IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

Appellee’s Answering Brief

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Below, Appellees
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NATURE OF PROCEEDINGS

Galena Capital Partners, Inc., ("Galena") commenced action against Callison Inc., ("Callison") and the Callison board of directors ("Board") on December 21,2012. Mem. Op. 16. The suit challenged a merger between Callison and Vicente Capital Inc. ("Vicente"), a private equity firm. Id. 16-17. On January 14, 2013, the Court of Chancery issued an opinion granting a preliminary injunction against the merger of Callison and Vicente. Order. Galena Capital Partners, Inc. v. Callison Inc., No. 7918-CN (Del. Ch. Jan. 15, 2013) (order granting preliminary injunction). The court enjoined the merger in an order dated January 15, 2013. Id.

Callison and the Directors filed an application pursuant to Supreme Court Rule 42 appealing the interlocutory order. Callison Inc., v. Galena Capital Partners, Inc., No. 162, 2013 (order accepting interlocutory appeal). The appeal addresses whether the Court of Chancery erred in granting Galena's motion for a preliminary injunction. On January 25, 2013, this Court accepted the interlocutory appeal. Id.

SUMMARY OF ARGUMENT

I. This Court should affirm the Court of Chancery's decision to grant a preliminary injunction enjoining the Callison Vicente merger agreement because the sales process included an invalid lock up agreement and the board of directors violated their fiduciary duty by failing to maximize shareholder value. The Revlon standard here because Callison initiated a sale of the entire company to a single buyer. Under Revlon, the Callison board of directors owes a fiduciary duty of due care and loyalty to hold the interests of the shareholders above the interests of outside parties. The Court of Chancery correctly applied the standard of enhanced judicial scrutiny as it pertains to the duties under Revlon. Callison's board of directors violated the rules outlined in Revlon by purposefully ignoring a superior tender offer and failing to maximize shareholder value during its sale. Furthermore, the Don't Ask Don't Waive Standstill agreement implemented by the Callison board of directors is invalid under Revlon and Section 193 of the Restatement (Second) of Contracts as it limits board of director duties of due care and loyalty and is thus contrary to Delaware law.

II. Even if this Court should not find that the Board violated its Revlon duties, this Court should hold that the directors of the Callison Board violated its fiduciary duties under the entire fairness standard derived from McMullin. Even when a majority shareholder-controlled subsidiary elects to completely sell the company, McMullin rightfully imposes a fiduciary duty on the directors of the subsidiary to conduct the transaction in a disinterested manner, with informed judgment, and in the best interest of its minority shareholders. The

Callison Board failed to satisfy its fiduciary duties by acting in an interested manner and conducting the sale process to accommodate Allen’s need for immediate liquidity. This resulted in a conflicted interest transaction that was not entirely fair to Galena and the other minority shareholders.

STATEMENT OF FACTS

Appellant Callison Inc. ("Callison") is a Delaware public corporation that trades its shares on the New York Stock Exchange. Mem. Op. 2. Allen Enterprises Incorporated ("Allen"), a privately-owned holding company incorporated under Delaware law, owns a controlling 72% share of Callison common stock. Id. at 2. Additional appellants include the seven members of Callison's board of directors ("Board"). Appellee Galena Capital Partners, LLC (Galena), a Delaware limited liability company, owns 10,000 shares of Callison common stock. Id. at 2

The Court of Chancery's order for the pending preliminary injunction arose out of a merger agreement between Callison and private equity firm Vicente Capital Inc. ("Vicente"), in which Vicente would acquire 100% of Callison's common stock through a two-step merger. Id. at 1.

Allen has a pending 2.4 billion cash acquisition of the Ca' Foscari Italian restaurant chain ("Ca' Foscari"), and concluded that a sale of its 72% stake in Callison would be the most effective method by which to gain liquidity to finance the transaction. Id. at 4. Allen's largest asset is its stake in Callison and together all of the other Allen businesses are worth only a fraction of the value of Allen's Callison stake. Id. at 3. Allen's contractual obligation to purchase Ca' Foscari was not subject to a financial condition and therefore created a greater demand for Allen to monetize its stake in Callison. Id. at 6. Along with its financial advisor Reed Crystal LLP ("Reed Crystal") and Board members, Allen searched for possible acquisition candidates for Callison during August and September 2012.

Id. at 6. Allen then authorized Reed Crystal to inform Callison that they had an interest in monetizing their 72% stake and that they believed a sale of the entire company was the most effective method. Id. at 4. A majority of the Board members are salaried executives of Allen, so the Board created a "Special Committee" of three "independent" directors who are not employed by Allen. Id. at 3. However, the three independent directors were still appointed to the Board by Allen. Id. at 3.

Allen's position as the dominant shareholder of Callison gave it effective veto power over any undesirable transaction negotiated by the Special Committee. Id. at 6-7. The Board, Callison and Allen approved sales process in which the Special Committee and its advisors privately canvassed the market, forced all potential bidders to sign a "Don't Ask, Don't Waive" standstill agreement ("DADW Standstill") in order to participate in the due diligence and bidding process. Id. at 8. The DADW Standstill required that the bidders agree to submit one bid to acquire Callison, as they would be precluded them from making any further bids even if they were superior. Id. at 7-8. Galena signed the DADW Standstill along with five other bidders, but Callison overlooked Galena's bid in favor of Vicente's winning $34/share offer. Id. at 11. The "market check" provision in the merger agreement allowed Allen and Callison forty additional days to privately canvass the market for potential topping bids from any other suitor except for Galena and the other unsuccessful original bidders. Id. at 15.

After the conclusion of the market check period, Vicente, Callison and Allen agreed that Vicente would commence its $34/share tender offer for Callison shares, and publicly announced the merger

agreement ("Vicente Merger Agreement") on December 17, 2012. Id. at 14. Meanwhile, Galena privately requested that Callison waive the DADW Standstill and allow Galena to make a financially superior topping bid of $35.50/share for all Callison shares - an offer $128 million higher than the winning Vicente offer. Id. at 15. Instead, the Board and its representatives ignored the Galena's superior bid and invoked the DADW Standstill, ordering that Galena cease all further communication with Callison. Id. at 16. On December 21, Galena commenced its own all-cash, all-shares tender offer for Callison shares at the higher $35.50/share price, and filed suit in the Court of Chancery. Id. at 16. Galena alleged that Callison's Board breached its fiduciary duties to Galena as a minority Callison shareholder, and that Galena's attempts to acquire Callison at a higher sale price did not breach any contractual obligations resulting from the DADW Standstill. Id. at 16-17.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE COURT OF CHANCERY'S DECISION BECAUSE THE CALLISON DIRECTORS BREACHED THEIR FIDUCIARY DUTY UNDER DELAWARE CORPORATE LAW WHEN THEY IMPLEMENTED THE DADW STANDSTILL AND THEN FAILED TO MAXIMIZE SHAREHOLDER VALUE IN A COMPANY SALE.

A. Question Presented

Under Delaware law, did the Court of Chancery correctly find that the Callison Board breached their fiduciary duty when they implemented a lock-up clause that prevented them from maximizing the value for shareholders in a sale of the entire company?

B. Scope of Review

This Court can grant or deny a preliminary injunction for the abuse of discretion by a lower court. S.I. Mgmt. v. Wininger, 707 A.2d 37, 40 (Del. 1998); In re Micromet, Inc. S'holders Litig., 2012 Del. LEXIS 1, *13-14 (Del. Ch.). The moving party must show a reasonable probability of success on the merits of the underlying claim, an imminent threat of irreparable harm and that a balancing of the equities tips in their favor. Id. Furthermore, this Court's decision is made without deference to the embedded legal conclusions of the trial court. Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392 (Del. 1996).

C. Merits of Argument

The Callison Inc. ("Callison") board of directors ("Board") breached their fiduciary duty when they failed to protect the financial interests of all of Callison's shareholders by implementing the Don't Ask Don't Waive Standstill agreement ("DADW Standstill") and failing to maximize the value of Callison's shares. First, the DADW Standstill cannot exculpate the Board's breach of duties of loyalty and good faith. The Board breached that duty when they failed to

consider the second share offer submitted by Galena, which was substantially higher than any other valid offer at that time. Second, the DADW Standstill allows the Board to disregard their responsibilities of care and loyalty to all shareholders. The DADW Standstill clause of the Callison sale process is in violation of Delaware law and therefore it is invalid.

1. Revlon applies.

The rules outlined in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. ("Revlon duty") are triggered when a board of directors considers selling, breaking up or transferring control of the corporation. 506 A.2d 173, 182 (Del. 1986); Paramount Commc'ns. Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994). When the Revlon duty is triggered by a sale, break up or transfer of control, the conduct of a board of directors is no longer judged pursuant to the traditional business judgment rule, but instead is scrutinized under a heightened standard for reasonableness. QVC, 637 A.2d at 34.

In Revlon, the board of directors sought to fend off a hostile takeover by seeking another bid from a "white knight" acquirer. 506 A.2d at 184. Initially, Revlon's board pursued alternative offers in order to prevent the company from being bought and then sold off in pieces. Id. But, once it became clear that a sale and breakup of the company was inevitable the fiduciary duty of the board became maximizing the shareholder value. Id.

In this case, like the Viacom-Paramount merger in QVC, the Callison merger will vest complete control of Callison to Vicente Capital Inc. ("Vicente"). The merger agreement provided for Vicente to launch a tender offer for any and all Callison shares. Mem. Op. 12.

After completion of the tender offer, Vicente also committed to a cash out merger with Callison. Id. at 13. Callison and its Board engaged in a sale of the entire company and therefore the Revlon duty applies. Furthermore, the conduct of the Board is subject to a heightened standard for reasonableness.

2. The Callison Board failed to fulfill their fiduciary duty of loyalty to all shareholders when they failed to maximize the value of Callison's shares as mandated by Revlon.

The Board breached their Revlon duty to shareholders when it failed to consider the second tender offer from Galena and did not pass that information on to their shareholders for a vote. When a company is sold, directors must focus on the primary objective – to secure the transaction offering the best value reasonably available for the stockholders – and they must exercise their fiduciary to further that end. QVC, 637 A.2d at 44; Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1989); Revlon, 506 A.2d at 182. Hence, enhance scrutiny applies and the burden of proof falls on directors to show that they were adequately informed in their decisions and acted reasonably in carrying out their fiduciary duties. QVC, 637 A.2d at 45.

In Revlon, this Court held that Revlon violated its fiduciary duties when it failed to obtain the best value for its shareholders during a sale. 506 A.2d at 182. Revlon entered into an agreement with Forstmann that ended the active bidding process in order to protect noteholder interest over shareholder interest. Id. This was an impermissible violation of the board of director's fiduciary duty of loyalty and due care. Id.

In QVC, this Court held that by entering into an agreement with Viacom, Paramount was prevented from critically evaluating tender offers from QVC, which significantly exceeded the Viacom offer. 637 A.2d at 45. The director's strategic vision for the future of Paramount was not a reasonable basis to ignore QVC's substantial offer. Id. at 50.

As in Revlon and QVC, where the directors' failure to consider a valid superior offer resulted in a breach of the directors' fiduciary duties, here the Board turned a blind eye to the second tender offer from Galena. The Board knew that the second Galena offer was higher than any other offer they had received and they failed to disclose the details of that offer to shareholders for a vote.

This Court articulated a test for analyzing board action where competing bidders are not treated equally. QVC., 637 A.2d at 45 (citing Macmillan, Inc., 559 A.2d at 1288.). First, the court must determine whether the directors properly perceived that the shareholder interests required heightened consideration. Id. Then the board's action must be reasonable in relation to the advantage given to a particular bidder. Id.

During the Callison sale process, the Board was moderately concerned about the effect of the sale of Callison being exposed to the public. Mem. Op. 20. The record did not cite any further facts to indicate how a public announcement of the sale would have an adverse effect. Additionally, the record contains no facts to indicate that Callison has a history of problems, financial or otherwise that might affect their stock price. The Board was also concerned that it would appear to be biased by its majority of Allen-appointed members. As a

result, the Board appointed a "Special Committee" of *independent* members with full negotiating power in the sale process. Id. at 5. Therefore, Callison was aware of the need for heightened consideration.

In setting up the sale process, the Board and the special committee implemented the DADW Standstill. Bidders were required to sign onto the DADW Standstill, which limited them to one single bid for Callison. Id. at 6. The Board's and Special Committee's reasoning for this lock-up provision was to prevent a long and public auction of Callison. Vicente was the highest bidder. Id. at 11. Callison entered into a merger agreement with Vicente that was contingent upon a "market check" where the market would be canvassed for further "superior offers." Then, Galena came forward with a second tender offer that was higher than Vicente's original offer. The Board refused to consider Galena's offer because they had participated in the original bidding process after signing onto the DADW Standstill. Although, this Court indicated in Revlon that lock-ups like the DADW Standstill are not *per se* invalid, they become problematic if they interfere with a board of directors' fiduciary duty to maximize shareholder value in a sale. 506 A.2d at 182.

Here, there was a real and valid "superior offer" proposed to Callison. Galena delivered an offer to Callison of a fully financed topping bid of $35.50 for all of Callison's shares. This offer was $1.50 higher than Vicente's offer, which equated to an additional $128 million. As previously stated, a board of directors has a fiduciary duty to maximize shareholder value, which reasonably includes considering all valid superior offers submitted to them. The Board did

not consider Galena's tender offer and therefore breached their fiduciary duties to their minority shareholders when they turned a blind eye to such critically important information.

3. The Don't Ask Don't Waive Standstill implemented as part of the sale process is invalid and therefore unenforceable under Delaware law because the Board cannot contract away their fiduciary duties.

This Court has held that "to the extent that a contract or provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable." Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1292 (Del. 1998). In Quickturn Design Systems, this Court found that a change in a corporation's bylaws preventing a board of directors from negotiating a corporate sale was an impermissible restriction on the board's power. Id. Furthermore, the Restatement (Second) of Contracts states that a "promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy." Restatement (Second) of Contracts § 193 (1981).

This Court implicated in Revlon that not all lock-up provisions are invalid, but many of them are amended in order to allow a company's board of directors to fulfill their fiduciary duties. 506 A.2d at 182.; In re Celera Corp. S'holders Litig., 2010 Del. LEXIS 66 (Del Ch.), aff'd in part, rev'd in part on other grounds, BVF Partners L.P. v. New Orleans Employees Retire't Sys., 2012 Del. LEXIS 658 (Del.). In Celera, as part of a settlement arising from claims of a violation of fiduciary duties, the court found that there was a benefit in modifying the original lock-up agreement that prevented original bidders from submitting additional offers. Id. Here, the

Board could have easily amended the DADW Standstill to allow Galena the opportunity to submit their second tender offer. By amending the DADW Standstill the Board would have made the provision unenforceable, but they would have fulfilled their fiduciary duty to maximize shareholder value.

Frequently, the initial benefits of a lock-up agreement becomes a hindrance on the sales process by impeding, not advancing, the maximization of stockholder value. In re Topps Co. S'holders Litig., 925 A.2d 58 (Del. Ch. 2007). In Topps, the company's board of directors faced a proxy contest. Id. at 61. Topps' board of directors eventually engaged in a merger agreement with Mr. Eisner of the Disney Corporation, but Upper Deck, a direct competitor of Topps, sued for a preliminary injunction of the merger. Id. Upper Deck claimed that the lock up agreement they had signed in a previous year was invalid and contrary to Delaware law because it prevented the Topps board from considering their bid and passing it on to shareholders for a vote. Id. at 66. The court held that Topps' refusal to release Upper Deck from the lock up agreement was invalid and granted Upper Deck a waiver to communicate with Topps shareholders about its offer. Id. at 87.

Here, Callison was approached by Galena with a second tender offer, which was superior to any offer that they had previously received. Similar to the events in Topps, the board refused to release Galena from the lock up agreement. The court in Topps found that the board of directors should have amended the invalid lock up agreement, just as Callison should have permitted Galena to submit a second tender offer.

The DADW Standstill is enabling the Callison Board to breach its duty of loyalty by allowing it to preclude Galena from tendering an offer to Callison's shareholders. Accordingly, because the DADW Standstill violates the Restatement (Second) of Contracts, the Board erred when it failed to consider Galena's tender offer. It can then be inferred that a corporation including a provision authorizing its directors to approve the sale of a company and forgoing consideration of valid offers at a greater value solely because of non-shareholder interests is a violation of Delaware law. Therefore because the Board failed to consider Galena's higher tender offer, it violated Delaware law and this Court should uphold the preliminary injunction ordered by the Court of Chancery.

II. THE COURT OF CHANCERY'S INJUNCTION ORDER SHOULD BE UPHELD BECAUSE THE CALLISON BOARD'S SALE PROCESS WAS A CONFLICTED TRANSACTION AND DOES NOT SURVIVE AN ENTIRE FAIRNESS REVIEW.

A. Question Presented

Whether the standard of strict scrutiny established by this Court in McMullin v. Beran, 765 A.2d 910 (Del. 2000) applies to the complete sale of a company owned by a shareholder with a financial liquidity conflict.

B. Scope of Review

In McMullin, this Court held that where a parent corporation with a need for liquidity seeks to sell its majority-owned subsidiary, the subsidiary Board of directors still has a duty to analyze the transaction in the interest of fairness for its shareholders. Id. at 921. In order to do so, the directors must make an informed and independent judgment on whether or not to recommend that the minority shareholders tender into the offer. Id.

C. Merits of Argument

1. **Allen's unique and conflicting need for liquidity requires a strict scrutiny standard of review.**

Allen's liquidity conflict as the controlling shareholder of Callison was the driving force behind the approval of the Vicente Merger, and was a violation of the fiduciary duties that both Allen and Callison owed to their shareholders. To rebut successfully rebut the business judgment presumption and invoke the entire fairness standard, a plaintiff must normally plead facts demonstrating "that a majority of the director defendants have a financial interest in the transaction or were controlled by a materially interested director. McMullin, 765 A.2d 910; Orman v. Cullman, 794 A. 2d 5, 9 (Del. Ch. 2002). In order to be considered "interested", a director need not merely receive a benefit, but must receive a "material" benefit. N.J. Carpenters Pension Fund v. Infogroup, 2011 WL 4825888 at *4, *9 (Del. Ch.). A material benefit is one significant enough "in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the ... shareholders without being influenced by her overriding personal interest. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); Infogroup, 2011 WL 4825888 at *10. Liquidity is a recognized type of material benefit that may lead directors to breach their fiduciary duties. McMullin, 765 A.2d 910, 921; Infogroup, 2011 WL 4825888 at *9.

A "liquidity conflict" is a potential conflict of interest faced by a majority or controlling shareholder due to a need to liquidate its stock. Jeffrey R. Woltersa1, Delaware Insider: Reining in the "Liquidity Conflict" Under Delaware Law. Bus. L. Today, Dec. 2012, at 1, 2. If simply selling into the market isn't feasible, then the

shareholder might advocate a sale of the entire company, even on sub-optimal terms. Id. at 1. Further, the shareholder's desire for immediate liquidity might motivate it to push for a quick sale to a first bidder rather than a market check to seek out higher offers. Id. at 2.

A shareholder who influences a sale process to sell his controlling stake in a company sale gains a material benefit distinct from the other minority shareholders – the ability to unload a large, previously illiquid, asset. N.J. Carpenters Pension Fund v. Infogroup, 2011 WL 4825888 (Del. Ch.). In Infogroup, the Delaware Court of Chancery declined to dismiss claims for a breach of fiduciary duty brought against a controlling stockholder for orchestrating a sale of the company to a third party. Id. at *4. All stockholders received the same per-share cash price. The plaintiff shareholder alleged that the sale was motivated by the controlling shareholder’s particular need for cash. The controlling shareholder, Gupta, owed over $12 million as a result of the derivative and SEC settlements. Id. He also had debt exceeding $13 million related to several loans taken out to buy info GROUP stock, and had no source of cash inflow or liquid assets (other than his stock). Id. His liquidity conflict was common knowledge to the Board of his company, info GROUP, and his financial advisors told Gupta that a sale of his block of ownership in info GROUP was the only alternative means of generating liquidity. Id. Gupta incited info GROUP’s board to conduct a rushed and inefficient sale process which resulted in a final sale price of eight dollars per share, lower than the $8.16 market price of the company’s shares as of the date of the announced merger. Id. at *7.

The illiquidity of Gupta's position resulted from its size - approximately thirty-four percent of the Company's common stock. The Company's second largest shareholder held less than six percent of its stock. Id. at *10. The plaintiff’s well-pleaded facts supported a reasonable inference that, with the exception of Gupta, info GROUP's other shareholders held relatively small, liquid positions. Id. Thus, while the other shareholders did receive cash, liquidity was not a benefit to them, as it was to Gupta, because their investment in info GROUP was already a relatively liquid asset prior to the Merger. By finally unloading his massive stake in info GROUP through the complete sale of the company, Gupta was able to gain $100 million in liquid funds. Id. at *11.

A controlling shareholder’s insistence on an expedited company sale implicates fiduciary duties of all of the directors involved, even those directors considered independent. In re Answers Corp. Shareholders Litigation, a minority stockholder alleged that Redpoint, a venture capital firm which owned thirty percent of Answers Corporation, decided to force a quick sale to meet its own liquidity needs, even though its subsidiary Answers had strong projections and was about to announce a “blowout” quarter. In re Answers Corp. S’holders Litig., 2012 WL 1253072 (Del. Ch.). Two of the directors of the Answers Board (Beasley and Dyal) were also board members of Redpoint.

The plaintiff alleged that the independent members of the board had acted in bad faith (that is, conscious disregard of their fiduciary duties) in acceding to the sale. Id. at *1. The Court of Chancery Complaint recognized that the plaintiff’s complaint had well-

pleaded facts to suggest that Redpoint's interest in a prompt liquidation of their stake in Answers conflicted with those of common Answers shareholders who, unlike Redpoint, could sell their Answers shares into the market. This desire to gain liquidity for Redpoint could cause them to manipulate the sales process. Thus, the Complaint alleged sufficient facts to suggest that Beasley and Dyal were interested in the Merger. Id.

Allen's need for liquid funds to complete the Ca'Foscari transaction creates a similar conflict of interest recognized by the Chancery Court in both Infogroup and In re Answers Corp. Like Gupta who owned significantly more stock in info GROUP than anyone else, Allen enjoys a dominant seventy-two percent share of all Callison stock. Mem. Op. 2. In this case and in Infogroup it was common knowledge the best chance for the controlling shareholders to alleviate their liquidity problems would be to negotiate the sales of their respective subsidiaries. Mem. Op. 2, 6; Infogroup, 2012 WL 1253072 at *4. Gupta was looking to pay off his millions in loans and debts; Allen's deal with Ca'Foscari had no financial contingency, highlighting the urgency with which Allen needed to facilitate a Callison sale. Mem. Op. at 2, 6. Additionally, Allen also stands to lose $60 million in terminate fees if it failed to complete the Callison sale in due time. Id. at 7.

Applying the logic from the Court of Chancery in Infogroup, it becomes apparent that even though all Callison shareholders would receive equal cash value for their shares, it is Allen who stood to gain a material benefit different from the other minority shareholders if the Board agreed to sell 100% of Callison. Unlike Galena and the

other shareholders could liquidate their relatively small shares on the market, Allen would only be able to liquidate its large percentage if the entire company was sold. Allen would be given the benefit of unloading this stake in the company that it otherwise may not have been able to do. For the minority shareholders, the sale itself did not result in a price that much higher than would have been possible to attain on the market itself.

Therefore, Allen's unique need for financial liquidity renders the Vicente Merger a conflicted transaction, and this conflict unfairly influenced the Callison Board's decision to pursue the Vicente Merger at the expense of Galena and the other minority shareholders.

2. The Board fails to show that the Vicente Merger Agreement was entirely fair to its minority shareholders.

The Board's Vicente Merger transaction does not meet the standards of entire fairness. In order to invoke entire fairness scrutiny, the plaintiff in a suit challenging a cash-out merger must plead specific facts to demonstrate the unfairness of the merger terms to the minority. Weinberger v. UOP, Inc., 457 A.2d 701, 709 (Del. 1983); Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011). The complaint must allege facts which, if accepted as true, establish that the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders. McMullin, 765 A.2d at 921.

The concept of fairness has two basic aspects: fair dealing and fair price. Weinberger, 457 A.2d at 711. However, the test for

fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness. Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 845 (Del. 1987); Weinberger, 457 A.2d at 712. Approval of a merger by an informed vote of a majority of the minority shareholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs. Nonetheless, the controlling shareholder retains the burden of showing complete disclosure of all material facts relevant to that vote. Id. at 713.

Even when a controlling shareholder can effectively block the decisions of a subsidiary board of directors, the directors may not simply tailor the sale process to acquiesce to the shareholder's interests. McMullin v. Beran, 765 A.2d 910. In McMullin, the Delaware Supreme Court evaluated the fairness of Atlantic Richfield's sale of its eighty-percent-owned subsidiary, ARCO Chemical ("Chemical"), to a third party. Id. at 912. Atlantic Richfield received an offer from a third party. Recognizing that no deal could be approved without Atlantic Richfield's support (due to its controlling stake in Chemical), the Chemical board authorized Atlantic Richfield itself to negotiate the sale of the company. Id. at 915. Working with its financial advisor, Atlantic Richfield measured the interest of a number of potential acquirers. Id. Following that investigation, Atlantic Richfield entered into serious negotiations with the initial third party bidder, Lyondell. Id. Having secured a number of price increases, Atlantic Richfield accepted Lyondell's all-cash, all-share tender offer for Chemical. Id. at 916. Chemical's twelve-member board

included six directors who were also employees of Atlantic Richfield and two other members who had prior affiliations with other subsidiaries of the Atlantic Richfield. Id. All of these "interested" directors participated in the meeting and the vote to approve the transaction. Atlantic Richfield's financial advisor, Chemical's financial advisor and other Atlantic officers gave presentations to the effect that the consideration was fair to the company's public stockholders. Id. Chemical's board approved the transaction and recommended that its stockholders tender into the offer. Id.

The Court found that the plaintiff's complaint raised a reasonable inference that Chemical's board did not exercise independent judgment. Id. Fundamentally, because the majority stockholder has the right to determine what to do with its own shares, the Court did not require the subsidiary board to engage in the essentially "futile exercise" of seeking a better alternative to the majority shareholder's favored transaction. Id. at 920. Although the Chemical board had no power to seek or effect a transaction not supported by the majority stockholder, it nevertheless had a duty to analyze the transaction with the Revlon value-maximization standard in mind, and make informed and independent judgments on whether or not to recommend stockholders tender into the offer. Id. at 921.

The Court of Chancery acknowledges that a well-pled shareholder complaint can raise a reasonable inference that subsidiary directors whom are financially beholden to a controlling shareholder are "interested". Orman v. Cullman, 794 A. 2d 5 (Del. Ch. 2002). In Orman, the Court of Chancery considered an attack by a minority shareholder on the fairness of a cash-out merger. Plaintiff, a minority

shareholder of General Cigar Holdings, Inc. ("General Cigar"), asserted claims for breaches of fiduciary duty in connection with the cash-out merger of the public shareholders of General Cigar. Id. at 14. The plaintiffs attacked the disinterest and independence of General Cigar's board of directors when it approved the merger, and claimed that the board breached its duty of disclosure by omitting material facts necessary for the public shareholders to make a fully informed decision to vote for or against the merger. Id.

The Court of the Chancery denied the directors' motion to dismiss, finding that: 1) the shareholder raised a reasonable doubt as to the disinterest of the board of directors, and (2) the shareholder's pleading stated a viable claim with respect to a breach of the fiduciary duty of loyalty. Id. The plaintiff raised a reasonable doubt as to the independence and/or disinterestedness of two directors, one of whom had a $75,000 consulting contract with the target company that would be honored by the surviving entity, raising a reasonable inference that he was beholden to the controlling shareholder. Id. at 30. The other director was the chairman of a company due $3.3 million in fees if the merger was consummated, thereby raising a reasonable doubt as to his disinterest. Id. As a result, plaintiff successfully challenged the independence and disinterest of a majority of the eleven-member board and avoided dismissal of its claims for breach of the duty of loyalty. Id. at 31.

Similar to situations in which the acquiring corporation obtains voting agreements representing a substantial percentage of the target corporation's shares, the situation in which a parent corporation seeks to sell its partially owned subsidiary encompasses the same

result. Michael A. Stanchfield, Voting Lock-Ups and Sales of Partially Owned Subsidiaries: Can Stockholders Love a Deal Too Early and Too Much? 28 Wm. Mitchell L. Rev. 1325. For the minority stockholders, the vote on the acquisition itself is largely, if not completely, a foregone conclusion. Id. at 1344. There is little or no hope that a superior offer may be made by a third party and be accepted by the target. Id. The only choice for public stockholders is whether to accept the consideration offered in the deal that has been approved by the Board, or to assert their statutory appraisal rights. Id. at 1345. Subsidiary directors therefore should be most concerned with undertaking an informed, deliberate process for evaluating the proposed transactions and thereby giving a meaningful recommendation to stockholders. Id. at 1347.

Allen influenced the Board's actions throughout the transaction. Allen's 72% share in Callison gave it effective blocking power over any transaction that the Callison Board may have approved after an auction, and that this blocking position would discourage a potential bidder from making a bid for the entire company. Mem. Op. 9. While Callison did appoint a negotiating committee of 3 outside directors, the Board itself remained involved in every integral step of the sale, and made important decisions at each stage of the process. Id. at 3. The Special Committee, while independent in name, still recognized the practical reality that Allen could block any proposed transaction that Allen didn't consider to be a fair price or in Allen's best interest. Id. at 6. This made the Committee hesitant to engage in any sale process that could end in futility if Allen was ultimately opposed to it. Id. at 7. Allen's influence on the sales process is also evident

from its insistence that each potential DADW winning bidder also sign a pre-commitment contract with Allen itself – an example of Allen altering the terms of the auction process to suit its unique position of control. Id. at 7.

If the Orman opinion serves as precedent, then the Chancery Court correctly identifies a majority of the Callison directors to be "interested" directors. Four out of the seven Callison directors - Timothy Michaels (Allen Vice President-Finance and Callison Chair and Chief Executive Officer), Clare Lieberman (Allan Vice President-Operations and Callison Chief Operating Officer), Rhaney Patricks (Allen Chief Information Officer and Callison Executive Vice President), and Julio Luis-Rojas (Allen Assistant Vice President and Callison Vice President) all keep important executive positions within the Allen corporation. Id. at 3. They are salaried Allen employees that are financially beholden to Fairmount and Allen. This makes them interested directors. Furthermore, Allen's October 3 interest meeting with the Callison Board declaring Allen's interest in liquidating its shares was merely a formality, as the Callison Board's close relationship with Allen meant that they were always informed of Allen's developing plans in "virtual real time" from July to October. Id. at 4.

As McMullin and similar cases have held, the directors' duty of care is implicated by a controlling stockholder's actions. Sinclair Oil Corp., 280 A.2d at 719. The principal owners of the target corporation are making a decision that a proposed deal should be approved, before the public stockholders have an opportunity to weigh in on the transaction. Stanchfield, supra at 1346. This decision by

the principal stockholder has the effect of all but precluding any third-party topping bid. Id. at 1347. It would be meaningless and wasteful of corporate resources to require the subsidiary board to engage in a search for value-maximizing alternatives to the deal struck by the majority stockholder. Id.

The situation described is identical to the present dynamic between Allen and Callison. Like the plaintiff shareholders in McMullin, Galena raises a reasonable doubt, based on well-pled facts, that the interested nature of the directors combined with the influence asserted by Allen throughout the transaction implicates a possible duty of loyalty violation. The aspect of fair dealing is not met here, even if the share price of the Vicente offer is higher than the market value of Callison stock. By encouraging their shareholders to accept a lower tender offer price and denying Galena the opportunity to tender its financially higher offer, the Board acted in an interested manner. The Board thus fails to show that the transaction was entirely fair to Callison's minority shareholders.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the decision of the Court of Chancery, and uphold the preliminary injunction order against the Appellants.

Respectfully Submitted,

____/s/__________________

Team O,
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