IN THE SUPREME COURT FOR THE STATE OF DELAWARE

No. 162, 2013

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

APPELLANTS' OPENING BRIEF

Team "G"
Counsel for Appellants

February 8, 2013

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NATURE OF PROCEEDINGS

This interlocutory appeal comes to the Court following the Court of Chancery's January 14, 2013 Memorandum Opinion ("Op."), in which Chancellor Nelson entered a Preliminary Injunction Order in favor of Appellee Galena Capital Partners, LLC ("Galena"). Defendants Callison Inc., Timothy Michaels, Clare Lieberman, Rhaney Patricks, Julio Luis-Rojas, Patrick Austin, Marsha Franklin, Ari Singh, and Allen Enterprises, Inc. (collectively "Callison") appeal to this Court to overturn the Order and permit Callison to merge with Vicente.

On December 16, 2012, Callison and Vicente signed a merger agreement. Op. 14. Following the public announcement of the merger, Galena requested that Callison waive the DADW provision it had signed and accept its higher bid. Op. 15. Callison complied with the DADW agreement and declined Galena's new offer. Op. 16. On December 21, 2012, Galena brought suit to enjoin the merger between Callison and Vicente, alleging that the use of the DADW provision caused the Callison Board to breach its fiduciary duties. Op. 16. On January 14, 2013, the Court of Chancery granted Galena's Motion for Preliminary Injunction and entered an Order on January 15, 2013. Prelim. Inj. Order. Chancellor Nelson held that the use of the DADW provision caused the Callison Board to breach the fiduciary duty to keep itself fully informed when it refused to consider a higher bid. Granting the preliminary injunction on that ground, Chancellor Nelson did not rule on whether the transaction was entirely fair to Callison's minority shareholders. Op. 25. Callison appealed the Court of Chancery's opinion and such appeal was accepted on January 25, 2013. Order.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred when it granted Galena's motion for a preliminary injunction because the DADW is an enforceable contract, and the Callison Board's adherence to it was consistent with the directors' fiduciary duties. The DADW agreement is enforceable because it is not per se invalid and is analyzed under a deferential reasonableness standard. *In re Ancestry.com Inc. Shareholder Litigation*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012), at 21. Furthermore, the Callison Board's use and enforcement of the DADW provision in a change-of-control transaction is consistent with the Board's heightened *Revlon* duties because the Callison Board obtained the best value *reasonably available* after its auction and market check periods. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986). Accordingly, the Callison Board fulfilled its fiduciary duties to its shareholders while conducting a private action in a reasonable manner.

2. It is improper for this Court to review Allen and the Callison Board's actions under the entire fairness standard because the Callsion Board was disinterested and Allen was not engaged in self-dealing. Under this Court's well-settled jurisprudence, a board is considered disinterested when the transaction is authorized by a committee of disinterested directors, 8 Del. C. § 144(a)(1), and a majority shareholder only engages in self-dealing when it receives a proportionally higher value from the disposition than do the minority shareholders. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). Because the independent Committee authorized the Vicente

transaction and because Allen received the same exact price per share as the minority shareholders, the entire fairness standard does not apply this Court's review of the transaction.

3. Callison should prevail even if this Court applies the entire fairness standard because the Vicente Agreement yielded a fair price and was conducted in fair dealing. Thirty-Four dollars per share was a fair price because it fell within a range of prices that would be acceptable to a reasonable seller. *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994) aff'd, 663 A.2d 1156 (Del. 1995). The transaction was conducted in fair dealing because the Committee (which was both independent from Allen and disinterested in the sale) considered and conducted the disposition process in good faith. Taken together, the showing of fair price and fair dealing establish that the Vicente agreement was entirely fair to minority shareholders.

STATEMENT OF FACTS

Headquartered in Raleigh, North Carolina and incorporated in Delaware, Callison is a publicly traded corporation engaged in the sale and manufacture of athletic apparel to well-known retailers. Op. 2. Seventy-two percent of Callison's 85 million outstanding shares are owned by Allen, a Delaware holding company privately owned by its founder, Allen D. Fairmount. Op. 2. While Callison is Allen's primary asset, Allen currently has and hopes to expand its holdings in the restaurant industry. Op. 3–4. To that end, Allen's Board of Directors hired the investment banking firm Reed Crystal LLP ("Reed Crystal") to

shop for suitable acquisition candidates from the latter part of August 2012, through September of that year. Op. 4.

In an effort to finance its future acquisition, Allen authorized Reed Crystal to approach Callison's Board and to formally disclose Allen's desire to monetize its 72% share in Callison on October 3. Op. 4. Allen communicated its preference that Callison be sold in its entirety because a complete change-of-control transaction would maximize the value realized by "all Callison stockholders, including its minority stockholders." Op. 4.

As a matter of first business in a meeting held later that day, the seven-member Callison Board unanimously voted to create a Committee, comprised of the three "outside" directors, which would have full authority and ability to negotiate the Callison disposition. Op. 5. The Committee met later that day and retained "independent, knowledgeable and experienced professional advisors" to provide legal and financial advice in developing a recommendation to present for approval by the full Callison Board. Op. 5.

Meanwhile, Allen approached FVP Restaurants, Inc. on October 15 to express interest in acquiring one of its holdings, Ca' Foscari Italian Grill ("Ca' Foscari"). Op. 5–6. The parties reached an agreement on November 28, providing that Allen would purchase Ca' Foscari in its entirety by the May 31, 2013 closing date. Op. 6. While the agreement was not subject to financing conditions and included a liquidated damages clause, Allen ultimately negotiated its purchase of Ca' Foscari for $2.4 Billion. Op. 6.

Before the Ca' Foscari Agreement was finalized, Allen and the Committee met with their advisors to discuss the manner in which Callison would be sold. Op. 6–7. During the October 20 meeting, the Committee raised its concern that conducting a long, drawn-out auction would have deleterious effects on the company, as the publicity garnered by a protracted auction could demoralize Callison's most valuable employees and jeopardize relations with key clients. Op. 7. All in attendance agreed that a swifter, more discreet disposition method was needed. Op. 7. Accordingly, the Committee determined that it would authorize its investment banking firm Bonchek Graycourt, Inc. ("Bonchek") to privately shop the market for 20 potential buyers and require each interested suitor to sign a DADW standstill agreement as a condition to accessing Callison's confidential information. Op. 7. Having carefully developed the plan with the assistance of expert financial and legal advisors, the Committee agreed that the DADW sales protocol was designed to facilitate "an efficient, non-disruptive and value maximizing private auction process." Op. 8. To ensure the integrity of the process, Allen agreed to sell its shares to whichever suitor emerged as the winning DADW bidder. Op. 9.

Under the terms of the DADW provision, any suitor obtaining due diligence access to Callison's information explicitly agreed: (1) to keep Callison's information confidential; (2) that it had the right to offer one bid, submitted anonymously and simultaneously with the other undisclosed suitors; (3) that it was contractually barred from submitting, or publicly or privately asking permission to submit, any subsequent bids; (4) that after the winning DADW bid was publicly

announced, that bid would be subject to a limited market check, where Callison would actively solicit superior bids (from any company not bound by the DADW agreement) for a period of 25 days and would receive unsolicited bids for an additional 15 days thereafter; (5) that the winning DADW bidder would have five days to match any topping bids received during the market check period; and (6) that Callison would pay a 3% termination fee to the winning DADW bidder if Callison terminated the DADW transaction in favor of a superior offer. Op. 7–9.

Adhering to its protocol, the Committee began canvassing potential buyers in the latter half of October and continued shopping throughout the month of November. Op. 10. The search initially yielded seven potential suitors, six of whom agreed to the terms of the DADW agreement. Op. 10. Those six gained access to Callison's confidential due-diligence information. Op. 10. The companies completed their due diligence by the end of November and submitted their "only, best and final" offers on December 14. Op. 10.

The Committee reviewed the bids that night with its financial and legal advisors and determined that the $34 per share bid offered by Party B (later identified as Vicente) was the winning bidder, beating out its next closest competitor (later identified as Galena) by a margin of $1.50 per share. Op. 11. Bonchek's detailed bid analysis showed that Vicente's offer represented a 26% premium over Callison's then $27 per share trade price. Op. 11. Moreover, it affirmed that the offer was "financially fair to Callison and its minority stockholders." Op. 11. The Committee agreed to recommend the transaction to the full Callison Board, and did so later that evening.

Op. 12. After reviewing the Committee's recommendation and Bonchek's fairness analysis, the Callison Board rendered a unanimous vote in favor of the proposed cash-out merger with Vicente. Op. 12.

The Callison Board met on December 16 to hear a presentation from its legal counsel concerning their fiduciary duties in recommending the transaction to Callison shareholders. Op. 14. Convinced that the terms of the DADW agreement were consistent with their fiduciary duties, the directors unanimously adopted the Vicente Merger Agreement, and representatives from Callison and Vicente signed the agreement later that evening. Op. 14. The next day, Vicente and Allen publicly announced and commenced the first step of the merger agreement, which caused the price of Callison's stock to jump from $27 to $33 per share in one day's time. Op. 14–15.

Unexpectedly, a Galena representative arrived two days later to deliver a confidential letter to Callison Chair and CEO, Timothy Michaels. Op. 15. In the letter, Galena requested that the Board disregard the DADW agreement and allow Galena to offer a topping bid of $35.50 per share. Op. 15. Admitting that its request was "facially in conflict" with the DADW agreement it signed less than one month before, Galena asked Callison to waive the DADW provision. Op. 15.

Cautious to breach the DADW agreement, the Callison Board held a conference call with its attorneys later that same evening to discuss Galena's request. Op. 16. The attorneys informed the directors that DADW agreements were likely enforceable under Delaware law and assured them that the Board would be well within its proper business judgment in rejecting Galena's request. Op. 16. Accordingly, the Board decided

to uphold the terms of its agreement and notified Galena of its determination on December 20. Op. 16.

The very next day, Galena filed this lawsuit and commenced a $35.50 per share tender offer for Callison stock. Op. 16. Suing in its capacity as a minority shareholder, Galena motioned to enjoin the Vicente Agreement and sought declaratory relief that: (1) the Board breached its fiduciary duties when it declined to breach the DADW agreement to accept Galena's after-the-fact offer; and (2) the DADW provision Galena signed is legally unenforceable. Op. 16. Chancellor Nelson granted Galena's request for preliminary injunction. Now, Callison asks this Court to remove the injunction and allow Callison to proceed with the Vicente merger.

ARGUMENT

I. The DADW Agreement Signed By Galena Is Valid And Enforceable Under Delaware Law.

A. Question Presented

Does a board of directors breach its fiduciary duties when it enters into and enforces a DADW Agreement in a change of control transaction?

B. Scope of Review

This Court reviews for abuse of discretion the Court of Chancery's decision to deny a motion for a preliminary injunction. *Box v. Box*, 697 A.2d 395, 397 (Del. 1997). The review is done without deference to the embedded legal conclusions of the trial court. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). The Court exercises *de novo* review of legal issues. *Id.*

C. **Merits of Argument**

This Court must REVERSE the Court of Chancery's grant of Galena's Motion for Preliminary Injunction because the DADW agreement:(1) is a valid and enforceable contract; and (2) does not cause the Callison Board to breach its fiduciary duties to minority shareholders.

1. **The DADW Standstill Agreement is a valid and enforceable contract.**

No Delaware statute or court opinion considers DADW agreements to be per se invalid. *In re Ancestry.com Inc. Shareholder Litigation*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012), at 21. It necessarily follows, therefore, that there is at least one permissible use for DADW provisions. This case presents that instance. As Chancellor Strine stated in this recent opinion in *Ancestry.com*, a DDW agreement is enforceable when it is used as a gavel "to impress upon [bidders] that . . . the process is meaningful; that if you're creating an auction, there is really an end to the auction for those who participate." *Id.* at 23. Here, Callison's DADW agreement did just that. It established a meaningful process that ended the auction for all six private auction participants. As such, this Court should recognize the DADW's validity and dissolve the preliminary injunction.

2. **The Callison Board did not breach its fiduciary duties to minority shareholders by entering into and enforcing the DADW Agreement.**

A board of director's breach of fiduciary duties is analyzed under one of three levels of judicial review: "the deferential business judgment rule, the . . . *Revlon* enhanced scrutiny standard, and . . . entire fairness." *Golden Cycle, LLC v. Allan*, 1998 WL

892631, at *11 (Del. Ch. Dec. 10, 1998). Because this is a change-of-control transaction, *Revlon*'s heightened scrutiny applies. *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994).

i. The DADW provision is valid and enforceable under *Revlon*'s enhanced scrutiny standard.

The ultimate responsibility for managing the business and affairs of a corporation falls on its board of directors. 8 Del. C. § 141(a). Generally, courts give deference to the managerial decisions of directors, unless certain circumstances warrant a heightened scrutiny. *QVC*, 637 A.2d at 42. A presumption exists "that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

Revlon's heighted standard is triggered in a change-of-control transaction and requires directors to "focus on one primary objective — to secure the transaction offering the best value reasonably available for the stockholders[.]" *QVC*, 637 A.2d at 44. A director's duty to maximize shareholder value is a product of a common law interpretation of 8 Del. C. § 141(a); it does not derive from the statute itself. As such, *Revlon* is not a bright-line rule requiring directors to accept the highest offer — it is not a "blueprint" or statutory mandate. Rather, the *Revlon* decision represents what was required of the directors within a particular fact-specific setting.

Broadly speaking, *Revlon* requires "reasonableness," meaning that the board must ensure that its actions are reasonable in change-of-

control transactions. *Revlon,* 506 A.2d at 180. This reasonableness standard requires careful attention to the information considered by the board, good faith negotiations, and a focus on determining which alternative is likely to offer the best value "reasonably available" to the shareholders. *Id.* In determining which alternative provides the best value, a board of directors is not limited to exclusively considering the highest dollar figure. *QVC*, 637 A.2d at 44. Indeed, *Revlon* does not set precedent for a "heated bidding contest" for a change in corporate control; rather "*Revlon* is merely one of an unbroken line of cases that seek to prevent the conflicts of interest that arise in the field of mergers and acquisitions by demanding that directors act with scrupulous concern for fairness to shareholders." *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).

Here, those conflicts of interest are not at play because the Callison Board acted reasonably throughout the disposition process. The earliest indicator of this was Callison's decision to sell the entire company (instead of Allen's 72% share). As the record shows, this decision was made in part because of the desire to realize the highest value for all Callison shareholders. Op. 4. Another instance is when the Committee decided to adopt the DADW as a way to protect the company's value in a potentially precarious public auction. Op. 7. Reasonably believing that a public auction could jeopardize Callison's relationship with employees and clients, the Committee acted to, and did, protect that interest by employing the DADW agreement. Op. 11. While the record is replete with other actions that reveal the reasonableness of the Board's decision, the two mentioned establish

more than enough evidence to show that the DADW agreement comports with *Revlon* and is, therefore, a valid provision.

ii. The Callison Board satisfied its fiduciary duties when entering into and seeking enforcement of the DADW agreement.

A court must focus on "whether the directors made a *reasonable* decision, not a *perfect* decision." *QVC*, 637 A.2d at 45 (emphasis in original). Courts have long honored this principle because of the recognition that directors need the discretionary freedom to "make rational decisions regarding negotiating strategy and the tactics of the auction process." *Ancestry.com*, at 23. Here, the Committee's decision to employ the DADW agreement was a valid exercise of its discretion because the directors, knowing the vulnerabilities a protracted public auction could impose on its company, rationally addressed that concern in a manner that protected Callison's value through the disposition. Galena, however, points to the Court of Chancery's ruling in *Genomics* to challenge Callison's actions.

In *In re Complete Genomics, Inc. Shareholder Litigation*, the Court of Chancery enjoined the enforcement of a DADW promise. C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012). There, the merger agreement contained a "no-shop" provision and required Genomics to pay a 4.8% break-up fee if it terminated the agreement in favor of another offer. *Id.*, at 18. The court reasoned that the DADW provision caused the Genomics directors to breach their fiduciary duties because it limited their ability "to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders." *Id.* Granting the injunction, the court compared the

provision to a "no-talk" provision, noting that "directors cannot willfully blind themselves to opportunities that are presented to them." *Id.* at 15 (citing *Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1207 (Del. Ch. 2001)).

While *Genomics* is certainly on point, it is distinguishable from the case at bar because, unlike the "no-shop" provision present there, the Callison DADW agreement here enabled Callison to solicit higher bids after conducting the private auction. Op. 9. After Callison and the winning DADW bidder entered into and announced a definitive transaction, Callison was permitted to: (1) solicit topping bids for 25 days (Go Shop period) from an unlimited universe of potential bidders that did not participate in the private auction; and (2) receive offers from other bidders outside of the DADW private auction for an additional 15 days (Window Shop period). Op. 9. Unlike the defendant in *Genomics*, the Callison Board was not contractually precluded from receiving a higher offer; it had 40 days from the date of contracting with the highest DADW bidder to receive a better offer. Op. 9. Additionally, the fact that Callison was only required to pay a 3% termination fee, Op. 9, as opposed to 4.8% required in *Genomics*, made the fiduciary out a viable option if higher bid did present itself during the market check. The presence of the market check and a less-onerous fiduciary out penalty distinguishes this case from *Genomics* and allows this Court to find to be consistent with the Callison Board's fiduciary duties.

The Callison Board made a tactical decision at the time to employ a private auction for the sale of the corporation. As Chancellor

Strine noted, the only proper way to conduct a DADW auction is for it to have finality at its end. *Ancestry.com*, at 23. Because a potential buyer does not want to participate in a transaction governed by fluctuating rules, the DADW provision makes clear that that the participants will have only one bid, which motivated them to come forward with their best and final offers. Without the DADW provision, it is likely that there would have been fewer bidders, less competition, and less value realized by the minority shareholder.

The Board's use of the DADW simply reflects its choice to maximize value on the front-end, rather than at the back-end of a protracted and potentially harmful public auction process. This arrangement benefitted shareholders by shortening the auction process and by establishing a higher benchmark price for when Callison conducted its market check. This proper business decision should not now be questioned for reasons that are, as a matter of practicality, entirely unrelated to protecting minority shareholder rights.

It is important for this Court to note that Galena only initiated its bid after Vicente had consummated its merger with Callison and after Callison's price per share increased from $27 to $33. In other words, Galena had the advantage that it contractually precluded itself from having – it made its second bid after having the benefit of seeing the limited market react to Callison's sale. It should not now reap the benefits of its unfair dealing.

Playing by the rules and having a reputation of playing by the rules – interests recognized by Delaware courts - is something of value to Callison. *See Ancestry.com*, at 27. Under the private auction

rules, all bidders were given a timeline and contractual permission to submit the highest and best offer each bidder was able and willing to make. The participating bidders contractually agreed that there would be no additional rounds of bidding. Op. 10. All bidders were given the opportunity to review the agreement before placing a bid. Op. 10. The fact that not all of them consented to it illustrates that the private auction bidders knew that Callison intended to enforce the terms of the DADW strictly. Indeed, it is noteworthy that seven of Callison's suitors expressed interest in placing a bid, but after reviewing the DADW provision, one party refused to sign and withdrew from the process. The remaining six parties, including Galena, signed the DADW agreement *without objection*. All parties, with the exception of Galena, honored the DADW provision. The Callison Board, operating with the information available at the time, entered into the DADW agreement to sell Callison for the highest price it could obtain while acting in good faith. This Court should respect Callison's desire to deal fairly with its suitors and dissolve the preliminary injunction.

II. The Entire Fairness Standard Is Not Applicable Because Allen Did Not Engage In Self-Dealing And The Board Was Not Interested In The Transaction.

A. Question Presented

Does the entire fairness standard apply in a change of control transaction when the majority shareholder receives the same value per share as the minority shareholders?

B. **Scope of Review**

This Court reviews motions to deny preliminary injunctions for abuse of discretion. *Box v. Box*, 697 A.2d 395, 397 (Del. 1997). The Court exercises *de novo* review of legal issues. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996).

C. **Merits of Argument**

When a majority shareholder and board of directors satisfy their fiduciary duties under Revlon's heightened requirements, their actions are entitled to a presumption of deference under the business judgment rule unless the challenging shareholder shows that (1) the majority shareholder engaged in self-dealing by standing on both sides of the transaction, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983); or (2) that the directors: (a) were interested in the transaction; or (b) lacked independence from one who had an interest in the transaction. *Orman v. Cullman*, 794 A.2d 5, 24-25 (Del. Ch. 2002). If the shareholder makes either showing, the burden of proof shifts to the board "to prove . . . the 'entire fairness' of the transaction to the shareholder plaintiff.'" *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). If, however, the shareholder cannot make either showing, courts must defer to the board's business judgments. *Id.*

As a preliminary matter, Callison concedes that this Court typically deems "inside" directors to be non-independent. *See Williams v. Geier*, 671 A.2d 1368, 1371 (Del. 1996). Because a majority of Callison's board is made up of "inside" directors (by virtue of their employment with Allen), Callsion does not contend that the full Board is independent. Callsion does note, however, that if Allan is not

engaged in self-dealing (as will be shown below), the inquiry into director independence becomes irrelevant. In other words, the question of whether the board was independent from Allen is only dispositive if Allen himself had a disqualifying interest (i.e. self-dealing). Accordingly, this section will only address: (1) whether the Allen engaged in self-dealing; and (2) whether the Board was disinterested in the Vicente transaction.

1. Allen did not engage in self-dealing because Allen received the same value per share as Callison's minority shareholders.

In order to show that a parent company engaged in self-dealing "by virtue of its domination of its subsidiary," the shareholder must show: (1) that the parent received "something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary." *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

In *Sinclair*, this Court considered whether the subsidiary board improperly favored the parent by authorizing the distribution of large dividends to satisfy the parent's need for cash. The Court concluded that the parent company's motive was irrelevant. *Id.* at 719-20. The relevant inquiry was whether the parent received anything from the subsidiary that was not received by the subsidiary's minority shareholders. *Id.* at 720. Because the minority shareholders received a proportionate share of the dividends, the Court concluded that neither the parent nor the board engaged in self-dealing. *Id.* at 722. Accordingly, both were afforded deference under the business judgment rule. *Id.*

Here, Allen's "liquidity conflict," assuming such a conflict actually exists, is of no consequence under this Court's rule in *Sinclair* because all shareholders — Allen and Galena alike — will receive $34 per share in the Vicente agreement. Because Allen, therefore, receives nothing "from the subsidiary to the exclusion of, [or] detriment to, the minority stockholders[,]" Allen falls within this Court's long-standing rule that such a supposed interest does not amount to self-dealing. *Id.* at 720.

Trying to circumvent this Court's precedent in *Sinclair*, Galena relies on a tortured interpretation of *McMullin* for the proposition that a majority shareholder's need for liquidity constitutes a disqualifying interest in a change of control transaction. *McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000). In *McMullin*, the Court considered whether to dismiss the complaint of a minority shareholder of a Chemical company ("Chemical"), who claimed that Chemical's board lacked independence from its majority shareholder, Atlantic Richfield Company ("ARCO") during Chemical's disposition to a third party, Lyondell. *Id.* at 914–16. Explicitly noting that its decision was only determined at the plaintiff-friendly motion to dismiss stage, *id.* at 925, the Court denied the defendants' motion, concluding that it was possible that some set of facts could support the shareholder's claim that the Chemical board acted in a manner that favored ARCO over its minority shareholders. *Id.* at 916. While certainly on point, *McMullin* is inapplicable for several reasons.

First, *McMullin* is procedurally distinct from the case at bar. Galena fails to recognize that *McMullin* and it progeny[1] were all decided on motions to dismiss under Delaware's lenient pleading standard. *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) (stating that Delaware Courts do not dismiss claims "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances."). As Chancellor Nelson mentioned below, a grant of a preliminary injunction, which requires the shareholder to show a probability of success on the merits, is much more stringent than Delaware's pleading standard. Op. 25. Because it was decided at a preliminary stage, *McMullin* is not the appropriate case from which to cull rules that question this Court's long-standing jurisprudence.

Second, *McMullin* is factually distinct from the case at bar. Most fundamentally, ARCO's need for liquidity was much more imminent in *McMullin* than it was for Allen here. In *McMullin*, ARCO entered into the challenged transaction because it had already committed itself to a $3.3 billion acquisition before it sold Chemical. *McMullin*, 765 A.2d at 921. ARCO's decision to sell Chemical was, therefore, a "preordained conclusion." *Id.* at 919. Here, however, the decision to sell Callison by using the DADW procedure was made in October, Op. 7-8, more than one month before Allen contracted to purchase Ca' Foscari, Op. 6, making Allen's "liquidity conflict" no conflict at all. This less-imminent desire for liquidity at the time the Committee

[1] *See New Jersey Carpenters Pension Fund v. Infogroup, Inc.*, 2011 WL 4825888 (Del. Ch. Sept. 30, 2011); *In re Answers Corp. S'holder Litig.*, 2012 WL 1253072 (Del. Ch. Apr. 11, 2012).

decided to adopt the DADW agreement suggests that the *McMullin* Court's concern with the majority shareholder's "liquidity conflict" was far less pernicious here than it was in *McMullin*.

Third, *McMullin* is legally distinct from the case at bar. Although Galena contends that *McMullin* simply applies the *Sinclair* rule to change of control transactions, recent case law suggests otherwise. Chancellor Strine declined to apply *McMullin* in a recent "liquidity conflict" case involving a majority shareholder who was also the chairman on a board filled with his family members. *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022 (Del. Ch. 2012). There, the court considered whether the majority shareholder's personal need for liquidity constituted a disqualifying interest when the board supposedly forewent more attractive offers for the quicker cash-and-stock sale of the majority shareholder's stake. *Id.* at 1024. Reasoning that a fiduciary need not "subrogate his own interests so that the minority stockholders can get the deal that they want[,]" *id.* at 1041, the Chancellor dismissed the complaint, reaffirming Sinclair's basic rule that "a fiduciary's financial interest in a transaction as a stockholder (such as receiving liquidity value for her shares) does not establish a disabling conflict of interest when the transaction treats all stockholders equally[.]" *Id.* at 1035.

Here, as stated above, minority shareholders and Allen both received the same value for their shares under the Vicente agreement. Much like Chancellor Stine stated in *Synthes*, this Court should not force Allen to "subrogate [its] own interests so that [Galena] can get the deal that [it] want[s]." *Id.* at 1041. Accordingly, *McMullin* does

not govern this case, and Allen's supposed "liquidity conflict" does not trigger the entire fairness standard of review.

2. **The Board was not improperly interested in the Vicente agreement because the decision to do so was approved by a Committee of wholly disinterested directors.**

It is fundamental Delaware law that "a transaction will be sheltered from shareholder challenge if approved by . . . a committee of independent directors[.]" *Oberly v. Kirby*, 592 A.2d 445, 467 (Del. 1991) (citing 8 Del. C. § 144(a)(1)). Therefore, even if a majority of the Board was interested in the transaction, the Committee brought the entire Callison board "within the scope of the business judgment rule" when it approved the Vicente agreement. *Id.* at 466. As such, this transaction is not subject to entire fairness review for want of a disinterested board, and Callison's actions are entitled to business judgment review.

III. Even If This Court Determines That The Entire Fairness Standard Applies To This Transaction, Callison Will Prevail Because The Vicente Agreement Yielded A Fair Price And Was Reached In Fair Dealing.

A. Question Presented

Is a change of control transaction entirely fair when independent directors use a DADW agreement to sell shares for an amount that falls within a range of prices that a reasonable seller would accept?

B. Scope of Review

This Court reviews motions to deny preliminary injunctions for abuse of discretion. *Box v. Box*, 697 A.2d 395, 397 (Del. 1997). The Court exercises *de novo* review of legal issues. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996).

C. **Merits of Argument**

A defendant satisfies the entire fairness standard when it shows that the transaction (1) yielded a fair price and (2) was conducted in fair dealing. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). While the court may consider each piece separately, "[a]ll aspects of the issue must be examined as a whole since the question is one of entire fairness." *Id.* at 711.

While the defendant bears the initial burden to show that the transaction was entirely fair, that burden shifts to the shareholder to prove the transaction's unfairness when it is approved by "an independent committee of directors." *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994). Here, it is undisputed that the individuals sitting on the Committee were "independent and disinterested 'outside' directors." Op. 3. Therefore, because Committee approved the Vicente transaction, the burden of proof rests with Galena to show that the transaction was unfair. Galena cannot overcome this burden because the Vicente transaction yielded a fair price and was conducted with fair dealing.

1. **Thirty-Four dollars per share is a fair price because it falls within the range of prices that a reasonable seller would expect to receive.**

A fair price "is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value[.]" *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994) aff'd, 663 A.2d 1156 (Del. 1995). Chancellor Allen illustrated this principle in *Cinerama*, stating that even if "a few dollars more" per share would have been feasible, the lower price representing a

smaller premium over market price would still have been fair if it fell within the a reasonable range of acceptable prices. *Id.* Here, the $34 price per share represented a 26% premium over the company’s value before the merger was announced. Op. 11. While this is a lower dollar amount than Galena’s offer of $35.50 per share, the $34 price certainly falls within, and perhaps even exceeds, what a reasonable seller would have taken prior to the merger announcement. This point is bolstered by the fact that $34 remained the highest offer Callison received pursuant to the DADW agreement, even after the post-auction market check. *See In re Cysive, Inc. Shareholders Litig.*, 836 A.2d 531, 534 (Del. Ch. 2003) (stating that markets checks constituted “material evidence of the fairness of the deal price.”). As such, this Court, like the court in *Cinerama*, should find this price fair.

This Court has also accepted opinions rendered by financial experts as a way to establish fair price. *See Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 87 (Del. 1995). Indeed, the *Cinerama* Court justified the challenged transaction price based on the fact that “Technicolor board’s financial advisor, Goldman Sachs, opined that the price was fair after performing a number of different analyses.” *Cinerama*, 663 A.2d at 1143. Similar to what these courts have done in the past, this Court should look to the fairness opinion Bonchek issued to the Board as a means of establishing the fairness of the transaction’s $ 34 per share price. Op. 11. Because the Board reasonably relied upon and based its decision on Bonchek’s independent and undisputed expertise, Op. 12, this Court should conclude that $34 per share was a fair price.

2. Callison conducted the Vicente transaction in fair dealing because the Committee acted to maximize shareholder value independently of Allen's supposed "liquidity conflict."

This Court has characterized the fair dealing inquiry as one that considers "when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). Courts have found that the following tend to show fair dealing: a special committee exercising it duties free from pressures of the majority shareholder, diligence by the special committee, and the majority shareholder's good faith. *In re Cysive, Inc. Shareholders Litig.*, 836 A.2d 531, 534 (Del. Ch. 2003).

Here, the record is replete with evidence that the actions of the Committee, the Board, and Allen were conducted fairly. The clearest indication of fair dealing was the fact that the Board empowered the Committee to negotiate the merger and equipped it with its own independent legal and financial advisors. Op. 5. This allowed the Committee to propose ideas — such as the DADW provision — that did not originate with Allen or the other Board members. Equally important was the fact that the Committee put a procedural safeguard in place — one that obligated Allen to sell all of his shares to the winning DADW bidder. Op. 9-10. Because this forced Allen to comply with the Committee's disposition process, it eliminated Allen's ability to select Callison's acquirer, thereby limiting the risk that Allen would improperly influence the Committee.

Galena contends that Allen's control and "liquidity conflict" infected the dealing process such that neither the Board nor the Committee had the chance to act independently. Op. 24-25. This conclusion is entirely unwarranted. There is no support in the record linking Callison's decision to enforce the DADW with Allen's "liquidity conflict" because there are no facts to suggest that selling shares to Vicente (as opposed to Galena) would put money in Allen's hands more quickly than acceding to Galena's offer. While Galena may point out that Allen initiated the Callison disposition and that Mr. Fairmount periodically attended Board meetings concerning the transaction in an attempt to illustrate his purportedly improper influence over the tranaction, this Court should recognize, as it has before, that "perfection is not possible," nor required in these types of business transactions. *Weinberger*, 457 A.2d at 709 n. 7. Indeed, the record shows that Allen and the Board exercised a scrupulous level of care and good faith from the beginning of the transaction, where Allen expressed his desire to get the highest value for shareholders, to the end, where the Board now seeks to abide by the terms of its agreement with Galena.

CONCLUSION

For the forgoing reasons, this Court should REVERSE the Court of Chancery's grant of Galena's motion for preliminary injunction.

Respectfully submitted,

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