IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GALENA CAPITAL PARTNERS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CALLISON INC., TIMOTHY MICHAELS, CLARE LIEBERMAN, RHANEY PATRICKS, JULIO LUIS-ROJAS, PATRICK AUSTIN, MARSHA FRANKLIN, ARI SINGH and ALLEN ENTERPRISES INCORPORATED,	)	Civil Action No. 7918-CN
	)	
Defendants.	)	

January 11, 2013, Submitted
January 14, 2013, Decided

MEMORANDUM OPINION

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Nelson, Chancellor

I. INTRODUCTION

This case involves the use of a "Don't Ask, Don't Waive" standstill agreement in the context of the sale of an entire company, Callison Inc. ("Callison" or the "Company") that is controlled by its 72% stockholder, Allen Enterprises Incorporated ("Allen"). Allen is interested in monetizing its 72% stake in Callison through a sale of the entire Company so that Allen will have the funds it needs to purchase another business in a separate transaction that Allen is contractually required to complete in the next few months. With Allen's support, Callison initiated a sale process for the Company that involved a private canvassing of the market among a limited universe of likely potential suitors who were all required to sign a "Don't Ask, Don't Waive" standstill agreement to participate in the due diligence and sale process. As described further in this opinion, all of these suitors (a total of 6 who submitted bids) were eventually afforded a one-time opportunity to submit a bid to acquire the entire Company, but each was contractually prevented by their respective standstill agreements from making any further offers or topping bids, or from simply asking Callison for permission to do so. Private equity firm Vicente Capital Inc. ("Vicente") was the highest bidder to emerge from this process and it subsequently entered into a merger agreement with Callison. This merger agreement provides for a market check that is currently underway and which is notable for excluding any of the 5 other suitors whose bids were unsuccessful. Vicente currently has pending a tender offer for Callison shares that will close at the earliest on Friday, January 25, 2013.

One of the 5 unsuccessful bidders, Plaintiff Galena Capital Partners, LLC ("Galena"), filed this action challenging the validity of the standstill agreement that it signed and which would purport to prevent Galena from making a topping bid for the Company, or from simply requesting Callison to waive the standstill's restrictions in this regard. Simultaneously with

filing of this lawsuit, Galena commenced a higher priced tender offer for any and all shares of Callison and has conditioned that offer on, among other things, the judicial invalidation of its standstill agreement.

Plaintiff Galena now seeks a preliminary injunction preventing Callison and/or Callison's board of directors from attempting to enforce the standstill with Galena so that Galena may proceed with its tender offer and otherwise attempt to acquire the Company. For the reasons that follow, I have decided to grant the motion.

II. FACTUAL BACKGROUND

A. The Parties.

Plaintiff Galena, a Delaware limited liability company, is a private equity firm with approximately $18 billion of capital under management. Galena owns 10,000 shares of Callison common stock.

Defendant Callison is a Delaware corporation headquartered in Raleigh, North Carolina. Callison's shares are traded on the New York Stock Exchange and it presently has outstanding approximately 85 million shares of common stock. Callison is engaged in the manufacture and sale of off-brand athletic apparel to familiar retail outlets such as Kohl's Corp. and Target Corp. On December 14, 2012, the last trading day prior to the announcement of the transaction challenged in this litigation, Callison's common stock closed at $27, suggesting a then market capitalization for the Company of approximately $2.3 billion.

Defendant Allen owns approximately 61.2 million or 72% of the outstanding shares of common stock of Callison. Allen is a holding company incorporated under the laws of Delaware and is privately owned by its billionaire founder, Allen D. Fairmount III. Allen also owns a

variety of other companies, including a relatively small restaurant chain with 12 locations in the Philadelphia region, but none of these other companies is publicly traded and together all of the other Allen businesses are worth only a fraction of the value of Allen's 72% stake in Callison. As discussed further below, in addition to the transaction challenged in this lawsuit, Allen currently has pending a $2.4 billion cash acquisition of Ca' Foscari Italian Grill ("Ca' Foscari"), a large restaurant chain with over 240 locations through the United States.

The individual defendants consist of the seven members of Callison's board of directors (the "Callison Board" or the "Board"), each of whom was nominated (and as practical matter elected) by Allen, Callison's 72% stockholder. Of the seven Callison directors, four are full time salaried executives with Allen: Timothy Michaels (Allen Vice President-Finance and Callison Chair and Chief Executive Officer); Clare Lieberman (Allan Vice President-Operations and Callison Chief Operating Officer); Rhaney Patricks (Allen Chief Information Officer and Callison Executive Vice President); and Julio Luis-Rojas (Allen Assistant Vice President and Callison Vice President). Although each of these four "inside" directors on the Callison Board is also a salaried officer of Allen, none of them serves on the Allen board of directors. The remaining three Callison directors, though also elected by Allen, are not employed by Allen or Callison, nor otherwise have entangling consulting or other financial relationships with Allen or Callison, and thus are considered independent and disinterested "outside" directors by the Court: Patrick Austin, Marsha Franklin and Ari Singh.

B. Allen Initiates a Sale of Callison.

In July 2012 Allen began to explore the possibility of liquidating its 72% stake in Callison. With Fairmount's encouragement, Allen's management team had become interested in pursuing

an acquisition of a major restaurant chain in the casual dining sector and recognized that a disposition of Allen's 72% ownership position of Callison would produce the necessary proceeds with which to consummate such a transaction. Accordingly in August 2012 Allen's board of directors (the "Allen Board") retained the investment banking firm of Reed Crystal LLP ("Reed Crystal") to advise Allen with regard to its strategic alternatives and to provide valuation advice for any proposed transaction that might emerge from this process. Working with Allen's senior management, including Callison Board members Michaels and Lieberman, Reed Crystal then embarked on a search, throughout the latter part of August and most of September, for promising acquisition candidates.

Following Reed Crystal's review of acquisition candidates in the restaurant sector (in which Ca' Foscari emerged as the most promising), Allen turned its attention to funding its acquisition plans. Accordingly, on October 3, 2012 the Allen Board authorized Reed Crystal to "formally" approach Callison to (1) discuss Allen's interest in monetizing its 72% stake in Callison so as to facilitate its acquisition of a restaurant chain and (2) communicate Allen's view that a sale of the entire Company in an all-cash transaction would be the most effective method for realizing the highest value for all Callison stockholders, including its minority stockholders. Because a majority of the Callison Board consists of salaried executives employed by Allen, all members of the Callison Board (including the three outside directors) were informally made aware of Allen's developing plans in "virtual real time" from July through October 3.[1]

In response to Allen's now formal overtures regarding a disposition of its 72% stake via a sale of the entire Company, the Callison Board met on October 10, 2012 to consider these developments. Recognizing that a majority of the Callison Board consisted of Allen executives,

[1] *See* Deposition of Ari Singh, Dec. 30, 2012 at p. 164.

the Board unanimously agreed to establish a special committee of the Board's three independent directors Austin, Franklin and Singh (together, the "Special Committee" or the "Committee") and delegated to the Special Committee full authority and negotiating power on behalf of the Company and its minority stockholders in connection with a potential transaction involving a sale of the entire Company. Any proposed sale of the Company or merger transaction emerging from this process would however remain subject to approval by the entire Callison Board. The newly constituted Special Committee met later the same day and resolved to retain the investment banking firm of Bonchek Graycourt Inc. ("Bonchek") to advise the Committee with regard to any potential transaction involving a sale of Allen's 72% stake in Callison and/or a sale of the entire Company. At this same meeting the Special Committee retained the Delaware law firm of Jenkins, Piper, Hitchens & Ward, LLP ("Jenkins Piper") to provide legal counsel. It is undisputed that neither Bonchek nor Jenkins Piper has ever represented Fairmount, Allen or Callison in any prior engagement and I am satisfied that the Committee enjoyed the advice of independent, knowledgeable and experienced professional advisors throughout the process.

C. Allen Pursues an Acquisition of Ca' Foscari.

With things now in motion for a potential sale of its 72% stake in Callison, Allen made its first overture on October 15, 2012 to express its interest in acquiring the Ca' Foscari restaurant chain. Ca' Foscari is owned by FVP Restaurants Inc. ("FVP"), a privately owned and diversified holding company with business operations in the casual dining sector (including Ca' Foscari and other restaurant businesses) and various consumer product lines. Thus representatives from Reed Crystal reached out to FVP's senior management on October 15 to convey Allen's interest in making a proposal to acquire Ca' Foscari through an asset purchase of all of its 240 wholly

owned restaurant locations, along with exclusive rights to the name, trademarks, and recipes, etc. of Ca' Foscari.

FVP management was open to the possibility of selling Ca' Foscari to Allen and invited Allen executives and members of Reed Crystal to conduct due diligence during the next several weeks. The particulars of this process need not delay us. Suffice it to say that the process was at times contentious but ultimately Allen and FVP reached a definitive agreement on November 28, 2012 (the "Ca' Foscari Agreement") providing for an asset purchase by Allen from FVP of the entirety of the Ca' Foscari restaurant chain for a cash price of $2.4 billion. Notably, Allen's contractual obligation to purchase Ca' Foscari from FVP is not subject to a financing condition, placing greater urgency on Allen's ability to monetize its 72% stake in Allison. The Ca' Foscari Agreement calls for a closing date no later than March 31, 2013 and a transaction termination date of May 31, 2013 in the event the asset purchase is not completed by that time. The Ca' Foscari Agreement also contains a reciprocal liquidated damage provision imposing damages of $60 million on whichever party might fail to complete the transaction under circumstances amounting to a contractual breach.

D. The Special Committee and Allen Confer, and Concur, on a Sale Process For Callison.

We return now to the chronology of events leading to the transaction at issue in this litigation. Shortly after the Special Committee was established and retained financial and legal advisors, the members of the Committee invited Allen and its advisors to a meeting on October 20, 2012 (the "October 20 Meeting") to confer on an approach to the process for selling Callison in its entirety. The Committee recognized the practical reality that Allen could block any proposed transaction Allen did not regard as fairly priced or otherwise not in Allen's best

interest. For its part, the Committee was unwilling to engage in a sale process could end in futility if Allen was ultimately opposed to it. Based on Bonchek's advice, the Special Committee also expressed concern to Allen and its advisors[2] that a protracted auction of Callison, especially a public auction, could harm the Company and its stockholders by, among other things, demoralizing key employees and jeopardizing future long term commitments with important Callison customers like Kohl's and Target. After discussion among all present, including attorneys from Jenkins Piper and Grant Jones, the parties were in accord that the Special Committee and its advisors would not conduct a public auction, but instead would privately canvass the market for potential suitors over a relatively short timeframe by making use of "Don't Ask, Don't Waive" standstill agreements. As described further below, this process would also include a market check following the announcement of any definitive acquisition agreement emerging from the canvassing process.

Under the proposed sale process that all parties at the October 20 Meeting (*i.e.*, Allen, the Special Committee and their respective advisors) agreed would be optimal in this context, Bonchek would privately canvass a limited universe of at most 20 logical potential buyers (including both strategic and financial buyers). Before having access to Callison's confidential information, any interested suitor from this group would be required first to enter into a confidentiality and standstill agreement with Callison containing a "Don't Ask, Don't Waive" standstill provision (the "DADW Standstill") that is the focus of the plaintiff's motion for a preliminary injunction.[3] Each suitor obtaining due diligence access to Callison's confidential

[2] By this time Allen had also retained the Delaware law firm of Grant, Jones, Micheletti and Chandler LLP ("Grant Jones"). Representatives from Grant Jones and Reed Crystal attended the October 20 Meeting. Also in attendance were the Special Committee's legal and financial advisors.

information would understand and commit, by agreeing to the DADW Standstill, that any bid on its part for the Company could only be made *once*, upon invitation from the Special Committee as part of a limited private auction among the universe of firms canvassed in this first stage process. Each party signing the DADW Standstill who eventually made a bid to acquire Callison (a "DADW bidder") thus would agree that submission of their invited bid would be their one and only opportunity to bid for Callison and that all bids from any DADW bidder would occur simultaneously. Thus each DADW bidder would be encouraged to put forth a bid that was its "only, best and final offer" with the highest DADW bidder winning the Company (subject to a limited market check noted below) in what the Committee describes as an efficient, non-disruptive and value maximizing private auction process. In sum, any DADW bidder outbid in this one-time, one-deadline private auction would be contractually barred from making a later topping bid (*i.e.*, after seeing the proverbial "cards" played by the other DADW bidders). Indeed, the "Don't Ask" part of the DADW Standstill would make it a breach of contract for a losing DADW bidder even to ask for permission from the Special Committee for an opportunity to make a higher bid, irrespective of whether that request was made publicly or privately.

The form of DADW Standstill to be used in the sale of Callison would also contain an understanding that any approval (by both Allen and the Callison Board) of the winning bid would then be subject to a limited market check with a fiduciary out and right of termination by Callison in favor of any "superior proposal" as determined in good faith by the entire Callison

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[3] The confidentiality provisions under the DADW Standstill are uncontroversial, requiring that any potential suitor conducting due diligence not permit Callison's confidential information to be seen by anyone except a handful of identified persons representing that suitor. Further, the suitor promises to keep that Callison information confidential and only to use that information for the purpose of considering and/or making a bid to acquire Callison if and when invited to do so by the Special Committee.

Board.[4] A 3% termination fee would be payable by Callison to the first-stage winning DADW bidder if its proposed transaction should be terminated in favor of a superior proposal.[5]

After Callison and whoever might emerge as the winning DADW bidder enter into and announce a definitive transaction, the Company would be permitted (1) to solicit topping bids for 25 days (the Go Shop period) from a nearly unlimited universe of potential other bidders that only would exclude any DADW bidder and (2) for 15 additional days thereafter (the Window Shop period) to receive, but not solicit bids from any other bidder, again except from any DADW bidder. In other words, any DADW bidder would be contractually precluded from participating in the market check process.

E. Allen Offers a Provisional Pre-Commitment Tender Agreement for the Winning DADW Bidder.

It was understood at the outset of the process that Allen's 72% stake in Callison gives Allen the ability to block any transaction that the Callison Board might approve upon completion of the first-stage limited auction process and that this blocking position might otherwise discourage a potential bidder from spending the time and resources needed to make a bid for the entire Company. Consequently, at the October 20 Meeting Allen proposed and the Special Committee agreed that Allen would also sign each DADW Standstill with a provision that obligates Allen to enter into a separate pre-commitment contract with the winning DADW bidder obligating Allen (assuming approval of the transaction by the Callison Board and Allen) to tender its entire 72%

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[4] The winning DADW bidder would also be protected with a five-day "match right" in the event of a superior proposal, meaning that the DADW bidder would still have the opportunity to avoid 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.

[5] The 3% termination fee would be based on the aggregate market value of the transaction proposed by the winning DADW bidder but later terminated by Callison.

block to that winning bidder. Allen's pre-commitment to tender would be subject to the same fiduciary out as determined by the full Callison Board. That is, if the Callison Board should later cause Callison to terminate its definitive agreement with the winning DADW bidder in favor of a superior proposal that went unmatched, Allen would be automatically released of its pre-commitment agreement and free to tender its shares to the new higher bidder.

F. Bonchek Canvasses the Market and Privately Solicits Bids.

Subsequent events transpired in keeping with the sale process outlined at the October 20 Meeting. During the end of October and throughout the month of November 2012, Bonchek privately canvassed the takeover market for potential suitors that it deemed a good fit for acquiring Callison, including both strategic and financial potential acquirers among 20 companies contacted. Of these 20 contacts, 7 expressed interest in conducting due diligence. Of these 7 interested parties, 1 refused to sign a DADW Standstill and withdrew from the process, whereas the remaining 6 parties, including plaintiff, signed the DADW Standstill without objection. Representatives of Bonchek arranged for extensive due diligence by each of these 6 potential suitors and advised each of them that the due diligence phase of the process must be completed by the end of November. No one from any of the 6 suitors complained about this timeframe or about the availability or quality of confidential information Callison provided.

On December 4 a representative of Jenkins Piper informed the 6 remaining suitors that the Special Committee was now inviting each of them, pursuant to their respective DADW Standstill agreements, to submit privately their "only, best and final" offer with each bid to be submitted no later than 5:00 p.m. East Coast time on Friday December 14, 2012. All 6 remaining suitors timely submitted bids on the afternoon of December 14.

G. Vicente Wins the Auction with a $34 Per Share Bid.

At 6:00 p.m., one hour after the 5:00 p.m. December 14 bidding deadline had closed, the Special Committee met with Bonchek and Jenkins Piper to review the 6 bids. Pursuant to the terms of each DADW Standstill, Bonchek also provided copies of all 6 bids to Allen. Meanwhile, the Special Committee, after receipt of advice from Bonchek, determined that the $34 per share all-cash, all-shares offer from Party B (since publicly disclosed as Vicente) was the best and most valuable proposal among the 4 bids. Plaintiff Galena (until then known only as Party H) also made an all-cash, all-shares offer but its bid fell short at $32.50 per share. Neither Vicente's nor Galena's bid was conditioned on financing or suffered from any uncustomary contingencies.[6] The remaining 4 bidders (Parties G, J, K and L) offered bids far below Vicente's winning $34 per share offer.

After concluding that the $34 offer from Vicente was the best offer among the 4 bids received, the Special Committee then received a detailed valuation analysis from Bonchek that included, among other things, a discounted cash flow analysis, a comparable companies analysis and a comparable transactions analysis.[7] At the conclusion of this hour long presentation, Bonchek delivered to the Special Committee its written opinion that the $34 all-cash, all-shares offer by Vicente was financially fair to Callison and its minority stockholders. Following this presentation, the Special Committee unanimously agreed to recommend the proposed Vicente transaction to the Callison Board.

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[6] Plaintiff does not dispute that its December 14 bid of $32.50 per share was inferior to Vicente's $34.00 offer.

[7] Vicente's $34 per share offer represents approximately a 26% premium over the unaffected trading price of $27 per for share for Callison's common stock on Friday December 14, the last trading day before the Vicente offer was publicly announced.

The full Callison Board convened later that same evening, at 8:00 p.m. The first order of business was to invite into the meeting, by telephone, representatives of Reed Crystal and officers of Allen who are not affiliated with Callison. Reed Crystal and Allen informed the Callison Board that the Allen Board had reviewed the 6 bids and determined that (1) the Vicente offer was superior to all other bids and fair to Callison and all of its stockholders and (2) Allen was authorized and ready to enter into a pre-commitment tender agreement with Vicente obligating Allen to tender its 72% stake to Vicente for $34.00 per share (subject to the fiduciary out described earlier). At this point, all representatives of Reed Crystal and Allen (except for those on the Callison Board) "left" the meeting by ending their telephone call. During the next hour, the Callison Board received the report of the Special Committee and its financial and legal advisors, including a summary presentation by Bonchek of its financial analysis and the basis for its fairness opinion regarding the $34.00 Vicente offer. Upon receipt of Bonchek's fairness opinion and the report and approving recommendation of the Special Committee, the Callison Board unanimously approved the Vicente offer and authorized 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).

H. Two Contracts in Two Days.

During the weekend of December 15-16, legal representatives for Callison and Vicente successfully negotiated a definitive merger agreement (the "Vicente Merger Agreement") providing for Vicente's acquisition of Callison in a two-step transaction. Vicente committed promptly to launch a first step tender offer for any and all Callison shares for $34 per share in

cash, subject to a minimum tender condition.[8] Vicente also contractually bound itself to hold open its tender offer for at least 40 days so as to permit the market check (a 25 day Go-Shop followed by a 15 day Window Shop) – all as contemplated by the sales process outlined at the October 20 Meeting. As part of the market check, the Callison Board also obtained a contractual fiduciary out that permits Callison to terminate the Vicente Merger Agreement in favor of a superior proposal upon immediate payment to Vicente of a termination fee of $87 million, an amount representing 3% of the $2.9 billion transaction contemplated by the Vicente Merger Agreement.[9] Assuming successful completion of its first step tender offer, Vicente also has committed to consummate a cash-out merger with Callison (through a wholly-owned acquisition subsidiary of Vicente) pursuant to which any outstanding shares of Callison not acquired in the tender offer will be eliminated for the same price of $34 per share in cash.[10]

During the same weekend Vicente's lawyers and Allen's legal team also reached a definitive agreement pre-committing Allen to tender its entire 72% Callison stake to Vicente in the first step tender offer contemplated by the Vicente Merger Agreement. Allen can only be discharged from this tender commitment if the Callison Board determines in good faith before the expiration

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[8] Under this minimum tender condition Vicente is not required to purchase any Callison shares in the tender offer unless the number of shares tendered, combined with the Callison shares already owned by Vicente, would result in Vicente owning at least 51% ownership of all Callison shares outstanding. As a practical matter, the minimum tender condition can only be satisfied if Allen tenders its Callison shares to Vicente in response to its first step tender offer.

[9] Plaintiff does not challenge the reasonableness of the $87 million termination fee.

[10] Dissenting Callison stockholders who do not tender their shares to Vicente and whose shares are subsequently acquired in the second-step cash-out merger will have appraisal rights. *See* 8 *Del. C.* § 262.

of the Vicente tender offer that the Company has received a superior proposal[11] and Vicente declines to exercise its match right.

On Sunday evening, December 16 the entire Callison Board met to receive a presentation from attorneys at Jenkins Piper about, among other things, their fiduciary duties under Delaware law in recommending the Vicente transaction to Callison stockholders and the key terms of the now definitive Vicente Merger Agreement. Although no term sheet was provided to the Board, I am satisfied from the record that counsel meaningfully walked the Board through each of the essential terms of the Vicente Merger Agreement, including the fiduciary out and termination provisions, and satisfactorily explained the limitations of the DADW Standstill agreements that prevent the 5 unsuccessful DADW bidders from participating in the market check. After counsel's presentation the Callison Board unanimously adopted a resolution approving the Vicente Merger Agreement and Timothy Michaels signed the contract on behalf of Callison in his capacity as the Company's Chairman and Chief Executive Officer. Later that same evening, Vicente's Executive Vice President, Sara Holt, countersigned the Vicente Merger Agreement on behalf of Vicente.

I. Vicente Begins Its Tender Offer on December 17

On Monday morning, December 17, prior to the opening of the stock market, Callison, Vicente and Allen issued a joint press release announcing the Vicente Merger Agreement at $34 per share. The market for Callison shares promptly rose from its last closing price of $27 to $33

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[11] As discussed earlier, under the terms of the DADW Standstill, a DADW bidder is precluded from submitting a topping bid, from otherwise participating in the market check process or requesting -- publicly or privately -- that the Callison Board waive the DADW Standstill so as to allow it to make a topping bid.

per share. At 9:00 a.m. that same morning, Vicente also commenced its first step all-cash, all-shares tender offer for $34 per share (the "Vicente Tender Offer"). The Vicente Tender Offer states that the offer cannot expire before 5:00 p.m. Friday, January 25, 2013 pursuant to the 40-day market check required by the Vicente Merger Agreement (providing for a 25 day Go-Shop followed by a 15 day Window-Shop).

Meanwhile, Bonchek immediately began contacting several additional potential acquirors as permitted by the Go-Shop provisions. Over the next three weeks, Bonchek privately contacted in excess of 100 potential suitors (both strategic and financial), but no expressions of interest have been received. Bonchek did not contact plaintiff or any of the other DADW bidders during the Go-Shop period which ended yesterday, on January 10, 2013.

J. Plaintiff Approaches Callison.

On Wednesday, December 19, Plaintiff Galena hand delivered a confidential letter to Callison Chair and CEO Michaels privately requesting Callison to waive the "Don't Ask, Don't Waive" provision of its DADW Standstill so as to permit Galena to make a fully financed topping bid of $35.50 for all of Callison's shares. Galena acknowledged in the letter that its request in this regard was "admittedly facially in conflict" with the terms of its DADW Standstill it had signed, but explained that its legal advisors had advised Galena that such DADW provisions were "likely" not enforceable under Delaware law. Galena further offered to sign a merger agreement with identical terms to the Vicente Merger Agreement except for increasing the price by $1.50 per share, representing a 4.4% increase over Vicente's bid, or some $128 million in addition overall consideration.

The Callison Board met telephonically that same evening to discuss the new Galena overture. Also attending were attorneys from Jenkins Piper who advised the Board that in their opinion, although the issue is legally unsettled, the DADW Standstill likely would be upheld by the Delaware Courts and that the Board was within its proper business judgment to insist on the literal terms of the DADW Standstill in responding to Galena. Following this discussion, the Board decided to hold fast to the terms of the DADW Standstill and authorized counsel to inform Galena that Callison would insist on Galena's compliance with the DADW Standstill. By letter hand delivered the following day (December 20), counsel informed Galena of the Board's position in this respect and also conveyed the Board's instruction to Galena that it cease all further communication with Callison and/or its advisors.

K. Galena Sues and Launches a Tender Offer for $35.50 Per Share.

On the morning of Friday, December 21, Plaintiff Galena filed this lawsuit and simultaneously commenced an all-cash, all-shares tender offer (the "Galena Tender Offer") for Callison shares at $35.50 per share. The Galena Tender Offer, which is also subject to a minimum tender condition, discloses Galena's intention to consummate an immediate second-step cash-out merger at the same $35.50 price if its offer is successful.[12]

On the litigation front, Galena seeks declaratory relief (1) that the Callison Board's use of the DADW Standstill in this context is a breach of the Board's fiduciary duties to Galena as a Callison stockholder and (2) that Galena's continuing attempts to acquire Callison (both by private overture and the public Galena Tender Offer) do not constitute a breach of any

[12] The Galena Tender Offer is also conditioned on the judicial invalidation of the DADW Standstill to which Galena is a party, or Galena otherwise being satisfied in its own discretion that this DADW Standstill is inapplicable to the pending Galena Tender Offer and proposed cash-out merger with Callison.

contractual obligations it may otherwise owe to Callison under the DADW Standstill. Plaintiff also sought expedited discovery and moved for a preliminary injunction preventing Callison and/or the Callison Board from enforcing the DADW Standstill so as to permit Galena to proceed with the Galena Tender Offer and subsequent cash-out merger.

By Order issued on consent, the parties proceeded with immediate expedited discovery exchanging thousands of pages of documents and arranging for eight depositions between December 27 and January 5. Following expedited briefing, a hearing on plaintiff's motion for a preliminary injunction was heard on Thursday, January 10. Meanwhile, the Vicente Tender Offer currently is scheduled to expire on Friday, January 25, 2013. However the Court takes judicial notice of the fact Vicente announced in a January 11, 2013 filing with the Securities and Exchange Commission that it will voluntarily extend the Vicente Tender Offer until March 29, 2013 if this Court preliminarily enjoins enforcement of the DADW Standstill and the Delaware Supreme Court grants an interlocutory appeal of that ruling.

III. LEGAL ANALYSIS

A. Standards for a Motion for a Preliminary Injunction.

Under our well settled standards for evaluating 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.[13] Defendants concede that if plaintiff were to demonstrate a reasonable probability of success on the merits at a final hearing, a preliminary

[13] *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).

injunction would be appropriate. Accordingly, the balance of this opinion addresses that probability.

B. The Validity of the "Don't Ask, Don't Waive" Standstill.

The Callison Board's decision to cooperate with Allen to facilitate a sale of the *entire* company to a single buyer in an all-cash acquisition implicated *Revlon* and its progeny[14] and thus required the Board to act reasonably to achieve immediate value maximization for all Callison stockholders.[15] The Board was understandably limited in any search for alternatives given Allen's ability to block a transaction it did not approve, but the directors on the Callison Board were nevertheless obliged to act in good faith and in an informed and loyal manner to ensure that any "final-stage" transaction proposed under these circumstances would maximize value for the Company's minority stockholders.[16]

Our Courts have not required any specific approach or "blueprint" for how a board must go about the process of realizing immediate value maximization in a *Revlon* transaction.[17] Nevertheless, when such a transaction is challenged on fiduciary grounds, the usual deference of a traditional business judgment rule analysis gives way to a heightened standard of judicial review, or enhanced scrutiny, in which the directors defending such a transaction (here, the Callison Board) must demonstrate to a reviewing Court's satisfaction that they have acted

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[14] *Revlon, Inc. v. MacAndrews & Forbes, Inc.,* 506 A.2d 173 (Del 1986); *Paramount Communications Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994).

[15] *McMullin v. Beran*, 765 A.2d 910, 918-919 (Del. 2000).

[16] *Id.*

[17] *Barkan v. Amsted Indus.*, 567 A.2d 1279, 1286-87 (Del. 1989); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1287 (Del. 1989).

reasonably.[18] The Court's enhanced scrutiny of the directors' conduct thus involves an assessment of the reasonableness of the sale process employed by the Board as well as the substantive reasonableness of the transaction emerging from that process.[19] As discussed further below, the this judicial inquiry into the directors' process importantly involves an examination of the "information on which the directors based their decision…."[20] Ultimately, however, a reviewing court in this context must be mindful not to second-guess the directors' substantive choices so long as their decision falls "within a range of reasonableness."[21]

Plaintiff Galena argues that the directors on the Callison Board breached their fiduciary duties to it as a Callison stockholder (and to all other Callison stockholders) by insisting on the use of the DADW Standstill as part of the sale process for Callison. Plaintiff has now offered a materially higher bid for the entire Company -- $35.50 per share as compared to Vicente's $34.00 per share -- but the Callison Board has refused to discuss this offer with Galena (despite Galena's initial private overture to do so) and has otherwise refused to waive the DADW Standstill so as to permit Galena to making this topping bid. Thus, plaintiff argues, the Callison Board has willfully turned a blind eye to critically important information that, objectively measured, would afford all Callison stockholders greater value maximization than the two-step acquisition contemplated by the Vicente Merger Agreement. Under such circumstances, Galena argues, the Callison Board cannot demonstrate the reasonableness of the sale process in this case.

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[18] *QVC*, 637 A.2d at 45.

[19] *Id.*

[20] *Id.* (emphasis added) (referring to a "judicial determination regarding the adequacy of the decisionmaking process employed by the directors, *including the information on which the directors based their decision.*")

[21] *Id.*

Defendants argue that they fulfilled their fiduciary obligations in all respects in this transaction. They emphasize a robust sale process that involved both (1) a private (and due diligence supported) canvassing of the market and (2) a subsequent market check that included both a public 25 day Go Shop period and still ongoing 15 day Window Shop period. Moreover, that process remained (and still remains) under the control of Special Committee whose independence is not disputed and whose members are being capably advised by independent financial and legal advisors. At the start of the sale process the Callison Board was legitimately concerned about the potential adverse consequences of a protracted public auction.[22] With the help and advice of these advisors, the Special Committee decided to use a DADW Standstill process to encourage all privately canvassed bidders, including plaintiff, to put their best foot forward through a single "only, best and final" offer opportunity. The use of the DADW Standstill thus was designed to maximize immediate value for all Callison stockholders by challenging each bidder in advance to offer a figure in the uppermost limit of its bidding range, knowing there would no second chance to bid. In the defendants' view, Galena's lawsuit is nothing more than an invitation by this Court to second-guess the choices made by a well advised and well functioning Special Committee and to impose a one-size-fits all "blueprint" for all sale of control transactions in contravention of the teaching of our decisional law.[23]

Defendants' *Revlon/QVC* arguments[24] are not without force, and the Court is certainly loath to second-guess the decisions of well advised directors acting in good faith for the benefit

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[22] *See e.g. In re MONY Group, Inc. Shareholder Litig.*, 852 A.2d 9, 20-21 (Del. Ch. 2004).

[23] *E.g. QVC*, 637 A.2d at 45; *Barkan*, 567 A.2d at 1286-87.

[24] Defendants also argue that Galena is in breach of contract by first asking Callison to waive the "Don't Ask" provision of the DADW Standstill and then subsequently commencing the Galena Tender Offer without Callison's invitation or consent. Because I conclude in this opinion that Galena has shown a

of the stockholders. But I cannot accept the idea that some notion of restrained deference in making a *QVC* "range of reasonableness" inquiry requires the Court simply to accept the tangible value-impeding consequences of the DADW Standstill in this case. A real bidder, with the only bid to emerge in the market check process, is currently offering indisputably higher value than the Vicente Tender Offer. In my view the Callison Board simply cannot ignore this development by citing the contractual limitations it imposed on itself and all of the DADW Bidders. Whatever benefit the DADW Standstill initially may have served in encouraging each of the DADW Bidders to put its best foot forward (a benefit that I assume is established for purposes of this motion), its continued use at this stage is plainly impeding, not advancing, the maximization of stockholder value.[25] Absent intervention by the Court, the Callison Board will "squander[]" the "final opportunity to negotiate on the stockholders' behalf…."[26]

In this respect I am in accord with the views of my Court of Chancery colleagues who have examined this question before me and concluded that a "Don't Ask, Don't Waive" standstill is highly problematic. In *Celera*[27] Vice Chancellor Parsons approved a class action settlement of fiduciary claims arising from an acquisition of Celera Corp. by Quest Diagnostics that resulted from a sale process initially involving the use of Don't Ask, Don't Waive standstill agreements with potential bidders. Part of the settlement, the benefits for which were all non-

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probability of success on the merits of its claim that the DADW Standstill is unenforceable, I need not further address Callison's contractual argument.

[25] *In re The Topps Co. Shareholders Litig.*, 925 A.2d 58 (Del. Ch. 2007).

[26] *QVC*, 637 A.2d at 50.

[27] *In re Celera Corp. Shareholder Litig.*, 2012 Del. Ch. LEXIS 66 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part on other grounds*, *BVF Partners L.P. v. New Orleans Employees Retire't. Sys.*, 2012 Del. LEXIS 658 (Del. Dec. 27, 2012).

monetary, included a modification of these standstill agreements during the auction to permit Celera to invite competing offers from potential bidders who were parties to these agreements. Although no topping bid emerged, the Court found a valuable benefit in the modification of the standstill agreements, noting that "Plaintiffs have at least a colorable argument that these [DADW Standstill] constraints collectively operate to ensure an informational vacuum" for the directors of a company undergoing a sale of control.[28]

More recently in *Complete Genomics,*[29] Vice Chancellor Laster preliminarily enjoined Complete Genomics, Inc. ("Genomics") from enforcing a DADW standstill agreement it had previously signed with a potential suitor and which otherwise prevented a possible topping bid from that suitor while a sale of Genomics to BHI-Shenzen was still pending. Citing former Chancellor Chandler's memorable "willful blindness" critique of a "no-talk" deal protection measure in the *Phelps Dodge*[30] case, Vice Chancellor Laster likened the DADW standstill in that case to a "bidder-specific no-talk clause" that was improperly preventing the Genomics directors from fulfilling their fiduciary duty to be informed in continuing to recommend the BHI-Shenzen transaction to Genomics stockholders. Likewise here the DADW Standstill with plaintiff Galena is preventing the directors on the Callison Board from fulfilling their fiduciary duties in continuing to recommend the sale of the Company to Vicente.

Our Supreme Court emphasized in *McMullin* that the directors' common law fiduciary duties, including the duty to be informed, apply to (indeed arise from) their statutory duty to

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[28] *Id.* at *80-81.

[29] *In re Complete Genomics, Inc. Shareholder Litig.*, Consol. C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (Transcript of Telephonic Ruling).

[30] *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 Del. Ch. LEXIS 202 (Sept. 27, 1999).

determine whether to approve a merger agreement that will be submitted to the stockholders.[31] That same common law fiduciary duty to be informed also attaches to the directors' duty to disclose all material facts to the stockholders so that they can "make an informed decision whether to accept the tender offer price or to seek judicial remedies such as appraisal or an injunction."[32] In my view, the Callison Directors cannot fulfill their fiduciary duties to be informed in this regard when they have refused to waive the DADW Standstill to permit the Galena Tender Offer to proceed and otherwise have refused to talk to Galena about its demonstrated interest in making a topping bid to acquire Callison.

For all of the above reasons, I have decided to grant plaintiff's motion for a preliminary injunction. The practical effect of the Court's decision in this regard is that Galena is contractually free – absent a reversal by the Supreme Court of this Court's decision -- to pursue the Galena Tender Offer (and subsequent merger if its offer succeeds) unfettered by what the Court has determined are the unenforceable terms of the DADW Standstill. Further, the Callison Board is free to consider the Galena Tender Offer and, if appropriate in the exercise of the Board's business judgment, to determine that the Galena Tender Offer is a "superior proposal" within the meaning of the Vicente Merger Agreement.[33]

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[31] *McMullin*, 765 A.2d at 917, *citing Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 721-22 (Del. 1971).

[32] *McMullin*, 765 A.2d at 917.

[33] The Court is mindful of the potential impact of its preliminary injunction decision on Vicente's contractual expectations under the Vicente Merger Agreement, but the Court concludes that any such expectations on Vicente's part must be subordinated in this instance to the fiduciary responsibilities of the directors on the Callison Board with whom Vicente negotiated. *See QVC*, 637 A.2d at 50-51*; Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 104 (Del. Ch. 1999), *citing* Paul L. Regan, *Great Expectations? A Contract Law Analysis for Preclusive Corporate Lock-Ups*, 21 CARDOZO L. REV. 1 (1999); *see also RESTATEMENT (SECOND) of CONRTACTS,* § 193.

C. Plaintiff's Entire Fairness/Liquidity Conflict Claim.

Separate from its *Revlon/QVC* claim challenging the validity of the DADW Standstill, plaintiff also makes an entire fairness argument, claiming that (1) because Allen has a unique and conflicting need for financial liquidity, the applicable standard of judicial review for the transaction is strict scrutiny and (2) defendants have not met their burden under this exacting standard to show that the transaction is entirely fair to the minority stockholders of Callison.[34] Plaintiff thus argues in the alternative that even if a DADW standstill could theoretically pass muster in an appropriate sale of control case, defendants here have misused the standstill and thus cannot demonstrate the entire fairness of the pending acquisition by Vicente.

Defendants deny there is any disqualifying conflict on the part of Allen. They emphasize that Allen will be receiving the identical consideration (on a per share basis) as the minority stockholders in a transaction that resulted from a deliberative process with an effective market check. Consequently, in defendants' view, the applicable standard of review in this case should be the traditional, and deferential, business judgment rule, or at most the enhanced scrutiny to be applied under *Revlon*.

Here, as in *McMullin*, Allen does have a unique financial interest in liquidating its control stake in Callison so as to facilitate consummation of a pending all-cash $2.4 billion acquisition of Ca' Foscari that Allen it is contractually bound to accomplish this spring. Plaintiff asserts that Allen's interest in liquidity diverges from and thus in not aligned with the financial interest of all minority stockholders generally, placing this case squarely within the holding of *McMullin*. In plaintiff's view, Allen's liquidity conflict -- which plaintiff claims compromised the deliberative

[34] *See McMullin*, 765 A.2d 910.

processes of the Callison Board -- rebuts the presumption of the business judgment rule and thereby triggers an entire fairness analysis.

I note preliminarily that *McMullin* was decided on a motion to dismiss, and thus the plaintiff in that case enjoyed every favorable inference afforded by the factual allegations of her complaint. This matter arises in the significantly different context of plaintiff's motion for a preliminary injunction, a setting in which Galena is charged with the burden of demonstrating, among other things, a likelihood of success on the merits on a more fully (albeit provisionally) developed factual record. Defendants also suggest that the Court of Chancery's recent analysis in *Synthes*[35] offers an opportunity for revisiting the "liquidity" conflict analysis that was central to the Supreme Court's analysis in *McMullin.*

I decline to take this analysis any further in light of my ruling enjoining the Board's continued use of the DADW Standstill based on a *Revlon/QVC* enhanced scrutiny analysis. Defendants are certainly free to argue for overruling *McMullin* in the context of any appeal of the order granting the requested preliminary injunction, but any such ruling is unnecessary to the determination of the motion now before the Court.

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction is granted, and an appropriate order will be entered upon notice.

/s/ Aaron Nelson
Chancellor

[35] *In re Synthes, Inc. Shareholder Litig.,* 50 A.3d 1022 (Del. Ch. 2012).