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, :

Court Below:

Court of Chancery of the State of Delaware C.A. No. 7918-CN

GALENA CAPITAL PARTNER, LLC.,

V.

:

Plaintiff Below-Appellee.

APPELLANT'S OPENING BRIEF

Team J Counsel for Defendants, Below-Appellants.

Date Filed: February 8, 2013

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NATURE OF THE PROCEEDINGS

This case comes before the Supreme Court as an appeal by the Defendants Below-Appellants, Callison Inc., Allen Enterprises

Incorporated ("Allen"), Timothy Michaels, Clare Lieberman, Rhaney

Patricks, Julio Luis-Rojas, Patrick Austin, Marsha Franklin and Ari

Singh (collectively "Callison" or "Company"), from an interlocutory

order of the Court of Chancery of the State of Delaware in and for New

Castle County (Nelson, Ch.) entered on January 15, 2013.

The Court of Chancery's ruling granted Plaintiff Below-Appellee Galena Capital Partners, LLC ("Galena") a preliminary injunction, enjoining the Defendants from enforcing the "Don't Ask Don't Waive" Standstill Agreement ("DADW Standstill") dated October 29, 2012. The DADW Standstill prevents Galena from proceeding with its tender offer ("Galena Tender Offer") to acquire any and all shares of common stock in Callison, and prevents Galena from communicating with Callison about making an offer to acquire the Company on terms equal to or more favorable than the pending Vicente Tender Offer.

Callison initiated a sale process for the Company, which involved a canvassing of potential suitors who were required to sign the DADW Standstill to participate in the bidding and sale process. Six suitors submitted bids with Vicente Capital Inc. ("Vicente") emerging as the highest bidder. This dispute arose from Galena's desire to waive the DADW Standstill, allowing it to submit a higher bid than Vicente. Upon Callison's rejection, Galena filed a lawsuit on December 21, 2012 seeking to enjoin Callison's use of the DADW Standstill as a breach of its fiduciary duties to Galena as a minority stockholder, and that

Galena's continued attempts to acquire Callison do not constitute a breach of the DADW Standstill.

Galena filed a motion for preliminary injunction to prevent

Callison from enforcing the DADW Standstill. On January 15, 2013 the

Court of Chancery granted the preliminary injunction against the

Defendants. Citing the duties a board of directors maintain in a

Revlon transaction, the Court found 1) the DADW Standstill was

preventing the Callison Board from performing its fiduciary duties, 2)

the board did not perform its fiduciary duties by failing to inform

stockholders of all material facts, and 3) acknowledged the QVC "range of reasonableness" inquiry, but did not believe that such an inquiry would allow the Court to ignore value-impeding consequences of the

DADW. The Court did not rule on the Galena's entire fairness argument.

On January 23, 2013 the Defendants filed an appeal from the interlocutory order. On January 25, 2013 the Supreme Court accepted the appeal from the Court of Chancery's order.

SUMMARY OF ARUGMENT

1. The DADW Standstill is valid and binding based on this Court's holdings in Revlon and QVC. The Court should not substitute its business judgment for that of the Board but rather determine if the Board's actions were within a range of reasonableness. Furthermore, the Board did not violate its fiduciary duty to shareholders because they used an independently advised sale process that optimized the sale price while decreasing risk exposure for shareholders. Finally, Galena breached its contractual duties after agreeing to the DADW and then submitted a topping bid after the original bidding process.

2. McMullin v. Beran should be overruled in the context of a motion for preliminary injunction because McMullin was decided on a motion to dismiss and the plaintiff enjoyed reasonable inferences in its favor unlike the present case in which the plaintiff must prove likelihood of success on the merits and a probability of irreparable harm under its liquidity conflict claim. Further, this court should adopt Chancellor Strine's analysis from In re Synthes that a need for liquidity does not create a disabling conflict. Also, a controlling shareholder should not be required to structure a deal differently or receive less in order to maximize wealth for minority shareholders.

STATEMENT OF FACTS

Callison is a Delaware corporation headquartered in Raleigh,
North Carolina that manufactures and sells athletic apparel. (R. at
2). Callison is traded on the New York Stock Exchange and has 85
million shares of outstanding common stock, 72% of which is owned by
Allen. Id. Allen is a privately owned holding company incorporated
under the laws of Delaware. Id. Galena is a Delaware limited liability
holding company that owns 10,000 shares of Callison. Id.

Callison's board of directors consists of seven members elected by Allen. *Id.* at 3. Four of the board members are full time executives of Allen, though they are not on the Allen board of directors. *Id.*The remaining three board members are not employed by Allen or Callison, and are independent and disinterested directors. *Id.*

Allen's management team became interested in acquiring a large restaurant chain and in August 2012 retained the investment banking firm of Reed Crystal LLP ("Reed Crystal") to assist them in the

search. *Id.* at 3-4. At the same time, Allen recognized that liquidating its stake in Callison might give them the necessary capital to acquire such a chain. *Id.* Ca' Foscari Italian Grill ("Ca' Foscari") emerged as the most promising acquisition option. *Id.* On October 15, Allen expressed its interest in buying Ca' Foscari to its owner FVP Restaurants, Inc. ("FVP") and on November 28, Allen and FVP reached a purchase agreement for a price of \$2.4 billion. *Id.* at 5.

On October 3, 2012 the Allen Board authorized Reed Crystal to inform Callison of its interest in monetizing its 72% stake, and of its belief that a sale of the entire Company would obtain the highest value for Callison stockholders. Id. at 4. Callison's Board established a Special Committee made up of the three independent directors ("Special Committee") with full negotiating power regarding the sale of the Company. Id. at 5. However, a final sale or merger was subject to the approval of the Callison board. Id. The Special Committee retained the investment banking firm of Bonchek Graycourt Inc. ("Bonchek") and the law firm of Jenkins, Piper, Hitchens & Ward, LLP ("Jenkins Piper") to act as independent advisers. Id.

The Special Committee was concerned that a protracted public auction would have negative effects to stockholders by demoralizing key employees and jeopardizing long term customer relationships. Id. at 7. The Special Committee decided that a private bidding process would be the best course of action. Id. This process required any interested buyer to agree to the DADW Standstill before obtaining due diligence and placing a bid. Id. Parties were aware that they could only make one bid and that the bids would occur simultaneously in a

private auction in order to expedite the process for the benefit of the stockholders. *Id.* Any approval of the winning bid would be subject to a limited market check and Callison would maintain the right to terminate a purchase in favor of any superior proposal, subject to a 3% termination fee. *Id.* at 8-9. Following the bidding process, Callison would be permitted to solicit topping bids in a twenty-five day "Go Shop" period from any bidder that did not sign the DADW Standstill, but not solicit, bids for another fifteen days from other bidders. *Id.* at 9. Therefore, the original bidders were aware that their initial bid was their only, best, and final offer.

Of the twenty companies Bonchek contacted about acquiring Callison, seven expressed interest in conducting due diligence. Id. at 10. Of these seven, one refused to sign the DADW Standstill and the other six, including Galena, agreed to sign DADW Standstill and submitted bids by the December 14, 2012 deadline. Id. at 10-11. Vicente's bid of \$34 per share all cash was the highest of the six bids with Galena submitting a bid of \$32.50. Id. at 11. After receiving a detailed valuation analysis from Bonchek the Special Committee determined Vicente's bid was the best and most fair for minority shareholders. Id. The Special Committee presented its findings to the Callison Board, which unanimously approved Vicente's offer on the evening of December 14. Id. at 12.

Callison and Vicente negotiated a two-step merger agreement on December 15-16, which permitted Callison to terminate the agreement for a superior offer dependant on an \$87 million termination fee. *Id*.

at 13. Allen agreed to tender its entire stake to Vicente in the first step. *Id*.

On December 19, despite previously signing the DADW Standstill, Galena delivered a letter to Callison requesting that it waive the DADW Standstill so Galena could submit a topping bid of \$35.50. *Id.* at 15. Jenkins Piper advised that the DADW Standstill would likely be upheld by Delaware Courts and that the Board should insist on the literal terms of the DADW Standstill. *Id.* at 16. On December 20, counsel informed Galena of the Board's decision to refuse to waive the DADW Standstill and consider Galena's topping bid. *Id.*

ARGUMENT

I. THE COURT OF CHANCERY'S RULING MUST BE REVERSED BECAUSE THE "DON'T ASK, DON'T WAIVE" STANDSTILL IS VALID UNDER DELAWARE LAW.

A. Question Presented

Whether a board of directors has breached its fiduciary duty to its stockholders by enforcing a "Don't Ask, Don't Waive" ("DADW")

Standstill against a company who willingly agreed at the beginning of the bidding process.

B. Scope of Review

The judgment of a board of director's conduct is a legal question and therefore is subject to de novo review by this Court. Nixon v. Blackwell, 626 A.2d 1366, 1375 (Del. 1993).

C. Merits of the Argument

1. The "DADW" Standstill is valid under this Court's holdings in QVC and Malpiede.

The DADW Standstill presented by Callison is valid and binding based on previous cases from this Court because its intent and

implementation were reasonable under the circumstances. When a company is in the process of completing a merger or a takeover, there is an enhanced level of judicial scrutiny enforced. Paramount Commc'ns Inc. v. QVC Network, Inc., 637 A.2d 34, at 45 (Del. 1994). As this Court noted in Paramount v. QVC, enhanced scrutiny involves a "review of the reasonableness of the substantive merits of a board's actions," and a "court should not ignore the complexity of the directors' task in a sale of control." Id. Most importantly, QVC noted that the board of directors, not the court is the "corporate decision making body best equipped to make [business and financial] judgments" and thus, a board's actions need not be perfect, simply reasonable under the circumstances. Id. Accordingly, the court should not substitute its own judgment for that of the board when determining how best to run one's own corporation. Id.

Keeping the reasonableness standard in mind, we now turn to corporations who actually used a DADW Standstill. In *Celera*, this court determined that the standstill agreements used by the selling corporations should not be enforced. *In re Celera Corp. S'Holder Litig.*, Civ. A. No. 6304-VCP, 2012 Del. Ch. LEXIS 66 (Del. Ch. Mar. 23, 2012). The DADW Standstill used by the Callison Board differs from both of these prior cases for the following reasons.

First, the Court of Chancery stated in *Celera* that when viewed in isolation, DADW Standstills foster legitimate objectives such as:

"ensur[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." *Id.* at *79. The court's only issue with DADW Standstills came when they were coupled with a No Solicitation Provision. *Id.* Because Callison did not bog down the bidding process with a No Solicitation Provision, the DADW Standstill should be considered on its merits alone. *See id.*; (R. at 7).

Second, by waiving the DADW Standstills, the Defendants in *Celera* invited back to the bargaining table the "four bidders arguably most likely to make a superior offer". *Id.* at *77. Callison did not waive the DADW Standstill because they were trying to avoid this exact result; the Company wanted to avoid an open auction that could delay the sale process and negatively affect its stockholders. (R. at 7).

In Phelps Dodge, while troubled by some of the side effects of no-talk provisions, Chancellor Chandler ruled in favor of the defendants and denied plaintiff's motion for injunctive relief, despite plaintiffs showing a reasonable probability of success. Phelps Dodge Corp. v. Cyprus Amax Minerals Co., Civ. A. No 17398, 1999 Del. Ch. LEXIS 202 (Del. Ch. Sept. 27, 1999). Chancellor Chandler reasoned that "an injunction would likely force the boards . . . to delay their respective shareholders meetings . . . and that delay in itself poses a clear and present risk to the potential [of the merger]." Id. at *6. Therefore, even though the DADW Standstill used by Callison may not be perfect in every sense, the risk to the transaction already on the table outweighs the harm asserted by Galena, and thus preliminary injunction should not be granted.

Since the DADW Standstill is legal, we now look to Callison's intentions in its implementation to determine whether it should be

considered valid. Galena here argues that Callison implemented the DADW Standstill in order to sell the company as quickly as possible so that Allen could finance the purchase of Ca' Foscari. Further, the Ca' Foscari Agreement also contains a reciprocal liquidated damage provision imposing damages of \$60 million to Allen if they were to fail to complete the transaction by the termination date of May 31, 2013. (R. at 6). Due to these circumstances, Galena contests that the Defendants' potential for personal liability was their primary motivating factor behind the DADW Standstill. See (R. at 19).

However, the implementation of the DADW Standstill was not for personal gain but rather to allow for a quick and efficient bidding process. Even if this court were to determine that the Board's intentions were primarily personal in nature, the DADW Standstill would not necessarily be considered invalid due to what this court ruled in Malpiede v. Townson. In Malpiede, stockholders brought breach of fiduciary duty claims against the corporation's board of directors following a merger. Malpiede v. Townson, 780 A.2d 1075, 1075 (Del. 2001). The plaintiffs argued that "the directors' individual interests in avoiding personal liability . . . influenced their decision to approve the . . . merger." Id at 1085.

In response to the plaintiff's claim, this Court noted that "except in egregious cases, the threat of personal liability for approving a merger transaction does not in itself provide a sufficient basis to question the disinterestedness of directors because the risk of litigation is present whenever a board decides to sell the company." Id. This court found in favor for defendant's in Malpiede

concluding that "the facts alleged in the complaint do not state a cognizable claim that the directors acted in their own personal interests rather than in the best interests of the stockholders "Likewise, in the present case, the Special Committee consisted of three independent and disinterested members who had no stake or personal interests in the outcome of the sale, and thus personal liabilities should not come into consideration.

2. Galena breached a contractual obligation by making an additional offer.

Galena agreed to the contract and should be held to the terms of the contract. The companies who were contacted by Bonchek and Special Committee were required to agree to the DADW Standstill in order to participate in the due diligence and sale process. (R. at 10). The six suitors who agreed to the standstill agreement were contractually prevented from making any further offers or topping bids or from asking Callison for permission to do so. *Id*. Galena was a willing participant in this process and submitted what they felt at the time to be their highest potential bid. *Id*.

As this Court noted in *Itek v. Chicago Aerial*, "actual intent of the parties is the [most] important consideration in determining whether a binding agreement existed" and that the outcome of the case itself "depends on the intention of the parties as shown from the words of the instrument and from what the parties said and did in connection with executing the instrument." *Itek Corp. v. Chi. Aerial Indus.*, *Inc.*, 274 A.2d 141, 143-44 (Del. 1971).

If Galena's actual intention was to have the opportunity to place a bid after the initial bidding process took place, then it should not

have signed the DADW Standstill. It could have joined the group of fourteen companies who were contacted by Bonchek but did not sign the DADW Standstill and now have the option to acquire the Company during the "Go-Shop" period. (R. at 10). In essence, Galena is trying to "have their cake and eat it too" by placing a bid in the initial bidding process and then making an additional offer. (R. at 11, 15). It would be an incredibly dangerous precedent for this Court to set to allow companies to agree to provisions that they find completely valid and acceptable at the outset of the contractual agreement, only to later renege on this promise and to claim that it is unlawful.

Galena's frivolous lawsuit is simply a plea to this Court to second-guess its previous rulings in control transactions. (R. at 20). Prior to now, this Court has held a flexible position when determining the reasonableness of a board's actions rather than impose a one size fits all "blueprint." Barkan v. Amsted Indus., 567 A.2d 1279, 1286 (Del. 1989). As this Court noted in Barkan, "the general principles announced in Revlon govern . . . every case in which a fundamental change of corporate control occurs or is contemplated." Id.

While it is always possible that "a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders," it is still not proper to place each of the duties and responsibilities of these boards into a "single blueprint." Id. Rather than creating a one size fits all test, "a board's actions must be evaluated in light of relevant circumstances to determine if they were undertaken with due diligence and in good faith." Id. Upon a thorough examination, if it is clear that the board has not breached any of its

fiduciary duties, then its actions are to be afforded "the protections of the business judgment rule." Id.

Finally, the reputation of Callison and its shareholders was at stake with this sales process. The Special Committee, upon Bonchek's advice, expressed concern to Allen that a protracted 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." (R. at 7). Just at it would have harmed the Company to conduct a public protracted auction, it would also hurt the reputation of the Company to drop the DADW Standstill and allow Galena to make an additional offer. By going against what the Board had contractually promised to five other bidders in an attempt to grab a few extra dollars, it would call into question the character and business acumen of each of the Defendants.

3. Callison did not violate the fiduciary duties of directors in this State by enforcing the DADW Standstill

Callison and the Special Committee did not violate its fiduciary duties to their shareholders. Because this case deals with the sale of the entirety of Callison to a single buyer through a cash acquisition, Callison is held to the standard of the business judgment rule. Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 173 (Del. 1986). Under the business judgment rule, there is a "presumption 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 interest of the company." Aronson v. Lewis, 473 A.2d 812 (Del. 1984). There is no reason to believe that Callison, the

Special Committee, Allen Enterprises, or any other entities involved in the bidding process acted in an unreasonable manner.

During the process of a company takeover or merger, the duty of the board is altered from the preservation of that corporation to the maximization of the company's value at a sale for the stockholder's benefit. Revlon, 506 A.2d at 182. In Revlon, the court likens the board's role in this instance to that of an "auctioneer." Id. However, it would be inappropriate to limit the significance of this matter to the monetary bid and stock value.

First, Callison conducted a sound sale process through the canvassing of the market for qualified bidders, followed by a shopping period to allow other potential interested buyers to enter their bids. (R. at 10,15). This indicates good faith effort, and is in stark contrast to the tactics seen by defendants in previous cases such as Revlon. In Revlon, this Court ruled in favor of the plaintiff because Revlon's board locked out all other bidders other than Forstmann Little and provided them financial data that was not available to all bidders. Revlon, 506 A.2d at 184. Further, following the acceptance of Forstmann's bid, Revlon's board did not take part in any sort of shopping period to allow others to enter the discussion. Id.

Second, the auction and bidding process was under the control of the Special Committee. (R. at 5). The Special Committee was acting not only in a manner which they found most fit, and they were also under the guidance of independent financial and legal advisors. *Id*. These groups had no financial or personal motivations to choose one company over the other. This differentiates itself from *Revlon* due to

the fact that Revlon's CEO at the time had a strong disdain towards the CEO of hostile bidder. Revlon, 506 A.2d at 176. Because of this feud Revlon was employing defensive measures to prevent Pantry Pride gain control of the company. Id. The case at hand is different due to the disinterestedness of the Special Committee and the advisors.

Finally, the Defendants had the stockholder's best interests in mind when deciding not to conduct a protracted public auction. The DADW Standstill implemented allowed the Board to maximize immediate value for all stockholders. (R. at 20). This is particularly true for the minority stockholders such as Galena, who would be receiving identical consideration as Allen. (R. at 24). Had the Board decided to make it an open auction, the process would have been bogged down with months of laborious negotiating and legal debating. By using the DADW Standstill, the stockholders will see an immediate return at a value that is much higher than the company's current stock price.

The immediacy that a sale to Vicente would provide is of great importance when considering the actual value of the offer. In the case at hand, Galena's offer following the initial bid is for \$35.50 per share, or \$1.50 (\$128 million) more per share than Vicente's \$34 price per share. (R. at 15). If Callison were to accept Galena's topping bid, it would then become liable for a termination fee totaling \$87 million. (R. at 13). Thus, following the termination fee, the Galena bid would only be worth \$41 million more than the Vicente bid. See (R. at 15-16). This value adds up to less than 50 cents per share more than the Vicente bid, and that number is before the time value of money is taken into consideration.

In Revlon, this court noted that despite Forstmann's slightly higher offer, their bid had to be discounted for the fact that the offer was not immediate. Revlon, 506 A.2d at 184. Thus, the delay in approving the merger and consummating the transaction would mean that the actual value of the deal would decrease by the time that the transaction went into effect. Id. Similarly, here, although Galena is offering a slightly higher bid than Vicente, by the time that their bid would actually go into effect, its overall monetary value will decrease and thus the differential between the two bids would also diminish. This minimal increase in monetary value to the shareholders is not worth the arduous bidding and legal battle that would result, from dropping the DADW Standstill and accepting Galena's bid.

II. Due to Consistent Criticism and Conflicting Opinions, This Court Should Overrule $McMullin\ v.\ Beran$ and Adopt The Reasoning of the Court of Chancery in In re Synthes Shareholder Litigation

A. Question Presented

Whether, in light of the Court of Chancery's recent decision in In re Synthes, the liquidity conflict analysis of McMullin v. Beran still presents a workable framework for this Court going forward.

B. Scope of Review

Under Delaware law, a court departs from stare decisis when the prior decision has lost its legal vitality, or for urgent reasons and "upon clear manifestation of error." Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 124 (Del. 2006); Travelers Indem. Co. v. Lake, 594 A.2d 38, 46 (Del. 199).

C. Merits of the Argument

The liquidity conflict analysis of *McMullin* no longer represents a workable framework for this Court going forward. This Court should overrule *McMullin* because 1) it is inapplicable in the context of a motion for a preliminary injunction; and 2) Chancellor Strine's opinion in *In re Synthes* represents the more logical analysis of the conflict liquidity.

1. The liquidity conflict analysis of McMullin is inapplicable as McMullin was decided on a motion to dismiss.

Galena argues that Allen's need for liquidity constitutes a disabling conflict, subjecting the Vicente Merger to entire fairness. (R. at 24). However, as Chancellor Nelson noted, *McMullin* was decided on a motion to dismiss, and the plaintiffs "enjoyed every favorable inference afforded by the factual allegations . . ." (R. at 25). In a motion for preliminary injunction the plaintiff must prove a likelihood of success on the merits and a probability of irreparable harm. *Revlon*, 506 A.2d 173, 178 (Del. 1986).

a. Likelihood of success on the merits

Assuming that the Court of Chancery would decide Galena's liquidity conflict claim on the merits, it is clear that the Vicente Merger would have survived entire fairness. Because the Defendants are able to prove the entire fairness of the transaction, this Court should apply the deferential business judgment rule.

i. The Vicente Merger was entirely fair to the minority shareholders.

Galena argues that entire fairness should apply to this transaction due to Allen's need for liquidity. (R. at 24). Delaware law requires that when a controlling shareholder is on both sides of a

transaction, entire fairness applies. Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 845 (Del. 1987). Entire fairness encompasses the concepts of fair price and fair dealing. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983). Fair price relates to the economic consequences of a merger, including assets, market value, earnings, future prospects, and "any other elements that affect the intrinsic or inherent value of a company's stock." Id. Fair dealing examines the structure and negotiation of a transaction, the actions of directors, and how stockholder approval was obtained. Id. Rather than examining these separately, the transaction must be viewed as a whole. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1140 (Del. Ch. 1994); Id. In the case of a cash-out merger, fair price is weighed more heavily than fair dealing, especially where there is a controlling shareholder. Cinerama, 663 A.2d at 1140.

With respect to fair price, the Delaware Court of Chancery, in Cinerama, found that the price paid to the minority shareholders was fair, taking into account the current going value of a firm and the "synergistic value" that would be created by a change. Id. at 1143. In Cinerama, minority shareholders brought suit alleging that the defendants breached its fiduciary duties of loyalty and care, despite that the price received in the cash-out merger was a 100% premium over the market price. Id. at 1135-36. The court found that the price was fair under the totality of the circumstances and that a fair price does not need to be the highest price, but it only needs to be reasonable. Id. at 1141-42, 43.

With respect to fair dealing, there was not a disqualifying conflict on the defendants' part. See Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 594-95 (Del. Ch. 1986). The court in Jedwab held that while a controlling shareholder owes fiduciary duties to minority shareholders, entire fairness is only triggered by a disqualifying conflict, a benefit to the majority at the expense and exclusion of the minority. Id. at 595 (citing Sinclair Oil v. Levinson, 280 A.2d 717, 720 (Del. 1971)). The plaintiffs alleged that this transaction was entitled to be reviewed under entire fairness because the cash-out merger treated preferred and common stock differently, despite the majority shareholders receiving less per share than minority shareholders. Id. at 591. The plaintiffs took the position that it was a breach of the duty of loyalty to favor one class of stock over another. Id. The court rejected the plaintiffs' claims of breach of the duty of loyalty, finding that the controlling shareholder did not favor preferred over common stock, but had a substantially equal interest in each class. Id. at 595.

The Vicente Merger passes entire fairness alleged by the Galena. With respect to fair price, like the court pointed out in *Cinerama*, the price paid only has to be reasonable for a seller to accept given the circumstances. *Cinerama*, 663 A.2d at 1143. In the present case, the price that all shareholders would receive is fair and reasonable. All shareholders are receiving the same all-cash consideration for their shares. (R. at 11-12) Further, prior to the Vicente Merger being announced, Callison stock was being traded at \$27 per share, with the Vicente Merger representing a 26% premium in the stock price. (R. at

11). Although Galena's offer topped Vicente's bid by \$1.50 per share, it was still reasonable for the Defendants to accept the Vicente Merger when taking into account the \$87 million termination fee.

Cinerama, 663 A.2d at 1143 ("[A fair] price . . . is one that a reasonable seller, under all circumstances, would regard as within the range of fair value; one that such a seller could reasonably accept."); (R. at 13, 15).

In addition to the price paid for Callison stock being fair, the conduct of the Callison board satisfies the fair dealing aspect of entire fairness. Galena's liquidity conflict claim does not rise to the level of a disqualifying conflict sufficient to prove that the transaction was unfair. See Jedwab, 509 A.2d at 595 (holding that the different treatment of common and preferred stock did not create a disqualifying conflict even in the presence of a controlling shareholder on both sides of the transaction). While Allen will receive liquidity to pursue the acquisition of Ca' Foscari, the minority shareholders will receive the same \$34 per share as Allen. (R. at 11). Further, the Defendants appointed an independent Special Committee, composed of outside directors to canvass the market, solicit bids, and negotiate bids on behalf of Callison. (R. at 4-5). The Special Committee spent nearly two months canvassing the market and soliciting bids from interested suitors, and independently approved the Vicente bid prior to presenting it to the full Callison board. (R. at 11).

> ii. Because the Defendants satisfy entire fairness, this Court should apply the deferential business judgment rule.

Having established that the Plaintiff cannot prevail on its conflict liquidity claim under entire fairness, this Court should apply the business judgment rule to the Vicente Merger. See (Rec. at 24). The business judgment rule is a presumption "that 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). The burden of the business judgment rule rests with Galena to allege specific facts that rebut the presumption of the business judgment rule. Cede Co. v. Technicolor, 634 A.2d 345, 361 (Del. 1993).

Applying the business judgment rule, Galena is unable to rebut the presumption in its liquidity conflict claim. As demonstrated earlier, the Defendants acted on an informed basis that the Vicente Merger was the best transaction for all parties, despite Allen's need for liquidity. (R. at 6-13) (outlining the composition of the Special Committee, the bidding process, and the acceptance of the Vicente Merger). Galena alleges that the Defendants misused the DADW Standstill, however, Galena does not provide any further information about how the Defendants' use of the DADW Standstill specifically prejudiced them. See (R. at 24). Due to the lack of specific factual allegations, Galena is unable to overcome the presumption of the business judgment rule that the Defendants acted on an informed manner and in good faith. See Cede Co., 634 A.2d at 361; see (R. at 24).

b. <u>McMullin</u> is not applicable in the context for a motion for preliminary injunction.

Due to the exacting standard imposed by this Court in order for a plaintiff to prevail on a motion for preliminary injunction, it is clear that McMullin should not apply. See (R. at 25) (noting that the Plaintiff is charged with proving a likelihood of success on the merits in order to prevail in the conflict liquidity claim). Because McMullin was decided on a Rule 12(b)(6) motion to dismiss, the facts are "taken as true and all inferences therefrom are viewed in a light favorable to the plaintiff." McMullin v. Beran, 765 A.2d 910, 916 (Del. 2000). In a 12(b)(6) motion to dismiss, the relevant inquiry is whether there is "any set of facts that could be proven to support the claims asserted" Id.

In McMullin, a minority shareholder brought suit alleging that the defendants breached their fiduciary duties by failing to seek the highest price available for all shareholders. Id. at 914. The controlling shareholder owned 80% of the subsidiary company and negotiated a sale, approaching only one buyer. Id. at 915-16. Under this liberal approach, the court accepted the plaintiff's allegations and found a breach of fiduciary duty due to the defendants' need for cash. Id. at 922. The court found that the board's deliberative processes were compromised due to its need for liquidity. Id.

In the present case, if this Court were to apply the same reasoning as the *McMullin* court, accepting Galena's allegations as true, then it is clear that there was indeed a liquidity conflict on Allen's part. See (R. at 3-4) ("[A] disposition of Allen's 72% ownership in Callison would produce the necessary proceeds with which to consummate . . . a transaction [with Ca' Foscari]."). However, due

to the heavy burden that Galena is charged with, the reasoning of *McMullin* is inapplicable here as the *McMullin* court based its decision on assumptions and factual inferences from the plaintiff's amended complaint. *McMullin*, 765 A2d at 921-923. Although Allen would benefit from liquidating its Callison shares, Galena is not entitled to the assumption that "Allen's interest in liquidity diverges from and thus is not aligned with the financial interest of all minority stockholders" (R. at 24).

2. This Court should adopt Chancellor Strine's liquidity conflict analysis, overruling *McMullin*.

In 2000, the Delaware Supreme Court decided McMullin, and in the years that have followed, the decision has received criticism for its analysis of the liquidity conflict, in particular from Chancellor Strine. See In re Synthes S'Holder Litig., 50 A.3d 1022, 1041 (Del. Ch. 2012); see also In re Toys "R" Us S'Holder Litig., 877 A.2d 975, 1013 n. 57 (Del. Ch. 2005). The liquidity conflict analysis in McMullin should be abandoned in favor of Chancellor Strine's analysis in Synthes: 1) that liquidity does not automatically create a disabling conflict when all shareholders are treated equally; and 2) that the majority shareholders should not have to take a different deal in order maximize wealth for minority shares only. See Synthes, 50 A.3d at 1035-37, 1039-41.

a. Because Allen received the same consideration as the minority shareholders, the desire for liquidity did not create a disabling conflict.

Galena's assertion that Allen's desire for liquidity created a disabling conflict is in error. A disabling conflict is present when a

majority shareholder receives a material benefit at the expense and exclusion of minority shareholders. Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993). A benefit is material if it would cause the director not to perform his fiduciary duties in light of his overriding personal interest. N.J. Carpenters Pension Fund v. Infogroup, No. Civ. A 5334, 2011 WL 4825888, at *9 (Del. Ch. Sept. 30, 2011) (citing Orman v. Cullen, 794 A.2d 5, 23 (Del. Ch. 2002)). Further, the shareholders must have received a benefit that is not shared with the other shareholders. Id. at *10.

In Synthes, the court found that the controlling shareholder's need for liquidity did not create a disabling conflict because the benefits were shared equally among minority shareholders as well as the controlling shareholder. Synthes, 50 A.3d at 1035. The plaintiffs alleged that the controlling shareholder's need for liquidity contaminated the sales process because he was looking to make a quick exit from the company. Id. at 1025-26, 1035. The Court of Chancery rejected this argument, reasoning that controlling shareholders have the most incentive to get the best deal possible since they have the largest financial stake in the company. Id. at 1035.

In the present case, Allen's desire for liquidity does not present a disabling conflict since all shareholders are receiving the same consideration. See (R. at 11). The benefit that Allen would receive is the same benefit that Galena would receive upon consummation of the deal. (R. at 11, 16). Unlike the suggestion in McMullin that the need for liquidity presents a disabling conflict,

the analysis in *Synthes* is the more workable framework moving forward. See *Synthes*, 50 A.3d at 1035; *McMullin*, 765 A.2d at 922.

b. This court should adopt the reasoning in *Synthes* that a controlling shareholder should not have to sacrifice in order to maximize value for minority shareholders.

Chancellor Strine's position in *Synthes* is that a controlling shareholder should not have to sacrifice value in order to maximize value for the minority shareholders. *See Synthes*, 50 A.3d at 1041. The *Synthes* court stated that while a controlling shareholder does have a duty to act in the best interests of the corporation, that does not mean self-sacrificing value so the minority shareholders can achieve a higher value. *Id.* at 1040-41.

In McMullin, accepting the plaintiff's allegations as true, the court found that the defendants' position as a controlling shareholder, the unilateral negotiation, and sale of the company constituted a disabling conflict due to the controlling shareholder's need for cash. McMullin, 765 A.2d at 922. The controlling shareholder sought to liquidate its interest in the company in order to pursue another business venture. Id. at 921. The court found that the sale of the company would have passed judicial muster if the defendants had structured the deal in a way to achieve wealth maximization for the minority shareholders. Id. at 922 ("The [defendants] were obligated to determine whether the . . . [t]ransaction . . . would maximize value for the minority shareholders.") (emphasis added). This language would seem that the McMullin court would have preferred a transaction in which the controlling shareholders received less per share than the minority. See Synthes, 50 A.3d 1041 n.91.

By contrast, in *Synthes*, the Court of Chancery rejected this specific allegation, holding that the controlling shareholder did not violate his fiduciary duties to the minority by opposing a transaction that would have been less beneficial to himself. *Id.* at 1041.

Chancellor Strine took the opportunity to criticize the holding of *McMullin* by stating that a differently structured deal does not always mean a higher value in cash, but that *McMullin* forces controlling shareholders to forfeit its legitimate interest in liquidity to favor the minority. *Id.* at 1041 n.91.

While Galena does not argue that the Defendants should take a lower amount than the minority, the analysis of Chancellor Strine in Synthes is the appropriate framework for this Court to adopt. A differently timed or structured deal does not necessarily mean it is a better deal for all shareholders. Id. Assuming that the Defendants had waived the DADW Standstill for Galena and accepted its bid of \$35.50 per share, the uncertainty surrounding the company would have ultimately had a negative effect on the stock price. See (R. at 7) (explaining that the purpose for the structuring of the transaction was to preserve key business relationships).

CONCLUSION

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

Respectfully submitted,

/s/ Team J

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