *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002). Interest and independence are defined as "mean [ing] that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." *Aronson*, 473 A.2d at 812. Here, the Callison Board's decision to appoint a disinterested special committee to orchestrate the sales procedure sufficiently preserved the independence of the process so as to avoid the implication of the entire fairness standard. Alternatively, because this case involves a sale of control, at most the Board should be subject to enhanced scrutiny under *Revlon*.

1. The Callison Board conferred all powers to oversee the transaction to its Special Committee ensuring an objective and independently managed sales process.

Director independence is based on a subjective, "actual person" standard, as opposed to a "reasonable director" standard. *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325 *8 (Del. Ch. Sept. 29, 2005.) A director's independence is demonstrated through a decision based on the merits rather than on peripheral considerations

or influence. *Id.* In contrast, a director who lacks independence is “beholden” to a controlling power with whom she has a relationship so as to deprive her of objective discretion in the decision. *Id.* This Court, in *McMullin*, concluded that a majority shareholder controlled the board when it “proposed, negotiated and timed” the entire sale to a third-party when that third party was not the product of an independent, safeguarded process. *McMullin*, 765 A.2d at 919. The defendant board in *McMullin* allowed the majority shareholder to “unilaterally” negotiate with the bidder of its choosing without affording the minority adequate representation in the process. *Id.* at 921. Thus, a majority shareholder’s total domination of a sales process will cause a corporate board to breach its duty of care if safeguards are not properly in place to protect the minority’s interests. *Id.* In the case at hand, the proposal, the negotiations and the timing of the entire sale was objectively managed by a group of disinterested, independent directors with no business relationship to the majority shareholder.

First, the proposal of the sale of Callison by the majority shareholder did not jeopardize the independence of the Board. A majority shareholder is entitled to want to sell its shares just as any other shareholder. *CompuCom*, 2005 WL 2481325 at *6. Next, the negotiations of the proposed transaction were squarely within the duties of the disinterested Special Committee, and the buyer was not hand-picked by the majority shareholder, but rather emerged from a well-coordinated auction process focused on maximizing value for all shareholders. Lastly, Allen’s liquidity interest did not interfere

with the independence of the Board or unduly shorten the timing of the transaction. The process was chosen for its efficiency in getting the best price and ample potential buyers were solicited resulting in a transaction providing equal treatment for all shareholders.

When Allen originally suggested the sale of its majority stake and its preference to sell the entire company, the Board appointed disinterested members to investigate its strategic options to ensure that a process could be structured to maximize value for all of its shareholders. Allen did not control the negotiations for the sale of Callison. To ensure independence, a Special Committee of disinterested members was appointed to 1) decide what type of process to pursue in the sale, 2) to review, reject and approve received proposals and 3) ultimately recommend only proposals that it objectively considered to maximize value for all shareholders. Unlike the *McMullen* board that abrogated their duty of care to the majority shareholder, the Callison Board empowered its independent Special Committee to negotiate at arm's length with potential bidders.

Allen's unique liquidity interest did not jeopardize the objective decisions of the board. In the recent *Synthes* decision, the Court of Chancery upheld the business judgment of the board in accepting an all-cash, whole company sale, when the majority shareholder had a unique liquidity interest in fulfilling his own estate planning goals. *In re Synthes*, 50 A.3d at 1025. Wyss, the majority shareholder of Synthes Inc. was directly involved with the negotiations of the sale, and was in the position to demand a premium for his control block of shares. *Id.* The court refused to apply the

entire fairness standard because by applying a higher standard when minority shareholders receive equal treatment, it would promote a rule incentivizing the majority to demand premiums, as opposed to a more palatable rule of rewarding controlling shareholders for pursuing pro rata minority treatment. *Id.* at 1035. In supporting an equal treatment transaction, a board would then “know that they have docked within the safe harbor created by the business judgment rule.” *Id.* The *CompuCom* court put it well when it said “as the owner of a majority share, the controlling shareholder’s interest in maximizing value is directly aligned with that of the minority.” *CompuCom*, 2005 WL2481325 at *6.

In this case, as in the *Synthes* case, the majority shareholder did not demand a premium for its shares and the resulting transaction gave fair treatment to all shareholders at a premium price for their stock. Even if Galena could argue that the non-committee members of the Callison board lacked independence (even though they were not receiving any additional benefit), the three disinterested committee members provided a sufficient level of detachment from the interested members by controlling all of the negotiations and basing their decision to recommend the merger on objective independent fairness opinions.

However, a majority shareholder’s urgent need for liquidity may impose time constraints on a board’s decision-making process, compromising the integrity of its deliberative process. *McMullin*, 765 A.2d at 922. Board decisions made hastily and not on a fully informed basis would not be afforded the deference of the business judgment rule, and an entire fairness analysis would be appropriate. *Van*

Gorkom, 488 A.2d 858. However, the timeframe for Callison's private auction sales process was not commercially unreasonable so as to be considered a "fire sale". While admittedly the time frame for the sale of Callison was short, it was also engineered to be efficient in its ability to extract from the market, moreover from the potential bidders, the best final price for all shareholders. Not a single first-stage bidder complained about the timeframe of the auction process and over 100 potential bidders were contacted during the "Go Shop" period without success.

The Callison sales process included multiple independent financial opinions and fairness reports that facilitated independent decision-making on behalf of the Special Committee and the Board. From the initial decision to pursue a sale of the entire company to the ultimate assessment of Vicente's winning bid, all board members were made aware of the limitations of the chosen sales process and objectively and unanimously agreed that the resulting Vicente transaction would maximize value for all.

2. At the very most, the *Revlon* intermediate scrutiny standard is the appropriate analysis if a board has conflicting interests preventing it from making an independent, objective assessment of the sales process.

Enhanced scrutiny is appropriate in three specific cases: (1) where a transaction resulted in a sale of control, (2) where a majority of the directors have material personal interests in the transaction or are controlled by a shareholder with those interests, or (3) defensive measures have been adopted in response to a threat of corporate control. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,

506 A.2d 173 (Del. 1986). The *Revlon* rule is an intermediate scrutiny level more deferential than the business judgment rule but less exacting than the entire fairness assessment. The standard subjects director's conduct to a "range of reasonableness" assessment and the court will not impose its own judgment over the reasonable decisions of the board. See *In re Netsmart Techs., Inc. S'holder Litig.*, 924 A.2d 171, 192 (Del. Ch. 2007). At most, this intermediate standard of review should apply to the transaction as discussed in Argument I above. *Infra.* p. 16.

CONCLUSION

For the reasons stated herein this Court should reverse the Court of Chancery's grant of a preliminary injunction.