IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALLISON INC., TIMOTHY MICHAELS, CLARE LIEBERMAN, RHANEY PATRICKS, JULIO LUIS-ROJAS, PATRICK AUSTIN, MARSHA FRANKLIN, ARI SINGH and ALLEN ENTERPRISES INCORPORATED,	:	No. 162, 2013
Defendants Below, Appellants,	:	
v.	:	
GALENA CAPITAL PARTNERS, LLC.,	:	
Plaintiff Below, Appellee.	:	

ON APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANTS' OPENING BRIEF

Team I
Counsel for Defendants Below,
Appellants

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NATURE OF PROCEEDINGS

Galena Capital Partners, LLC ("Galena") instituted this action in the Chancery Court for New Castle County on December 21, 2012, challenging the validity of the "Don't Ask, Don't Waive" standstill agreement (herein, "DADW Standstill" or "DADW) it had entered into with Callison Inc. ("Callison"). Mem. Op. 1, 16, Jan. 14, 2013. The agreement, signed as part of a limited auction for all outstanding Callison shares, prohibited Galena from making a second bid for Callison in the event that it did not win at the private auction. Mem. Op. 1. In violation of the terms Galena subsequently initiated a tender offer for Callison and moved for a preliminary injunction to prevent Callison from enforcing the terms of the DADW Standstill. Mem. Op. 17.

Following expedited discovery and oral argument, the Chancery Court entered its interlocutory order granting the preliminary injunction, prohibiting Callison from attempting to enforce the terms of the DADW Standstill with Galena. Mem. Op. 17; Prelim. Inj. Order, Jan. 15, 2013. On January 17, 2013, Callison, Timothy Michaels, Clare Lieberman, Rhaney Patricks, Julio Luis-Rojas, Patrick Austin, Marsha Franklin, Ari Singh and Allen Enterprises Incorporated (collectively "Appellants") filed their application for certification of the interlocutory order, which the trial court granted on January 21. Notice of Appeal From Interlocutory Order, Jan. 23, 2013. On January 25, the Supreme Court accepted the interlocutory appeal. Order, Jan. 25, 2013.

SUMMARY OF ARGUMENT

1. In light of the specific facts of the cases on which Galena relies, this court's prior recognition of the validity and legitimate uses of DADW standstills, and the leeway afforded to a board under a Revlon reasonableness analysis, the Callison Board fulfilled its fiduciary duties in insisting on the use of, and refusing to waive, the DADW Standstill. Therefore, Plaintiff has not demonstrated that it has a reasonable probability of success on the merits.

2. The Chancellor's order should be reversed because without evidence of a majority shareholder's benefit to the exclusion of and detrimental to the minority shareholder, a board's decisions should not be subject to strict scrutiny but should benefit from the protection of the business judgment rule. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720-21 (Del. 1971). In the alternative, even under strict scrutiny Galena has failed to establish a reasonable probability of success on the merits of its liquidity conflict claim because the sale was fair. See McMullin v. Beran, 765 A.2d 910, 914 (Del. 2000).

STATEMENT OF FACTS

This appeal and the underlying action arise out of Galena's contractual breach of its signed agreement with Callison. See Mem. Op. 15.[1] Plaintiff Galena is a Delaware limited liability company and minority shareholder of Callison. Mem. Op. 2.[2] Callison is a publicly traded Delaware corporation engaged in the manufacture and sale of athletic apparel to retail outlets. Mem. Op. 2. Allen Enterprises Incorporated ("Allen"), which owns 72% of Callison, is a Delaware holding company owned privately by Allen D. Fairmount III. Mem. Op. 2. The individual defendants are comprised of the seven members of Callison's board of directors (the "Callison Board" or the "Board") and were nominated to the Board by Allen. Mem. Op. 3. Of the seven, four directors are Allen executives in addition to their responsibilities as directors of Callison: Timothy Michaels, Clare Lieberman, Rhaney Patricks and Julio Luis-Rojas ("inside directors"). Mem. Op. 3. The three remaining directors, although nominated by Allen, are "outside" directors and have no conflicting business relationship with either Callison or Allen: Patrick Austin, Marsha Franklin and Ari Singh. Mem. Op. 3.

In July of 2012, Allen began considering buying a restaurant chain. Mem. Op. 3-4. To finance the acquisition, Allen planned to liquidate its ownership of Callison. Mem. Op. 3. On October 3, in conjunction with an investigation of potential targets Allen authorized its financial advisor, Reed Crystal LLP ("Reed Crystal"),

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[1] Galena stipulates that initiating the tender offer was "facially in conflict" with the terms of the standstill. Mem. Op. 15.
[2] Galena owns 10,000 shares of Callison Common Stock. Mem. Op. 2.

to initiate discussions with Callison regarding Allen's interest in liquidating its 72% share of the company. Mem. Op. 4.

Recognizing the potential conflict of interest posed by the inside directors' positions within Allen, the Callison Board unanimously voted to establish a special committee comprised of the outside directors Austin, Franklin and Singh (together, the "Special Committee"). Mem. Op. 4-5. The Board vested the Special Committee with the full authority to negotiate on behalf of Callison and its shareholders in any potential sale. Mem. Op. 5.[3] The Special Committee retained the investment-banking firm Bonchek Graycourt Inc. ("Bonchek") and the law firm Jenkins, Piper, Hitchens & Ward, LLP ("Jenkins Piper"), neither of whom have ever worked for Fairmount, Allen or Callison. Mem. Op. 5.

On October 20, 2012, the Special Committee held a meeting ("October 20 Meeting") to discuss a potential sale at which Allen and its advisors were present. Mem. Op. 6.[4] Upon Bonchek's advice, the Special Committee stated that it was against a protracted public auction that could "harm the Company and its stockholders" by jeopardizing Callison's ability to retain key employees and its business with important retail customers. Mem. Op. 7. All parties present agreed that the Board would conduct a private auction, granting Bonchek the power to "canvass a limited universe of at most [twenty] logical potential buyers." Mem. Op. 7. To further protect the interests of Callison's shareholders the Special Committee decided

[3] Any proposed sale would ultimately require the entire Board's approval. Mem. Op. 5.

[4] The Board included Allen in its initial deliberations. Mem. Op. 6-7.

that each suitor, before obtaining due diligence access to Callison's records, would sign the DADW Standstill. Mem. Op. 7. Under the terms of the provision, each suitor would commit that any bid made in connection with the private auction would be the its only opportunity to purchase Callison and would be "contractually precluded" from making subsequent offers. Mem. Op. 8, 9.[5] The use of the DADW Standstill was ideal because it is an "efficient, non-disruptive and value maximizing" tool that served to protect the interests of Callison's shareholders. Mem. Op. 8.

The Special Committee adopted several additional measures designed to ensure that the shareholders received the maximum possible value for their shares. Mem. Op. 8. First, the agreement would stipulate that the Callison Board had a 25-day "Go Shop" period, during which the Board could solicit other potential bids from an unlimited universe and would include an additional "Window Shop" period of 15 days, when the Board could receive, but not solicit, bids from any potential suitor. Mem. Op. 9.[6] Second, the approval of the winning bid would be subject to a fiduciary out clause and right of termination by the Board should any superior proposal arise during the market check process. Mem. Op. 8.[7] Finally, the parties at the October 20 Meeting agreed that Allen, as Callison's majority shareholder, would sign each DADW Standstill and include a provision

[5] The terms of the "DADW Standstill would make it a breach of contract for a losing [] bidder even to ask for permission from the Special Committee" to make a second bid. Mem. Op. 8.
[6] Auction participants would be excluded from the market check process. Mem. Op. 9.
[7] Callison would pay a 3% termination fee to the private auction winner should a superior bid emerge. Mem. Op. 9.

requiring "Allen to enter into a separate pre-commitment contract with the winning DADW bidder," to tender all of its Callison shares to the winner upon approval of the sale by the Board. Mem. Op. 9.[8]

Reed Crystal's investigation into acquisition targets for Allen identified the restaurant chain Ca' Foscari Italian Grill ("Ca' Foscari") as the most promising. Mem. Op. 4. On October 15, Allen initiated discussions with FVP Restaurants Inc., the owner of Ca' Foscari, proposing to purchase the chain in its entirety. Mem. Op. 5-6. After further negotiations and a due diligence investigation by Reed Crystal, the parties agreed to the transaction for $2.4 billion in cash on November 28, 2012 ("Ca' Foscari Agreement"). Mem. Op. 6. The agreement is not subject to a financing requirement, must close before March 31, 2013 and will automatically terminate on May 31, 2013 if not completed by that date. Mem. Op. 6. Additionally, a $60 million payment of damages is imposed on either party that breaches the terms. Mem. Op. 6.

Following the October 20 Meeting, Bonchek conducted a private search for potential suitors for Callison. Mem. Op. 10. Of the twenty companies approached, six, including Galena, agreed to participate in the private auction and signed the DADW Standstill. Mem. Op. 10. Bonchek then organized the requisite due diligence investigation by each suitor. Mem. Op. 10. On December 4, Jenkins Piper informed each auction participant that the Board was officially inviting it to submit its "only, best and final" offer. Mem. Op. 10.

[8] The pre-commitment agreement would be subject to the fiduciary out clause. Mem. Op. 10.

Pursuant to the terms of the DADW Standstill, all suitors submitted their bids by the 5:00 p.m. East Coast time deadline on Friday, December 14. Mem. Op. 10.

At 6:00 p.m. that same day, the Special Committee met with its advisors to review the bids. Mem. Op. 11. The Special Committee determined, with consideration of Bonchek's advice, that Vicente's $34 per share all-cash bid was the most valuable proposal. Mem. Op. 11.[9] After further deliberations the Special Committee unanimously agreed to recommend the Vicente bid to the Board. Mem. Op. 11. At 8:00 p.m. Allen informed the Board that it also determined the Vicente bid was the best offer and was prepared to enter its pre-commitment tender agreement with Vicente at $34 per share. Mem. Op. 12.[10] After ending its call with Allen, the Board heard reports from its financial and legal advisors on the Vicente bid's fairness to the Callison shareholders and unanimously approved, authorizing Callison to negotiate the definitive terms of the merger. Mem. Op. 12.

Over the weekend of December 15-16, Callison negotiated the specific terms of the two-step merger with Vicente. Mem. Op. 12. Vicente agreed to initiate the first step for $34 per share, subject to a minimum tender condition that Vicente would then own at least 51% of Callison. Mem. Op. 13. Pursuant to the terms of the DADW Standstill, Vicente was obligated to hold its offer open while Callison conducted a market check during the "Go Shop" and "Window Shop" periods. Mem. Op. 13. Likewise, the agreement contained a

[9] Galena's offer of $32.50 fell short of Vicente's bid. Mem. Op. 11.
[10] Allen, as a party to the DADW Standstill, was provided with copies of the six bids. Mem. Op. 11.

fiduciary out clause in the event a superior bid emerged during the market check. Mem. Op. 13.[11] Upon completion of the first step offer, Vicente agreed to execute a cash-out merger for all outstanding shares at $34 per share. Mem. Op. 13.[12] Concurrent with its negotiations with Callison, Vicente entered a pre-commitment tender agreement with Allen. Mem. Op. 13. On the evening of December 16, following a detailed presentation from Jenkins Piper on the transaction and the Board's fiduciary duties under Delaware law, the Board unanimously approved the Vicente merger, which was signed by both parties that evening. Mem. Op. 14. The next day Callison, Vicente and Allen jointly announced the approved merger and Vicente commenced its first step tender offer. Mem. Op. 15. Bonchek had received no intimations of interest as of the January 10, 2013 deadline. Mem. Op. 15.[13]

On December 19, 2012, Galena, in direct violation of the explicit terms of the DADW Standstill, confidentially contacted Callison's CEO requesting that the Board waive the agreement and permit Galena to make a second offer. Mem. Op. 15. When Callison, in compliance with its contractual duties, refused to engage in further discussions Galena filed this suit and initiated its proscribed tender offer for Callison on December 21 at $35.50 per share. Mem. Op. 16.

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[11] The 3% termination fee in the event of a superior bid emerging amounts to $87 million. Mem. Op. 13.

[12] Pursuant to 8 Del. C. § 262, any minority shareholder refusing to tender its shares to Vicente are entitled to appraisal rights. Mem. Op. 13.

[13] Vicente has extended the "Window Shop" period to March 29, 2013. Mem. Op. 17.

ARGUMENT

I. THE CHANCELLOR'S ORDER SHOULD BE REVERSED BECAUSE THE CALLISON BOARD HAS NOT VIOLATED ITS REVLON DUTIES BY INSISTING ON THE USE OF THE DON'T ASK, DON'T WAIVE STANDSTILL AND GALENA HAS THEREFORE FAILED TO ESTABLISH A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS OF ITS BREACH OF FIDUCIARY DUTY CLAIM.

A. Question Presented

Should the Court affirm the Chancery Court's order granting a preliminary injunction prohibiting the Callison Board from enforcing the terms of its agreement with Galena where the Board thoroughly canvassed the market, relied on independent expert advisors in strategically deciding to implement a private auction and the DADW Standstill, properly included a fiduciary out and market check period in the merger agreement and actively searched for potential suitors during that market check?

B. Scope of Review

Courts review the grant or denial of a preliminary injunction for abuse of discretion, Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 394 (Del. 1996), "without deference to the embedded legal conclusions of the trial court," which are subject to *de novo* review. Id.; Lawson v. Meconi, 897 A. 2d 740, 743 (Del. 2006).

C. Merits of Argument

1. The process was reasonable because Callison's informed, independent, and disinterested Board actively shopped the company before selecting the highest bid.

In deciding to issue a preliminary injunction order, the Chancery Court must find that "the plaintiff has established: (1) a reasonable probability of success on the merits; (2) irreparable harm; and (3) a balance of equities in its favor." Kaiser, 681 A.2d at 395. In

requesting a preliminary injunction the moving party bears a significant burden because the courts have generally shown a "considerable reluctance" to enjoin the decisions of corporate directors and shareholders. La. Mun. Police Empls.' Ret. Sys. V. Crawford, 918 A.2d 1172, 1176, 1185 (Del. Ch. 2007). The disposition of this appeal turns on the first prong of the analysis: whether Galena has demonstrated a reasonable probability of success on the merits of its Revlon and liquidity conflict claims. Mem. Op. 17-18.

When a corporation "embarks on a transaction that will result in a change of control," the primary objective of its directors becomes to maximize the value of the sale of the company for the benefit of its shareholders. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); Paramount Commnc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 44 (Del. 1993). There is "no single blueprint" a board must follow in maximizing shareholder value, however a board has "a duty to take a reasonable course of action under the circumstances presented." Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989); In re Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 192 (Del. Ch. 2007). In reviewing a board's actions, a court is not free to enjoin contractual provisions arbitrarily In re Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1000-01 (Del. Ch. 2005). Instead the Court will look to the adequacy of the information available to the board and the reasonableness of the board's decisions at the time they were made. In re Orchid Cellmark, Inc. S'holders Litig., 2011 WL 1938253, at *4 (Del. Ch. May 12, 2011). See also In re Dollar Thrifty S'holder Litig., 14 A.2d

573, 594 (Del. Ch. 2010) (standard for judging director action is one of reasonableness, not perfection).

The court's ruling in Netsmart sets forth that a pre-signing market check must consist of a robust, active canvassing of potential suitors, or at the very least a discreet, focused, and orderly marketing effort towards select strategic buyers. In re Netsmart, 924 A.2d at 195. Here, the Callison Board followed the precise methodology that Netsmart requires. Specifically, there was a robust sales process that involved a private canvassing of the market and a subsequent 40-day market check that included both a 25-day "Go Shop" period and a 15-day "Window Shop" period. Mem. Op. 6-9, 20. The private auction process was deliberately chosen to maximize share value. Mem. Op. at 7.

The market check is also subject to a fiduciary out and a right of termination by Callison in favor of any "superior proposal" as determined in good faith by the Board. Mem. Op. at 8. At the outset of the market check, Callison's financial advisor, Bonchek, contacted in excess of 100 potential acquirers in a three-week period. Mem. Op. at 15. The Market Check remained under the control of the independent Special Committee. Mem. Op. at 3-5. The Special Committee met with its independent legal and financial advisors several times to discuss strategy and best practices. Once Vicente was determined to be the highest bidder, the Special Committee received a detailed valuation analysis from Bonchek. That valuation analysis included a discounted cash flow analysis, a comparable companies analysis, and a comparable transactions analysis. Mem. Op. 7-8, 11-12, 14, 16, 20.

Therefore, the Chancellors Order should be reversed because the Callison Board has not violated its Revlon Duties. In fact, the Callison Board exercised good faith utilizing a process that demonstrates its absolute independence. The Board relied on the recommendations of outside advisors focusing on the best value for the shareholders.

2. The substantive decision was reasonable because Don't Ask, Don't Waive standstill agreements are not per se invalid and because the Board had legitimate reasons in deciding to use and enforce one.

The substantive decision of the Callison Board was reasonable because Galena incorrectly reads the decisions in In re Complete Genomics S'holder Litig., C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (Transcript of Telephonic Ruling) and In re Celera Corp. S'holder Litig., 2012 WL 1020471, at *25 (Del. Ch. March 23, 2012), aff'd in relevant part, 2012 WL 6707736 (Del. Dec. 27, 2012) as completely prohibiting the use of DADW provisions. In In re Ancestry.com S'holder Litig., C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012), Chancellor Strine opined that Don't Ask, Don't Waive Standstill provisions are not per se invalid, and potentially have a useful role in extracting maximum value from bidders in an auction of a publicly traded company. Id. In discussing the issue, Strine observed that the Delaware courts have been reluctant to create bright-line rules invalidating contract provisions in mergers. Id.; In re Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1006 n. 46 (Del. Ch. 2005). While recognizing the analysis in Genomics and Celera, the Chancellor noted that Celera expressly stated that the court was not adopting a per se

rule against DADW provisions, and that there was no prior ruling under Delaware law to that effect. In re Ancestry.com, C.A. No. 7988-CS. While not explicitly rejecting Genomics, Chancellor Strine's decision unequivocally reaffirms the principle that any review of a DADW standstill must be fact-specific. Id. Although Galena's argument suggests that DADW provisions be abandoned in light of Genomics, Ancestry.com makes a strong case that that view goes too far and is incompatible with Delaware law.

Even putting aside the questionable viability Galena's interpretation of Genomics, it is distinguishable from the facts of this case. First, in Genomics the merger agreement included a "No Shop" clause, which prohibited the company from soliciting competing offers during the time which the target was given to satisfy the "minimum tender condition." Genomics, C.A. No. 7888-VCL, at *14. Second, the Genomics merger agreement did not allow the company to terminate in the event the board changed its recommendation in favor of a superior proposal. Id. at *18. Finally, in the Genomics agreement there was an apparent inconsistency in the various confidentiality agreements signed by participants in the process. Id. at *4. Here, not only did the Vicente agreement not contain a "No Shop", it included "Go Shop" and "Window Shop" periods as well as a fiduciary out clause. Mem. Op. 8-9. Moreover, all of the confidentiality agreements had identical DADW Standstill provisions, so there were no inconsistencies. Mem. Op. 8-9.

When properly designed and implemented, as is the case here, a standstill agreement with a DADW provision enables a diligent board to

structure and run an orderly auction process where bidders are incentivized to make their highest bid prior to the seller signing and announcing a definitive sale agreement. See Mem. Op. 8. Moreover, DADW provisions give additional comfort to target boards that a determination to initiate an exploration of a potential sale process will not lead to a hostile process later on. In re Celera, 2012 WL 1020471, at *21. DADW agreements further serve to protect the confidential information of the target corporations and allow their boards to negotiate on behalf of shareholders for valuable concessions from potential bidders. In re The Topps Co. S'holders Litig., 926 A.2d 58, 91 (Del. Ch. 2007). The independent special committee had the best interests of the shareholders when it implemented a valid DADW.

The losing bidder, Galena attempts to circumvent a fair, independent and reasonable bidding process by arguing that by refusing to waive the DADW standstill the Callison Board has not satisfied its Revlon duty to maximize shareholder value. Galena's argument is misguided because it fails to recognize that the auction actually benefits the stockholders by shortening the duration and encouraging the highest offers at the outset. Mem. Op. 8. Additionally, acting upon the advice of the independent advisors, the Special Committee, concerned that a protracted public auction of Callison could harm the Company and its stockholders by demoralizing key employees and jeopardizing future long-term commitments with important Callison customers like Kohl's and Target, chose to utilize the DADW. Mem. Op. 7. See, e.g. In re MONY Grp. Inc. S'holder Litig., 852 A.2d 9 (Del. Ch. 2004), judgment entered sub nom. In re The Mony Grp. Inc. S'holder

Litig., 2004 WL 5389603 (Del. Ch. Mar. 1, 2004). Therefore, the Callison Board has met its Revlon duties, and the Chancellors decision should be reversed.

Galena's further reliance on Celera in assaulting standstill provisions is misplaced, as Celera is distinguishable on its facts. Mem. Op. 21. In Celera, the board's Achilles heel was the existence of a "No Shop" provision, which the plaintiffs argued was especially onerous because the most likely competing bidders for Celera were the very same companies bound by the DADW standstills. In re Celera, 2012 WL 1020471, at *21. Those standstills rendered the "No Shop's" fiduciary out effectively worthless because the parties most interested in Celera could not request a waiver to make a competing offer. Id. The Court agreed, but was evident that standstills and "No Shops", on their own, are commonly used and acceptable. Id. at *22. It was their combined effect that was problematic, since a DADW standstill prevents parties known to be interested in the target company from informing the board of their willingness to bid, even as the no-shop prevents the board from inquiring into that same interest. Id. This has an effect of "emasculating whatever protections" the fiduciary out would have provided. Id. at *21.

Unlike Celera, the Vicente agreement does not have a "No Shop" provision. On the contrary, it has "Go Shop" and "Window Shop" provisions, which allow the Board to conduct a thorough and nearly unlimited market check. Mem. Op. 13. Therefore, any fear of an "informational vacuum" for the board is simply unfounded. See Mem. Op. 22; In re Celera, 2012 WL 1020471, at *21. Even under Galena's

theory, only five potential bidders out of the entire universe of potential buyers are contractually prohibited from making a tender offer, and rightfully so: they had their chance to give their highest offer. Mem. Op. 10. Therefore, the Chancellor's decision should be reversed.

Other cases have emphasized the importance of a court performing a nuanced, fact-intensive inquiry in looking at deal protection measures in merger agreements. In re Ancestry.com involved a "going-private transaction" in which Ancestry.com entered into a confidentiality agreement that also included a DADW provision. In re Ancestry.com, C.A. No. 7988-CS, at *20-21. In that case, the Ancestry.com board and CEO were unaware of the existence of the DADW, let alone its significance. Id. Also, the board's financial adviser may have been similarly unaware. Id. at *24-5. The Court indicated that this conduct by the Ancestry.com board appeared inconsistent with its value maximizing Revlon obligation. Id. In the present case, the Callison board was fully apprised of the existence of the DADW standstill, and made an informed, deliberate decision to use it therefore the Chancellors decision should be reversed. Mem. Op. 7-8.

In Toys "R" Us, the court cautioned that a court should not presume that "all business circumstances are identical." In re Toys "R" Us, 877 A.2d at 1016. In refusing to grant a preliminary injunction to plaintiffs, the court stated that:

> [D]eal protections…provide a bidding cushion for merger partners that makes small, margin-topping bids non-viable. When that cushion results, as it did here, from a good faith negotiation process in which the target board has reasonably granted these protections in order to obtain a

> good result for the stockholders, there is no grounds for judicial intrusion.

Id. The same deference should be given to the tactical decision-making of the Callison Board. Here, the Special Committee likewise made rational decisions regarding negotiating strategy and the tactics of the auction process, concluding that the best way to maximize immediate value for shareholders would be by challenging each bidder in advance to offer a figure in the uppermost limit of its bidding range. The fact that circumstances have changed and there is now a marginally higher, yet contractually prohibited, offer that it refuses to accept does not alone support a claim for breach of fiduciary duties.

Given the leeway afforded to a board under a Revlon reasonableness analysis, and this court's prior recognition of the validity and legitimate uses of DADW standstills, the Callison Board fulfilled its fiduciary duties in insisting on the use of, and refusing to waive, the DADW standstill. Furthermore, the specific facts of the cases on which Galena relies make its reliance misplaced. Therefore, Galena has not demonstrated that it has a reasonable probability of success on the merits and the Chancellors decision must be reversed.

II. THE CHANCELLOR'S ORDER SHOULD BE REVERSED BECAUSE ALLEN'S PURCHASE OF CA' FOSCARI DOES NOT INVALIDATE THE DON'T ASK, DON'T WAIVE STANDSTILL AND GALENA HAS THEREFORE FAILED TO ESTABLISH A REASONBLE PROBABILITY OF SUCCESS ON THE MERITS OF ITS LIQUIDITY CONFLICT CLAIM.

A. Question Presented

Does Allen's purchase of Ca' Foscari invalidate the DADW Standstill even though Allen and all minority shareholders received the same compensation from Vicente for their shares, the private auction was designed to maximize share value, the winning bid was subject to a forty-day market check and any dissatisfied minority shareholder has the right to seek an appraisal of its shares with the Chancery Court pursuant to 8 Del. C. § 262?

B. Scope of Review

Courts review the grant or denial of a preliminary injunction for abuse of discretion, Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 394 (Del. 1996), "without deference to the embedded legal conclusions of the trial court," which are subject to *de novo* review. Id.; Lawson v. Meconi, 897 A. 2d 740, 743 (Del. 2006).

C. Merits of Argument

1. Allen's purchase of Ca' Foscari does not invalidate the standstill agreement because the McMullin standard should be overturned and the Callison Board's decisions should properly be reviewed under the business judgment rule standard.

Galena alleges that Allen's purchase of Ca' Foscari created a "unique and conflicting need for financial liquidity,"[14] which should trigger strict scrutiny of the Vicente merger. Galena argues that Appellants have not demonstrated the entire fairness of the

[14] Mem. Op. 24.

transaction as required under McMullin v. Beran, 765 A.2d 910 (Del. 2000). While the Chancery Court did not reach the issue, Galena's liquidity conflict claim must fail because the business judgment rule is the proper standard of review for the Callison Board's decisions.

In McMullin, the court heard a minority shareholder's challenge to the sale of ARCO Chemical Company ("Chemical") to Lyondell Petrochemical Company. The minority shareholders argued that the Chemical board had violated its fiduciary duty to Chemical's minority shareholders by allowing ARCO, the parent and majority owner of Chemical, to dictate the sale's terms. Id. at 914. On appeal the court reversed the Chancery Court's dismissal of McMullin's claim, holding that one could reasonably find that ARCO's need for liquidity compromised the Chemical board's deliberations. Id. at 922.[15] The McMullin court reached this conclusion despite the fact that both ARCO and Chemical's minority shareholders received identical compensation for their shares. See id. at 916. This has created controversy in the courts and therefore McMullin should be reversed.

McMullin should be overruled because it created undeniable tension with the long-standing principles set forth in Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971), where this Court unanimously held that the defendant, Sinclair, had violated its fiduciary duty to its subsidiary, Sinclair Venezuelan Oil Company ("Sinven"), under the "intrinsic fairness" test. Id. at 719.[16] While acknowledging that the majority owner and parent company owed its

[15] In McMullin, ARCO required $3.3 billion in cash to facilitate its acquisition of Union Texas Petroleum Holdings. Id. at 921.
[16] Sinclair owned 97% of Sinven shares. Sinclair, 280 A.2d at 719.

subsidiary a fiduciary duty, the Sinclair court opined that, without more, a fiduciary duty "alone will not invoke the intrinsic fairness standard." Id. at 720. A violation of the intrinsic fairness standard requires some semblance of self-dealing on the part of the parent. Id. For example, if the majority owner "receiv[es] something from the subsidiary to the exclusion of and detrimental to its minority stockholders," then, "[t]his self-dealing, coupled with the parent's fiduciary duty, would make intrinsic fairness the proper standard by which to evaluate" the board's disputed action. Id. at 721. Otherwise, a board's business decisions are subject to the protections of the business judgment rule. See id. at 720-21; Easterbrook, Frank H. & Fischel, Daniel R., The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161, 1195 (1981) ("Without some showing of either bad faith or self-dealing, courts almost uniformly refuse to subject the decisions of managers to review on the merits."). Therefore, Allen's purchase of Ca' Foscari does not invalidate the standstill agreement and the Chancellor's decision should be reversed.

While true that Allen's desire to purchase Ca' Foscari initiated Callison's sale the entire fairness standard is not triggered because there was no semblance of self-dealing on the part of Allen. Mem. Op. 11-12. Therefore, the Sinclair business judgment rule analysis is appropriate. Allen derived no benefit to either the exclusion or the detriment of Callison's minority shareholders: all shareholders received the same consideration for their Callison shares. Mem. Op. 11-12. Without more, the Callison Board's decisions regarding the

sale should fall within the ambit of the business judgment rule. Sinclair, 280 A.2d at 720-21.

The business judgment rule has long stood for "the fundamental principal…that the business and affairs of a corporation are managed by" that corporation's board of directors and that a court must not "impos[e] itself unreasonably on the business affairs of [that] corporation." Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993). To arbitrarily eschew the rule's deference to managerial decisions, as occurred in McMullin, unreasonably limits a majority shareholder's right to sell its stake in a company. In re Synthes Inc. S'holder Litig., 50 A.3d 1022, 1041 n. 91 (Del. Ch. 2012). More importantly, the business judgment rule serves to maximize the benefit to all shareholders by ensuring that decisions are made efficiently by corporate boards rather than courts, which "lack the experience and information necessary" to maximize shareholders' welfare. Easterbrook & Fischel, supra, at 1196. This Court should overturn McMullin because it inescapably clashes with the deference required by the business judgment rule. Under the business judgment rule standard, Galena's claim necessarily fails and the Chancellor's order should be dismissed.

In In re Synthes, minority shareholders brought a breach of fiduciary duty claim against Synthes, arguing that because its largest shareholder, Hansjoerg Wyss, had a personal desire to get out of the business, Synthes' merger with Johnson & Johnson was "a conflicted transaction that should be subject to review under the entire fairness standard." In re Synthes, 50 A.3d at 1025, 1031. In dismissing the

plaintiffs' claim, Chancellor Strine held that there was no conflict that merited an entire fairness analysis. Id. at 1024. Echoing Sinclair, the Chancellor questioned McMullin because the Delaware courts have traditionally held that a transaction in which the majority and minority shareholders receive the same consideration for their shares does not create an impermissible conflict of interest and is protected by the business judgment rule. In re Synthes, 50 A.3d at 1041 n. 91.[17] Here, because the majority and minority owners received the same consideration for their shares, the business judgment rule standard is appropriate.

Had the court in McMullin adhered to the spirit and letter of Sinclair, it would have held that the Chemical board's decision to sell the company to Lyondell did not trigger an entire fairness analysis of the transaction because ARCO, as majority shareholder of Chemical, received the same compensation as the minority shareholders for its shares. See McMullin, 765 A.2d at 916. Similarly, in the present case, overturning McMullin's flawed entire fairness analysis renders Galena's claim toothless because Galena and all other minority shareholders received the same compensation for their shares as Allen. Mem. Op. 11-12.

Given the necessity of overturning McMullin in light of its clash with Sinclair, and supported by the recent decision in In re Synthes, this Court should overturn McMullin and give substantial deference to

[17] This is not the first time Chancellor Strine has been critical of McMullin. See Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 202 n. 95 (Del. Ch. 2006), aff'd, 931 A.2d 438 (Del. 2007); In re Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1013 n. 57 (Del. Ch. 2005).

the Callison Board's deliberative process and deny the preliminary injunction motion.

2. Alternatively, should the Court decline to overturn McMullin, Allen's purchase of Ca' Foscari does not invalidate the standstill agreement because the sale was fair.

Should this Court decline to overturn McMullin, Allen's purchase of Ca' Foscari does not invalidate the DADW Standstill because Appellants have demonstrated that the sale was fair. In McMullin, the Court reasoned that the entire fairness analysis does not result in per se liability because the duties imposed upon corporate boards "depend[] upon the specific context that gives occasion to the board's exercise of its business judgment." McMullin v. Beran, 765 A.2d 917, 918 (Del. 2000). There are several facts, aside from the higher burden Galena must satisfy in requesting a preliminary injunction,[18] that definitively establish the entire fairness of the Callison sale. The role of Allen throughout the sale process and the share maximizing provisions and protections adopted by the Callison Board distinguish the present case from McMullin and therefore require reversal of the Chancellor's decision.

Central to McMullin was the fact that, in that case, the disputed transaction was "proposed, negotiated and timed" entirely by the majority shareholder, Lyondell. Id. at 919. In the instant matter, Allen proposed the sale but did not negotiate or time it. See Mem. Op. 4. To maintain good faith duties to the corporation and its shareholders, the Board created the Special Committee, endowed with the full authority to negotiate on behalf of Callison and its minority

[18] McMullin was decided at the 12(b)(6) stage. Id. at 914.

shareholders. Mem. Op. 5. The Special Committee retained full authority over each substantive decision regarding the negotiation and timing of the sale. See Mem. Op. 12. Therefore, the Chancellor's order should be reversed.

Additionally, in McMullin there was only one potential buyer in the proposed transaction. McMullin, 765 A.2d at 917. No other bids existed to test the merits and fairness of Lyondell's offer. Here, the Board purposefully constructed the auction to maximize the value to Callison's shareholders by encouraging each of the six suitors to put forth its "only, best and final offer." Mem. Op. 8. The DADW Standstill signed by each bidder required the winner to hold its bid open for forty days, during which the Board was free to conduct a market check for additional bids to ensure that the shareholders received the maximum share value. Mem. Op. 9. Finally, any shareholder displeased with the terms of the Vicente deal is legally entitled to seek appraisal of its shares in compliance with 8 Del. C. § 262. Mem. Op. 13.[19]

Because the Callison Board's actions are sufficiently distinguishable from those taken by Chemical, they surpass the standard set forth in McMullin. The court in In re CompuCom Sys., Inc. S'holders Litig., 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) came to a similar conclusion holding that, because the board's process in that case was readily distinguishable from McMullin, the board had

[19] Because Vicente's first-step tender offer is still open, the right to seek an appraisal is not yet ripe. However, once the extended deadline of March 29 passes, any dissenting minority shareholder is entitled to seek an appraisal in the Chancery Court for the fair value of its shares. See Mem. Op. 17.

satisfied its fiduciary duty and the case was dismissed. Id. at *7. Cf. Malpiede v. Townson, 780 A.2d 1075, 1087 n. 37 (Del. 2001) (distinguishing McMullin in affirming dismissal of shareholder suit). Because the Callison Board's actions mirror those of In re Compucom, this Court should find that the Board has satisfied its duty to the minority shareholders and the Chancellor's decision should be reversed.

Therefore, under either Sinclair or McMullin, Allen's pending purchase of Ca' Foscari does not invalidate the DADW Standstill. For this reason Galena has failed to establish a reasonable probability of success on the merits of its liquidity conflict claim.

For the foregoing reasons, we respectfully request that the Court reverse the Chancellor's order and deny Galena's preliminary injunction motion.

Respectfully submitted,

Team I
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Appellants

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