

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALLISON INC., TIMOTHY MICHAELS :
CLARE LIEBERMAN, RHANEY PATRICKS, : No. 7918-CN
JULIO LUIS-ROJAS, PATRICK AUSTIN, :
MARSHA FRANKLIN, ARI SINGH and :
ALLEN ENTERPRISES INCORPORATED, :
 :
Defendant Below- :
Appellants, :
 :
v. : Court Below- Court of Chancery of
 : the State of Delaware, in and for
GALENA CAPITAL PARTNERS, LLC, : New Castle County
 :
Plaintiff Below- :
Appellee. :

Appellee's Opening Brief

Dated: February 8, 2013

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Counsel for
Plaintiffs below- Appellee

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NATURE OF PROCEEDINGS

Plaintiff Galena Capital Partners, LLC. ("Galena") commenced this action against Callison, Inc. ("Callison"), the seven members of Callison's board of directors (collectively "the Callison Directors"), and Allen Enterprises Inc. ("Allen") on December 21, 2012, challenging the sale of Callison to Vicente Capital, Inc. ("Vicente"). *Galena Capital Partners, LLC v. Callison Inc.*, No. 7918-CN, slip op. at 16. (Del. Ch. Jan. 14, 2013). On January 14, 2013, the Court of Chancery granted a preliminary injunction enjoining Callison and the Callison Directors from enforcing the "Don't Ask, Don't Waive" Standstill ("DADW Standstill") signed by Galena. *Id.* at 23. In an order dated January 15, 2013, the court enjoined the sale of Callison to Vicente. *Galena Capital Partners, LLC v. Callison Inc.*, No. 7918-CN (Del. Ch. Jan. 15, 2013) (order granting preliminary injunction).

On January 17, 2013, the Defendants collectively filed an application pursuant to Supreme Court Rule 42 for an order certifying an appeal from the interlocutory order. Order. *Galena Capital Partners, LLC v. Callison Inc.*, No. 162, 2013 (Del. Jan. 17, 2013) (order accepting interlocutory appeal). If accepted, the parties have agreed to an expedited appeal. *Id.* On January 25, 2013, this Court accepted the interlocutory appeal. *Id.*

SUMMARY OF ARGUMENT

This case is about ensuring that directors play by the rules. This Court should affirm the Court of Chancery's grant of preliminary injunction and find in favor of Plaintiff Galena for two reasons. First, the DADW Standstill precludes the Callison Directors from fulfilling their fiduciary duties under *Relvon* and, further, the

provision is unenforceable in this case because it operates as an unreasonable deal-protection device under *Omnicare*.

Second, this Court should affirm the Court of Chancery's grant of preliminary injunction because this Court should evaluate the sale of Callison under the entire fairness standard. The entire fairness standard applies because the majority of the Callison Directors expect a financial benefit from the sale of Callison that would not be shared equally between shareholders. Furthermore, the transaction does not satisfy the Callison Directors' entire fairness burden because it lacks fair dealing.

STATEMENT OF FACTS

This appeal involves the use of a DADW Standstill used in the sale of Callison in its entirety. *Galena* No. 7918-CN at 1. The Court of Chancery granted Galena's motion for preliminary injunction enjoining the Callison Directors from enforcing the DADW Standstill, reasoning that the Standstill prevents the Callison Directors from fulfilling their fiduciary duties. *Id.* at 23. The Defendants appealed.

Callison is a Delaware corporation headquartered in Raleigh, North Carolina. *Id.* at 2. Callison manufactures and sells athletic apparel to retail stores and has a market capitalization of \$2.3 billion. *Id.* Allen is a holding company and a Delaware corporation that owns approximately 72% of the outstanding shares of Callison common stock. *Id.* The individual Defendants consist of the seven Callison Directors, each of whom was nominated and elected by Allen. *Id.* at 3. Of the seven, four are full time salaried executives of Allen. *Id.*

In July 2012 Allen became interested in acquiring a major restaurant chain. *Id.* at 4. In order to finance the acquisition, Allen acknowledged it would be forced to liquidize its 72% ownership of Callison. *Id.* Because the majority of the Callison Directors are Allen executives, it is not surprising that the Callison Directors also began to consider the sale of Callison at this time. *Id.* The Callison Directors established a special committee ("Committee") composed of the three directors who are not Allen executives. *Id.* at 5. This Committee had the power to negotiate on behalf of Callison; however, any transaction required approval by all Callison Directors. *Id.* Simply put, any proposed merger agreement was subject to the votes of the four Allen executives as board members and to Allen's 72% shareholder vote. *Id.*

On October 20, 2012, the Committee decided not to conduct a public auction, opting instead for a private auction consisting of one round of bidding. *Id.* at 7. The Committee was concerned that a public and protracted auction could demoralize key Callison employees and jeopardize future long-term commitments with its customers. *Id.* In an effort to protect against a public and protracted auction, the Committee and its outside legal and financial advisors agreed to require that any interested bidder sign a DADW Standstill. *Id.*

The DADW Standstill operated in the following manner. Any interested purchaser had to sign the DADW Standstill before having access to Callison's confidential information. *Id.* Upon invitation into the private auction, the DADW Standstill allowed any interested purchaser of Callison to submit only one bid simultaneously with all

other bidders before December 14, 2012. *Id.* at 8. The DADW Standstill further prohibited any losing bidder from making a topping bid to the Committee. *Id.* After the auction, however, Callison had a forty-day window to receive bids from anyone other than those who signed the DADW Standstill. *Id.* at 9. Significantly, Allen signed the DADW with a provision that obligated Allen to tender its entire 72% block to the winning bidder. *Id.*

Following the October 20 meeting and through the month of November, the investment bank employed by the Committee examined the interest of 20 potential bidders. *Id.* at 10. Seven of these companies expressed an interest in acquiring Callison; however, only six agreed to sign a DADW Standstill. *Id.*

Meanwhile, on November 28, 2012, Allen reached a definitive agreement to purchase the Ca' Foscari restaurant chain for a cash price of \$2.4 billion. *Id.* at 6. The agreement contained a penalizing liquidated damages clause that required Allen to pay \$60 million if it failed to consummate its purchase by March 31, 2013. *Id.* It is important to note that the agreement was not conditioned on Allen's obtaining financing, placing greater urgency on Allen's ability to liquidate its 72% stake in Callison. *Id.*

On December 4, 2012, the six parties who signed a DADW Standstill were invited to submit their "only, best and final offer." *Id.* at 10. Vicente emerged as the highest bidder at \$34.00 per share, edging Galena's \$32.50 per-share bid. *Id.* at 11. The Committee then proposed the Vicente transaction to the other Callison Directors, who unanimously approved Vicente's offer. *Id.* at 12. Callison and Vicente

then negotiated a two-step merger agreement consisting of a first-step cash tender offer by Vicente at \$34 per share, followed by a cash-out merger of any outstanding shares. *Id.* Pursuant to its provisional agreement on each DADW Standstill, Allen agreed to tender its 72% stake to Vicente in the first step tender offer. *Id.* at 13. Finally, the Callison Directors unanimously approved the agreement. *Id.* at 14.

On December 19, 2012, Galena asked the Callison Directors to waive the DADW Standstill so that it could make a topping bid of \$35.50 per share - amounting to about \$128 million of additional consideration over Vicente's bid. *Id.* at 15. Further, Galena offered to sign a merger agreement with identical terms to that Vicente signed. *Id.* Despite the higher tender offer, the Callison Directors refused to waive the DADW and declined to further consider Galena's offer. *Id.* at 16.

Consequently, Galena sued, seeking a preliminary injunction preventing Callison and/or the Callison Directors from enforcing the DADW Standstill and permitting Galena to proceed with its tender offer. *Id.* The Court of Chancery granted the preliminary injunction, holding that the DADW Standstill prevents the Callison Directors from fulfilling their fiduciary duties. *Id.* at 23.

ARGUMENT

I. The Court of Chancery appropriately enjoined the Callison Directors from enforcing the DADW Standstill because the provision precludes the Directors from fulfilling their fiduciary duties under Revlon, and it is an unreasonable deal-protection device under Omnicare.

A. Question Presented

Whether the Court of Chancery correctly enjoined the Callison Directors from enforcing Galena's DADW Standstill because the provision precludes the Directors from fulfilling their fiduciary duties under *Revlon*.

B. Standard of Review

"This Court's standard and scope of review on appeal from a preliminary injunction is whether, after independently reviewing the entire record, the findings of the Court of Chancery are sufficiently supported by the record and a product of an orderly and logical deductive process." *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 37 n.3 (Del. 1993) (citing *Ivanhoe Partners v. Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334, 1341-42 (1987)).

C. Merits of Argument

The Court of Chancery appropriately enjoined the Callison Directors from enforcing the DADW Standstill because it precludes the Callison Directors from fulfilling their fiduciary duties under *Revlon*. Further, all the DADW Standstills in this case are unenforceable because they, together with the other deal-protection devices, are unreasonable under *Omnicare*.

1. The Callison Directors' failure to waive Galena's DADW Standstill violated Revlon because the provision precludes the Directors from fulfilling their duty to be informed.

"A business corporation is organized and carried on primarily for the profit of the stockholders." *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). This notion played a leading role in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, where this Court held that once the sale of a corporation becomes inevitable, the duty of the corporation's board changes "from the preservation of [the company] as a corporate entity to the maximization of the company's value at a sale for the stockholders benefit." 506 A.2d 173, 182 (Del. 1985). The obligation to obtain the best price available for stockholders has been termed a board's "Revlon duties." See *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1989).

a. The Callison Directors' decision to sell Callison in its entirety implicated Revlon and the enhanced scrutiny review.

Revlon duties are implicated "when a corporation initiates an active bidding process seeking to sell itself." *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989). Two important consequences flow from the application of Revlon. First, the board's fiduciary duties must focus on short-term profit maximization for the benefit of the shareholders. See *Macmillan*, 559 A.2d at 1288. Second, the flexibility normally afforded to directors under the business judgment rule gives way to an enhanced scrutiny review of their decisions. *QVC*, 637 A.2d at 42.

First, Revlon transforms the directors' role into that of an auctioneer charged with obtaining the best price for the stockholders

at the company's sale. *Revlon*, 506 A.2d at 182. *Revlon* involved a board's decision to sell a company to a white knight in order to fend off a hostile takeover. *Id.* at 178. The definitive merger agreement entered into with the white knight contained deal-protection devices - specifically, lock up and no-shop provisions - that were found to have effectively ended the bidding contest for the company. *Id.* at 182. While ultimately holding that the directors violated their fiduciary duties by entering into the auction-ending merger agreement, this Court acknowledged the latitude a board has in responding to takeover threats. *Id.* at 180 (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). However, when the sale of the company became inevitable, "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at the sale of the company." *Id.* Thus, the directors breached their fiduciary duties because the deal-protection devices precluded the directors from obtaining the best price for their stockholders. *Id.*

Second, when *Revlon* applies, board actions are no longer protected by the traditional business judgment rule, but instead are reviewed under an enhanced scrutiny test. See *QVC*, 637 A.2d at 42. See also *Barkan v. Amsted Industries, Inc.*, 567 A.2d 1279, 1286 (Del. 1989). Enhanced scrutiny of board actions taken during a hostile takeover or a sale of corporate control is justified because of the increased risk that the target company's board may act primarily in its own interests rather than those of the corporation's shareholders. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (announcing enhanced scrutiny review of measures taken by board in

opposition to hostile takeover); *Omnicare, Inc. v. NHS Healthcare, Inc.*, 818 A.2d 914, 930 (Del. 2003) (applying enhanced scrutiny test to a negotiated merger transaction).

Enhanced scrutiny review requires that the court "take a more direct and active role in overseeing the decisions made and actions taken by the directors." *QVC*, 637 A.2d at 42. According to *QVC*,

The key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decision making process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.

Id. at 45.

Revlon duties and enhanced scrutiny review attached to the present case on November 28, 2012, when Allen signed a definitive agreement to purchase Ca' Foscari from FVP Restaurants Inc. *Galena*, No.7918-CN at 6. Thus, on this date the sale of Callison became inevitable, see *Revlon*, 506 A.2d at 182, because Callison Directors - the majority of whom are Allen employees - knew that Allen's Ca' Foscari purchase would require a disposition of Allen's 72% ownership position. *Galena*, No.7918-CN at 6. The Callison Directors actions taken after November 28, therefore, were subject to the obligation to obtain the best price reasonable available for stockholders.

The Court of Chancery appropriately enjoined the Callison Directors from enforcing *Galena's* DADW Standstill for two reasons. First, the Callison Directors acted unreasonably and breached their duty to be informed when they failed to waive the DADW Standstill

signed by Galena. Second, the Callison Directors' use of the DADW Standstill was not for a value-maximizing purpose but instead was used to benefit non-shareholder constituencies.

b. The Callison Directors breached their duty to inform themselves when they refused to waive Galena's DADW Standstill.

Under an enhanced scrutiny test, this Court must review the substantive merits of a board's decision. *QVC*, 637 A.2d at 45. While this review does not require a perfect decision, it does require that the board's actions be reasonable in light of the circumstances then existing. *Id.* Because the Callison Directors refused to waive Galena's DADW Standstill when they knew that Galena intended to offer more value to the Callison shareholders, the Callison Directors acted unreasonably and breached their fiduciary duties.

When a board pursues its *Revlon* duties, "[t]he need for adequate information is central to the enlightened evaluation of a transaction that a board must make." *Barkan*, 567 A.2d at 1287. Therefore, directors have a "duty to inform themselves, prior to making a business decision, of all material information reasonably available to them." *QVC*, 637 A.2d at 49. This duty also includes the obligation "to disclose with entire candor all material facts concerning the merger, so that the minority stockholders would be able to make an informed decision." *McMullin v. Beran* 765 A.2d 910, 917 (Del. 2000).

In *QVC*, this Court rejected the defendant directors' argument that they were precluded by contractual provisions from negotiating with a third party. *QVC*, 637 A.2d at 48. The contractual provisions at issue in *QVC* prevented the target board from entering into negotiations with a third party. *Id.* at 39. This Court reasoned that

"such provisions, whether or not they are presumptively valid in the abstract, may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the [] directors from carrying out their fiduciary duties under Delaware law." *Id.* at 48. Thus, when the defendant directors refused to negotiate with the third party because of the contractual restriction, they rejected "the opportunity...to seek significantly higher value" for their stockholders and, as a result, breached their *Revlon* duties. *Id.* at 49.

The Court of Chancery has recently expressed concern that the enforcement of DADW standstills may conflict with the board's duty to be informed. See *In re Celera Corp. S'holder Litig.*, C.A. No. 6304-VCP, 2012 WL 1020471 (Del. Ch. 2012) *aff'd in part, rev'd in part*, 2012 WL 6707736 (Del. 2012). In *Celera*, Vice Chancellor Parsons noted that the DADW standstills blocked "at least a handful of once-interested parties from informing the Board of their willingness to bid." *Id.* at 21. Similarly, in *Complete Genomics*, Vice Chancellor Lastor emphatically proclaimed that the DADW standstill "absolutely preclude[s] the flow of incoming information to the board" and was therefore impermissible. *In re Complete Genomics, Inc. Shareholder Litig.*, Consol. C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (Transcript of Telephonic Ruling). Furthermore, the standstill "represents a promise by a fiduciary to violate its fiduciary duty, or represents a promise that tends to induce such a violation." *Id.*

Most recently, Chancellor Strine pointed out that where the winning bidder does not demand an assignment of the right to enforce the DADW standstills signed by losing bidders, he would recommend that

the selling company waive the DADW standstills' "no ask" provisions as to the other parties "[w]hich then makes clear to all of them that if they wish to ask for a waiver in order to make a superior proposal, that they are legally allowed to do that." *In re Ancestry.com Shareholder Litig.*, Consol. C.A. No. 7988-CS (Del. Ch. Dec. 27, 2012) (Transcript of Telephonic Ruling).

Applied to the present case, the Callison Directors refused to waive Galena's DADW Standstill despite no assignment demand from Vicente. This refusal was unreasonable in light of the circumstances then existing because the Callison Directors insisted on the contract's terms despite knowing that Galena intended to make a superior offer. Thus, the Callison Directors' failure to waive the DADW Standstill upon receiving a higher tender offer from Galena violated their *Revlon* duties. Further, the Callison Directors may not use a contractual provision to limit their *Revlon* duties or prevent them from carrying out their *Revlon* duties. See *QVC*, 637 A.2d at 48.

In sum, *Revlon* required that the Callison Directors inform themselves of and consider Galena's superior offer for Callison. Instead, the Directors attempted to assert a contractual provision that ostensibly prevented them from exercising this duty. As *QVC* showed, however, this was impermissible. Thus, the Callison Directors breached their *Revlon* duties by willfully blinding themselves to material information that would have provided greater value to Callison stockholders.

c. The Callison Directors improperly considered non-shareholder constituencies when it used DADW Standstills.

A board is not limited to a single method in deciding how to obtain the best value for shareholders. *Barkan*, 567 A.2d at 1286-87. However, “[i]n the sale of control context, the directors must focus on one primary objective - to secure the transaction offering the best value reasonably available for the stockholders - and they must exercise their fiduciary duties to further that end.” *QVC*, 637 A.2d at 44. Accordingly, this Court in *Revlon* stated “concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.” *Revlon*, 506 A.2d at 182.

In the context of DADW standstills, the Court of Chancery has similarly recognized the importance of a shareholder-focused and value-maximizing purpose. Chancellor Strine recently cautioned against the use of DADW standstills because they are “potent” and “directors need to use these things consistently with their fiduciary duties, and they better be darn careful about them” as “they’re often used in cases like this which are governed by *Revlon*.” *In re Ancestry.com Shareholder Litig.*, Consol. C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (Transcript of Telephonic Ruling).

The Callison Directors’ decision to use the DADW Standstills was inconsistent with their *Revlon* duties. The Directors used the DADW Standstills due to the concern that a prolonged or public auction could demoralize key employees and jeopardize long-term commitments

with important customers. *Galena*, No.7918-CN at 7. To alleviate these concerns, the Callison Directors opted to use DADW Standstills in connection with a private auction "over a relatively short time frame." *Id.* The alleviation of these concerns, however, does not in any way benefit the current shareholders of Callison who, once the sale of Callison became inevitable, were concerned only with the company's sale price. In sum, the Callison Directors decision to use DADW Standstills was motivated by constituencies other than its shareholders and was therefore unreasonable and in violation of *Revlon*.

2. The DADW Standstills, combined with the Allen Provisional Pre-Commitment Tender Agreement and the termination fee, operate as an unreasonable deal-protection device under *Omnicare*.

The DADW Standstills in the present case are also unenforceable because they operate as an unreasonable deal protection device. See *Omnicare*, 818 A.2d at 932. The enhanced scrutiny test announced in *QVC* and explained above applies with equal force to deal-protection devices. See *Id.* In this context, a board can prove the reasonableness of its decision-making process so long it was neither preclusive nor coercive. *Id.*

In *Omnicare*, this Court reviewed whether defensive devices adopted by a target's board to protect a definitive merger agreement were reasonable under the enhanced scrutiny test. *Id.* *Omnicare* stated that devices that are either preclusive or coercive are unreasonable. *Id.* at 935. Board action is coercive "if it is aimed at forcing upon stockholders a management-sponsored alternative to a hostile offer." *Id.* at 935 (quoting *Unitrin, Inc. v. American General Corp.*, 651 A.2d

1361, 1387 (Del. 1995)). An action is preclusive "if it deprives stockholders of the right to receive all tender offers or precludes a bidder from seeking control by fundamentally restricting proxy contests or otherwise." *Id.*

In *Omnicare*, two devices were at play. The first - contained in the merger agreement - was a board promise that it would submit the bidder's tender offer to a shareholder vote regardless of whether the board recommended it. *Id.* at 925-26. The second - a voting agreement - bound two shareholders representing in excess of 50% of the outstanding voting power to approve the bidder's tender offer. *Id.* at 925. Although contained in two separate agreements, this Court considered their combined effect because "the stockholder voting agreements were inextricably intertwined with the defensive aspects of the [] Merger Agreement." *Id.* at 934.

The two defensive devices, considered together, were both coercive and preclusive. *Id.* at 936. The devices were coercive because the minority stockholders had no choice but to accept the tender offer. *Id.* Thus, the offer was a *fait accompli*. *Id.* For this same reason, the devices were preclusive because any other bidder was precluded from making a successful bid. *Id.* As a result, this Court determined that the two devices could not withstand enhanced scrutiny review. *Id.*

There are three deal-protection devices at play in the present case: the DADW Standstill; Allen's Provisional Pre-Commitment Tender Agreement, which obligates Allen to tender its 72% voting block to the winner of the DADW upon the Directors' approval; and the termination

fee owed to the winning bidder if the Directors decided to recommend a superior proposal. *Galena*, No.7918-CN at 8-10. Just as in *Omnicare*, these three devices operated to make the winning bidder's tender offer a *fait accompli* despite whether a better offer came about.

First, the devices were coercive. Due to Allen's voting block, the Directors were reluctant to recommend any offer that Allen would not approve. *Id.* at 9. Further, Allen possessed an exigent liquidity interest due to its November 28 purchase agreement that was not conditional on financing. *Id.* at 6. As a result, in combination with the substantial termination fee it would owe otherwise, it was a *fait accompli* that the Callison Directors would recommend to its shareholders the private auction winner's tender offer. Further, it was a *fait accompli*, contractually, that Allen would tender its 72% voting block to this winner. In addition, as in *Omnicare*, the devices are preclusive because they make it difficult for any interested bidder to make a successful bid for Callison.

In sum, the DADW Standstills in the present case are unenforceable because they operate as an unreasonable deal-protection device under *Omnicare*. Thus, the Court of Chancery appropriately enjoined its enforcement.

II. Entire fairness is the applicable standard of review in this case to evaluate the allegations of director misconduct, and the Callison Directors failed to satisfy this standard.

A. Question Presented

Whether this Court should find that 1) an entire fairness standard applies to the sale of Callison; and 2) the Callison Board failed to satisfy the entire fairness standard.

B. Standard of Review

"This Court's standard and scope of review on appeal from a preliminary injunction is whether, after independently reviewing the entire record, the findings of the Court of Chancery are sufficiently supported by the record and a product of an orderly and logical deductive process." *QVC*, 637 A.2d at 37 n.3 (citing *Ivanhoe Partners v. Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334, 1341-42 (1987)).

C. Merits of Argument

1. The entire fairness standard applies because the majority of the Callison Directors expect a financial benefit from the sale of Callison that does not benefit all other shareholders equally.

The business judgment rule will not apply where a majority of directors approving a transaction expect to derive a financial benefit from the transaction that does not benefit all shareholders equally. *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983). The business judgment rule establishes a presumption that, in making a business decision, "the directors of a corporation have acted on an informed basis, in good faith, and in the honest belief that their decision is in the best interests of the company." *Aronson*, 473 A.2d at 812. The burden is on the plaintiff challenging the directors' decision to establish facts rebutting this presumption. *Id.* at 812.

If the plaintiff rebuts this presumption, however, by showing that a majority of the directors approving a transaction expect to derive a material, financial benefit not equally shared between shareholders, then the business judgment rule does not apply. *Orman v. Cullman*, 794 A.2d 5, 22-23 (Del. Ch. 2002). As a result, the entire

fairness standard is the applicable standard to evaluate directors' decisions. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). Under the entire fairness standard, the directors approving the transaction bear the burden of proving the sale is entirely fair to all shareholders. *Id.*

a. The majority of the Callison Directors expect a financial benefit from the sale of Callison.

This Court has recognized that liquidity is a financial benefit that triggers the entire fairness standard. *McMullin*, 765 A.2d at 921-22. In *McMullin*, the defendant directors circumvented their deliberative transactional process to accommodate the controlling shareholder ARCO's immediate need for cash. *Id.* ARCO was contractually bound to fund a \$3.3 billion acquisition of another company, and would lose its single-A credit rating if it failed to complete the transaction. *Id.* at 921. This court denied the defendants' motion to dismiss, holding that the directors' conflicted loyalty to ARCO's liquidity interest may have led them to sacrifice potential shareholder value. *Id.* at 923.

The Court of Chancery has emphasized the presence of exigent circumstances before finding that liquidity was a financial benefit. See *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1036 (Del. Ch. 2012). In *Synthes*, the court rejected the plaintiff's contention that the target company chairman and controlling shareholder - despite being very wealthy - forced a crisis sale to provide the liquidity he needed for his retirement objectives. *Id.* at 1036-37. The court reasoned that the controlling shareholder's retirement planning faced

neither a solvency issue nor exigent circumstances – “such as a margin call or default in a larger investment.” *Id.* at 1036.

Additionally, an expedited transaction process lacking negotiations and other calculated steps can underscore an immediate need for liquidity. See *In re CompuCom Sys., Inc. S’holders Litig.*, 2005 WL 2481325 at 10 (Del. Ch.) (holding that when the “process of finding a suitable transaction dragged on for more than two years,” the controlling shareholder did not unduly impose an immediate sale of the company at a “fire sale price”); *Van de Walle v. Unimation, Inc.*, 1991 WL 29303 at 11 (Del. Ch.) (rejecting notion that controlling shareholder’s financial distress prompted a disabling conflict of interest when an eight-month market search and negotiations illustrated that the board wanted to obtain the best possible value for all stockholders).

Like the controlling shareholder in *McMullin*, Callison’s controlling shareholder, Allen, had a need for financial liquidity. Both ARCO and Allen contractually bound themselves to complete an acquisition of another company *without* having the required cash available. Moreover, both would suffer a financial detriment if they failed to close the transaction – ARCO would have lost its single-A credit rating, *McMullin*, 765 A.2d at 921, and Allen would be liable for a \$60 million liquidated damages provision in their Ca’ Foscari acquisition contract. *Galena*, No.7918-CN at 6. This immediate need for liquidity placed great urgency on Allen to cash-out its 72% stake in Callison, *id.*, an urgency far greater than the controlling shareholder’s retirement objectives in *Synthes*. In *Synthes*, the

controlling shareholder did not have a liquidity interest because he faced no immediate financial detriment if he was unable to liquidize his stock. *In re Synthes*, 50 A.3d at 1036 (noting that by the plaintiffs' own admission, the controlling shareholder was financially stable to begin his retirement). Consequently, the *Synthes* plaintiffs could not plead any "facts suggesting the controlling shareholder faced a solvency issue" and "was in any particular rush to sell his *Synthes* shares." *Id.* at 1036. Conversely, Allen did face a solvency issue and was in a particular rush to avoid the financial detriment to its company.

Also, the Callison Directors' expeditious auction underscored Allen's urgent need for liquidity. The Directors' desire to tender Allen's shares in less than two months contrasts with the patient and strategically-negotiated transactions in *CompuCom Sys.* and *Unimation*, where the Court of Chancery found no liquidity exigencies. See *In re CompuCom Sys.*, 2005 WL 2481325 at 10; *Unimation, Inc.*, 1991 WL 29303, at 11. That Allen proposed the Provisional Pre-Commitment Tender Agreement obligating itself to tender all its shares to the winning bidder, regardless of how low the winning price was, further illustrates Allen's interest to quickly liquidate its stake.

b. The liquidity benefit is unique to the majority of the Callison Directors and is not shared by other shareholders.

Liquidity can uniquely benefit an interested controlling shareholder despite a pro rata cash buyout of the other shareholders. See *N.J. Carpenters Pension Fund v. Infogroup, Inc.*, 2011 WL 4825888 at 9 (Del. Ch.). Here, the controlling shareholder initiated a sale of the company because he desperately needed liquidity to repay loans and

personal judgments in excess of \$25 million. *Id.* at 10. Yet, his 34% ownership of the company's common stock was considered illiquid by the court because he could not sell it without flooding the market and significantly driving down its price. *Id.* The second largest shareholder held less than 6% – an amount not subject to the same market risks. *Id.* Consequently, the court denied the company's motion to dismiss. *Id.* The court reasoned that the sale of the company provided a liquidity benefit only to the controlling shareholder because the minority shareholders could have sold their shares for cash at any time. *Id.*

Thus, not only is Allen's liquidity interest a financial benefit, it is also unique to Allen. Even though the sale to Vicente would offer a pro rata \$34 per share, Allen would still receive the benefit of liquidity similar to the controlling shareholder in *N.J. Carpenters Pension Fund* that other shareholders would not receive. There, the court considered the controlling shareholder's 34% ownership of a company with a market capitalization of \$643.75 million too illiquid to sell in a block trade due to its size. *Id.*; *N.J. Carpenters Pension Fund*, No. 5334-VCS Pl.['s] Am. Compl. ¶ 6 (Apr. 8, 2010). Yet, Allen's 72% ownership of a company with a market capitalization of \$2.3 billion is even more illiquid as a block sale. See *Galena*, No.7918-CN at 2. Thus, Allen's desire to sell Callison in an all-cash transaction would bring Allen the benefit of liquidity that other shareholders already have.

c. The liquidity benefit is material to the majority of the Callison Board.

The financial benefit must be material to the director for the entire fairness standard to apply. *Orman*, 794 A.2d at 23. The liquidity benefit that Allen received was a material benefit. Allen would receive over \$2 billion for its 61.2 million shares of common stock in Callison. See *Galena*, No.7918-CN at 2, 12. Pertaining to the *N.J. Carpenters Pension Fund* transaction, the Court of Chancery stated "it would be naive to say, as a matter of law, that \$100 million in cash is immaterial to a man in need of liquidity." *N.J. Carpenters Pension Fund*, 2011 WL 4825888 at 10. Thus, both Allen's larger cash amount and use of the cash to prevent liability for liquidated damages constitute a material benefit to Allen.

In conclusion, Allen has a financial interest in liquidating its control stake in Callison to avoid a \$60 million liquidated damages provision in the Ca' Foscari acquisition. The benefit of liquidity Allen would receive through selling Callison is unique to Allen because of its ownership block size. The liquidity benefit is also material to Allen. For these reasons, the majority of Callison's Board is an interested party in the transaction and entire fairness is the applicable standard of review.

2. Applying the entire fairness standard, Callison has not satisfied its burden or shifted the burden to Galena.

To prove a transaction was entirely fair, directors must demonstrate that the transaction was (1) effectuated at a fair price and (2) the product of fair dealing. *Weinberger*, 457 A.2d at 711

(emphasis added). Fair price and fair dealing "are not independent and the Court does not focus on each of them individually." *S. Muoio & Co. LLC v. Hallmark Entertainment Investments Co.*, 2011 WL 863007 at 9 (Del. Ch.). Fair dealing focuses on the conduct of the fiduciaries involved in the transaction. In analyzing fair dealing, the court may inquire into how the transaction was timed, initiated, negotiated, and structured, as well as how approvals of the directors and stockholders were obtained. *Weinberger*, 457 A.2d at 711. Furthermore, the entire fairness analysis requires the transaction to be objectively fair; the board's subjective belief as to the fairness of the transaction is insufficient. *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 459 (Del. Ch. 2011).

a. The Callison Directors have not satisfied the entire fairness standard because the transaction was not the product of fair dealing.

The formation of a disinterested and independent committee in a cash-out transaction does not necessarily make it fair. See *Rabkin v. Olin Corp.*, 1990 WL 47648 at 860 (Del. Ch.) aff'd 586 A.2d 1202 (Del. 1990). Instead, the committee must function in a manner that indicates that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining power "at arms length." *Id.* A "court's investigation of a special committee process for fairness is highly fact intensive." *Gesoff v. IIC Industries, Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006).

One indicium of a properly functioning independent committee is that, where the majority stockholder has the ability to block any

competing transaction, the special committee must retain power not to accept the proposed transaction:

The power to say no is a significant power. It is the duty of a director serving on [an independent] committee to approve only a transaction that is in the best interest of the public stockholders, to say no to any transaction that is not fair to those shareholders and is not the best transaction available.

In re First Boston, Inc. Shareholders Litig., 1990 WL 78836 at 7 (Del. Ch.).

Regarding the transaction, the Callison Directors did not bestow the Committee with the power to effectively reject the transaction. Only a vote by the all the Callison Directors – including the four members employed by Allen – could reject the transaction. See *Galena*, No.7918-CN at 5. Furthermore, only all the Callison Directors could terminate Allen's Provisional Pre-Commitment Tender Agreement that obligated Allen to tender its entire 72% block to the winning bidder. See *Galena*, No.7918-CN at 9-10. In other words, the Committee was powerless to stop Allen tendering its shares regardless of how low the winning bid might be. That the Committee could not stop Allen – who was contractually bound and in need of liquidity to accomplish its Ca' Foscari acquisition in a few months – from expediting the sale of its shares is not a structure of fair dealing.

b. The Defendants have not shifted the burden of proving the entire fairness to the Galena.

Some cases have held that even though the initial burden of establishing entire fairness rests upon the defendant directors, the approval of the transaction by an independent committee shifts the burden of proof on the issue of fairness from the controlling

shareholder to the challenging plaintiff. *E.g.*, *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1117 (Del. 1994). But the formation of a perfunctory and powerless independent committee does not shift the burden of proof in the entire fairness analysis in a cash-out transaction from the controlling shareholder to the plaintiff. *Kahn v. Temont Corp.*, 694 A.2d 422, 429 (Del. 1997); *Krasner v. Moffett*, 826 A.2d 277, 284 (Del. 2003).

In addition to the Callison Directors' structure of the Committee not amounting to fair dealing, the Directors' actions never even sufficed to switch the burden in the entire fairness standard from the Defendants to Galena. Since the Directors did not bestow the Committee with the power to effectively reject the transaction, the burden of demonstrating that the transaction is not entirely fair cannot shift from the Defendants to Galena. *See Kahn*, 638 A.2d at 1117 (requiring a "fully functioning" committee to shift the burden to the plaintiffs). Thus, the Defendants still bear the full burden of proving the entire fairness of the transaction. As demonstrated above, the facts show that the Defendants have failed to do so.

CONCLUSION

For the reasons stated above, this Court should affirm the Court of Chancery's grant of the Plaintiff Galena's Motion for Preliminary Injunction.

Respectfully Submitted,

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