

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.,)	On Appeal from the Court of
)	Chancery of the State of
)	Delaware
Plaintiff Below,)	
Appellee.)	

APPELLEE'S OPENING BRIEF

Law Firm Q
Attorneys for Plaintiff below,
Appellee

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Table of Contents

Table of Citations iv

Nature of Proceedings..... 1

Summary of the Argument..... 2

Statement of the Facts..... 3

Argument..... 6

 I. GALENA IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS BECAUSE THE CALLISON BOARD OF DIRECTORS CANNOT SHOW THE PROPOSED TRANSACTION IS ENTIRELY FAIR SINCE THEY REFUSED TO CONSIDER A HIGHER OFFER..... 8

 A. Questions Presented 8

 B. Scope of Review 8

 C. Merits of the Argument 9

 1. The board must show the entire fairness of the proposed transaction because the directors failed to act in an informed and reasonable manner 9

 2. Galena is substantially likely to succeed on the merits because the board of directors cannot show entire fairness of the proposed transaction when they failed to consider the interests of the minority stockholders. 13

 II. GALENA WILL SUFFER IRREPARABLE HARM WITHOUT THE INJUNCTION BECAUSE NO ADEQUATE REMEDY IS AVILABLE ONCE THE BOARD SELLS THE COMPANY..... 16

 A. Question Presented 16

 B. Scope of Review 16

 C. Merits of the Argument 16

 III. THE BALANCING OF THE EQUITIES TIP IN GALENA’S FAVOR BECAUSE THE INCONVENIENCES TO CALLISON FROM AN INJUNCTION PALE IN COMPARISON TO THE HARM SUFFERED BY GALENA WITHOUT THE INJUNCTION..... 20

 A. Question Presented 20

B. Scope of Review	20
C. Merits of the Argument	20
<u>Conclusion</u>	22

Table of Citations

<u>Abrons v. Maree,</u>	
911 A.2d 805 (Del. Ch. 2006)	6
<u>Cede & Co. v. Technicolor, Inc.,</u>	
634 A.2d 345 (Del. 1993)	14
<u>Guth v. Loft, Inc.,</u>	
5 A.2d 503 (Del. 1939)	6
<u>In re Cogent, Inc. Shareholder Litigation,</u>	
7 A.3d 487 (Del. Ch. 2010)	16, 17, 18, 19
<u>In re MONY Group Inc. Shareholder Litigation,</u>	
852 A.2d 9 (Del. 2004)	17
<u>In re Netsmart Technologies, Inc. Shareholders Litigation,</u>	
924 A.2d 171 (Del. Ch. 2007)	10, 17, 18
<u>In re Pure Resources, Inc., Shareholders Litigation,</u>	
808 A.2d 421 (Del. Ch. 2002)	17
<u>In re Synthes, Inc. Shareholder Litigation,</u>	
50 A.3d 1022 (Del. Ch. 2012)	13, 15
<u>In re Topps Co. Shareholders Litigation,</u>	
926 A.2d 58 (Del. Ch. 2007)	10, 11
<u>Ivanhoe Partners v. Newmont Mining Corp.,</u>	
535 A.2d 1334 (Del. 1987)	13
<u>Kahn v. Lynch Communication Systems, Inc.,</u>	
638 A.2d 1110 (Del. 1994)	13
<u>Mills Acquisition Co. v. Macmillan Inc.,</u>	
559 A.2d 1261 (Del. 1989)	7, 8, 9, 11, 16, 20
<u>Odyssey Partners, L.P. v. Fleming Companies, Inc.,</u>	
735 A.2d 386 (Del. Ch. 1999)	10
<u>ODS Technologies, L.P. v. Marshall,</u>	
832 A.2d 1254 (Del. Ch. 2003)	17

<u>Omnicare, Inc. v. NCS Healthcare Inc.,</u>	
818 A.2d 914 (Del. 2003)	6, 10, 12
<u>Paramount Communications Inc. v. QVC Network Inc.,</u>	
637 A.2d 34 (Del. 1993)	6, 9, 10, 11
<u>Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,</u>	
506 A.2d 173 (Del. 1986)	6, 9, 10, 12, 16, 20
<u>SI Management L.P. v. Wininger,</u>	
707 A.2d 37 (Del. 1998)	6, 8, 16, 20, 21
<u>Smith v. Van Gorkom,</u>	
488 A.2d 858 (Del. 1985)	6
<u>Strassburger v. Earley,</u>	
752 A.2d 557 (Del. Ch. 2000)	14
<u>Unocal Corp. v. Mesa Petroleum Co.,</u>	
493 A.2d 946 (Del. 1985)	10
<u>Wayne County Employees' Retirement System v. Corti,</u>	
954 A.2d 319 (Del. Ch. 2008)	17
<u>Weinberger v. UOP, Inc.,</u>	
457 A.2d 701 (Del. 1983)	10, 12, 14
<u>Weldin Farms, Inc. v. Glassman,</u>	
414 A.2d 500 (Del. 1980)	17

Nature of Proceedings

This interlocutory appeal comes before the Supreme Court of Delaware upon the application by the Defendants below: Callison, Inc., Timothy Michaels, Clare Lieberman, Rhaney Patricks, Julio Luis-Rojas, Patrick Austin, Marsha Franklin, Ari Singh, and Allen Enterprises Incorporated—challenging the Court of Chancery’s order issuing a preliminary injunction in favor of Galena Capital Partners, LLC., against the continued use of a “Don’t Ask, Don’t Waive” standstill agreement. The Appellants timely filed their notice of interlocutory appeal on January 23, 2013, seeking review of the preliminary injunction order by Chancellor Aaron Nelson on January 15, 2013. Pursuant to its authority under Supreme Court Rule 42, the Supreme Court of Delaware accepted the petition for interlocutory appeal on January 25, 2013.

Summary of the Argument

[1] The Callison Board failed to act with the vigor normally expected in securing the highest value reasonably available to the stockholders. First, the Board improperly used a "Don't Ask, Don't Waive" standstill agreement to refuse consideration of a higher-value tender offer during the market check period of a merger. Second, the directors are unable to show the entire fairness of the proposed transaction because the stockholders will receive a deficient amount as a result of the current offer.

[2] Allen's interest for immediate liquidity prompted the sale of Callison, triggering strict scrutiny by the entire fairness standard. Allen, along with Callison's board acted unfairly because Allen's interest in immediate liquidity contrasts with the minority stockholders' interest in receiving a maximization of consideration for the sale of Callison. Because Galena tendered a superior offer to Vicente's, and the Callison board refused to waive the "Don't Ask, Don't Waive" Standstill Agreement, Allen and the board cannot meet their burden under the entire fairness standard.

[3] Galena will suffer irreparable harm as a minority stockholder because Galena will be subjected to an uninformed stockholder vote and ultimately receive inferior consideration if the preliminary injunction were lifted.

[4] The Court must weigh the benefits to the party seeking the injunction against the consequences to the would-be enjoined party. The benefits of injunctive relief for Galena outweigh any inconveniences endured by Callison, validating the injunction.

Statement of Facts

This controversy comes before the Supreme Court of Delaware on an interlocutory appeal by Callison, Inc. ("Callison"), its board of directors (the "Board") and its majority controlling stockholder, Allen Enterprises Inc. ("Allen"), from a preliminary injunction ordered by Chancellor Aaron Nelson on January 15, 2013, in favor of Galena Capital Partners, LLC. ("Galena"). R. at 25. The order enjoins the use of a "Don't Ask, Don't Waive" standstill agreement (the "DADW Standstill") between the parties arising from due diligence during the sale process between Callison (the seller) and Galena (a prospective buyer). R. at 1.

Galena is a Delaware company and a minority Callison stockholder, owning 10,000 shares of common stock. R. at 2. In November 2012, Callison approached Galena and twenty other potential buyers to assess interest in a possible acquisition. R. at 10. Galena was interested and agreed to Callison's pre-requisite terms. Id. Prospective buyers were required to enter into confidentiality and standstill agreements with a DADW provision in order to conduct due diligence and submit a bid. R. at 7. The DADW Standstill restricted each interested buyer to one, and only one, bid. R. at 8. Losing bidders were contractually precluded from making topping bids or asking Callison to waive the agreement during the forty day market check period after the winning offer was accepted. Id. Callison believed this process would yield the maximum value for their company. Id.

Callison is a publicly traded Delaware corporation with its headquarters in North Carolina. R. at 2. Allen is Callison's

majority stockholder, owning seventy-two percent of Callison stock. Id. Allen's largest asset, by far, is its stake in Callison. R. at 3. Callison's board of directors consists of seven members handpicked by Allen. Id. Due to a pressing obligation to purchase another company, Ca' Foscari Itallian Grill ("Ca' Foscari"), for \$2.4 billion in cash, Allen must liquidate its interest in Callison quickly. Allen's contract for Ca' Foscari closes in March 2013, calls for \$60 million in liquidated damages should Allen fail to perform, and is not contingent upon financing. R. at 6. Allen has neither cash nor alternate financing to afford the Ca' Foscari acquisition. This urgent need for fast cash is the only impetus for the Callison sale. R. at 1.

On the afternoon of December 14, 2012, Galena submitted its bid to purchase Callison consistent with its obligations under the DADW Standstill. R at 10. Galena offered \$32.50 per share, yet they lost to Vicente Capital Inc. ("Vicente"), who offered \$34 per share. R. at 11. The merger agreement between Callison and Vicente (the "Vicente Merger Agreement") was finalized by December 16. R. at 12. The Vicente Merger Agreement requires Vicente to hold open its cash offer for Callison for forty days while the Board conducts a market check for any superior offer—superior offers, of course, from anyone other than the five previous losing bidders, including Galena. R. at 13. If a higher bid comes, Callison's fiduciary out clause gives Vicente five days to match the superior offer or withdraw entirely and receive \$87 million in liquidated damages as a termination fee. R. at 13-14. On the morning of December 17, 2012, Vicente commenced its all-cash,

all-shares tender offer at the \$34 per share price (the "Vicente Tender Offer").

Advised by its legal team that the DADW Standstill was likely unenforceable under Delaware law, Galena privately approached Callison on December 19, 2012, requesting them to waive the DADW Standstill so that Callison could entertain a fully financed Galena topping bid of \$35.50 per share. R. at 15. Galena wanted to make this offer with terms identical to the Vicente Merger Agreement, save one exception: a materially superior purchase price. Id. The extra \$1.50 per share intended by Galena represents a 4.4% increase over the Vicente bid, equating to \$128 million in additional consideration overall, before the \$87 million termination fee due to Vicente. Id.

Later in the evening of December 19, the Callison Board met over the phone to consider entertaining Galena's offer. R. at 16. Deciding to enforce the restrictive DADW Standstill, the Board rejected Galena's materially superior offer and requested for Galena to cease and desist any and all further communication with the Board regarding a subsequent offer. Id. On December 21, Galena filed suit and sought a preliminary injunction against Callison, the Board, and Allen with respect to the DADW Standstill and commenced an all-cash, all-shares tender offer (the "Galena Tender Offer") for \$35.50 per share. Id. On January 14, 2013, the Court of Chancery for New Castle County, Delaware granted Galena's injunction. R. at 25. Callison timely appealed in accordance with Delaware Supreme Court Rule 42.

Argument

The bedrock principle of Delaware corporate law is that members of the board of directors owe stockholders the fundamental duties of care and loyalty. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985). In connection with the sale of a company, courts will abandon the traditional deference afforded directors under the business judgment rule and instead apply enhanced scrutiny to determine whether the directors' conduct was informed and reasonable. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986). To that end, judicial relief is available when directors breach their fiduciary duties during the consummation of a sale. Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1993). When the board is unable to show that its conduct was both informed and reasonable, the directors must then prove the proposed transaction is entirely fair to all stockholders. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 931 (Del. 2003). A preliminary injunction is appropriate where stockholders can establish: (1) a substantial likelihood of success on the merits; (2) irreparable harm would occur without a preliminary injunction; and, (3) the balancing of the equities tip in favor of the moving party. SI Management L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998). A particularly strong showing of one element can offset a weak showing on another. Abrons v. Maree, 911 A.2d 805, 810 (Del. Ch. 2006).

Here, the Court of Chancery properly issued a preliminary injunction. First, Galena is substantially likely to succeed on the

merits because the board of directors cannot show the proposed transaction is entirely fair to all stockholders since the Board arbitrarily refused to consider a higher-value offer. Second, Galena will suffer irreparable harm without the injunction because no adequate remedy is available to stockholders once the Board sells the company. Third, the equities tip in Galena's favor because the inconveniences experienced by Callison from the injunction pale in comparison to the harm suffered by Galena without the injunction. As a result, the Court of Chancery did not abuse its discretion by issuing the preliminary injunction. See Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1278 (Del. 1989) (holding appellate courts will review the legal conclusions de novo to determine if the preliminary injunction was an abuse of discretion). This Court should affirm the Court of Chancery's order and dispose of this interlocutory appeal to allow the stockholder litigation to proceed.

- I. GALENA IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS BECAUSE THE CALLISON BOARD OF DIRECTORS CANNOT SHOW THE PROPOSED TRANSACTION IS ENTIRELY FAIR SINCE THEY REFUSED TO CONSIDER A HIGHER OFFER.

A. Questions Presented.

1. Did the Court of Chancery properly apply enhanced scrutiny when the board of directors failed to act in an informed and reasonable manner by refusing to waive the "Don't Ask, Don't Waive" standstill agreement that prevented their consideration of a higher offer?
2. Even if the Court of Chancery improperly applied enhanced scrutiny, does Galena remain substantially likely to succeed on the merits because the board of directors cannot show entire fairness of the proposed transaction when they failed to consider the interests of the minority stockholders during the sale initiated by the majority stockholder?

B. Scope of Review.

Courts will review the grant or denial of a preliminary injunction for abuse of discretion while reviewing the legal conclusions of the Court of Chancery de novo. E.g. SI Management L.P. 707 A.2d at 40. Although the Supreme Court might reach different conclusions, if the findings of the Chancellor are supported by the record and are the result of orderly and logical deductive reasoning process, the Supreme Court will accept the findings. E.g. Mills Acquisition Co., 559 A.2d at 1278.

C. Merits of the Argument

1. The board must show the entire fairness of the proposed transaction because the directors failed to act in an informed and reasonable manner.

Directors breached their fiduciary duties by refusing to waive a DADW Standstill that prevented consideration of a higher-value tender offer. During the sale of a company, the board's primary objective must be securing the highest value reasonable available to the stockholders. Revlon, Inc., 506 A.2d at 182 (Del. 1986). When reviewing director conduct, courts will apply enhanced scrutiny rather than the deferential business judgment rule. Mills Acquisition Co., 559 A.2d at 1282.

Judicial application of enhanced scrutiny focuses on two aspects: whether (1) the board of directors was adequately informed, and (2) the decision made as a result of that information was within a general range of reasonableness. QVC Network, Inc., 637 A.2d at 45. Courts will look to whether directors considered all the information that was readily available when determining if directors were adequately informed. See Barkan v. Amstead Industries, Inc., 567 A.2d 1279, 1287 (Del. 1989). Reasonableness will be determined by the veracity of the directors' commitment to achieving the highest possible value for stockholders. See Mills Acquisition Co., 559 A.2d at 1281.

When stockholders show that the board failed to act in an informed and reasonable manner, the burden shifts to the directors to prove the transaction was entirely fair. McMullin v. Beran, 765 A.2d 910, 916-17 (Del. 2000). Entire fairness focuses on process and price.

Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983). While measures such as the DADW Standstill are not per se illegal, the board must bear the burden of justifying the agreement's continued use. Omnicare, Inc., 818 A.2d at 930-31. Often this is impossible because these agreements effectively limit the flow of information the board of directors receive. See In re Netsmart Technologies, Inc. Shareholders Litigation, 924 A.2d 171, 192 (Del. Ch. 2007).

Directors cannot "wall off" themselves from information material to the value stockholders receive in a proposed transaction. QVC Network, Inc., 637 A.2d at 1287. Any favoritism shown toward a prospective buyer must be geared toward obtaining a higher value. See, e.g., In re Topps Co. Shareholders Litigation, 926 A.2d 58, 91 (Del. Ch. 2007). Contractual provisions must yield to directors' fiduciary duties. QVC Network, Inc., 637 A.2d at 51-52. Courts will look beyond the form of the agreement to determine its true function. See In re Topps, 926 A.2d 91. If the measure incentivizes maximum profit, the agreement stands. See McMullin, 765 A.2d at 919. On the other hand, if the provision effectively ends negotiations before maximizing profit, the agreement falls. See Revlon, Inc., 506 A.2d at 184. As the court in Revlon held, "when a board ends an intense bidding contest on an insubstantial basis, ... [that] action cannot withstand the enhanced scrutiny which Unocal requires of director conduct." Id.; see also Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. 1985) (holding directors must be informed and act reasonably).

In the instant case, Callison is clearly for sale. R. at 1. Accordingly, enhanced scrutiny is the appropriate level of judicial

inquiry. See Mills Acquisition Co., 559 A. 2d at 1282. The two-step sales process involved submission of private bids followed by a 40-day market check. R. at 7, 9. Companies that made an initial bid, however, are contractually prevented from making a topping offer. R. at 7-8. Galena is ready, willing, and able to offer a higher amount than Vicente with identical terms. R. at 15-16. Yet, the Board has failed to consider this information by refusing to waive the standstill. R. at 16. Consequently, the agreement's continued use during the market check serves no useful purpose other than to "wall off" directors from information material to the value stockholders receive. See QVC Network, Inc., 637 A.2d at 45. Thus, the Board failed to act in an informed manner by refusing to waive the DADW Standstill. See Barkan, 567 A.2d at 1287.

The directors' conduct is also unreasonable. See Mills Acquisition Co., 559 A.2d at 1281. Unlike in Topps, Galena is not a hostile competitor seeking an unfair advantage. See Topps, 926 A.2d at 58. Callison invited Galena to submit a preliminary bid. R. at 10. The directors presumably would have accepted Galena's initial offer had it been higher than \$34 dollars per share offered by Vicente. R. at 11. Galena's subsequent offer would yield a gross amount of \$128 million more than Vicente's initial bid. R. at 15. Should Vicente decline to exercise its contractual match rights, Callison would pay \$87 million in liquidated damages. R. at 13. The net benefit to the stockholders would be \$41 million. R. at 13, 15. Therefore, the board has failed to act reasonably by refusing to consider this information because the stockholders would gain a material benefit. See Mills Acquisition Co.,

559 A.2d at 1281. So, Callison directors must bear the burden of demonstrating the entire fairness of the proposed transaction. See McMullin, 765 A.2d at 916-17.

Directors contend the process was fair because it included an active market check. R. at 20. Additionally, the Board concludes the price offered by Vicente was fair because it reflected a twenty-six percent premium above the trading price before the merger announcement. R. at 11. Nevertheless, the sales process is unfair because the market check is ineffective. See Weinberger, 457 A.2d at 711. The continued use of the standstill prevents the companies most likely to offer a higher amount (i.e., the losing bidders) from submitting competing offers. See Omnicare, Inc., 818 A.2d at 930-31. Moreover, the price is inadequate because Callison's market value is at least \$41 million higher than Vicente is offering. R. at 13-15. Although, the Board has failed to consider this information by refusing to waive the standstill. R. at 16. The agreement does little more than terminate a bidding contest to the stockholders detriment. See Revlon, Inc., 506 A.2d at 173. As a result, the proposed transaction is not entirely fair. See Weinberger, 547 A.2d at 711. Therefore, the board of directors has breached its fiduciary duties by insisting upon continued adherence to the standstill. See McMullin, 765 A.2d at 916-17.

2. Galena remains substantially likely to succeed on the merits because the board of directors cannot show entire fairness of the proposed transaction when they failed to consider the interest of the minority stockholders.

Allen's unique need for immediate liquidity prompting the sale of Callison subjects the sale to strict scrutiny via the entire fairness standard, and since Allen's interest in a quick sale regardless of superior bids diverges from and conflicts with the interest of minority stockholders to receive maximize value, Allen and the Callison Board have acted unfairly. See In re Synthes, Inc. Shareholder Litigation, 50 A.3d 1022, 1036 (Del. Ch. 2012) (recognizing that in certain situations a controlling stockholder's urgent liquidity need may constitute a disabling conflict of interest). A majority controlling stockholder owes fiduciary duties to minority stockholders. Kahn v. Lynch Communication Systems, Inc., 638 A.2d 1110, 1113-14 (Del. 1994) (quoting Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987)). When a majority controlling stockholder uses its power over a board of directors to sell a company, and that sale violates the protection afforded to minority stockholders by law, the entire fairness standard of review is appropriate. Odyssey Partners, L.P. v. Fleming Companies, Inc., 735 A.2d 386, 412 (Del. Ch. 1999).

The entire fairness standard is the product of the duty of loyalty owed by a majority stockholder and its board of directors to minority stockholders, and this duty "mandates that the best interest of the corporation and its [stock]holders takes precedence over any

interest possessed by a director, officer or controlling [stock]holder and not shared by the stockholders generally.” Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). Under the entire fairness standard, the burden shifts to the majority stockholder and the board of directors to establish that the sale agreement was entirely fair to the minority stockholders. Strassburger v. Earley, 752 A.2d 557, 570 (Del. Ch. 2000). The court must be fully satisfied that the directors’ conduct was entirely fair to meet this burden. Cede & Co., 634 A.2d at 361. Courts evaluate the entire fairness standard with an analysis of the sale price and sale process. Weinberger, 457 A.2d at 711. For the sale price analysis, a board must establish that the agreed upon price was the maximum value possible given the circumstances. Cede & Co., 634 A.2d at 361. Analyzing the fairness of the sale process, courts consider factors such as how the transaction was timed, initiated, and disclosed. Weinberger, 457 A.2d at 711.

In the present case, Allen Enterprises is the majority controlling stockholder of Callison, Inc., owning seventy-two percent of Callison stock, and has instigated a hasty sale of Callison because of Allen’s immediate need for liquidity. R. at 3. Allen has pending a \$2.4 billion cash acquisition of Ca’ Foscari Italian Grill. Id. Allen instigated the sale of Callison to finance its pressing contractual obligations with Ca’ Foscari. R. at 4. Allen’s contract is not contingent upon financing and is set to close no later than March 31, 2013. R. at 6. Allen faces paying millions of dollars in liquidated damages should it breach its contractual obligation to

purchase Ca' Foscari this spring. Id. As a result of Allen's position of authority as the majority controlling stockholder, and Allen's need for fast cash that prompted the sale of Callison, this sale falls within the purview of the entire fairness standard.

The entire fairness standard shifts the burden to the Board to prove that the sale protects the rights of minority stockholders. The Board cannot meet this burden because they refused to consider Galena's materially higher offer or distribute relevant information to the stockholders. The refusal to consider a higher bid in the face of urgent liquidity needs by a controlling stockholder is the conflict of interest that distinguishes this controversy from the holding in Synthes. See In re Synthes. 50 A.3d at 1046 (holding that a sale arising from a controlling stockholder's liquidity need does not deserve the entire fairness standard nor conflict with the interests of minority stockholders because all stockholders receive equal per share consideration). Had the controlling stockholder in Synthes allowed his unique interest in liquidity to preclude the board from entertaining a superior purchase price, as is true with the present case, a conflict would have existed. Allen's unique interest to liquidate soon for a future lucrative business deal has instigated the Callison sale and has produced an entirely unfair sale process—yielding an entirely unfair purchase price that ignores a superior bid for the company. This conflict of interest is impermissible under Delaware's entire fairness standard. Therefore, Galena is substantially likely to win on this argument, validating the injunction.

II. GALENA WILL SUFFER IRREPARABLE HARM WITHOUT THE INJUNCTION BECAUSE NO ADEQUATE REMEDY IS AVILABLE ONCE THE BOARD SELLS THE COMPANY.

A. **Question Presented.**

Does an uninformed stockholder vote and inferior consideration in a merger constitute irreparable harm entitling Galena to a preliminary injunction?

B. **Scope of Review.**

Courts will review the grant or denial of the preliminary injunction for abuse of discretion while reviewing the legal conclusions of the Court of Chancery de novo. E.g. SI Management L.P., 707 A.2d at 40. Although the Supreme Court might reach different conclusions, if the findings of the Chancellor are supported by the record and are the result of orderly and logical deductive reasoning process, the Supreme Court will accept the findings. E.g. Mills Acquisition Co., 559 A.2d at 1278.

C. **Merits of the Argument.**

This Court should affirm the preliminary injunction because Galena would suffer irreparable harm as a minority stockholder due to an uninformed stockholder vote and receipt of inferior consideration. The second element a moving party must show when requesting a preliminary injunction from the court is irreparable harm if the injunction were denied. Revlon, 506 A.2d at 179. Courts require the plaintiff to show "imminent" harm such that a denial of the injunction would not only leave the plaintiff with no adequate remedy at law, but also be tantamount to a denial of justice. In re Cogent, Inc.

Shareholder Litigation, 7 A.3d 487, 514 (Del. Ch. 2010). The harm must be genuine rather than apprehension of “uncertain speculative damage at an indefinite time in the future.” Weldin Farms, Inc. v. Glassman, 414 A.2d 500, 505 (Del. 1980).

For example, the threat of an uninformed stockholder vote constitutes irreparable harm. ODS Technologies, L.P. v. Marshall, 832 A.2d 1254 (Del. Ch. 2003). A stockholder is uninformed when making a tender or voting decision on materially misleading or inadequate information. In re Pure Resources, Inc., Shareholders Litigation, 808 A.2d 421, 452 (Del. Ch. 2002). If a plaintiff’s claim against a board for failure to disclose a material fact prior to a vote holds merit, irreparable harm exists. Wayne County Employees’ Retirement System v. Corti, 954 A.2d 319, 329 (Del. Ch. 2008).

In addition, stockholders may suffer irreparable harm when the board breaches its Revlon duties by failing to shop the company adequately—resulting in a failure to maximize the value in a sale. In re Cogent, 7 A.3d at 515. Courts generally regard a market check as more than adequate to determine the best price possible, avoiding irreparable harm. In re MONY Group Inc. Shareholder Litigation, 852 A.2d 9, 24 (Del. 2004). Such harm may exist, however, when a denial of an injunction would result in the disappearance of a superior offer. In re Netsmart, 924 A.2d at 208; See also In re Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813, 838 (Del. Ch. 2011) (stating that stockholders deprived of receiving a topping bid face irreparable harm without an injunction). Moreover, a failure to disclose a material

fact prior to voting on a merger agreement constitutes irreparable harm. In re Netsmart. 924 A.2d at 207.

Specifically, in Cogent, the court discussed a spectrum of situations when a preliminary injunction would be appropriate. In re Cogent, 7 A.3d at 515. On one side of the spectrum, preliminary injunctions are likely to be granted where the board of directors ignores a superior offer in favor of an inferior one. Id. On the other end, a preliminary injunction is unlikely to be issued where a selling board's alleged violations occur in the absence of any additional topping bids emerging during an effective market check. Id.

Here, Galena as a minority stockholder will suffer irreparable harm if the preliminary injunction were reversed due to a pending uninformed stockholder vote as well as the Callison board's intent to hide behind the DADW Standstill and ignore Galena's topping bid. The harm faced by Galena is imminent because the market check will be over by the time the litigation is complete. R. at 15. There is no speculation that harm will be done to Galena and other stockholders if the injunction were lifted-allowing the Galena offer to be ignored. This type of behavior by the board merits a preliminary injunction because once the merger with Vicente is finalized, stockholders' opportunity to maximize the value of their stock is permanently lost. Moreover, the offer by Galena was made through confidential letter, and the record is silent on whether the Callison board notified stockholders of materially important information concerning the offer. This failure to release a material fact will result in an uninformed stockholder vote.

Galena, while having an apparent interest in acquiring control of Callison, they remain a minority stockholder, entitled to all the accompanying fiduciary duties as any other stockholder. R. at 2. At the heart of this preliminary injunction is the DADW Standstill that called for any bidder in the private auction to give their “only, best, and final” offer. R. at 8. As a result of this private auction, Vicente won with an offer of \$34 per share while Galena lost with their offer of \$32.50 per share. R. at 11. The Special Committee reported to the Board, prior to Galena’s second offer, that this deal was fair to all stockholders. Id. The merger between Callison and Vicente was announced on December 17. R. at 14. During the “Go Shop” period 100 potential suitors were contacted, but none expressed any interest. R. at 15. Meaning, no other company besides Galena offered a topping bid, which the Callison board has ignored. Id.

While there are business considerations such as paying out the termination fee to Vicente, Callison receives more net consideration through the Galena offer. R. 15. Because the Board has hidden behind the DADW Standstill and chosen to ignore Galena’s topping bid, Galena and other Callison stockholders will be deprived of a maximization of their stock value. Like in Cogent, the Board’s conduct here warrants an injunction. See In re Cogent, 7 A.3d at 515.

III. THE BALANCING OF THE EQUITIES TIP IN GALENA'S FAVOR BECAUSE THE INCOVENIENCES TO CALLISON FROM AN INJUNCTION PALE IN COMPARISON TO THE HARM SUFFERED BY GALENA WITHOUT THE INJUNCTION.

A. Question Presented.

Is the harm suffered by Galena without an injunction greater than the inconvenience endured by Callison from being enjoined?

B. Scope of Review.

Courts will review the grant or denial of the preliminary injunction for abuse of discretion while reviewing the legal conclusions of the Court of Chancery de novo. E.g. SI Management L.P., 707 A.2d at 40. Although the Supreme Court might reach different conclusions, if the findings of the Chancellor are supported by the record and are the result of orderly and logical deductive reasoning process, the Supreme Court will accept the findings. E.g. Mills Acquisition Co., 559 A.2d at 1278.

C. Merits of the Argument.

The benefits of injunctive relief for Galena outweigh any inconveniences endured by Callison, validating the injunction. The Court must weigh the benefits to the party seeking the injunction against the consequences to the would-be enjoined party. Revlon, Inc., 506 A.2d at 179. If the benefits to the party seeking an injunction outweigh the consequences endured by the enjoined party, the injunction is proper, provided the other elements are also met.

SI Management L.P., 707 A.2d at 40.

In the instant case, the injunction is proper. The benefits to Galena outweigh the consequences to Callison since the injunction simply forces the Board to consider a higher-price-per share offer for the sale of the company. Galena has offered to purchase Callison with terms identical to the terms of the Vicente Merger Agreement with one exception: the per share purchase price in the Galena offer is substantially higher. R. at 15. Callison would receive \$128 million more in overall consideration for the company if it sold to Galena, minus the \$87 million termination fee owed to Vicente. Id. The harm to Galena as a minority stockholder by receiving less consideration per share outweighs any inconveniences to Callison as a result of having to consider a superior bid. Additionally, as noted in the record, the Appellants concede that this element for the injunction is most likely met. R. at 17-18. Moreover, the Chancellor took judicial notice of Vicente's SEC disclosure voluntarily extending the Vicente Merger Agreement until March 29 should this Court uphold the preliminary injunction. R. at 17. If the Board prevails, it would be free to accept the offer currently available. Therefore, the equities of the injunction weigh in favor of Galena because the superior consideration outweighs the nominal inconveniences of evaluating a new offer.

Conclusion

For the foregoing reasons, the Appellee, Galena Capital Partners, LLC., respectfully requests that this Court affirm the preliminary injunction ordered by the Court of Chancery.