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### NATURE OF THE PROCEEDINGS

Defendants, Callison Inc., Timothy Michaels, Claire Lieberman, Rhaney Patricks, Julio Luis-Rojas, Patrick Austin, Marsha Franklin, Ari Singh, and Allen Enterprises Inc., appeal the judgment rendered by the Court of Chancery of the State of Delaware on January 14, 2013, granting Plaintiff Galena Capital Partners, LLC's a preliminary injunction. Defendants appeal to this Court to overturn the Order enjoining them from taking any action to enforce the "Don't Ask, Don't Waive" Standstill ("DADW Standstill") provision of a contract Callison entered into with Galena.

Starting in October 2012, Callison decided to sell the company and entered into DADW Standstill agreements with Galena and five other bidders. Op.5, 10. The agreements prohibited the bidders from making any subsequent communications or proposals. (Op.8) On December 17, 2012, Callison announced that Vicente Capital Inc.'s \$34 offer, was the winning DADW bid. (Op.14) Several days later on December 21, Galena commenced a tender offer for Callison shares at \$35.50 and simultaneously filed a lawsuit alleging that the "Callison Board's use of the DADW Standstill. . . is a breach of the Board's fiduciary duties to Galena as a Callison stockholder. . . ." (Op.15-16)

Chancellor Nelson concluded that enforcement of the DADW Standstill was a breach of the Callison Board's fiduciary duties under *Revlon* to maximize shareholder value and to make a meaningful and informed recommendation to the shareholders regarding an open tender offer. (Op.21-23) On January 25, 2012, this Court accepted the appeal made by Defendants. (Order Accepting Appeal 1)

## SUMMARY OF THE ARGUMENT

The DADW employed by the Callison board is an unenforceable contract provision, and therefore the preliminary injunction granted by the Chancery court should be upheld. The DADW does not comport with the *Revlon* Doctrine, which mandates a duty to obtain the highest possible price in consideration of a merger. This court should interpret the *Revlon* Doctrine to find the DADW invalid and unenforceable, as the directors excluded a tender offer that would have directly and substantially benefitted their shareholders. Further, because the board refused to discuss a materially higher offer, they essentially turned a blind-eye to critically important information that, objectively measured, would afford shareholder greater value.

Should this court find the Callison board's decision to uphold the DADW provision adequate under the *Revlon* standard, this court should utilize a strict scrutiny review and still grant the preliminary injunction using an entire fairness analysis of the transaction. A fairness analysis aims to determine that the transaction was completed with a fair price and fair dealing. Allen, the controlling Callison shareholder, contracted to purchase another company, and needed to liquidate all of its Callison shares. Due to Allen's unique need for liquidity and conflicting interest in the funds, he exerted improper influence on the sale process for Callison and pushed to uphold the DADW agreement in violation of his fiduciary duty of care to the shareholders.

## FACTS STATEMENT

### A. The Parties

Appellant Callison, Inc. ("Callison") is a Delaware corporation headquartered in Raleigh, North Carolina. (Op. at 2) Callison manufactures and sells "off-brand athletic apparel." (Op. 2) Appellant Allen Enterprises Incorporated ("Allen") is a holding company that is privately owned by billionaire Allen D. Fairmount, III. (Op. 2) Allen holds 72% of Callison's 85 million shares of outstanding stock. (Op. at 1, 2) Callison is Allen's largest portfolio company. (Op. at 3)

The individual appellants include the seven members of Callison's Board of Directors that were nominated by majority shareholder Allen. (Op. at 3) Four of the directors are full-time employees of both Callison and Allen, and can be classified as inside directors. (Op. at 3) The remaining three directors have no financial or personal ties to Allen, but were nominated and elected by Allen. (Op. at 3)

Appellee Galena Capital Partners, LLC ("Galena") is a private equity firm and a Delaware limited liability company that has 18 billion dollars of capital under management. (Op. at 3) Galena owns 10,000 shares of Callison's common stock. (Op. at 2)

### B. Factual Background

In July 2012 Allen became interested in liquidating its stake in Callison to finance the acquisition of a major restaurant chain. (Op. at 3-4) From August 2012 to October 2012, Allen's management team, with the assistance of investment banking firm Reed Crystal, LLP searched for good acquisition targets. (Op. at 4)

After receiving authorization from Allen, Reed Crystal contacted Callison to discuss the liquidation of Allen's 72% stake in the company. (Op. at 4) Reed Crystal informed the Callison board that it believed an "all-cash transaction would be the most effective method for realizing the highest value for all Callison shareholders. . . ." (Op. at 4) In response, on October 10, 2012, the Callison Board established a special committee ("Committee") of the three independent directors to whom it delegated full authority and negotiating power in connection with the sale. (Op. at 5)

The Committee, advised by investment bank Bonchek Graycourt Inc. ("Bonchek"), met with Allen and its advisors on October 20, and expressed concern over a protracted public auction. (Op. at 6-7) To protect confidential information and expedite the bidding process, the Committee and its advisors decided to solicit bids from twenty potential buyers for a private sale and made use of a "Don't Ask, Don't Waive" Standstill ("DADW Standstill") agreement. (Op. at 7) The agreement required a bidder to make a one-time "best offer" and barred bidders from making subsequent "topping bids." (Op. at 7-8) The DADW Standstill also contained a market check provision with a fiduciary out that enabled Callison to terminate the bid in favor of any "superior proposal" from the market. (Op. at 8) If Callison cancelled the DADW winning bid for a superior one, it would have to pay out a 3% termination fee to the bidder. (Op. at 9)

On November 28, 2012, Allen reached a definitive agreement to purchase the Ca' Foscari restaurant chain for \$2.4 billion in cash. (Op. at 6) Allen's obligation to purchase Ca' Foscari was not subject

to a financing condition, but was subject to a liquidated damages provision imposing a \$60 million penalty for failure to close the transaction by March 31, 2013. (Op. 6)

Six companies signed the DADW Standstill and at the close of bidding, Galena's bid of \$32.50 per share was the second best offer after Vicente's winning bid of \$34 per share. (Op. at 10, 11) Neither of the bids was subject to financing or other conditions. (Op. at 11) In a presentation to the committee, Bonchek advised that the \$34 per share was financially fair to Callison and its minority stockholders. (Op. at 11) Later, the Callison Board unanimously approved the Vicente offer and on December 15-16 entered into a definitive merger agreement for \$34 per share. (Op. at 12) Vicente agreed to keep its tender offer open for 40 days to accommodate the market check evaluation period. (Op. at 13)

On December 17, Callison, Vicente, and Allen issued a joint press release announcing the merger. (Op. at 14) During the market check period Callison received no superior proposals from outside bidders. (Op. 15) However, two days after the merger announcement, on December 19, Galena delivered a confidential letter to Callison privately requesting that they waive the DADW Standstill agreement to permit Galena to make a topping bid. (Op. at 15) Galena sought to make a fully financed offer of \$35.50 per share for all of Callison's shares, representing a \$128 million or 4.4% premium over Vicente's offer. (Op. at 15) The Callison board met on the night of December 19, 2012 to evaluate Galena's actions and decided to enforce the provisions of the

DADW Standstill agreement. (Op. at 16) Callison denied Galena's waiver request. (Op. at 16)

On December 21, Galena filed a lawsuit and simultaneously commenced an "all cash, all shares tender offer" for Callison shares at \$35.50 per share. (Op. at 16) The tender offer disclosed Galena's intention to initiate a second-step cash-out merger if its offer was successful, thereby mirroring the structure of Vicente's offer. (Op. at 12-13, 16) Galena seeks declaratory relief that "Callison Board's use of the DADW Standstill. . . is a breach of the Board's fiduciary duties to Galena as a Callison stockholder and that Galena's continuing attempts to acquire Callison are not in breach of any contractual obligations under the DADW." (Op. at 16-17)

## ARGUMENT

- I. **The Court of Chancery was correct when it granted a preliminary injunction and held the DADW Standstill agreement to be unenforceable.**

### **Question Presented**

Did the Court of Chancery properly enjoin Callison from taking any action to enforce the DADW Standstill?

### **Scope of Review:**

The grant of a preliminary injunction is reviewed for abuse of discretion but without deference to the legal conclusions of the lower court. *See, SI Management L.P. v. Winger*, 707 A.2d 37, 40 (Del. 1998) (citing *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996)).

To succeed on a motion for a preliminary injunction, the moving party must demonstrate that there is a reasonable probability of success on the merits of the underlying claim, that there is an imminent threat of irreparable harm and that a balancing of the equities of the case tips in its favor. *See, SI Management L.P. v. Winger*, 707 A.2d 37, 40 (Del. 1998); *In re Micromet, Inc. Shareholders Litig.*, 2012 Del. Ch. LEXIS 1, \*13-14 (Feb. 29, 2012).

### **Merits of Argument:**

This court should affirm the Court of Chancery's decision to grant Plaintiff's motion for a preliminary injunction because Callison's adherence to the DADW standstill agreement violates its fiduciary duty of care under *Revlon*. *See, Revlon, Inc. v. MacAndrews & Forbes Holdings Inc.*, 506 A.2d 173 (Del. 1986). When a transaction results in a sale of control, *Revlon* is implicated, and the directors'

primary objective becomes "secur[ing] the transaction offering the best value reasonably available for the stockholders." *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 44 (Del. 1993). The burden shifts to the directors to prove "that they were adequately informed and acted reasonably." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1031 (Del. Ch. 2012). The court must analyze both: (1) the "adequacy of the decision making process employed by the directors, including the information on which [they] based their decision" and (2) "the directors' actions in light of the circumstances then existing." *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005) (quoting *QVC*, 637 A.2d at 42).

The Callison Board's refusal to pursue Galena's higher tender offer violated its fiduciary obligations to maximize shareholder value under *Revlon*. Given that the DADW Standstill agreement prevented bidders from communicating continuing interest in the company, Callison's Board could not fulfill its statutory duty to make an informed recommendation to the shareholders about whether to accept Vicente's tender offer. Therefore, this court should affirm the decision below and hold that the DADW Standstill is unenforceable.

**A. In light of Galena's explicit and materially better offer, the Callison Board breached its *Revlon* duty when it refused to waive the provisions of the DADW standstill agreement and forfeited substantial shareholder value.**

Once a board has elected to proceed with the sale of an entire company, it is "required to seek the highest value reasonably available for the shareholders regardless of where that value comes from." *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560 at \*7 (Del. Ch. 2013) There is no specific "blueprint" for the process that

directors must employ, however, the ultimate focus of the transaction must be value maximization. *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). Upon judicial review, courts will not usurp a board's business judgment, but will determine if the decision was within a "range of reasonableness." *Toys "R" Us, Inc.*, 877 A.2d at 1001. Thus, "[a]lthough the directors have a choice of means, they do not comply with their *Revlon* duties unless they undertake reasonable steps to get the best deal." *In re Netsmart Technologies Shareholders Litigation*, 924 A.2d 171, 192 (Del. Ch. 2007).

The Callison Board acted unreasonably when it failed to explore all available options in pursuit of the best offer for the company. Galena offered Callison \$35.50 per share. Vicente only offered \$34. When presented with Galena's concrete topping bid, the Callison Board instead deferred to the self-imposed contractual limitations of the DADW Standstill and left significant value on the proverbial table. By sacrificing upwards of \$128 Million in potential shareholder value, the Callison Directors have clearly breached their fiduciary duty under *Revlon*. When approached by Galena the Directors' duty was paramount and required value maximization. Failure to achieve this renders any other actions the Directors' took inconsequential and the provision unenforceable.

Although Callison attempts to justify usage of the DADW Standstill as a stalwart against a protracted auction period that could potentially frustrate the long-term prosperity of the company, this justification is insufficient. A board may consider the long-term implications for a company, but these concerns are subordinate to the

goal of value maximization. Regardless of the merits behind the private auction process that led to a successful bid by Vicente, the provisions of the DADW Standstill cannot supersede the board's duty to its shareholders. Any contractual parameters are ancillary to the duty that the directors had to maximize the corporation's sale value. See, Paul L. Regan, *Great Expectations? A Contract Law Analysis for Preclusive Corporate Lock-Ups*, 21 *Cardozo L.Rev.* 1, 86 (1999).

Because Galena's superior proposal would cover the termination fee included in the Vicente offer, the argument that accepting Galena's offer would threaten shareholder value is erroneous. Boards can effectively utilize deal protection devices when there is a "good faith negotiation process in which the target board has reasonably granted protections in order to obtain a good result for the stockholders. . . ." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1049 (Del. Ch. 2012). However, in order to uphold these protections, a court must analyze the measures' cumulative effect on overall shareholder value, and conclude that the board "knew" they had secured the most lucrative deal for the company. *Ryan v. Lyondell Chemical Company*, 2008 WL 2923427, at \*16 (Del. Ch. 2008). Absent an inquiry into Galena's offer, the Callison Board could not definitively "know" whether Vicente's offer was better than Galena's. Therefore, ongoing adherence to the contractual provisions of the DADW was a breach of the Directors' fiduciary duty.

**B. The Directors' fear of a protracted auction had been eliminated by the end of the market check period and usage of the DADW Standstill was no longer justified.**

As previously noted, no specifically delineated process exists which directors must abide by in order to fulfill their fiduciary duty to maximize shareholder value. *See, Barkan*, 567 A.2d at 1286.

"[V]iewed in isolation...Don't Ask Don't Waive Standstills arguably foster legitimate objectives," however, these agreements are problematic in light of the importance of achieving the best deal and adequately exploring every end in furtherance of that goal. *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471 at \*21 (Del. Ch. 2011).

The Callison Directors initially expressed fears regarding an open auction and the effect it could have on the company's long-term prosperity. These preliminary concerns may have been justified at the inception of the auction process, but had been eliminated at the time of Galena's topping bid. Galena's firm offer was made within Callison's finite and self-imposed market check period. At this point Callison was presented with only two tender offers from vetted and pre-selected bidders. The only difference between the offers was that Galena's superior proposal was \$1.50 per share higher. Both companies made offers with no contingent financing. Therefore, the Callison Directors lacked justification for its refusal of Galena's bid at the expense of shareholder value.

The Callison Board subverted the shareholders' right to decide whether to pursue Galena's tender offer. The facts here are similar to those in *In re Topps Company Shareholders Litigation*, where plaintiffs (shareholders of the target) argued that the board of directors was

"denying its shareholders the chance to decide for themselves" whether to abandon a lower-priced bid for a higher one when the board refused to enter into talks with a subsequent interested party. *In re Topps Co. Shareholders Litigation*, 926 A.2d 58, 63 (2007). There, the court ruled that the directors breached their *Revlon* duty because "any favoritism...display[ed] toward particular bidders must be justified solely by reference to the objective of maximizing the price the stockholders receive for their shares." *Topps*, 926 A.2d at 64. Further, a breach of fiduciary duty occurs whenever any action is taken by a director to "bias the process against one bidder and toward another not in a reasoned effort to maximize advantage for the stockholders." *Topps*, 926 A.2d at 64.

Similarly, Callison's failure to pursue Galena's offer undermined the sale process and displayed favoritism towards Vicente's bid without regard for shareholder value. Callison relies solely on the DADW Standstill to justify this favoritism. This bias against Galena was not part of a reasoned effort to maximize shareholder value and thus is a breach of fiduciary duty.

Furthermore, *Revlon* mandates that "directors may not use tactics that destroy the auction process." *Barkan*, A.2d at 1286. By foreclosing Galena's ability to submit its topping bid and refusing to negotiate further in light of the DADW, the Directors fundamentally destroyed present value immediately recognizable to shareholders. The directors were required to explore Galena's offer in furtherance of their fiduciary duties.

**C. The Callison Board breached its ongoing statutory and fiduciary duty to give a meaningful and current recommendation to its stockholders by adhering to the terms of the DADW Standstill.**

The DADW Standstill prohibits the expression of continuing interest in Callison from the company's most enthusiastic suitors. Callison chose to completely sever the lines of communication between itself and the DADW bidders after they submitted their proposals. This "operated to ensure an informational vacuum" and "increased [the] risk that the Board would outright lack adequate information." *In re Celera Corp. Shareholder Litigation*, 2012 WL 1020471, at \*21 (Del. Ch.). Such a vacuum interfered with the Board's ability to evaluate the winning DADW bid or any subsequent "superior proposal." (Op. 8). The DADW Standstill also rendered it impossible for the Callison Board to satisfy its related and ongoing obligation "to give a meaningful [and] current recommendation to its stockholders" regarding an active tender offer. *In re Complete Genomics, Inc. Shareholder Litig.*, Consol. C.A. No. 7888-VCL, 17 (Del. Ch. Nov. 27, 2012) (Transcript of Telephonic Ruling). The potential shareholder harm that can result from contractually creating an informational vacuum was illustrated perfectly when Galena was forced to breach the standstill to privately propose an objectively better offer. Rather than considering or investigating the initial offer as mandated by its fiduciary and statutory duties, the Callison Board willfully disregarded it. Therefore, this court should affirm the decision below and hold that the DADW Standstill is unenforceable.

A board of directors owes a duty of care to be informed of all material information reasonably available to it prior to making a

business decision. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). In the context of a merger, a director's duty to act in an informed and deliberate manner flows from the board's duties under 8 Del.C. § 251(b) to approve a merger agreement and recommend it to the stockholders. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985). State statutory and fiduciary law dictates the directors duties to approve and recommend the proposed merger agreement extends beyond Williams Act compliance. *Matador Capital Management Corp. v. BRC Holdings, Inc.*, 729 A.2d 280, 295 (Del. Ch. 1998).

"Delaware law requires that a board of directors give a meaningful, current recommendation to stockholders regarding the advisability of a merger including...recommending against the merger as a result of subsequent events." *Complete Genomics*, No. 7888-VCL at 17. To the extent that a contract provision purports to require a board's action or inaction that would limit the exercise of fiduciary duties, it is invalid and unenforceable. *QVC*, 637 A.2d at 51.

The DADW Standstill is invalid because it completely forecloses the opportunity of the Callison Board to privately negotiate with or entertain bids from previous bidders. In *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, the court held that the plaintiff's duty of care claim had reasonable success on the merits against a company that enforced a "no-talk provision" which prevented suitors from entering into private acquisition talks with the company. 1999 WL 1054255, at \*1-2 (Del. Ch. Sept. 27, 1999). The court reasoned that such a provision is the "legal equivalent of willful blindness" and may

constitute a breach of a board's duty to be informed of all information reasonably available. *Id.* at \*2.

In *Complete Genomics*, the court granted a preliminary injunction against the target company in an acquisition from enforcing a DADW Standstill provision. *Genomics*, No. 7888-VCL. The court originally denied the bidders' application to enjoin the provision when it falsely believed the DADW would allow for private communications between the bidders and the target. *Id.* at 12. However, once the bidders clarified that the DADW operated as a blackout provision that eliminated all waiver requests, the court found that a preliminary injunction was warranted. *Id.* at 12-13. Citing *Phelps Dodge*, the *Genomics* court analogized a DADW Standstill provision to a "bidder-specific no talk clause." *Id.* at 14. The court additionally concluded that the DADW Standstill impermissibly interfered with the board's duty to make a current and meaningful merger recommendation. *Id.* at 17. The court invalidated the provision. *Id.* at 18.

The DADW Standstill provision that Callison refused to waive is nearly identical to the provision held invalid by the Chancery Court in *Complete Genomics*. The DADW Standstill prohibited communication between Callison and Galena through both public and private channels. Callison contracted away its ability to learn that Galena had continuing interest in extending a tender offer to Callison shareholders at a higher price. This information was material and would certainly influence an objective evaluation of the prospective sale of the company. The Callison Board assumed a position of willful blindness that precluded it from making an informed and current

recommendation to its shareholders after the DADW bidders submitted their initial offers.

The Board did not have the power to place a deadline on the flow of information. Although the agreement was subject to a fiduciary out, the increased risk that the board would not obtain or employ all relevant and adequate information "emasculate[d]" the protections afforded by the fiduciary out. *Celera Corp.*, 2012 WL 1020471 at \*21. Therefore, since the DADW Standstill unduly impaired the Callison Board's ability to exercise its fiduciary duties, it is unenforceable and invalid.

Callison's minority shareholders would suffer irreparable harm if this Court overturned the preliminary injunction. When a board has decided to sell a company, a contractual restraint that prevents stockholders from considering or choosing another higher-priced deal threatens irreparable injury. *Topps*, 926 A.2d at 92. The agreement is still precluding the other DADW bidders from coming forward with any expression of interest. One can only speculate as to damage this is causing minority shareholders. *Genomics*, No. 7888-VCL, at 20. The only remedy for this situation is the invalidation the DADW Standstill agreement.

A balance of the equities also militates toward upholding the Chancery Court's limited injunction against the enforcement of the DADW Standstill agreement. As previously noted, Callison's original concerns for requiring its bidders to sign the standstill are no longer pertinent to the sale process. Callison would face the minor hardship of having to evaluate the facially higher offer, negotiate

with Galena, and pay Vicente the termination fee which is more than covered by Galena's premium offer. The Plaintiff and all shareholders face the hardship of making an uninformed decision to tender their shares to Vicente while they are foreclosed from getting a higher price.

**II. This court should uphold the preliminary injunction because the Callison Board's actions constituted a breach of fiduciary duty under the heightened entire fairness standard of review.**

#### **Question Presented**

Should the controlling shareholders' conflicting financial interest for liquidity warrant heightened judicial scrutiny of the Callison Board's misuse of the DADW?

#### **Scope of Review**

The grant of a preliminary injunction is reviewed for abuse of discretion but without deference to the legal conclusions of the lower court. *See, SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998); *citing Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Therefore, the standard of review remains *de novo*, and the court should consider all legal arguments posited.

To succeed on a motion for a preliminary injunction, the moving party must demonstrate that there is a reasonable probability of success on the merits of the underlying claim, that there is an imminent threat of irreparable harm and that a balancing of the equities of the case tips in its favor. *See, SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998); *In re Micromet, Inc. Shareholders Litig.*, 2012 Del. Ch. LEXIS 1, \*13-14 (Del. Ch. Feb. 29, 2012).

**Merits of Argument:**

If the Court decides that the DADW Standstill did not violate the Callison Board's fiduciary duty under a sale of control *Revlon/QVC* analysis, this Court should still grant Galena's request for a preliminary injunction because the Callison Board's actions would not survive an entire fairness review as articulated in *McMullin*. Specifically, majority shareholder Allen's financial necessity for liquidity influenced the Callison Board's decision to reject Galena's tender offer. The Directors breached their hallmark duties of loyalty and care owed to all shareholders, when they rejected Galena's offer. Accordingly, the business judgment presumption is rebutted and enhanced scrutiny is applied to the transaction. Because the Galena proposal offered an objectively higher price, and the Board did not engage in any consideration of this proposal, the Callison Board failed to meet its fiduciary obligations. Therefore, the DADW Standstill should not be enforced.

**A. Controlling shareholder Allen's pressing need for financial liquidity improperly influenced the Board's decision to uphold the DADW and warrants a heightened standard of review.**

Any transaction undertaken by a Board of Directors is subject to the rebuttable presumption of the business judgment rule. See *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000); *Aronson*, 473 A.2d at 812. In order to rebut the business judgment rule, the plaintiff must provide evidence that the Board of Directors breached any one of its "triad of primary fiduciary duties: due care, loyalty or good faith." *Emerald Partners v. Berlin*, 726 A.2d 1215, 1221 (Del. 1999). Upon discovering evidence of a breach of any of the aforementioned duties,

the burden then shifts to the defendant, to prove the "entire fairness" of the transaction. *Id.* at 1222. The fairness inquiry is a heightened standard of review that looks at both the procedure and substance of the challenged transaction or essentially, "fair dealing and fair price." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

When a majority shareholder has an ulterior financial interest in a sales transaction, the board can not abdicate its duty to minority shareholders. In *McMullin v. Beran*, controlling shareholder ARCO, who maintained well over a 50% ownership stake, initiated and negotiated the sale of company Chemical in order to attain necessary liquidity to fund ARCO's acquisition of United Texas Petroleum Holdings. 765 A.2d 910, 921 (Del. 2000). Minority shareholders alleged that the Chemical Board breached its duty of loyalty by de-prioritizing the value maximization of all shareholders to satisfy the financial needs of one. *Id.* at 923. They also took issue with the Board's failure to require conflicted ARCO directors to abstain from approving the third-party transaction. *Id.* at 923. Additionally, minority shareholders alleged that the Chemical Directors breached their duty of care by failing to adequately inform themselves about whether the valuation was fair. *Id.* at 922. The court found that one could reasonably infer breaches of both of these duties, and therefore heightened scrutiny was warranted. *Id.* at 922-924.

Here, controlling shareholder Allen sought to liquidate its ownership in Callison in order to finance its acquisition of Ca' Foscari. In fact, Allen initiated talks with the Callison directors to commence sale of the entire company. Allen's interest in immediate

liquidity conflicts with the financial interest of the minority shareholders. Allen entered into an agreement to purchase Ca' Foscari that does not contain a contingent financing condition. However, Allen is subject to a 60 million dollar liquidated damages penalty for failure to close the Ca' Foscari acquisition by March 31, 2013. Allen would be unable to finance the Ca' Foscari transaction without liquidating its ownership in Callison.

The Callison Board, aware of Allen's financial necessity, improperly utilized the DADW as an excuse to reject Galena's proposal. If the Board entertained the Galena tender offer, it would have had to provide Vicente with the opportunity to match the offer, and would likely have led to a longer acquisition process. With the clock ticking on the Ca' Foscari deal, Allen's ability to meet the deadline was in jeopardy. This fear improperly influenced the Callison Board to hide behind the DADW in order to reject Galena's value maximizing bid in favor of Vicente's safe bet. Therefore, the Court should reasonably infer, as in *McMullin*, that the Callison Board breached its duty of loyalty to minority shareholders by failing to consider the superior proposal.

The Callison Directors were also required under statutory and fiduciary obligations to make an informed recommendation to its shareholders. 8 Del.C. § 251(b) (2010); *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985). This duty is enhanced in the context of the sale of a company initiated by a majority shareholder and bears on the overall procedural fairness of the transaction. *McMullin*, 765 A.2d at 920. It requires a board to (1) conduct a critical assessment of the

transaction, and (2) to then make an independent determination of whether the proposed transaction resulted in maximized shareholder value. *McMullin*, 765 A.2d at 920.

Without considering the Galena tender offer, the Callison Board could not independently determine whether the Vicente bid maximized shareholder value. Although Boncheck, the Board's financial advisor, deemed the Vicente bid financially "fair," this evaluation was before the Galena tender offer was on the table. The Board's outright refusal to entertain Galena's offer prevented it from making an informed recommendation and was a glaring flaw in their procedural fairness of the sale.

The Board's decision to uphold and utilize the DADW simply does not constitute a matter of business discretion. Appellant may highlight the reality that Allen had the voting power to veto anything it disfavored. However, this factual reality does not allow the Board to abdicate its responsibilities to minority shareholders. In fact, because there was a majority shareholder actively invested and involved in this process, the Board's fiduciary obligation to look out for the interests of the minority shareholders was heightened. Accordingly, the Callison board improperly utilized the DADW to serve Allen's financial needs, thereby breaching its duty to minority shareholders.

The Board's failure to address all offers shows that its transactional process was incomplete and did not constitute "fair dealing." *Weinberger*, 457 A.2d at 711. Because the Callison Board breached its duties of loyalty and care and employed an unfair sale

process, Galena has a reasonable probability of success on the merits and the preliminary injunction should be affirmed.

**B. *Synthes* is inapposite because the majority shareholder in *Synthes* had no existing financial obligations and the board fully deliberated over two structurally diverse offers.**

Contrary to Appellants' claim, *In Re Synthes, Inc. Shareholder Litigation* gives no occasion to revisit the liquidity conflict analysis of *McMullin*. 50 A.3d 1022 (Del. Ch. 2012). In *Synthes*, former CEO Wyss was the controlling majority holder of *Synthes*. *Id.* at 1025. Although Wyss expressed interest in pursuing other ventures that would require liquidity he did not initiate talks with the *Synthes* Board about sale of the company. *Id.* at 1025-6. The *Synthes* court stated that the plaintiffs pled no facts to "suggest that Wyss forced a crisis sale. . . to satisfy some urgent need for cash." *Id.* at 1036. The *Synthes* Board privately canvassed strategic suitors to solicit offers, and engaged in talks with private equity firms that expressed interest in acquisition. *Id.* at 1026-1027. The *Synthes* Board then compared the competing proposals it received from one of the strategic suitors and a private equity firm. *Id.* at 1028. These two offers were structurally distinct; one was for an all-cash transaction while the other was for a combination of cash and stock. *Id.* at 1027-1028. The Board continued negotiations with both companies and was able to extract higher value. *Id.* at 1027-1029.

Conversely, controlling shareholder Allen's need for financial liquidity is well-established. Allen initiated discussions with the Callison Board to finance its hopeful acquisition of a restaurant chain. This necessity materialized when Allen executed a definitive

agreement to purchase Ca' Foscari. Because Callison represents Allen's largest portfolio asset, Allen does not simply desire but requires liquidation of its shares to have any hope of satisfying its contractual obligations to acquire Ca' Foscari. The Board responded to this necessity when it commenced the sale process at Allen's behest, favored a non-protracted auction process, and rejected Galena's offer for fear it might inhibit Allen's ability to realize its goals. This continued prioritization of Allen's needs exhibits a strong conflict of interest for Callison's minority shareholders.

In addition, unlike Callison, the Synthes negotiations involved no DADW Standstill agreements and the Board was free to pursue other offers. This flexibility allowed the Synthes Board to extract better offers from the two standout contenders. Instead, the Callison Board tied its hands by implementing and upholding the DADW Standstill. Subsequently, the Board outright ignored a superior proposal from an alternate bidder. This flawed process demands heightened scrutiny. Most importantly, the Synthes Board and controlling shareholder Wyss fully analyzed two competing and structurally diverse offers before reaching a decision. The *Synthes* court held that the Board and majority shareholder's preference for a deal that offered cash liquidity for all shareholders did not constitute a breach of their duty to minority shareholders. *Id.* at 1038-9. Although the majority shareholder should not unfairly advantage itself at the expense of the minority shareholders, "Delaware law does not . . . impose on controlling stockholders a duty to engage in self-sacrifice for the benefit of minority shareholders." *Id.* at 1040. This is especially

true when the majority and minority shareholders share the same goal of liquidity. *Id.* at 38. However, in this case, Callison faced two structurally identical offers that both offered the needed liquidity. Any preference was only a function of Allen and the Board's conflict of interest.

Callison's minority shareholders would suffer irreparable harm if this Court overturned the preliminary injunction. When a board has decided to sell a company, its misuse of a contractual restraint may prevent stockholders from considering or choosing another higher-priced deal that threatens irreparable injury. *Topps*, 926 A.2d at 92. Callison's adherence to the DADW Standstill in light of Allen's liquidity concerns, prioritizes the agenda of the majority shareholder and deprives the minority shareholders from the opportunity to vote on a lucrative opportunity.

A balance of the equities also militates toward upholding the Chancery Court's limited injunction against the enforcement of the DADW Standstill agreement. Because Galena provided a firm offer, the execution of this tender offer would not inhibit Allen's ability to meet his pending financial obligations and fulfill his interest in the transaction. Therefore, Allen would suffer no actionable hardship. Conversely, the minority shareholders are deprived of the opportunity to receive a substantial premium for their shares. Thus upholding the preliminary injunction serves to prevent an inequitable burden on minority shareholders.

**CONCLUSION**

For the foregoing reasons, Appellees ask the Court to AFFIRM the decision of the Court of Chancery, and recognize the invalidity of the DADW standstill provision and its application in this case.

Respectfully submitted,

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