IN THE SUPREME COURT OF THE STATE OF DELAWARE

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<tr><td>CALLISON INC., TIMOTHY MICHAELS,
CLARE LIEBERMAN, RHANEY PATRICKS,
JULIO LUIS-ROJAS, PATRICK AUSTIN,
MARSHA FRANKLIN, ARI SINGH and
ALLEN ENTERPRISES INCORPORATED,

Defendants Below,
Appellants,

v.

GALENA CAPITAL PARTNERS, LLC,

Plaintiff Below,
Appellee.</td><td>:
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No. 162, 2013

On Appeal From
The Court of Chancery
of the State of Delaware
C.A. No. 7918-CN</td></tr>
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Appellee's Opening Brief

Team "M"
Counsel for Plaintiff Below,
Appellee

February 8, 2013

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NATURE OF PROCEEDINGS

Plaintiff-Appellee Galena Capital Partners, LLC ("Galena") commenced the underlying proceeding against Defendants-Appellants Callison Inc. ("Callison"), its seven directors (Timothy Michaels, Clare Lieberman, Rhaney Patricks, Julio Luis-Rojas, Patrick Austin, Marsha Franklin, and Ari Singh), and Allen Enterprises, Inc. ("Allen Enterprises" or "Allen") on December 21, 2012. (R. 3, 16). Galena challenged the Callison Board's use of a "Don't Ask, Don't Waive" standstill agreement (the "DADW Standstill") which prevented Galena from making bids to purchase Callison other than its initial bid, arguing that this violated the Board's fiduciary duties to Galena as a Callison stockholder. (R. 16). Galena also argued that its continued attempts to acquire Callison did not constitute a breach of any contractual obligations it may owe to Callison under the DADW Standstill. (R. 16-17).

Galena sought expedited discovery and moved for a preliminary injunction preventing Callison from enforcing the DADW Standstill so as to allow Galena to proceed with its own tender offer and subsequent cash-out merger. (R. 17). Following a hearing on January 10, the Court issued an opinion granting Galena's motion for a preliminary injunction on January 14, 2013. (R. 17). The Court found that the DADW Standstill agreement was unenforceable and that the Callison Directors violated their fiduciary duties. (R. 23). An order granting the injunction was issued on January 15, 2013. (Prelm. Inj.). It is from this order that Defendants-Appellants now appeal. This Court accepted the appeal via an order issued on January 25, 2013.

SUMMARY OF ARGUMENT

1. In a sale of an entire company, *Revlon* duties are implicated; the directors must act as impartial auctioneers, whose primary objective is to secure the transaction offering the best value reasonably available for the stockholders. The directors do not enjoy business judgment rule deference in such situations; rather, enhanced scrutiny applies to determine whether the directors were adequately informed and acted reasonably. When a board uses a DADW standstill, as the Callison Board did here, it ignores its fiduciary duty to be adequately informed. The Board has attempted to contract around its fiduciary duties, but the fiduciary duties are constant and cannot be avoided through contract. DADW Standstill agreements are invalid and unenforceable under Delaware law, because they attempt to limit the directors' fiduciary duties. Thus, the Chancery Court's decision to grant Galena's motion for a preliminary injunction should be upheld.

2. When selling the entire company, the Board's duty is to ensure maximum value for all stockholders. The Callison Board breached its fiduciary duty of due care by deferring its judgment to a controlling shareholder and by willfully ignoring relevant information as to the merger's value. Because the Board breached its fiduciary duty of due care, the Board has the burden of demonstrating the entire fairness of the transaction. Entire fairness requires a showing of fair dealing and fair price. The Board cannot show fair dealing here because the conflicted transaction was poorly negotiated and poorly structured. Further, the Board cannot show that the price was the highest value reasonably available, due to the presence of a viable higher offer.

STATEMENT OF FACTS

Callison is a Delaware corporation, traded on the New York Stock Exchange, with a market capitalization of approximately $2.3 billion as of December 14, 2012. (R. 2). Allen Enterprises, a private holding company incorporated under the laws of Delaware and wholly owned by billionaire Allen D. Fairmount III, is the majority shareholder in Callison, owning approximately 72% of the outstanding stock. (R. 2). Galena is one of Callison's minority stockholders. (R. 2). While the Callison stock is not Allen Enterprises only asset, its other assets are collectively worth only a fraction of the Callison stock. (R. 3). In July of 2012, in response to Mr. Fairmount's desire to acquire a major restaurant chain, Allen began exploring the possibility of monetizing its stake in Callison. (R. 3-4). In October of 2012, Allen formally approached Callison, through an investment banking firm, to inform Callison of its interest in monetizing its stake in Callison so as to facilitate its acquisition of a restaurant chain, and that in its view an all-cash transaction would be the most effective method of realizing the highest value for all Callison stockholders. (R. 4).

In response, the Callison Board established a special committee of its three independent directors ("the Special Committee" or "the Committee") to negotiate a potential transaction involving the sale of the entire company. (R. 4-5). However, the Committee was not given authority to enter into a deal; any proposed sale or merger remained subject to approval by the entire Board. (R. 5). The Special Committee met with Allen representatives on October 20, 2012, to decide on the best approach for selling Callison. (R. 6). The Committee expressed that it would not engage in a sale process that might end in futility if Allen was opposed to it. (R. 7). Additionally, the Committee expressed concern that a protracted auction, especially a public auction, could harm the Company and its stockholders by demoralizing key employees and jeopardizing future long-term commitments, among other things. (R. 7). Thus, Allen and the Committee agreed that no public auction would be conducted, and instead potential suitors would be privately canvassed and given a DADW standstill agreement. (R. 7).

Under the DADW Standstill, each potential suitor obtaining due diligence access to Callison's confidential information would understand and commit that any bid it made for Callison could only be made once, with the highest DADW bidder winning the company, subject to a limited market check. (R. 8). The limited market check provided for a fiduciary out and a right of termination by Callison in favor of any "superior proposal" as determined in good faith by the Callison Board. (R. 8-9). However, the DADW Standstill specified that it would be a breach of contract for a losing DADW bidder to make a subsequent bid, or even to ask permission for an opportunity to make a higher bid. (R. 8). The market check included a 25 day Go Shop period during which the Callison Board could solicit other bids, and an additional 15 days during which it could receive, but not solicit, other bids; however, DADW bidders were excluded from this process. (R. 9). Thus, after its initial bid, a DADW bidder would be completely shut off from any further negotiations with the Callison Board. (R. 9).

Meanwhile, on October 15, 2012, Allen Enterprises contacted FVP Restaurants Inc. ("FVP") to express its interest in purchasing the Ca'

Foscari restaurant chain, which was owned by FVP. (R. 5). Allen reached a definitive agreement with FVP on November 28, 2012, for an asset purchase by Allen of the entire Ca' Foscari restaurant chain for a cash price of $2.4 billion. (R. 6). The agreement was not made subject to any financing condition and called for a closing date of no later than March 31, 2013. (R. 6). The agreement provided for liquidated damages of $60 million on any party failing to complete the transaction under circumstances amounting to a contractual breach. (R. 6). Thus, as a practical matter, Allen needed to monetize its stake in Callison by March 31, 2013, or its purchase of Ca' Foscari would fall through, requiring it to pay $60 million in damages. (R. 6).

While Allen negotiated the purchase of Ca' Foscari, Callison's representative approached twenty companies that it deemed a good fit for acquiring Callison. (R. 10). Six of these companies, including Vicente Capital Inc. ("Vicente") and Galena, signed the DADW Standstill and completed due diligence. (R. 1, 10-11). On December 4, 2012, these six suitors were informed that they must submit their "only, best and final" offer by December 14, 2012. (R. 10). All six submitted an offer. (R. 10). Vicente made an all-cash offer of $34 per share, the highest offer received, while Galena made an all-cash offer of $32.50 per share, the second highest. (R. 11). The Special Committee met on December 14 to review all six offers, and following an hour-long presentation by its advisor, who concluded Vicente's offer was financially fair, the Special Committee unanimously agreed to recommend Vicente's offer. (R. 11). The Callison Board met later that same evening, and it unanimously voted to accept Vicente's offer.

(R. 12). That weekend, a definitive merger agreement was reached between Callison and Vicente, including the Go Shop provision and fiduciary out provisions included in the DADW Standstill, with Vicente committing to promptly launch a first step tender offer for any and all Callison shares at $34 per share. (R. 12-13). As a part of the agreement, Allen agreed to tender its Callison stake to Vicente in the first step tender offer; this commitment could only be discharged if the Board determined that an offer received during the Go Shop was superior and Vicente declined to match that offer. (R. 13-14).

Vicente, Callison, and Allen issued a joint press release announcing the merger agreement on December 17, and Vicente began its tender offer that morning. (R. 14-15). Over the next three weeks, Callison's advisors contacted over 100 potential suitors, but per the Go-Shop provision, none of the other DADW bidders were contacted, and none of the contacted suitors expressed interest by the end of the Go-Shop period. (R. 15). However, on December 19, Galena delivered a confidential letter to Callison's Chair and CEO requesting that Callison waive the provision of the DADW Standstill provision that prevented Callison from making a subsequent bid. (R. 15). Galena offered to increase its bid to $35.50 per share and expressed its opinion that the DADW Standstill was not enforceable. (R. 15). The Callison Board met that evening to discuss Galena's offer and decided to follow the DADW Standstill, instructing Galena to cease communications. (R. 16). Galena subsequently launched its own tender offer for $35.50 per share and filed the underlying suit on December 21, 2012. (R. 16).

ARGUMENT

I. THE CALLISON BOARD'S USE OF THE DADW STANDSTILL AS A PART OF THE COMPANY'S SALE PROCESS BREACHED ITS FIDUCIARY DUTIES TO THE CALLISON SHAREHOLDERS, THUS THE DADW STANDSTILL AGREEMENT IS UNENFORCEABLE AND INVALID.

A. Question Presented

Whether, under Delaware law, a corporation's board of directors breaches its fiduciary duties when it uses a DADW Standstill in the process of selling the entire company, in a sale implicating *Revlon* and its progency, and whether such standstill agreements are enforceable.

B. Scope of Review

This is an appeal from the Delaware Court of Chancery's order granting a preliminary injunction in favor of Galena. The grant or denial of a preliminary injunction is generally only reviewed for abuse of discretion, and nothing in the present case prevents this general rule from applying. *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). In considering whether to grant or deny a preliminary injunction, the trial court must consider whether the plaintiff has shown: "(1) a reasonable probability of success on the merits; (2) irreparable harm; and (3) a balance of equities in its favor." *Id.* (citing *Allen v. Prime Computer, Inc.,* 540 A.2d 417, 419 (Del. 1988)). In the present case, the Defendants-Appellants conceded below that if Galena were to demonstrate a reasonable probability of success on the merits then the other two factors would also be met. (R. 17-18). The Court of Chancery thus properly focused on whether Galena had established a reasonable probability of success on the merits. (R. 18).

C. Merits of Argument

1. The Callison Board's Decision to Cooperate with Allen to Facilitate the Sale of the Entire Company Implicated *Revlon* and its Progeny; thus, Enhanced Scrutiny Applies.

A Board can generally give regard to constituencies other than the shareholders in discharging its responsibilities, as long as there "are rational related benefits accruing to the stockholders . . . ." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). But "such 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." *Id.* One of the clearest situations to implicate these *Revlon* duties, which require the directors to act as impartial auctioneers, is the sale of corporate control. *See Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1993); *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989).

In a sale of control, "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. When *Revlon* duties are implicated, the typical business judgment rule deference, under which courts do not interfere with the managerial decisions of the directors, does not apply. *Id.* at 42. Rather, when the case involves "the approval of a transaction resulting in a sale of control," the court should "take a more direct and active role in overseeing the decisions made and actions taken by directors." *Id.* The directors' conduct is subject "to enhanced scrutiny to ensure that it is reasonable." *Id.* Notably, while the present case does differ from *Revlon*, *QVC*, and *Time* in the sense that in those cases no majority shareholder existed pre-merger, this Court has recognized that the same enhanced scrutiny analysis applies irrespective of whether any shareholder held control pre-merger when the transaction involves the sale of the entire company, and not just the majority shareholder's share. *See McMullin v. Beran*, 765 A.2d 910, 920 (Del. 2000). Such is the case here; thus, enhanced scrutiny applies. (R. 11-12).

The enhanced scrutiny test involves two key judicial determinations:

> (a) a judicial determination regarding the adequacy of the decisionmaking 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.

QVC, 637 A.2d at 45.

When enhanced scrutiny applies, the burden is on the directors to prove "that they were adequately informed and acted reasonably." *Id.* at 45. The reviewing court "will examine whether the board has reasonably performed its fiduciary duties 'in the service of a specific objective: maximizing the sale price of the enterprise.' " *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471 at *23 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part on other grounds*, 2012 WL 6707736 (Del. Dec. 27, 2012) (quoting *In re Alloy, Inc.*, 2011 WL 4863716 at *7 (Del. Ch. Oct. 13, 2011)). "This enhanced scrutiny 'has both subjective and objective components.' " *Id.* (quoting *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 830 (Del. Ch. 2011)). The directors must have attempted, in good faith, to get the best available price, and those efforts "must have been objectively reasonable." *Id.*

2. The Callison Board Breached its Fiduciary Duties by Requiring Bidders to Agree to a DADW Standstill Agreement; the Standstill Agreement is thus Invalid and Unenforceable.

The intrinsic problem with a DADW Standstill coupled with a No Solicitation Provision is that it prevents the for sale company from contacting the most likely competing bidders and prevents those bidders from reaching out to the for sale company. *See Celera*, 2012 WL 1020471 at *6. It is fundamental that "[t]he need for adequate information is central to the enlightened evaluation of a transaction that a board must make." *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1287 (Del. 1989). The Callison Board has essentially attempted to contract around its fiduciary duties by agreeing not to contact any of the companies most likely to submit a competing bid to Vicente's bid, and even more disturbingly, requiring those companies to agree not to submit a competing bid or to even contact the Callison Board privately to discuss a bid. (R. 8, 10-11). The Callison Board may have hoped that by contractually preventing itself from becoming informed it could avoid its fiduciary duties, but such is not the case.

In *QVC*, the Paramount defendants argued that they acted properly in refusing to negotiate with QVC because "they were precluded by certain contractual provisions, including the No-Shop Provision, from negotiating with QVC or seeking alternatives." *QVC*, 637 A.2d at 48.

This Court dismissed that argument, recognizing that "[s]uch 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.* Thus, "to the extent such provisions are inconsistent with those duties, **they are invalid and unenforceable**." *Id.* (citing *Revlon*, 506 A.2d at 184-85) (emphasis added)).

DADW Standstill agreements are a relatively new phenomenon, which appear to have been designed as an end-run around the board's fiduciary duties which, in the *Revlon* context, require them to "focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders . . . ." *QVC*, 637 A.2d at 44. As made clear in *Omnicare*, a board cannot contractually discharge its fiduciary responsibilities; the board must therefore negotiate for a fiduciary out provision in the merger agreement allowing it to consider competing offers when not doing so would violate its fiduciary duties. *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 936 (Del. 2003). Not including such a clause creates a high risk that the agreement will be deemed invalid and unenforceable, since any contract or provision is invalid and unenforceable to the extent that it purports to require a board to act, or not to act, in such a way so as to limit or avoid any of its fiduciary duties. *See id.*

After *Omnicare*, fiduciary out provisions were virtually always included in merger agreements, but then came situations where the

Board was held liable for failing to use the provision to allow competing offers. For example, in *Topps*, the Court found that the Topps Board breached its fiduciary duties when it refused to release Upper Deck from a standstill agreement. *In re Topps Co. S'holders Litig.*, 926 A.2d 58 (Del. Ch. 2007). The Topps Board had approved of a merger agreement, negotiated with Michael Eisner, which included a fiduciary out provision, but when Upper Deck approached the Topps Board with a higher offer the Topps Board refused to waive a standstill agreement that Upper Deck had agreed to earlier in the sales process. *Id.* at 82-83. The Court found that the Topps Board had a fiduciary obligation to consider Upper Deck's bid, and that its refusal to release Upper Deck from the standstill justified an injunction. *Id.* at 88-92.

After *Topps* and other similar cases, clever corporate counsel came up with a way to avoid a board becoming liable for refusing to release a standstill agreement: having a DADW standstill agreement under which the would-be bidder cannot even request that the board waive the standstill agreement. This Court has not previously had the opportunity to address the validity of DADW Standstill agreements specifically, but such agreements are inconsistent with this Court's precedent in that they are, at their core, an attempt to contractually limit the director's fiduciary duties. *See Omnicare*, 818 A.2d at 936; *QVC*, 637 A.2d at 48.

Unsurprisingly, the few Chancery Courts that have been faced with DADW Standstill agreements have found them "highly problematic." *Galena Capital Partners, LLC v. Callison, Inc.*, No. 7918-CN (Del. Ch.

Jan. 14, 2013) (Mem. Op. at 21). One recent case to address a DADW Standstill agreement is *Celera*, which involved the approval of a class action settlement of fiduciary duty claims. *Celera*, 2012 WL 1020471. Because this was a settlement approval case, the Vice Chancellor did not rule on the merits of whether the Celera Board breached its fiduciary duties in using DADW Standstill agreements, but since part of the settlement included a modification of the DADW standstill agreements, the Court discussed such agreements at length. *See id.* at *1-6, *21. In finding that the settlement's waiving of the DADW Standstill agreements was "valuable" consideration the Court noted that "[h]ere, the [DADW] Standstills block at least a handful of once-interested parties from informing the Board of their willingness to bid . . ., and the No Solicitation Provision blocks the Board from inquiring further into those parties' interest." *Id.* at *21-22. The Court recognized that such arrangements are suspect, and that "[p]laintiffs have at least a colorable claim that these constraints collectively operate to ensure an informational vacuum." *Id.* at 21.

Here, as in *Celera*, the merger agreement contained a fiduciary out provision should a "superior proposal" be presented (R. 13), but "[o]nce resigned to a measure of willful blindness, the Board . . . lack[s] the information to determine whether continued compliance with the Merger Agreement . . . violate[s] its fiduciary duty to consider superior offers." *Id.* When combined with a No Solicitation Provision, a DADW Standstill "arguably emasculates whatever protections the . . . fiduciary out otherwise could have provided." *Id.*

In the even more recent *Complete Genomics* case, the Vice Chancellor preliminary enjoined Complete Genomics, Inc. from enforcing a DADW standstill agreement similar to the one in the present case. *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (Transcript of Telephonic Ruling). The Vice Chancellor had previously denied the motion for a preliminary injunction, based on his understanding that "the standstill agreements prohibited public waiver requests but otherwise were not 'Don't Ask, Don't Waive Standstills' of the type discussed in the Celera Corporation case that would purport to forbid a counterparty from ever asking for a waiver." *Id.* at 12. However, after being apprised that the DADW Standstill agreement was in fact of the same type as in *Celera* (and the present case), the Vice Chancellor reconsidered the motion and granted the preliminary injunction. *Id.* at 12-13.

The Vice Chancellor pointed out that a DADW Standstill has the "same disabling effect as [a] no-talk clause, although on a bidder-specific basis." *Id.* at 18. By agreeing to the DADW Standstill, the Complete Genomics Board, like the Board in the present case, "impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders." *Id.*

The analogy to a no-talk clause is a sound one, and such clauses have long been recognized as problematic. *See Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999). No-talk provisions "are troubling precisely because they prevent a board from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party." *Id.* at *1. Completely foreclosing the opportunity to negotiate, privately or otherwise, with a group of prospective bidders "is the legal equivalent of willful blindness, a blindness that may constitute a breach of a board's duty of care . . . to be informed of all material information reasonably available." *Id.* at *2.

Under Delaware law, directors have a statutory duty "to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders." *McMullin v. Beran*, 765 A.2d 910, 917 (Del. 2000) (citing Del. Code tit. 8, § 251 (2010)). Both no-talk provisions and DADW Standstill provisions impermissibly impede the Board from fulfilling its fiduciary obligations to give proper consideration to any competing offers, disclose all material information to the stockholders, and make an informed merger recommendation to its stockholders. In fact, with a DADW Standstill agreement "there is literally no situation where one could ask for a standstill waiver or the board could obtain information that could be pertinent and indeed required in terms of its merger recommendation." *Complete Genomics*, Transcript of Telephone Ruling at 26.

The Callison Board's use of the DADW Standstill agreement was itself a breach of the duty of care justifying the grant of a preliminary injunction. In order to pass enhanced scrutiny, the directors have the burden to prove "that they were adequately informed and acted reasonably." *QVC*, 637 A.2d at 45. The directors here cannot meet this standard; they not only failed to adequately inform themselves but were willfully blind and attempted to prevent themselves from becoming informed by not allowing the companies most likely to submit a higher bid to contact them. Under such circumstances, the directors cannot show that they were "adequately informed and acted reasonably." *See id.*

3. The Callison Board Breached its Fiduciary Duties by Failing to Remain Informed and Update its Merger Recommendation.

The Board's duty "to act in an informed and deliberate manner" does not end upon approval of a merger agreement. *McMullin*, 765 A.2d at 917. The Board has an ongoing statutory and fiduciary obligation to provide a current, candid and accurate merger recommendation. *See id.* "Revisiting the commitment to recommend the Merger [is] not merely something that [the Board is] allow[ed] . . . to do;" rather, it is the duty of the Board to "review the transaction to confirm that a favorable recommendation would continue to be consistent with its fiduciary duties." *Frontier Oil v. Holly Corp.*, 2005 WL 1039027 at *28 (Del. Ch. Apr. 29, 2005). As Professor William Allen, formerly a Delaware Chancellor, put it, "[a] board may not suggest or imply that it is recommending the merger to the shareholders if in fact its members have concluded privately that the deal is not now in the best interest of the shareholders." William T. Allen, *Understanding Fiduciary Outs: The What and the Why of an Anomalous Concept*, 55 Bus. Law. 653, 660 (2000).

Thus, even if the use of the DADW Standstill agreement was not itself a fiduciary duty breach, the Board's decision not to waive it after Galena contacted them with a higher offer cannot be justified. At that point, the Board knew for a fact that a higher cash offer was available, and it does not contest that Galena's offer was superior, nor could such an argument reasonably be made. Instead, the Board argues that it correctly ignored this new information because they had entered into a contractual arrangement designed to keep them uninformed. Regardless of what contractual agreements the Board has agreed to, it cannot ignore new information that a higher offer exists. *See QVC*, 637 A.2d at 45; *Topps*, 926 A.2d at 88-92; *Frontier Oil*, 2005 WL 1039027 at *28. The Board has a continuing obligation to keep informed and to update its merger recommendation if the merger is no longer in the best interest of the shareholders. *Frontier Oil*, 2005 WL 1039027 at *28. The Callison Board utterly failed its fiduciary duty to make an informed decision, and not only did it fail to remain informed, but even when presented with evidence that the Vicente merger was not in the shareholders' best interest the Board did not update its merger recommendation. The Board cannot show that it "acted reasonably" when it willfully ignored a higher offer and failed to update its merger recommendation after becoming aware of a higher offer. *See QVC*, 637 A.2d at 45.

II. THE CALLISON BOARD BREACHED ITS FIDUCIARY DUTY OF DUE CARE, TRIGGERING AN ENTIRE FAIRNESS ANALYSIS, AND THE BOARD CANNOT DEMONSTRATE THE ENTIRE FAIRNESS OF THE TRANSACTION UNDER THIS EXACTING STANDARD.

A. Question Presented

Whether the Callison Board breached its fiduciary duty of due care when it deferred its judgment to a controlling shareholder and willfully ignored relevant information as to the merger's value, and whether the Callison Board can demonstrate the entire fairness of a poorly negotiated and poorly structured merger.

B. Scope of Review

This is an appeal of a Court of Chancery's order granting a preliminary injunction in favor of Galena. As previously stated in Part I, the grant or denial of a preliminary injunction is generally only reviewed for abuse of discretion, and nothing in the present case prevents this general rule from applying. *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Further, as stated in Part I, the Appellants conceded below that if Galena were to demonstrate a reasonable probability of success on the merits then the other factors for granting the preliminary injunction are met. (R. 17-18).

C. Merits of Argument

1. Because the Callison Board Breached its Duty of Due Care, the Board's Merger Decision is Not Entitled to the Protections of the Business Judgment Rule.

The Callison Board breached its duty of due care by deferring its judgment to a controlling shareholder and by willfully ignoring relevant information as to the merger's value. Once the decision to sell the company was made, the Board's duty was to ensure maximum value for the minority shareholders, even with the practical reality that Allen could block any merger. *See McMullin v. Beran*, 765 A.2d 910, 919-20 (Del. 2000). The Board neglected this duty by compromising its deliberative process in order to serve Allen's liquidity needs. Further, the Board had a duty to ensure the merger maximized value for all shareholders. *Id.* at 920. The Board breached this duty by willfully ignoring a higher bid. Thus, the Board breached its duty of due care by seeking a deal based on what was best for Allen, instead of what was best for all shareholders.

A board that defers its judgment to a controlling shareholder and fails to make an informed decision about the proposed transaction's value for all shareholders breaches its duty of due care. In *McMullin*, an 80% majority shareholder initiated a self-negotiated cash-out merger in order to fund a pending $3.3 billion transaction. *Id.* at 921. The majority shareholder negotiated the merger agreement and placed cash restrictions on potential bidders. *Id.* The plaintiff argued that the majority shareholder gained the advantage of immediate cash at the expense of some of the value of the company. *Id.* Further, the plaintiff argued that the lost value likely would not have been sacrificed under a differently structured and timed agreement. *Id.* *McMullin* was decided on an appeal of a motion to dismiss. *Id.* at 918. Taking the pleaded facts as true and in the light most favorable to the plaintiff, this Court reversed the motion to dismiss. *Id.* at 926.

This Court reasoned that the board in *McMullin* could have been found to have breached its duty of due care by compromising its deliberative process in order to accommodate the majority shareholder's immediate need for cash. *Id.* at 922. Further, the following reasons were identified for why the board may have been found to be uniformed: the timing of the transaction, the lack of procedural safeguards for minority shareholders, and the use of cash restrictions on bidders. *Id.* at 921-22. A board that rushes to a decision frequently fails its duty of due care. *Id.* at 922. The plaintiff alleged that the board met and approved the merger in one meeting. *Id.* at 921-22. Ultimately, this Court found that the board breached its duty of care by not "adequately informing themselves about the transaction and without determining whether the merger consideration equaled or exceeded [the company's] appraisal value as a going concern." *Id.* at 922.

On the other hand, a board that uses an uncompromised deliberative process satisfies its duty of due care. In *Synthes*, the majority shareholder was attempting to fairly liquidate his 38.5% share of the company in order to retire. *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1025 (Del. Ch. 2012). The minority shareholders brought suit claiming the board breached its duty of due care by rushing into a merger agreement in order to meet the majority shareholder's conflicting liquidity needs. *Id.* at 1035. However, evidence revealed that the majority shareholder had no urgent need for cash. *Id.* at 1036. Further, the record showed that the board took its time and fairly negotiated for the best deal. *Id.* 1030-31. For these reasons, the Court granted the defendant's motion to dismiss. *Id.* at 1049. However, the Court noted that there may be a limited set of situations where a controlling shareholder's need for immediate cash could constitute a breach of due care, for example a rushed sale in order to avoid default on a larger investment. *Id.* at 1036.

Just as in *McMullin*, the Board here compromised its deliberative process by accommodating the majority shareholder's conflicting need for immediate cash at the expense of some of the value of the company. The Board put some effort into making it appear as though it acted with due care, such as forming a special committee and hiring business and legal analysts, but as this Court has repeatedly stated, there is no one formula for meeting due care. *McMullin*, 765 A.2d at 918. The

Special Committee compromised its deliberative process by being unwilling to consider any sale process that Allen may oppose. (R. 7). This compromise of process effectively put cash restrictions on bidders. Further, the sale process the Committee used was rushed, as the process was designed to find the most likely buyers over a "relatively short timeframe" and only allowed those buyers one bid without any negotiation from the other most likely buyers. (R. 7-8). As in *McMullin*, Allen gained a financial advantage from a quick, all-cash transaction at the sacrifice of some of the value of the company. In a differently structured, less restrictive process, this sacrifice likely would not have occurred, as the two capable bidders would likely have been allowed to continue bidding. Moreover, as this Court noted in *McMullin*, failure to exercise due care is often the result of being rushed. *McMullin*, 765 A.2d at 922. As in *McMullin*, the approval of the merger occurred in one meeting just hours after the bids were opened. (R. 12). The Board in this case breached their duty of due care by acting in an unnecessarily hurried fashion, which compromised its deliberative process and sacrificed some value of the company.

Unlike *Synthes*, the Board's decision-making process in this case was compromised by the conflicting needs of the majority shareholder. Contrary to *Synthes*, Allen did have a reason for immediate liquidation of Callison stock. Allen began active negotiations to acquire the Ca' Foscari restaurant chain on October 15, five days before the Special Committee convened regarding the sale process of Callison. (R. 5-6). Allen Enterprises knew it would need to liquidate its Callison stock, and Allen expected to be able to do so quickly. Also, unlike *Synthes*, the Board willfully ignored Galena's higher bid. Galena does not argue that Allen was not free to sell his own shares for a price he deemed reasonable, but once the decision to sell the entire company was made, the Board had a duty beyond Allen's liquidity needs.

Thus, this case is much more akin to *McMullin* than *Synthes*; here the Board breached its fiduciary duty of due care by deferring its judgment, compromising its deliberative process, and willfully neglecting relevant information as to the value of the merger.

2. The Callison Board Cannot Demonstrate that the Merger Was Entirely Fair.

Because the Board breached its fiduciary duty of due care, the Board has the burden of demonstrating the entire fairness of the transaction. *McMullin*, 765 A.2d at 917. Even though the Board used a special committee of disinterested directors to craft the sale process, the Committee did not have real bargaining power to negotiate at arm's length. *See Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997). Thus, the use of the Special Committee does not shift the burden of proving entire fairness to Galena. But even if this Court does find the Special Committee had real bargaining power, the merger was not entirely fair.

Entire fairness requires a showing of fair dealing and fair price. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). The concepts of fair dealing and fair price must be considered in conjunction, with fair price garnering more weight. *Id.* The Board cannot establish fair dealing here because the conflicted transaction was poorly negotiated and poorly structured. Since the transaction in this case is the sale of the entire company, fair price requires a showing that the transaction represents the "highest value reasonably available." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995)(quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1994)). Due to the presence of a viable higher offer, the Board cannot show that the price was fair.

i. The Callison Board Has the Burden of Demonstrating that the Merger Was Entirely Fair because the Special Committee Did Not Have Real Bargaining Power, and even if the Special Committee Had Real Bargaining Power, the Merger Was Not the Result of Fair Dealing and thus Was Not Entirely Fair.

The Board bears the burden of demonstrating that the merger was entirely fair because the Special Committee could not enter into an agreement without approval by the entire Board; thus, the Committee did not have real bargaining power that it could exercise at arm's length from the majority shareholder. *Tremont* identified two factors for a Board to obtain the "the benefit of burden shifting": 1) the controlling shareholder must not dictate the terms of the merger and 2) the committee must exercise real bargaining power at arm's length from the controlling shareholder. *Tremont Corp.*, 694 A.2d 422 at 429. The Committee in this case was not "well functioning." *See id.* at 428. The Committee hindered its own ability to bargain by limiting its choices of sale process to any process that Allen would not oppose. (R. 7). Even more concerning, the Committee's ability to negotiate at arm's length was nullified by the requirement that any proposal be approved by the entire Board, which was composed by a majority of conflicted directors. (R. 3-5).

Even if the Committee had real bargaining power, the merger process was not the result of fair dealing because the process was overly restrictive and was the product of Allen's needs. Fair dealing concerns "how the purchase was initiated, negotiated, structured and the manner in which director approval was obtained." *Tremont*, 694 A.2d at 431. In the case at hand, the most condemning of these factors are the structure and negotiation. The Committee used a rushed process that was designed to find the most likely buyers over a "relatively short timeframe," and the process only allowed those buyers one bid, without any possibility of further negotiations. (R. 7-8). The result of this poorly structured sale process was a merger being approved of without any negotiations taking place between the only other capable and willing bidder, even when the declined bidder offered a subsequent higher bid.

Conversely, a board can demonstrate fair dealing when, unlike the Callison Board, the board proceeds with active negotiations throughout the merger process. In *Synthes*, one argument the minority shareholders advanced was that the merger was unfair because the majority shareholder demanded the board end a bidding war in favor of his offer of choice. *Id.* at 1031. However, evidence revealed that the bidding ended between two unsuccessful bidders because one of the two made a final offer, which the other bidder never countered. *Id.* at 1044. Moreover, the board used that final bid to negotiate up the price of the selected offer. *Id.* at 1029. The Court also reasoned that any unselected bidder had eight months after the merger announcement to offer a superior bid. *Id.* at 1031. Based on a well-negotiated sale process, the Court dismissed all of the plaintiffs' fair dealing claims. *Id.*

Synthes does not apply in this case because the merger here was poorly negotiated. Unlike *Synthes*, there was no negotiation between willing and capable bidders, and the Board neglected to use the Galena offer to bid up the chosen bidder. Further, unlike *Synthes*, a superior offer was presented after the merger announcement; however, the sale process was so restrictive that the Board could not consider the only competing offer in the market.

ii. The Board's Poorly Negotiated and Poorly Structured Sale Process Resulted in an Unfair Price for All Shareholders.

In the face of a viable higher offer, the Board cannot demonstrate that the merger price was fair. When a contested transaction is the sale of the company, the fair price analysis requires the board of directors to show "that the price offered was the highest value reasonably available under the circumstances." *Cinerama*, 663 A.2d at 1163 (quoting *Cede*, 634 A.2d at 361). Further, the Board cannot demonstrate that the Galena offer confers an unfair benefit to one party or is in some way defective compared to the selected bid. *See Synthes*, at 1033-34. Since the Board ignored a higher offer that was reasonably available, the Board cannot demonstrate that the accepted price was fair.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's grant of a preliminary injunction enjoining Vicente's merger with Callison.

Respectfully submitted,
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