

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,)	
)	
Defendants Below,)	
Appellants)	
v.)	Civil Action No. 162, 2013
)	
GALENA CAPITAL PARTNERS, LLC,)	
)	
Plaintiff Below,)	On Appeal from the Court
Appellee)	of Chancery of the State
)	of Delaware
)	

APPELLANTS' OPENING BRIEF

Team F
Counsel for Defendants Below
Appellants

Date Filed: February 8, 2013

Table of Contents

Table of Citations i

Nature of Proceedings 2

Summary of Arguments 3

Statement of Facts 4

Argument 6

I. THE COURT OF CHANCERY COMMITTED AN ERROR OF LAW WHEN APPLYING ENHANCED SCRUTINY TO THE BOARD’S REFUSAL TO WAIVE THE STANDSTILL AGREEMENT BECAUSE THE COURT SHOULD HAVE APPLIED THE BUSINESS JUDGMENT RULE. 6

1. Due to the Nature of the Standstill, the Court should use the business judgment rule to review the Board’s decision *not to waive* the Standstill..... 8

2. The Court of Chancery Abused Its Discretion Under Enhanced Scrutiny When Evaluating the Board’s Decision Not to Waive the Standstill..... 10

i. The Court of Chancery Showed that the Board Rationally Enacted the Standstill for the Purpose of Achieving the Best Interest of the Stockholders and in Good Faith with Legal and Financial Counsel 10

ii. The Court of Chancery Second-Guessed the Board’s Reasonable Decision to Uphold the Standstill and Therefore Committed an Abuse of Discretion 11

iii. The Court of Chancery Erred When Applying Precedent to Reject the Continued Validity of the Standstill 13

3. There Would Be No Irreparable Harm Were No Preliminary Injunction in Place..... 15

4. Trial Court’s Determined Incorrectly That the Balance of Equities Fall in Plaintiff’s Favor..... 15

II. UNDER SYNTHES, APPELLANT ALLEN’S LIQUIDITY INTEREST DID NOT CONSTITUTE A DISABLING CONFLICT OF INTEREST, THEREFORE THE SUBSTANTIVE PROTECTIONS OF THE BUSINESS JUDGMENT RULE APPLY TO THE DECISIONS AND ACTIONS OF THE INDIVIDUAL APPELLANTS OF THE CALLISON BOARD 16

1. No Disabling Conflict Exists Under <u>Synthes</u> , Therefore The Business Judgment Rule Protects Appellants.....	17
i. Appellee Failed to Apply <u>Synthes</u> and Misunderstood <u>McMullin</u> in Its Conflict of Interest/Entire Fairness Argument	18
ii. The Present Case Fits Firmly Within the Holding of <u>Synthes</u>	19
Conclusion	22

Table of Citations

Cases

<u>Barkan v. Amsted Industries, Inc.</u> , 567 A.2d 1279 (Del. 1989).....	8,10
<u>Cede & Co. v. Technicolor, Inc.</u> , 634 A.2d 345(Del. 1993).....	17
<u>Cinerama, Inc. v. Technicolor, Inc.</u> , 663 A.2d 1156 (Del. 1995).....	18
<u>Citron v. Fairchild Camera and Instrument Corp.</u> , 569 A.2d 53 (Del. 1989).....	8
<u>Ivanhoe Partners v. Newmont Min. Corp.</u> , 535 A.2d 1334 (Del. 1987).....	15
<u>McMullin v. Beran</u> , 765 A.2d 910 (Del. 2000).....	17, 19
<u>Mills Acquisition Co. v. Macmillan, Inc.</u> , 559 A.2d 1261 (Del. 1989).....	8
<u>Paramount Communications Inc. v. QVC Network Inc.</u> , 637 A.2d 34 (Del. 1994).....	10
<u>Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.</u> , 506 A.2d 173 (Del. 1986).....	8,12
<u>SI Mgmt. L.P. v. Wininger</u> , 707 A.2d 37 (Del. 1998).....	7, 17
<u>Cinerama, Inc. v. Technicolor, Inc.</u> , 663 A.2d 1134 (Del. Ch. 1994).....	18
<u>In re Celera Corp. S'holder Litig.</u> , CIV.A. 6304-VCP, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012).....	12,14
<u>In re Complete Genomics, Inc. Shareholder Litig.</u> , C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012).....	14

In re Synthes Inc., S'holder Litig.,
50 A.3d 1022 (Del.Ch. 2012)..... 18-21

In re Topps Co. S'holders Litig., 926 A.2d 58 (Del.Ch.2007)..... 12

State of Wis. Inv. Bd. v. Bartlett,
2000 WL 238026, at *3 (Del. Ch. Feb. 24, 2000)..... 7

Statutes

Del. Code tit. 8, § 141..... 11

Nature of Proceedings

On December 21, 2012, Plaintiff Galena Capital Partners, LLC ("Galena"), filed suit against Defendants Callison Inc. ("Callison"), Callison's Board of Directors ("Directors"), and Allen Enterprises Incorporated ("Allen"). Galena Capital Partners, LLC v. Callison Inc., No. 7918, at *16 (Del. Ch. Jan 14, 2013). Plaintiff moved for preliminary injunction preventing defendants from enforcing the "Don't Ask Don't Waive" Standstill Agreement. Id. On January 14, 2013, the Court of Chancery for the State of Delaware granted plaintiff's motion for preliminary injunction. Id. at 25. On January 15, 2013, the Court of Chancery ordered defendants preliminary enjoined from taking any action to effectuate or enforce the terms and provisions of the "Don't Ask Don't Waive" Standstill Agreement dated October 29, 2012. (Prelim. Inj. Order).

On January 23, 2013, defendants filed a notice of appeal from the Court of Chancery's interlocutory order. On January 25, 2013, pursuant to Supreme Court Rule 42, the Court of Chancery certified defendants' application for interlocutory appeal.

Summary of Arguments

I. The Court of Chancery committed an error of law when it applied the enhanced scrutiny standard to the Board's refusal to waive the standstill agreement because the Court should have applied the business judgment rule. Assuming Revlon standards are applicable to the Board's use of the Standstill agreement, the Court should use enhanced scrutiny when reviewing the Board's decision to enact the

Standstill in the first place and the business judgment rule to review the decision not to waive the standstill at Galena's request. Even if the enhanced scrutiny standard applies, the Court of Chancery abused its discretion under the enhanced scrutiny standard when it evaluated the Board's decision not to waive the standstill agreement.

II. Under Synthes, appellants did not have a disabling conflict of interest in liquidity; therefore, the substantive protections of the business judgment rule apply.

Statement of Facts

Plaintiff- Appellee, Galena, a Delaware limited liability company, is a private equity firm with around 18 billion of capital under management. Galena Capital Partners, LLC v. Callison Inc., No. 7918, at *2 (Del. Ch. Jan 14, 2013). Defendant- Appellant, Callison, is a Delaware corporation engaged in the manufacture and sale of off-brand athletic apparel. Id. Callison has 85 million shares of common stock which on December 14, 2012, was valued at 27 dollars a share with a market capitalization of 2.3 billion dollars. Id. Galena owns 10,000 shares of Callison common stock. Id. Defendant- Appellant Allen, a holding company incorporated under the laws of Delaware, owns 72 percent (61.2 million shares) of Callison common stock. Id. Allen also owns a variety of other companies, including a restaurant chain. Id. at *3. The individual members of Callison's board of directors are also appellants. Id. Each was elected by shareholder Allen. Id. Four of Callison's directors are full time salaried executives with Allen. Id. The other three members of Callison's board are not employed by

Allen or Callison and are considered independent and disinterested.

Id.

Allen's board of directors retained the investment banking firm, Reed Chrystal LLP, to help them sell Allen's 72 percent ownership in Callison. Id. at *4. Allen planned to use the proceeds from the sale to acquire a major restaurant chain, Ca' Foscari. Id. Allen informed Callison about its plans to monetize its shares through a sale of the entire company. Id. Allen and FVP Restaurants, owner of the Ca' Foscari restaurant chain, reached an agreement providing for an asset purchase by Allen from FVP of the chain for a cash price of 2.4 billion dollars, not contingent on a financing condition with a closing date of March 31, 2013. Id. at *6. In response, the Callison board formed a Special Committee of disinterested members to handle the transaction, retaining a law firm and an investment banking firm to advise its decisions. Id. at *5.

The special committee decided to allow the investment banking firm to privately canvass the market for potential buyers for Callison. Id. at *10. The six interested buyers, including Galena, entered into a Confidentiality and Standstill agreement with Callison, containing a "Don't Ask Don't Waive" provision. Id. at *7. Under this agreement, the potential buyers, after doing due diligence into Callison's confidential records, would bid one time for a purchase of Callison by Friday December 14, 2012. Id. at * 8. The bids all occurred simultaneously and any bidder outbid would be barred from making a later topping offer. Id. at *8. Under the agreement, it would

be a breach of contract for a losing bidder to ask Callison for permission to make a second, higher bid. Id. at *8. This agreement was intended to promote efficiency and encourage bidders to make their highest offer. Allen signed each standstill agreement with a provision that obligated Allen to enter into a separate pre-commitment contract with the winning bidder obligating Allen to tender its entire shares to the winning bidder. Id. at *7.

The 34 dollar a share offer from the company Vicente was the highest bid. Id. at *11. Galena only offered 32.50 dollars per share. Id. at *11. The full Callison board, after meeting with the special committee, the Allen board, the investment banking firm, and the lawyers, approved the offer from Vicente and authorized Callison management to negotiate a merger agreement with Vicente. Id. at *12. Vicente launched a tender offer for Callison shares at 34 dollars a share and held the offer open long enough for Callison to perform a market check. The market check period allowed the banking firm to look for other buyers, excluding the previous bidders who signed the "Don't Ask, Don't Waive" provision, who might be interested in purchasing Callison for a higher price, but found none. Id. at *15.

On December 19, 2012, Galena gave a letter to the Callison CEO, requesting that Callison waive the "Don't Ask Don't Waive" provision of the standstill agreement. Id. at *15. Galena also offered to sign a merger agreement with Callison, identical to the Vicente agreement, except for an increase in the purchase price by 1.50 dollars per share. Id. Callison responded in a letter instructing Galena to desist

all communication with Callison. Id. at *16. Callison refused to discuss the offer with Galena. Id. Galena then commenced an all cash all shares tender offer for 35.50 per share for Callison's shares and filed a lawsuit alleging that the Callison board breached its fiduciary duties to Galena as a Callison stockholder, that Galena's tender offer to Callison does not constitute a breach of any contractual obligations to Callison and moved for preliminary injunction preventing Callison from enforcing the standstill agreement. Id. The Court of Chancery granted the motion for preliminary injunction. (Prelim. Inj. Order).

Defendants appeal.

Argument

I. THE COURT OF CHANCERY COMMITTED AN ERROR OF LAW WHEN APPLYING ENHANCED SCRUTINY TO THE BOARD'S REFUSAL TO WAIVE THE STANDSTILL AGREEMENT BECAUSE THE COURT SHOULD HAVE APPLIED THE BUSINESS JUDGMENT RULE.

First Question Presented

(A) Did the Court of Chancery abuse its discretion when it went beyond the standard of review as required by Revlon and second-guessed the business judgment of an independent and reasonably informed committee?

(B) Is it probable that the Callison Board, guided by a committee of independent directors and informed of all relevant facts, acted reasonably when using a DADW Standstill Agreement to arrive at the maximum value of shares when it found that the Agreement was in the best interest of the shareholders?

Scope

To succeed on a motion for preliminary injunction, a plaintiff must show: (1) a reasonable probability of success on the merits; (2) irreparable harm; and (3) a balance of equities in its favor. SI Mgmt. L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998). "This test is stringent and the relief is extraordinary." State of Wis. Inv. Bd. v. Bartlett, 2000 WL 238026, at *3 (Del. Ch. Feb. 24, 2000).

The Supreme Court reviews the decision on a motion for preliminary injunction, determining only that there has been no error of law or abuse of discretion but giving no deference to legal conclusions. Id. (finding trial court did not abuse its discretion). Appellee's reasonable probability of success on the merits relies on the validity of the "Don't Ask, Don't Waive" Standstill Agreement ("Standstill").

Merits of Argument

Appellee does not have a reasonable probability of success on the merits, and Appellant carries the burden of harm resulting from the injunction. A committee of independent and disinterested directors ("Special Committee"), as well as the entire Board, enacted the Standstill using all reasonably available information to achieve the highest bid for the stockholders. If the Court upholds the injunction on the Standstill, the Appellant will suffer irreparable harm because the Court will invalidate a reasonable method for reaching a highest bid possible, the current guaranteed sale for what was determined to be the maximum bid for Callison may not take place, and any other bid

or tender offer could be blocked by the majority shareholder. The harm to the Plaintiff, moreover, was foreseeable and preventable by the Plaintiff. In this context, the Court of Chancery's injunction should be reversed.

1. Due to the Nature of the Standstill, the Court should use the business judgment rule to review the Board's decision *not to waive* the Standstill.

This Court stated in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. that "in a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders." 559 A.2d at 1288. A court evaluates a board's decision to which Revlon duties apply using enhanced scrutiny "*at the threshold . . .* before the normal presumptions of the business judgment rule will apply." Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1989) (emphasis added).

This Court has applied enhanced scrutiny to a board's determination in valuing one tender offer or bid over another as well as in determining which *method* to use when finding a potential suitor. The Court acknowledged there was "no single blueprint" that directors must follow when determining the correct process for finding a suitor, Barkan v. Amsted Industries, Inc., 567 A.2d 1279, 1286 (Del. 1989) ("A stereotypical approach to the sale and acquisition of corporate control is not to be expected in the face of the evolving techniques and financing devices employed in today's corporate environment"), 1285-86; Citron v. Fairchild Camera and Instrument Corp., 569 A.2d 53, 68 (Del. 1989); Macmillan, 559 A.2d at 1287, but the decision to enact

that process must be in good faith and according to fiduciary duties.

Due to the nature of a Standstill Agreement, the Court should use enhanced scrutiny—if it applies—to review a board’s decision enacting a standstill or when a board determines it should waive the Standstill, but not when a board makes a *specific* decision to deny a bidder’s appeal *to waive a standstill*. The Revlon duty requires that the Board take appropriate actions to maximize shareholder interests. Because the act of putting a standstill in place attempts to secure the highest bid and best interests of a stockholder, such a standstill can only effectuate its purposes if it is used through the entire bidding process.

If the Court were to use enhanced scrutiny to evaluate the Board’s decision not to waive the Standstill in this case *in the middle of the private auction*, the Board would arguably be violating Revlon duties regardless of its decision to waive the standstill or abide by its provisions. If the Board does not abide by the Standstill, it reverses a process that the Board has already determined will maximize bid offers. A court cannot apply enhanced scrutiny to a decision not to waive a standstill in a vacuum without considering the entire purpose and process of the standstill, including other agreements—such as the Go Shop period—still in place.

The character of a standstill agreement requires the court to perform enhanced scrutiny—if at all—at the enactment of the standstill or when reviewing a board’s decision to waive the standstill. Because the Board passed enhanced scrutiny at the enactment of the Standstill,

any continuance of the Standstill should receive business judgment deference.

2. The Court of Chancery Abused Its Discretion Under Enhanced Scrutiny When Evaluating the Board's Decision Not to Waive the Standstill.

The enhanced scrutiny test requires the court to determine whether: (1) the directors used an adequate decision making process, including the information on which the directors based their decision; and (2) the directors' action was reasonable in the specific context. Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 45-46 (Del. 1994).

i. The Court of Chancery Showed that the Board Rationally Enacted the Standstill for the Purpose of Achieving the Best Interest of the Stockholders and in Good Faith with Legal and Financial Counsel.

This Court considers a board to be adequately informed when it uses (1) adequate information in quality and quantity, Barkan, 567 A.2d at 1287, and (2) involves outside, independent directors, Macmillan, 559 A.2d at 1285; QVC, 637 A.2d at 44.

Here, the Court of Chancery was satisfied that the Board adequately informed itself of all relevant information and relied heavily, not only on the Special Committee (three independent directors), but on outside counsel as well when implementing the Standstill. First, the *independent* directors suggested that the Board use the Standstill agreement in order to maximize stockholder profits. Galena, No. 7918, at *5. Further, "the Committee enjoyed the advice of independent, knowledgeable and experienced professional advisors throughout the process." Id.

Second, the review of material concerning the Standstill was adequate as "counsel meaningfully walked the Board through each of the essential terms . . . and satisfactorily explained the limitations of the DADW Standstill agreements" Id. at *14.

The Court of Chancery also determined that the Board adequately informed itself of all relevant information and relied heavily on the Special Committee and on outside counsel when deciding not to waive the Standstill. All members of the Board, including independent counsel, discussed the second Galena proposal. Id. The outside counsel informed the Board that "although the issue is legally unsettled, the DADW Standstill likely would be upheld by the Delaware Courts and that the Board was within its proper business judgment to insist on the literal terms of the DADW Standstill in responding to Galena." Id. at *6. The Board is able to rely on the advice of its independent advisors. Del. Code tit. 8, § 141(e).

Thus, the Board established that the Board met its first obligation under enhanced scrutiny, commenting that "the Court is certainly loath to second-guess the decisions of well advised directors acting in good faith for the benefit of the stockholders." Galena, No. 7918 at *21.

ii. The Court of Chancery Second-Guessed the Board's Reasonable Decision to Uphold the Standstill and Therefore Committed an Abuse of Discretion.

The court then decides "whether the directors made a *reasonable* decision, not a *perfect* decision," and the court "should not second-guess that choice even though it might have decided otherwise or

subsequent events may have cast doubt on the board's determination." QVC, 637 A.2d at 45-46. The court must merely find that the Board acted within a "range of reasonableness." Id.

The court measures the reasonableness of the decision based on the directors' adherence to its primary focus during sale, which is to obtain the "best value reasonably available for the stockholders" while abiding by fiduciary duties. QVC, 637 A.2d at 44; Revlon, 506 A.2d at 182.

Price offered is not the only determination of the best value for the stockholders. QVC, 637 A.2d at 44-45. "Instead, the directors should analyze the entire situation and evaluate in a disciplined manner the consideration being offered." Id. The board may take into account "questions of illegality; . . . the risk of non-consum[er]ation; and the bidder's business plans for the corporation and their effects on stockholder interests." Macmillan, 559 A.2d at 1282 n. 29.

This Court has acknowledged the validity of enacting a standstill or other related agreement where their adoption is not a breach of fiduciary duty. Revlon, 506 A.2d at 176. Standstills have legitimate uses, "ensure[ing] that confidential information is not misused . . . [,] establish[ing] rules of the game that promote an orderly auction, and . . . giv[ing] the corporation leverage to extract concessions from the parties who seek to make a bid." In re Topps Co. S'holders Litig., 926 A.2d 58, 91 (Del.Ch.2007).

Provisions of standstill agreements are not unenforceable, but a court should view enforceability on a case by case basis. In re Celera

Corp. S'holder Litig., CIV.A. 6304-VCP, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012) aff'd in part, rev'd in part, 212, 2012, 2012 WL 6707736 (Del. Dec. 27, 2012).

Here, the Standstill Agreement was a reasonable decision by the board to maximize shareholder value. The Court recognized the Special Committee's concern that "a protracted auction of Callison, especially a public auction, could harm the Company and its stockholders." Galena, No. 7918 at *7. Instead of a public auction, the Special Committee would "privately canvass the market for potential suitors." Id. at *7. The Special Committee and its advisors settled on the Standstill agreement as the best method to maximize stockholder value. Thus, the Standstill agreement's enactment falls within the range of reasonable decisions.

Once the Court determined that enacting the Standstill Agreement was a reasonable action, its next determination should have been whether the decision to abide by the Standstill Agreement was also a reasonable action. Instead of determining whether abiding by the valid Standstill was reasonably performed for the benefit of the stockholders—which it was—the court simply rejected the idea of the Standstill all together. Id. at *1. ("But I cannot accept the idea that some notion of restrained deference in making a QVC 'range of reasonableness' inquiry requires the Court simply to accept the tangible value-impeding consequences of the DADW Standstill in this case.")

iii. The Court of Chancery Erred When Applying Precedent to Reject the Continued Validity of the Standstill.

Although when combined with other agreements or in light of other relevant facts, a standstill agreement may prevent a board from fulfilling its fiduciary duties, no such complication is present in this case.

The restraints of the standstill agreement in Celera are not of concern in the present Standstill agreement. Rejection of the "Don't-Ask-Don't-Waive" standstill agreement was as a result of its combination with a No Solicitation Provision. Celera, 2012 WL 1020471 aff'd in part, rev'd in part, 212, 2012, 2012 WL 6707736 (Del. Dec. 27, 2012). Here, the Standstill agreement is combined with a Go-shop period and a Window Shop period which actually enhance the ability of the Board to solicit other potential suitors.

Reliance on In re Complete Genomics, Inc. Shareholder Litig., is equally problematic. C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (Transcript of Telephonic Ruling). First, the facts are significantly different enough to cast significant doubt that the DADW agreement would maximize a bid for the best interest of the shareholder. Out of nine potential suitors in a private auction, only one had a DADW standstill with the target company. Here, the effect of the DADW standstill is to put all bidders on even playing field and maximize the bid that they decide to put forward without regard to what another bidder might put forward.

An increase in value of offer *may* eventually be in the best interest to the stockholders, but it is *not necessarily* in stockholders' best interest, especially when there are considerations

beyond the price of the offer, including possible break down of the auction process, other litigation initiated by companies that refused to enter into the Standstill agreement in the first place, and numerous breaches of contract. The Court of Chancery abused its discretion to evaluate the Board's decision with enhanced scrutiny when it substituted its own business judgment for the Board's, and such a ruling cannot be sustained.

3. There Would Be No Irreparable Harm Were No Preliminary Injunction in Place.

Any irreparable harm that requires an injunction to benefit the stockholders, were a breach of fiduciary duty found, could more reasonably be achieved through damages. Appellee, owning 0.01 percent of Callison stock, claim the Board breached its fiduciary duty to Appellee as stockholders. But a request for an injunction shows that they are more interested in being able to acquire Callison than get the highest value for their stock. Appellee should have put its highest bid forward in its one time, highest bid for Callison. Appellee could have prevented their own harm, and an injunction is now a means to allow Plaintiffs to play the law to their favor.

4. Trial Court's Determined Incorrectly That the Balance of Equities Fall in Plaintiff's Favor.

Plaintiffs have the burden of showing that the potential harm they will suffer without an injunction outweighs the harm that the defendants will suffer if the injunction is granted. Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1341 (Del. 1987).

Here, harm to Appellee is relatively minor compared to the harm on other stockholders in upholding the injunction, and Appellee's harm was foreseeable and avoidable. Appellee is not only stockholders—owning a total of 0.01 percent of Defendant—but are also the hostile bidders seeking an injunction. The Standstill agreement, therefore, was created and enacted specifically with Appellee's best interest in mind. As a bidder, Appellee could have rejected the standstill agreement, as did other potential suitors, and have been eligible to place bids during the Go-Shop period. Instead, Appellee signed the agreement even though Appellee believed at that point it was not enforceable.

Appellee, in addition, manufactured need for a hostile bid offering when it did not put forth its maximum bid, as required by the DADW Standstill agreement. If Plaintiffs had reason to believe that Callison would be worth what Plaintiffs have now argued is the highest value, Plaintiffs should have advanced that bid as their first bid. Rewarding Appellee's behavior with an injunction not only frustrates the point of the DADW Standstill, but it delays and possibly prevents a sale that will benefit the other Stockholders of Callison.

II. UNDER SYNTHES, APPELLANT ALLEN'S LIQUIDITY INTEREST DID NOT CONSTITUTE A DISABLING CONFLICT OF INTEREST, THEREFORE THE SUBSTANTIVE PROTECTIONS OF THE BUSINESS JUDGMENT RULE APPLY TO THE DECISIONS AND ACTIONS OF THE INDIVIDUAL APPELLANTS OF THE CALLISON BOARD.

Question Presented

Whether appellant Allen's liquidity interest was a disabling conflict of interest, rebutting the presumptions of the business judgment rule and imposing the "entire fairness" standard.

Scope

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. The Court reviews questions of law *de novo*. Id.

Merits of Argument

1. No Disabling Conflict Exists Under Synthes, Therefore The Business Judgment Rule Protects Appellants.

The presumption of the business judgment rule places the initial burden on plaintiffs to demonstrate that the board violated one of its duties: loyalty, due care, and good faith. McMullin v. Beran, 765 A.2d 910, 917 (Del. 2000). "Substantively, 'if the shareholder plaintiff fails to meet that evidentiary burden, the business judgment rule attaches' and operates to protect the individual appellants from personal liability for making the board decision at issue." Id., quoting Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). If plaintiff meets the evidentiary burden, the presumption of the business judgment rule is rebutted, and the burden shifts to defendant-directors to prove the entire fairness of the transaction. Id.

To overcome the business judgment rule by showing director interestedness, plaintiffs must prove, under the "actual person" standard, either that a material interest infected either a majority of voting/acting directors, or that it infected a minority of directors but still controlled or dominated the board (and that "a reasonable board member would have regarded the existence of the

material interest as a significant fact in the evaluation of the proposed transaction"). Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1168 (Del. 1995), quoting Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1153 (Del. Ch. 1994).

In Synthes, the Court of Chancery recently held that the liquidity interest of a controlling shareholder in selling his shares to facilitate estate planning goals was not a conflict of interest which would trigger the entire fairness standard. In re Synthes Inc., S'holder Litig., 50 A.3d 1022, 1024 (Del.Ch. 2012). The court first noted that, in most cases, a controlling shareholder's interest in value maximization is in exact alignment with that of minority shareholders. Id. at 1035. It also found that when controlling and minority shareholders receive *the same pro rata allocation of any premium realized upon the sale of the entire company*, there is almost never a disabling conflict of interest. Id. at 1035. Then the court weighed other factors: (1) whether the controlling shareholder had an immediate need for liquidity due to a crisis, Id. at 1036, and (2) whether the sale process discriminated against a class of buyers. Id. at 1037. A crisis could be reflected, for example, by a fire sale to meet a margin call (perhaps within two months). Id. at 1036. Regarding bidder discrimination, the court found probative the willingness of the Synthes board to accept topping bids from others after entering into an agreement with the initial top bidder. Id. at 1037. Appellants ask this Court to adopt and apply Synthes' rule.

i. Appellee Failed to Apply Synthes and Misunderstood McMullin in Its Conflict of Interest/Entire Fairness Argument.

Under McMullin, directors owe duties stemming from 8 Del. C. §251 to “make an informed, deliberate judgment, in good faith, that the merger terms, including the price, were fair.” McMullin, 765 A.2d at 917. As the Court of Chancery noted in the present case, McMullin “was decided upon a motion to dismiss, and thus the plaintiff in that case enjoyed every favorable inference afforded by the factual allegations of her complaint.” Galena Capital Partners, LLC v. Callison Inc., No. 7918, at *25 (Del. Ch. Jan 14, 2013). This Court held that plaintiff McMullin’s allegations (primarily that *the board completely abdicated the decision-making process* to the majority shareholder in a merger) were sufficient to withstand a motion to dismiss. See McMullin, 765 A.2d at 914. As further demonstrated below, the Synthes’ rule does not conflict to this characterization of director duty, and Appellants ask that this Court adopt and apply it on this appeal.

In Synthes, plaintiff minority shareholder made numerous conflict of interest allegations, all of which were found insufficient to withstand defendants’ motion to dismiss: the controlling shareholder Hansjoerg Wyss (“Wyss”) had a liquidity interest in the sale of the entire company to facilitate his estate planning goals, Wyss had family and business ties with other directors on the Synthes board which allowed him to dominate it, Wyss had been CEO of Synthes, and that Wyss supported in the sale of Synthes. Synthes, 50 at 1025-26.

ii. The Present Case Fits Firmly Within the Holding of Synthes.

The present case is remarkably similar to and falls within the holding of Synthes. There was an alleged majority of “inside”

directors on both the Synthes and Callison boards, and all had strong ties to the majority/controlling shareholder. Synthes, 50 A.3d at 1025; Galena, No. 7918 at *3. Allen Enterprises Incorporated (Allen), a holding company, is the 72 percent owner (61.2 million shares) of Callison Inc. Galena, No. 7918 at *1. Callison's board of directors consists of seven directors, four of which are "inside" salaried officers of Allen, with the remaining three being independent and disinterested "outside" directors. Id. at *3. In Synthes, the board of ten directors included Wyss and five other directors whom were allegedly "controlled" by Wyss through family relationships and trust arrangements. Synthes, 50 A.3d at 1025.

In both cases, the majority/controlling shareholder had an interest in liquidity that was not shared by other shareholders. Allen's interest in liquidating its 72 percent stake in Callison was prompted by its capital needs in connection with its plan to purchase restaurant chain Ca' Foscari. Galena, No. 7918 at *3-4. This liquidation interest began in July 2012, and a definitive agreement was to buy Ca' Foscari on March 31, 2013 was reached on November 28, 2012. Id. at *6. Wyss, the controlling shareholder of Synthes, had a similar liquidity interest motivated by his recent retirement and estate planning goals, and this interest was not shared by other shareholders. Synthes, 50 A.3d at 1025.

In neither case did the majority/controlling shareholder have a crisis or rush requiring the immediate sale of its shares. On October 3, 2012, Allen first approached Callison about Allen's interest in

liquidating its shares. Galena, No. 7918 at *4. The Callison board took steps to make sure it acted in a disinterested manner: On October 10, 2012, Callison formed a Special Committee of "outside" directors and provided them with independent legal counsel and financial advice. Id. at *5. A deal was not agreed upon with Vicente until December 16, 2012, and that deal was subject to a market check that did not end until January 25, 2013. Id. at *15-16. Thus, the sale process was not a rush, having taken place over the course of four months. See id. The Synthes record demonstrates a comparably fastidious sales process, taking seven months to reach a deal. Synthes, 50 A.3d at 1037.

Furthermore, the Synthes principle of not discriminating against classes of buyers was followed in both cases. It bears mentioning that appellee Galena willfully entered into a DADW standstill agreement with Callison, the terms of which gave it only one bid. See Galena, No. 7918 at *1. Any topping bid allowed would have violated those terms. Adhering to DADW standstill agreements was clearly not considered discrimination in the holding of Synthes, as that case did not involve this mechanism at all. Though Synthes' board did not bar topping bids with a DADW standstill agreement, it also did not expressly solicit them from a previous bidder, and the Synthes court found no discrimination. Synthes, 50 A.3d at 1044. Excluding the DADW standstill agreement bidders did not constitute discrimination of a class of bidders within the clear holding of Synthes.

Far from discriminating against a class of buyers, Callison sought to include Galena and the DADW bidders in the first place to

assure shareholder interests in value maximization were served. The Special Committee, acting upon the advice of the of its retained investment banking firm Boncheck, recommended that majority shareholder Allen and the remainder of the Callison board avoid a public auction, since it could "harm the Company and its stockholders by, among other things, demoralizing key employees and jeopardizing future long term commitments with important Callison customers like Kohl's and Target." Galena, No. 7918 at *7. Thus, the Callison board and Allen acted reasonably and in pursuit of the minority shareholders' interest by complying with the advice of Jenkins Piper and Grant Jones by agreeing to privately canvass the market using "Don't Ask, Don't Waive" standstill agreements. See id. The DADW standstill agreements served the best interests of majority and minority shareholders, because the opportunity to bid only once encourages bidders to bid high immediately. Id. at *20. Then, with a high bid in hand, Callison was free to check the entire market (excepting the DADW bidders) for higher bids. Id. at *7.

Conclusion

For the foregoing reasons, Appellants ask the court to reverse the decision of the Court of Chancery granting the appellee's motion for preliminary injunction.

Respectfully Submitted,

Law Firm F
Counsel for Appellants