

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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CALLISON INC., TIMOTHY MICHAELS, )  
CLARE LIEBERMAN, RHANEY )  
PATRICKS, JULIO LUIS-ROJAS, )  
PATRICK AUSTIN, MARSHA )  
FRANKLIN, ARI SINGH and ALLEN )  
ENTERPRISES INC., )  
 )  
Defendants Below )  
Appellants, )  
 )  
v. )  
 )  
GALENA CAPITAL PARTNERS, LLC, )  
 )  
Plaintiff Below )  
Appellee. )  
 )

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Court Below:  
Court of Chancery of  
the State of Delaware  
for New Castle County  
C.A. No. 7918-CN

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APPELLEE'S ANSWERING BRIEF

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Team S  
Counsel for Appellee,  
Below-Plaintiff

Date filed: February 8, 2012

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## NATURE OF PROCEEDINGS

On December 21, 2012, Appellee Galena Capital Partners, LLC ("Galena") filed a motion for preliminary injunction against Appellants Callison Inc. ("Callison"), Timothy Michaels, Clare Lieberman, Rhaney Patricks, Julio Luis-Rojas, Patrick Austin, Marsha Franklin, Ari Singh, and Allen Enterprises Inc. ("Allen"). Galena sought to enjoin Appellants from consummating a merger agreement between Callison and Vicente Capital Inc. ("Vicente").<sup>1</sup> On January 14, 2013, the Delaware Court of Chancery granted Galen's request and enjoined Appellants from consummating its merger agreement. (Op. 1) In its written opinion, the Court of Chancery held that Appellants violated the fiduciary duties set forth in the *Revlon* and *QVC*. *Paramount Communications Inc. v. QVC Network Inc.*, Del. Supr., 637 A.2d 34, 37 (1993); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 506 A.2d 173, 176 (1986). The Court of Chancery rejected Appellants' argument that they complied with *Revlon* by conducting a private canvassing for bidders and a subsequent market check that excluded the participation of the original bidders.

The Court of Chancery issued the preliminary injunction order on January 15, 2013. (Preliminary Injunction Order, 1-2). On January 23, 2013, Appellants filed a Notice of Appeal from the Court of Chancery's finding. (Notice of Appeal, 1-2). On January 25, 2013, this Court granted Appellants' appeal to determine the issues presented above. (Order Accepting Interlocutory Appeal 1-2).

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<sup>1</sup> *Galena Capital Partners, LLC v. Callison Inc.*, Del. Ch., C.A. No. 7918-CN, Nelson, C. (Jan. 14, 2013) (hereinafter "Op.").

## SUMMARY OF ARGUMENT

1. The trial court correctly enjoined the Appellants' use of the DADW standstill because the provision prevented the Callison Board from complying with its fiduciary duty to evaluate competing offers and disclose material information to its stockholders. Under Delaware law, a board of directors has a duty to act in an informed and deliberate manner when submitting recommendations to its stockholders during a merger or acquisition. When the sale of an entire company is inevitable, the board of the target company also has a duty to maximize the company's value for the benefit of its shareholders. Here, the Callison Board's use of the DADW provision during the auction of the company prevented it from meeting its *Revlon* duties because the Board could not consider superior offers and, therefore, could not maximize the value of the company for the shareholders.

2. The Vicente transaction should be enjoined because the Callison board failed to show that the transaction was entirely fair to the minority shareholders. Similar to *McMullin*, Allen's unique interest in liquidating its controlling stake in Callison tainted the deliberative processes of the Callison board. Thus, it effectively rebutted the presumption of the business judgment rule and triggered the entire fairness standard of review. Because the Callison board misused the standstill in structuring the transaction, it could not demonstrate the entire fairness of the pending acquisition by Vicente.

## **STATEMENT OF FACTS**

### **A. Parties.**

Appellee Galena, a Delaware limited liability company, is a private equity firm with approximately \$18 billion of capital. (Op. 1). Galena owns 10,000 shares of Callison common stock. (Op. 2).

Appellant Callison is a Delaware corporation that is publically traded and has approximately 85 million shares of outstanding common stock. (Op. 2).

Appellant Allen, a Delaware holding company, owns approximately 72% of Callison's outstanding shares of common stock. (Op. 2). Allen is privately owned by billionaire Allen D. Fairmount III. (Op. 2). As discussed below, in addition to the transaction challenged in this lawsuit, Allen currently has a pending \$2.4 billion cash acquisition of Ca' Foscari Italian Grill ("Ca' Foscari"), a large restaurant chain. (Op. 3).

The individual appellants consist also of the seven members of Callison's board of directors (the "Callison Board" or the "Board"), each of whom was nominated and elected by Allen. (Op. 3). Of the seven Callison directors, four are full time salaried executives with Allen. (Op. 3). The remaining three Callison directors are independent and disinterested "outside" directors. (Op. 3).

### **B. Allen Initiates a Sale of Callison.**

In July 2012, Allen sought to liquidate its 72% stake in Callison in order to produce the necessary funds for an acquisition of Ca' Foscari. (Op. 3-4). Hence, the following month, Allen's board of directors (the "Allen Board") hired investment banking firm Reed

Crystal LLP ("Reed Crystal") to provide Allen with valuation advice for the proposed transaction. (Op. 4). Allen authorized Reed Crystal to approach the Callison Board to discuss Allen's interest in monetizing its 72% stake in the Company in order to finance its acquisition of Ca' Foscari and communicate Allen's preference for the sale of the entire Company in an all-cash transaction. (Op. 4).

The Callison Board met on October 10, 2012 to consider Allen's proposed sale of the company. (Op. 4-5). The Board established a special committee that included the three independent directors ("Special Committee"), and gave it the authority to negotiate a potential sale of the Company. (Op. 4-5). However, any transaction proposed by the Special Committee would remain subject to approval by the Callison Board, which consists primarily of directors with financial ties to Allen. (Op. 5). The Special Committee later retained both the investment banking firm of Bonchek Graycourt Inc. ("Bonchek") to provide advice concerning the sale of the entire Company, and the firm of Jenkins, Piper, Hitchens & Ward, LLP to provide legal advice for the potential acquisition. (Op. 5).

On November 28, 2012, Allen reached an agreement (the "Ca' Foscari Agreement") for an asset purchase by Allen of the entire Ca' Foscari restaurant chain for \$2.4 billion cash. (Op. 5). The Ca' Foscari Agreement required a closing date of no later than March 31, 2013 and a transaction termination date of May 31, 2013. (Op. 5-6). Because this contract was not subject to a financing condition, and also contained a \$60 million reciprocal liquidated damage provision,

there was great urgency for Allen to monetize its 72% stake in Callison. (Op. 6).

### **C. The Auction Process.**

Shortly after the Special Committee was established and retained financial and legal advisors, the Committee met with Allen on October 20, 2012 (the "October 20 Meeting") to discuss how the sale of the company would be conducted. (Op. 6). During this meeting, the Special Committee discussed the practical reality that Allen could block any proposed transaction Allen did not believe was in its best interests. (Op. 6-7). Therefore, the Committee could not engage in a sale process that Allen would unilaterally veto. (Op. 7). Allen also agreed to enter into a pre-commitment contract with the winning DADW bidder allowing Allen (assuming approval by the Callison Board and Allen) to tender his 72% Callison stocks to that winning bidder. (Op. 9-10).

The Special Committee also voiced its concerns that a protracted public auction could harm its stock price and employee morale. (Op. 7). The parties thereafter agreed that the Special Committee would not conduct a public auction, but would privately canvass the market for potential suitors over a very short timeframe through the use of a DADW standstill agreement. (Op. 7). This process would also include a "market check" after a public announcement of any acquisition agreement resulting from the private canvassing. (Op. 7).

On December 4, 2012, Bonchek privately canvass for logical buyers, eventually inviting 6 interested bidders to submit a one-time-only-bid no later than 5:00 p.m. on Friday, December 14, 2012. (Op. 7, 10). However, Callison required the interested bidders to sign a

confidentiality and standstill agreement containing a DADW standstill provision; the focus of Galena's original motion for a preliminary injunction. (Op. 7). The DADW provision required that any bid by an interested party be a blind, one-time-only bid made simultaneously with all other interested parties. (Op. 7-8). In other words, a party's "only, best and final offer" would be made without knowledge of any competing bids. (Op. 7-8). As a result, the highest DADW bid would win the Company (subject to a limited market check noted below). (Op. 7-8). In sum, the Callison Board would under no circumstances consider a topping offer later made by any DADW bidders. (Op. 7-8). Moreover, the "Don't Ask" part of the DADW Standstill would make it a breach of contract for a losing DADW bidder to even ask for permission for an opportunity to make a higher bid, irrespective of whether that request was made publicly or privately. (Op. 7-8).

The DADW Standstill and Allen's pre-commitment agreement also contained a provision stating that any winning bid would be subjected to a limited market check with a fiduciary out and right of termination by Callison in favor of any "superior proposal."<sup>2</sup> (Op. 8-9, 10). Callison would be subject to a 3% termination fee payable to the first-stage winning DADW bidder if the proposed agreement were terminated in favor of a superior proposal. (Op. 8-9). The market check also stated that following the announcement of a definitive transaction, Callison could (1) solicit topping bids for 25 days from

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<sup>2</sup> The winning DADW bidder would also be granted a five-day "match right" in the event of a superior proposal. In other words, the DADW bidder could avoid the termination of its acquisition agreement if it "matched" any superior proposal within five days of notice from the Callison Board that such a proposal had been received by the Company.

bidders to the exclusion of any DADW bidders and (2) for 15 additional days thereafter could receive bids from interested parties, again, to the exclusion of any DADW bidders. (Op. 9). In other words, any DADW bidder could not participate in the market check process. (Op. 9).

#### **D. Callison/Vicente Merger**

Upon review of all 6 anonymous bids, the Special Committee determined that the \$34 per share all-cash, all-shares offer from Party B (later disclosed as Vicente) was the highest bid amongst the 6 offers. (Op. 11). Appellee Galena also made an all-cash, all-shares offer of \$32.50 per share. (Op. 11). Neither Vicente's nor Galena's bid was conditioned on financing or suffered from any uncustomary contingencies. (Op. 11). Following a valuation analysis from Bonchek, the Special Committee agreed to recommend the proposed Vicente transaction to the Callison Board. (Op. 11-12).

The Callison Board convened that same evening where Reed Crystal and Allen informed the Board that the Allen Board had determined that (1) the Vicente offer was the superior bid and that (2) Allen wanted to enter into a pre-commitment tender agreement with Vicente. (Op. 12). After Reed Crystal and Allen "left" the meeting, the entire Callison Board reviewed the Special Committee report for an hour and approved the Vicente offer, authorizing Callison management to negotiate a definitive two-step merger agreement with Vicente (involving a first-step tender offer followed by a cash-out merger at the same price). (Op. 12).

Between December 15-16, Callison and Vicente entered into a merger agreement (the "Vicente Merger Agreement") providing for

Vicente's acquisition of Callison in a two-step transaction, subject to the market check.<sup>3</sup> (Op. 12-13). Pursuant to this transaction, Vicente agreed to consummate a cash-out merger with Callison where any outstanding shares of Callison not acquired in the tender offer would be eliminated for the same price of \$34 per share.<sup>4</sup> (Op. 12-13). Allen also agreed to pre-committing its 72% Callison stake in the first-step tender offer to Vicente. (Op. 13). Currently, Allen can only be discharged from this commitment if the Callison Board finds a superior proposal that Vicente does not "match" before the expiration of the Vicente tender offer. (Op. 13-14). On December 16, the Callison Board approved the Vicente Merger Agreement after discussing with its legal counsel the DADW standstill and its fiduciary obligations. (Op. 14).

On December 17, Vicente and Allen publically announced their merger agreement, while Vicente also commenced its first-step tender offer of \$34 per share (the "Vicente Tender Offer") that would expire at 5:00 p.m. on Friday, January 25, 2013 after to the 40-day market check. (Op. 14-15). Subsequently, after three weeks of privately canvassing over 100 potential suitors pursuant to the market check, no entities expressed an interest in acquiring Callison. (Op. 15). Callison's advisors never contacted Galena or any of the other DADW bidders during the market check period. (Op. 15).

#### **E. Galena's Tender Offer And Lawsuit**

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<sup>3</sup> Noting that the 3% termination fee was \$87 million based on that proposed \$2.5 billion transaction.

<sup>4</sup> Dissenting Callison stockholders who does not tender their shares to Vicente and whose shares are subsequently acquired in the second-step cash-out merger would have appraisal rights. See 8 Del. C. § 262.

On December 19, Galena delivered a private letter to Callison CEO Timothy Michaels requesting a waiver of the DADW Standstill in order to permit Galena to make a fully financed topping bid of \$35.50; a \$128 million increase over Vicente's bid. (Op. 15). In response to the new Galena overture, the Callison Board's attorneys advised the Board that while the enforceability of the DADW standstill is legally unsettled, the directors could insist on the literal terms of the DADW Standstill in responding to Galena. (Op. 16). The Board then opted to enforce the literal terms of the DADW Standstill and informed Galena that Callison would not consider its superior proposal and instructed Galena to cease all further communication with Callison and/or its advisors. (Op. 16).

In response to Callison's refusal to consider Galena's offer, Galena filed suit to enjoin the Vicente Merger Agreement while simultaneously commencing an all-cash, all-shares tender offer (the "Galena Tender Offer") for Callison shares at \$35.50 per share. (Op. 16). The Galena Tender Offer, subject to a minimum tender condition, disclosed Galena's intention to consummate an immediate second-step cash-out merger at \$35.50 per share. (Op. 16).

#### **F. Procedural History**

The Court of Chancery enjoined Callison's use of the DADW Standstill because the provision caused the Board to breach its fiduciary duty to maximize the value of the sale for stockholders. (Op. 21). The Court also held that Galena's tender offer did not constitute a breach of any contractual obligations. (Op. 23). Callison then sought and was granted an appeal by the Delaware Supreme Court.

## ARGUMENT

### I. **THE COURT OF CHANCERY'S PRELIMINARY INJUNCTION WAS APPROPRIATE BECAUSE THE "DON'T ASK, DON'T WAVE" STANDSTILL PROVISION LIMITED THE CALLISON BOARD'S ABILITY TO DISCHARGE ITS STATUTORY AND FIDUCIARY OBLIGATIONS TO ITS STOCKHOLDERS.**

#### a. Question Presented

Does enforcement of a DADW provision that restricts a board's ability to solicit or consider tender offers from all interested entities throughout the auction process violate a board's duty to be informed?

#### b. Scope of Review

The grant or denial of a preliminary injunction is review for abuse of discretion, while questions of law are reviewed *de novo*. See *SI Mgmt. L.P. v. Winifer*, Del. Supr., 707 A.2d 37, 40 (1998).

#### c. Merits of Argument

This Court should uphold the trial court's preliminary injunction because the DADW provision prevented the Callison Board from considering or soliciting all possible topping offers, and therefore violated the Board's fiduciary duty to evaluate competing offers and disclose material information to its stockholders.

#### **i. The Trial Court Correctly Found That The DADW Provision Was Invalid Because It Prevented The Callison Board From Evaluating Competing Offers And Disclosing Material Information In Order To Make A Meaningful Recommendation To Its Stockholders.**

This Court should uphold the trial court's preliminary injunction because the DADW provision prevented the Callison Board from complying with its fiduciary duty to evaluate competing offers and disclose material information to its stockholders. Directors have fiduciary

duties of care, loyalty, and to act in a good faith manner. *Malone v. Brincat*, Del. Supr., 722 A.2d 5, 11 (1998). In either a merger or a sale, the board has a duty to act in an informed and deliberate manner in determining whether to approve a transaction before submitting its recommendations to stockholders. *McMullin v. Beran*, Del. Supr., 765 A.2d 910, 917 (2000), *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858, 873 (1985). When the sale of an entire company is inevitable, the board of the target company has a duty to maximize the company's value for the benefit of its shareholders. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 506 A.2d 173, 182 (1986). Here, the Callison Board's use of the DADW provision during the auction of the company prevented it from meeting its *Revlon* duties because the Board could not consider superior offers and therefore could not maximize the value of the company for the shareholders. Accepting the trial court's findings that are supported by the record, the preliminary injunction should be upheld because compliance with the DADW standstill prevented the Callison Board from complying with its duty to be informed, its duty to disclose, and therefore from making an informed recommendation to the stockholders concerning Vicente's acquisition of Callison. See *Mills Acquisition Co. v. MacMillian Inc.*, Del. Supr., 559 A.2d 1261, 1278 (1989).

**ii. The Trial Court Correctly Found That The Defendants Breached Their Duty Of Care By Enforcing A DADW Provision That Restricted Their Ability To Maximize The Value Of The Sale For The Stockholders.**

The trial court correctly held that the plaintiff demonstrated a reasonable probability of success on the merits of its claim because

the defendants' use of the DADW standstill provision during pre-closing negotiations prevented the Callison Board from complying with its continuous duty to receive and report all material information concerning the Company's merger with Vicente. This Court will uphold a preliminary injunction if the trial court's findings are supported by the record and are otherwise the product of an orderly and logical deductive reasoning process. *Macmillan*, 559 A.2d at 1278 (citing *Levitt v. Bouvier*, Del. Supr., 287 A.2d 671, 673 (1972)).

Typically, Delaware courts apply the deferential business judgment rule when reviewing a board's general business decisions, "presum[ing] that in making a business decision the directors of a corporation acted on an informed basis, in good faith[,] and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, Del. Supr., 473 A.2d 805, 812 (1984). However, in an all-cash merger or acquisition, a board's activities are subjected to an enhanced standard of review requiring a board to show, *inter alia*, that any defensive mechanism used in such a transaction is not "preclusive" and is "proportional" or "reasonable in relation to the threat posed." *Omnicare, Inc. v. NCS Healthcare, Inc.*, Del. Supr., 818 A.2d 914, 932 (2003) (extending *Unocal* enhanced scrutiny standard to deal protection devices employed in negotiated transaction contexts.), *Unocal Corp. v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946, 955 (1985). While it is common practice to implement protective devices—such as termination fees, confidentiality agreements, "no-shop" provisions, and the presently litigated "Don't ask, don't waive" standstills—when selling a corporation, this Court

assess such provisions with "great care" given the risk of the provision "defin[ing] . . . limit[ing] . . . or prevent[ing directors] from carrying out their fiduciary duties." *Omnicare*, 818 A.2d at 938 (citing *Paramount Communications, Inc. v. QVC Network, Inc.*, Del. Supr., 637 A.2d 34, 48). This Court has defined defensive measures as "preclusive" if it "deprives stockholders of the right to receive all tender offers . . ." and not within the "range of reasonableness" if the device is not proportionate to the perceived threat to the corporation and its stockholders. *Id.* at 935. Hence, while directors are afforded great flexibility to both ensure an orderly auction process and to protect against hostile takeovers, courts must ensure that a board does not knowingly or accidentally compromise their sole obligation to stockholders: value-maximization. *Id.*

This Court has also imposed the proverbial *Revlon* duties on directors when the sale of a company becomes inevitable. 506 A.2d at 182-86. Once the sale of a company goes beyond scouting for potential bidders and the board enters into an all-cash negotiated sale of the company, the "directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders . . . ." *Id.* at 184, *In re Smurfit-Stone*, Del. Ch., C.A. No. 6164-VCP, 2011 WL 2028076, at \*13 (2005) (noting that it is well-accepted under Delaware law that an all-cash merger or acquisition triggers *Revlon* duties because there is "no tomorrow" for the target's shareholders.). Hence, in the sale of a corporation, *Revlon* and its progeny require that directors to "take an active and direct role in the context of a sale of a company from beginning to

end” by evaluating competing offers, disclosing material information, making meaningful recommendations to its stockholders. *Cede & Co. v. Technicolor, Inc.*, Del. Supr., 634 A.2d 345, 368 (1993) (citing *Citron v. Fairchild Camera & Instr. Corp.*, Del. Supr., 569 A.2d 53, 66 (1989) (noting that “directors cannot be passive instrumentalities during merger proceedings.”).

Enhanced scrutiny under *Revlon* furthermore applies a “reasonableness test” to deal with protection devices, requiring directors to “evaluate critically whether [] all material aspects of the [] transaction were reasonable and in the best interests of the [] stockholders.” *QVC*, 637 A.2d at 48-51. “As a practical matter, that means that the directors cannot give lockups or other preferences to one bidder if that will have the effect of deterring a sale of the company at the best price.” Vice Chancellor Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 Bus. Law 919 n.25 (2001). In determining whether a board had a reasonable basis for adopting a deal protection device, this Court will apply a “fact-sensitive inquiry.” *In re Toys “R” Us, Inc. S’holder Litig.*, Del. Ch., 877 A.2d 975, 1015-16 (2005). Therefore, during the sale of a company, a board’s actions are subjected to the enhanced *Revlon* standards, while the use of any defensive mechanisms or deal protection devices are subject to the *Unocal* enhanced scrutiny.

With respect to DADW provisions—that is, a promise made by a bidder not to request a waiver from the standstill provision—the Court of Chancery has emphasized how these provisions can create a conflict

of interest between a board's desire to conduct an expedited auction and its *Revlon* duties. In *Celera Corporation*, the Court of Chancery approved a settlement that, amongst other provisions, modified a "no-talk" provision to allow bidders originally subjected to the DADW agreement to make subsequent bids. *In re Celera Corp. S'holder Litig.*, Del. Ch., CA No. 6304 VCP, 2010 WL 1020471 at \*11, (Mar. 23, 2012), *aff'd in part and rev'd in part*, Del. Supr., No. 212, 2012 (Dec. 27, 2012). While not finding DADW *per se* unenforceable, the Court noted that the combination of both the DADW standstill and the bidder-specific no-shop provision rendered the fiduciary out provision ineffective, finding that

The need for adequate information is central to the enlightened evaluation of a transaction that a board must make. Here, the [DADW] Standstills block at least a handful of once interested parties from informing the Board of their willingness to bid []. Thus, Plaintiffs have at least a colorable argument that these constraints collectively operate to ensure an informational vacuum. Moreover, the increased risk that the Board would outright lack adequate information arguably emasculates whatever protections the No Solicitation Provision's fiduciary out otherwise could have provided. Once resigned to a measure of willful blindness, the Board would lack the information to determine whether []the Merger Agreement would violate its fiduciary duty to consider superior offers.

*Id.* (internal quotations omitted). Given the directors' inability to comply with their continuing obligation to maximize the value of the stock within this "informational vacuum," the Court found that "[c]ontracting into such a state could constitute a breach of fiduciary duty." *Id.* at 54.

In *Complete Genomics*, the Court of Chancery found that a target board's use of a DADW standstill violated its duty of care because the provision inhibited the board from discharging its ongoing obligation to make informed and revised recommendations to its stockholders. *In re Complete Genomics, Inc. S'holder Litig.*, Del. Ch., C.A. No. 7888-VCL, at \*55 (Nov. 27, 2012). In *Genomics*, the target board agreed to not waive any standstill it had entered into with an unsuccessful third-party, including its DADW standstill. In its ruling prohibiting enforcement of the DADW provision, the Court found that:

[A] [DADW] Standstill is impermissible because it has the same disabling effect as the no-talk clause, although on a bidder specific basis. By agreeing to this provision, the Genomics board impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful [] recommendation to its stockholders.

*Id.* By restricting a bidder's ability to communicate a higher offer to the board, the *Genomics* Court found that the standstill provision effectively precluded the "flow of incoming information" to the target's board; thereby inhibiting a board's ability to remain informed throughout the auction process. *Id.*

Finally, in the most recent Court of Chancery opinion concerning DADW provisions, Chancellor Strine enjoined Permira Advisers' acquisition of Ancestry.com because the DADW provision enforced against initially unsuccessful bidders impeded the value-maximization function of the target's board. *In re Ancestry.com Inc. S'holder Litig.*, Del. Supr., C.A. No. 7988-CS (Dec. 17, 2012). While acknowledging that such a standstill can have legitimate purposes, Chancellor Strine cautioned that "directors need to use these things consistently with their fiduciary duties, and they better be darn careful about them." According to Chancellor Strine, a DADW provision could only be used as a value-maximizing tool if used as an "auction gavel" to impress upon serious bidders that the competitive bidding process is coming to an end. *Id.* at \*23. The use of a DADW standstill as an "auction gavel" echoes the Chancellor's previous postulations that such a device could legitimately be used to end a bidding process after "actively canvass[ing] the market...in a competitive environment." *ACE Ltd. v. Capital Re Corp.*, Del. Ch., 747 A.2d 95, n.36 (1999), see also *In re Topps Co. S'holders Litig.*, Del. Ch., 926 A.2d 58, n.28 (2007) (suggesting that a DADW provision could legitimately be used in a final round auction involving "credible, but now tired bidders [to] extract the last dollar they could for their stockholders."); *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. 3d 254 (Can. Ont. C.A.) (upholding the use of a DADW provision "requiring bidders to come up with their best price in the second round.) (emphasis added). Hence, according to the *Ancestry.com* Court, a DADW provision can be legitimately used to

end a bidding process after a target has negotiated with various bidders in a competitive environment, where the absence of such a competitive process prior to its implementation is less justifiable.

When read together, the Court of Chancery has emphasized that a board's duty to be informed is a continuous duty, requiring its members to constantly assess all material information and, if necessary, revise any previous recommendations to its stockholders concerning either the transaction itself or whether to pursue a judicial remedy when the transaction is inevitable. While reaffirming that contracts, such as standstills, will be respected and enforced, and that directors are given great flexibility to craft a value-maximizing sales process, the aforementioned rulings require that directors continue to act on an informed and engaged basis for the sole purpose of attaining the highest value for the stockholders. Hence, a DADW provision becomes problematic if it acts to insulate a board from receiving all material information—be it hypothetically or factually—that could improve the transaction to the benefit of the stockholders. *In re Celera*, 2010 WL 1020471 at \*34-35 (enjoining DADW provision despite the absence of an actual pending topping bid).

In the present case, the plaintiff can demonstrate a likelihood of success on its claim because by effectively excluding five of the entities most likely to make a topping bid from the auction process, the Callison Board not maximizing the value of the transaction for the shareholders. First, the Callison Board's fiduciary out provision, which only permits the board to consider "superior offers" from entities not bound by the DADW provision, limits the possibility that

a board will receive a topping bid prior to the close of the acquisition. Second, the inability of the board to consider superior offers from DADW-bound entities inhibits its ability to properly advise the minority shareholders as to whether they should seek an appraisal of their shares in the inevitable acquisition.

A board cannot contract away its ability to negotiate and enter into an agreement with bidders making superior offers. The Callison Board contracted away its value-maximization duty under *Revlon* by intentionally forbidding the five "logical potential buyers" who participated in the first-stage, pre-market check auction from making subsequent superior offers. See *Omnicare*, 818 A.2d at 938-39 (holding that a "board [is] required to contract for an effective fiduciary out clause to exercise its continuing fiduciary responsibilities to the minority stockholders"), see also *QVC*, 637 A.2d at 48 (holding that contractual provisions, even if they are presumptively valid in the abstract, cannot limit or prevent a director from carrying out his fiduciary duties to stockholders); *Revlon*, 506 A.2d at 184 (finding that directors breached their fiduciary duties when they enacted an auction-ending lock-up agreement to the detriment of shareholders).

The Callison Board, in an attempt to structure an "efficient, nondisruptive . . . private auction process," used the DADW Standstill in conjunction with a limited market check that granted the Board a fiduciary out and right of termination. The fiduciary out provision allowed the board to enter into negotiations with any non-DADW entity that proffered a "superior proposal." However, the standstill provision was "preclusive" under *Omnicare* because the Callison Board

could not consider superior offers from DADW-bound entities, such as the offer made by the Appellee that exceeds Vicente's offer by \$128 million. As such, the DADW provision, in conjunction with the limited market check and high termination fee, was preclusive under *Omnicare* because it deprived stockholders of the "right to receive *all* tender offers." 818 A.2d at 935 (emphasis added).

The DADW provision similarly fails to meet the "range of reasonableness" test because the Board restricted its continuing obligation to consider superior offers even after an acquisition agreement has been publically announced. Here, the Callison Board was concerned about the harm a protracted auction could inflict on its stockholders by "demoralizing key employees and jeopardizing future long term commitments with important customers . . . ." (Op. 7). In an attempt to avoid this harm, the Board decided to conduct a one-time-only blind-auction amongst privately interested entities, accompanied with a market check following the announcement of any definitive acquisition agreement. Like in *Omnicare*, where the Supreme Court required a board to include a fiduciary out provision that allowed it to comply with its continuing obligation to revise its recommendation if an initial offer became inferior in light of a superior offer, this Court should require the Callison Board to consider superior bids from all interested entities, including the DADW-bound entities. 818 A.2d at 935-37. Similarly, like in *Celera*, where the DADW standstill "block[ed] at least a handful of once-interested parties from informing the Board of their willingness to bid," Callison's DADW provision ensures that its Board can have no knowledge as to whether

any of those once interested parties would be willing to outbid Vicente. 2010 WL 1020471 at \*33-34. To hold otherwise would allow the Callison Board to forego its fiduciary obligations during a stage of merger negotiations when the board's judgment and recommendations are most important.

In the present case, because the minority shareholders could not out-vote the Allen, the only decision to be made was whether to accept Vicente's offer or seek an appraisal of their shares. The minority shareholders' decisions, however, could not be informed because the auction process designed by the Callison Board created an "informational vacuum." See *In re Celera Corp.*, 2010 WL 1020471 at \*27-34. By restricting both the five standstill counterparties from offering topping bids and the Callison Board's ability to solicit bids from these select entities, the Board "emasculated whatever protections the . . . fiduciary out [provision] otherwise would have provided." *Id.* at 53-54 (citing *QVC*, 637 A.2d at 44). By removing these potential topping bidders from the auction process after a one-time-only bidding opportunity, the Callison Board has contracted away its *Revlon* duties and breached its duty to undertake a reasonable and fully informed process to maximize shareholder value. See *QVC*, 637 A.2d at 48. Because the Callison board has breached its fiduciary duties, the trial court's injunction should be upheld to allow any possible topping bids to be proffered in order to prevent irreparable harm to the shareholders.

**II. THE PRELIMINARY INJUNCTION WAS PROPER BECAUSE THE CALLISON BOARD FAILED TO DEMONSTRATE THE ENTIRE FAIRNESS OF THE PENDING ACQUISITION BY VICENTE.**

a. Question Presented

Does Allen's liquidity conflict rebut the presumption of the business judgment rule and thereby trigger the entire fairness analysis for the pending Vicente's acquisition of Callison?

b. Scope of Review

Because there are no issues of material fact, the standard of review is *de novo*. *Lawson*, 897 A.2d at 743.

c. Merits of Argument

This Court should uphold the Court of Chancery's preliminary injunction because by improperly implementing the DADW standstill, the Callison Board could not show that the Vicente transaction was entirely fair to the minority stockholders.

It is a fundamental principle that a Delaware corporation is managed by and under its board of directors. Del. Code Ann. tit 8, §141(a) (2013); *Van Gorkom*, 488 A.2d at 872. The business judgment rule protects the directors by providing a presumption that they "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Van Gorkom*, 488 A.2d at 872. A shareholder plaintiff may rebut this presumption of the business judgment rule by providing evidence that the defendant board breached any one of its fiduciary duties, at which point the burden shifts to the defendant directors to prove the "entire fairness" of the transaction. *McMullin*, 765 A.2d at 917.

**i. The Entire Fairness Analysis Is Triggered Because The Allen Liquidity Conflict Successfully Rebutts The Presumption Of The Business Judgment Rule.**

A Delaware director's statutory duties and common law fiduciary obligations are contextually specific. *McMullin* 765 A.2d at 918. In the context of evaluating a proposal for a sale of the entire corporation to a third party, the board's obligation is immediate value maximization for all shareholders. *McMullin*, 765 A.2d at 918. When the entire sale to a third party is proposed by the majority shareholder, the directors must "make an informed and deliberate judgment, in good faith," as to whether the majority shareholder's proposal "will result in a maximization of value for the minority shareholders." Del. Code Ann. tit 8, § 251(b) (2013); *McMullin*, 765 A.2d at 918-19; *Van Gorkom* , 488 A.2d at 873. For example, in *McMullin*, the majority shareholder ARCO's immediate need for cash prompted it to propose a sale of the entire company to the board. 765 A.2d at 918-19. The board approved the proposed transaction after considering the terms presented to it by ARCO's financial advisor at a meeting. The Court held that ARCO's need for immediate liquidation of its stock rebutted the board's business judgment rule presumption, because "the time constraints on a board's decision-making process may compromise the integrity of its deliberative process."

As a majority shareholder, Allen's liquidity conflict sufficiently rebuts the Callison board's presumption of the business judgment rule. Like *McMullin*, where the majority shareholder proposed the sale of the entire company soon after it had requested the board

to repurchase its 80% holdings in the company, Allen expressed its interest in monetizing its 72% stake in Callison and simultaneously proposed an all cash sale of the entire company. In *McMullin*, the majority shareholder needed immediate cash for its pending \$3.3 billion acquisition. 765 A.2d at 918-19. Similarly, Allen urgently needed cash to fulfill its pending contractual obligation to purchase the restaurant chain Ca'Foscari. Allen's \$2.4 billion pending acquisition of Ca'Foscari was not subjected to financing condition, which placed greater urgency on Allen to monetize its Callison stock. Allen's exigent need for cash forced the board to seek accommodation that compromised its deliberative process. Even though the Callison Board appointed a Special Committee to evaluate the process, the Committee structured the auction that was in Allen's best interest; the auction was designed to focus on expediency instead of value maximization. Therefore, the Callison board's decision leading to the Vicente transaction requires an analysis under the entire fairness standard.

**ii. The Vicente Transaction Should Be Enjoined Because The Callison Board Failed To Demonstrate That The Transaction Was Entirely Fair To The Minority Shareholders.**

The concept of fairness has two basic aspects: fair dealing and fair price. *Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701, 711 (1983). Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Id.* Fair price "relates to the economic and financial

considerations of the proposed merger.” *Id.* Thus, the entire fairness standard requires a directors to establish that the “transaction was [] both fair dealing and fair price.” *Cede*, 634 A.2d at 361.

The Vicente transaction was not fair to the minority shareholders because it resulted from a misuse of the DADW standstill by the Callison board. The Board’s utilization and enforcement of the standstill, in structuring the auction process, limited the board’s ability the consider offers from those most likely and able to make superior bids. As explained above, the DADW standstill prevented the board from considering an obvious higher bid by Galena. This self-imposed, willful blindness stymied the auction process that prevented the board from fulfilling its Revlon duties.

#### **CONCLUSION**

For the foregoing reasons, the Court of Chancery’s preliminary injunction order enjoining the consummation of the Vicente Merger Agreement should be upheld in all respects.

Respectfully Submitted,

/s/ TEAM S Attorneys

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